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WHAT DOES “FORESEEABLE” MEAN? THE SCOPE OF DAMAGES  
UNDER CISG ARTICLES 74–77: REASONABILITY PRINCIPLE OF  
FORESEEABILITY—WE DON’T NEED A CRYSTAL BALL

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WHAT DOES “FORESEEABLE” MEAN? THE SCOPE OF DAMAGES  
UNDER CISG ARTICLES 74–77: REASONABILITY PRINCIPLE OF  
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*Yasutoshi Ishida*\*

I. INTRODUCTION

Article 74 of the United Nations Convention on Contracts for the International Sale of Goods (the “CISG”), defining the damages for breach of contract, provides,

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.<sup>1</sup>

The first sentence of this provision is interpreted to declare the principle of full compensation to the aggrieved party,<sup>2</sup> awarding damages “equal to the loss, including loss of profit, suffered . . . as a consequence of the breach.”<sup>3</sup> On the other hand, the second sentence limits the award of damages to

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<sup>1</sup> United Nations Convention on Contracts for the Int’l Sale of Goods, art. 74, Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3 (1983) [hereinafter CISG].

<sup>2</sup> In this Article, an “aggrieved party” means the party who suffers loss by the breach of the contract by the other party.

<sup>3</sup> CISG, *supra* note 1, art. 74.

foreseeable<sup>4</sup> loss. These sentences are “brief but powerful”<sup>5</sup> and vital for the parties in dispute whose principal concerns are the items of the loss and the amount of damages recovered. As for the first sentence, the causal connection of the loss and breach is determined by the but-for test. We ask whether we can consider that a loss would not have arisen but for the breach. If the answer is yes, the loss has a causal connection with the breach. Easy and simple.

However, we do not have any handy test for the interpretation of the second sentence, which confines the damages to “the loss which the party in breach . . . ought to have foreseen.”<sup>6</sup> In this paper, this limitation is called the “foreseeability test.” As far as this author reads, he cannot find any elaborate annotation or criterion of the foreseeability test in commentaries and case decisions. The foreseeability test preordains the outcome of suits seeking damages. A proper criterion for the test is imperative. Without it, a judge would have to decide the issue by his bare discretion or intuition. Decisions on the foreseeability test will be unforeseeable.

This Article suggests the “reasonability principle” and two criteria based on the principle: (1) *the item of the recoverable loss must be reasonable*, and (2) *the amount of the recoverable damages must be reasonable*. These criteria are well congruous with the reasoning of the actual court decisions, wherein the courts seemed to covertly adopt the principle. The reasonability principle is abstracted from the three articles following Article 74, namely, Articles 75–77. They have the same function as Article 74, namely, demarcating the scope of the recoverable loss and damages. Article 75 is applied when the aggrieved party makes a cover-transaction substituted for the breached contract, requiring such transactions to be made “in a *reasonable* manner and within a *reasonable* time.”<sup>7</sup> Article 76 presents a *reasonable* method of calculating the amount of the lost profit by hypothetical substitute transactions when Article 75 is not applicable. Article 77 requires the aggrieved party to “take such measures as are *reasonable* in the circumstances to mitigate the loss.”<sup>8</sup> Thus, these three articles confine the

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<sup>4</sup> In this Article, the word “foreseeable” used in the context of Article 74 of the CISG means the situation where “the party in breach . . . ought to have foreseen,” unless otherwise implied.

<sup>5</sup> JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 403 at 571 (Harry M. Flechtner ed., 4th ed. 2009) [hereinafter HONNOLD & FLECHTNER] (“The standard established by Article 74 is brief but powerful.”).

<sup>6</sup> CISG, *supra* note 1, art. 74.

<sup>7</sup> *Id.* art. 75 (emphasis added).

<sup>8</sup> *Id.* art. 77 (emphasis added).

recoverable loss and damages to reasonable ones. We can know the tree by its fruit. Article 74 as a general provision (tree) on the damages should have the same attributes as the following articles (fruit). Therefore, the foreseeability test should also command the reasonability principle and its two criteria above. The “reasonability” principle is clothed with the name “foreseeability” because its determination must be made in light of the information available in the *past*, *i.e.*, “at the time of conclusion of the contract.”<sup>9</sup> Put differently, foreseeability is the reasonability assessed by the information available at the time of conclusion of the contract.

This interpretation is acknowledged because it is drawn from the explicit provisions of the Convention dealing with the same subject. It is also justified by the truism that reasonableness is regarded as one of the general principles of the CISG. It is further justified by the words used in the foreseeability test. The phrase “ought to have foreseen”<sup>10</sup> implies that it is not the duty of the breaching party to foresee unreasonable ramifications of his breach. It denies recovery for such a loss as caused by knowingly continuing to use defective materials,<sup>11</sup> or for the lost profit which constitutes as much as 50% of the price.<sup>12</sup>

Part II analyzes the first sentence of Article 74 which provides that the damages consist of the loss “suffered by . . . *as a consequence* of the breach.”<sup>13</sup> Section A confirms the principle of full compensation. Section B proposes the but-for test as a proper test of the causal connection between the loss and breach, showing that the test functions well in most cases. Section C critically analyzes the “reasonable certainty” test, a test of the causal connection propounded by the CISG Advisory Council Opinion No. 6.<sup>14</sup> It is demonstrated that in addition to the limited role of the test, it may eviscerate the second sentence of Article 74.

In Part III, Section A clarifies the relation between the but-for test and the foreseeability test. Section B expounds the two grounds justifying the

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<sup>9</sup> *Id.* art. 74.

<sup>10</sup> *Id.*

<sup>11</sup> See Cour d’appel [CA] [Court of Appeals] Rennes, May 27, 2008, 07/03098. See *infra* note 92 and accompanying text.

<sup>12</sup> See *Great Britain v. Russian Federation*, 406/1998, Award (Int’l Com. Arb. Ct. at the Russian Fed. Chamber of Com. and Ind. 2000) (<https://iicl.law.pace.edu/cisg/case/russian-federation-june-6-2000-translation-available>). See *infra* note 106 and accompanying text.

<sup>13</sup> CISG, *supra* note 1, art. 74 (emphasis added).

<sup>14</sup> CISG Advisory Council, *Opinion Number 6: Calculation of Damages Under CISG Article 74*, <http://www.cisgac.com/cisgac-opinion-no6/> (last updated 2006) [hereinafter *AC Opinion*].

foreseeability test: (1) the notion of responsibility and (2) the share tacit assumption theory.

Part IV analyzes the requirement of reasonableness in the three articles following Article 74, namely, Article 75 requiring substitute transactions to be made reasonably (in Section A), Article 76 stipulating a hypothetical reasonable substitute transaction (in Section B) and Article 77 requiring a reasonable measure to mitigate the loss (in Section C). Section D concludes that the “reasonability principle” can be abstracted from the three articles and proposes the two aforementioned criteria.

In Part V, Section A elucidates the true colors of foreseeability and argues that it is not a prescient ability which only a prophet has. It is our *present* reasoning of the possibility of future events in light of our *past* experience. Based on this perception of foreseeability, Section B demonstrates that the reasonability principle and its two criteria are incorporated in the foreseeability test and proposes four reasons for this rationale. Section C shows that the reasonability principle is congruous with the actual court decisions.

Part VI clarifies the relation between Article 74 and Articles 75–76. Critically analyzing the commentaries that argue the foreseeability test is not applied to Articles 75 and 76, Section A concludes that Article 74 (foreseeability test) as a general provision on damages is applied to Articles 75 and 76, specific provisions on damages. Section B contends that the applications of Articles 75 and 76 are mandatory when their conditions are met. Section C shows that the application of the foreseeability test to Articles 75 and 76 produces different outcomes of the damages awarded. Section D points out that there is one exceptional case to which foreseeability should not be applied.

Part VII explicates Article 8 which stipulates the modes of interpretation of the statements and conducts of the parties to identify their intent. Section A explains Article 8(1) which provides that, under the specified conditions, the subjective intent of the parties prevails over the objectively ascertainable interpretation of the statements and conducts of the parties. It also adduces a hypothetical case which applies the provision to the foreseeability test. Section B presents the “reasonable merchant standard” based on Article 8(2) which provides for the objective interpretation of the statements and conduct of the parties. It also shows an example of the reasonable merchant standard applied to the foreseeability test. Section C explains Article 8(3) which enumerates the ways and sources to be used for determining the intent of the

parties. It is pointed out that the reasonable merchant standard is incorporated in Article 74 as a criterion to ascertain foreseeability. Finally, Section D advocates that a judge must assume the perception of a reasonable merchant in determining the foreseeability.

This author truly hopes the criteria formulated in this Article will organize the amorphous notion of foreseeability, and thereby simplify the task of the judges by giving them a set of tests with a phrase familiar to them (“reasonable”).

## II. THE FIRST SENTENCE OF ARTICLE 74: CAUSAL CONNECTION AND STANDARD OF PROOF

### A. Principle of Full Compensation

The first sentence of Article 74 announces the principle of full compensation, providing, “Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.”<sup>15</sup> According to the Secretariat Commentary, this provision “makes it clear that the basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed.”<sup>16</sup>

Professor Honnold also writes in his commentary that Article 74 sets a standard “designed to place the aggrieved party in as good a position as if the other party had properly performed the contract—that is, protection of the aggrieved party’s ‘expectation interest.’”<sup>17</sup> This interest expected from the contract is also depicted as “benefit of bargain.”<sup>18</sup>

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<sup>15</sup> CISG, *supra* note 1, art. 74.

<sup>16</sup> U.N. Secretariat, Commentary on the Draft Convention on Contracts for the International Sale of Goods ¶ 3 at 59 U.N. Doc. A/CONF.97/5 (1980). *See also* Serbia v. Macedonia, T-6/08, Judgment, VI.3 ¶ 3 (Foreign Trade Ct. of Arb. attached to the Serbian Chamber of Com. in Belgrade), <https://iicl.law.pace.edu/cisg/case/19-october-2009-foreign-trade-court-arbitration-attached-serbian-chamber-commerce> (The arbitrator “should be guided by the general principle upon which the Article 74 is based, *i.e.*, the principle of full compensation for the loss suffered.”). *See infra* note 114 and accompanying text.

<sup>17</sup> HONNOLD & FLECHTNER, *supra* note 5, § 403, at 571 (emphasis in original).

<sup>18</sup> *See, e.g.*, E. Allan Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247 (1979) (“[R]elief to the promisee is to be measured by his *expectation*, sometimes called ‘the benefit of the bargain’”) (emphasis in original).

As far as the first sentence of Article 74 is concerned, these observations are correct.<sup>19</sup> The sentence says, “the loss, including loss of profit, suffered by the other party *as a consequence of the breach*.”<sup>20</sup> It embraces all the losses suffered as a consequence of the breach.<sup>21</sup> If the aggrieved party can recover all the loss he has suffered, he will be placed in the same economic position he would have been in if the contract had been performed.

This principle of full compensation is justified. The principal aim of people concluding a contract is to make profit and realize the economic position which the due performance of contracts will bring about. If the damages which law awards are insufficient for this aim, people will have less incentive to use contracts as a social system, and also less incentive to perform.<sup>22</sup>

### *B. But-for Causal Connection Between Loss and Breach*

The first sentence of Article 74 provides that the recoverable loss must be one suffered “*as a consequence of the breach*.”<sup>23</sup> This phrase unequivocally announces that the loss must have a causal connection with the breach.<sup>24</sup> To effect the principle of full compensation embodied in the first sentence of Article 74, we need to have a proper criterion to determine the causal connection between the loss and breach. To be fully compensated, the aggrieved party must prove all the loss he has suffered. Article 74 itself contains no explicit words to provide such a criterion.

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<sup>19</sup> As explained *infra* III.A, the second sentence of Article 74 limits damages to foreseeable loss. Therefore, it is not precise to say that Article 74 as a whole reflects the general principle of full compensation.

<sup>20</sup> CISG, *supra* note 1, art. 74 (emphasis added).

<sup>21</sup> See Farnsworth, *supra* note 18, at 249 (The principle of full compensation “is nowhere stated in so many words, it seems implicit in a reference to the promisee’s ‘loss, including loss of profit’ in the first sentence of art. 70 [draft counterpart of CISG art. 74].”).

<sup>22</sup> See Melvin Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CALIF. L. REV. 563, 574 (1992) (The breaching party “in determining whether to perform or breach [] will internalize not only his own loss, but the losses of the other party as well. Expectation damages therefore create efficient incentives for performance.”).

<sup>23</sup> CISG, *supra* note 1, art. 74 (emphasis added).

<sup>24</sup> See Djakhongir Saidov, *Methods of Limiting Damages Under the Vienna Convention on Contracts for the International Sale of Goods*, 14 PACE INT’L L. REV. 307, 344 (2002) (“[I]t is apparent that there is a requirement as to the presence of a causal link between the breach and the loss.”).

However, the principle of full compensation implies a criterion. The “but-for” causation test is such a criterion: *but for* the breach, the loss would not have been suffered.<sup>25</sup> In other words, *but for* the breach, the other party would have gained all the benefits he had expected from the contract.

Whether a breaching party foresaw or ought to have foreseen a loss entails intricacies to be ascertained from the viewpoint at the time of conclusion of contract. However, the fact that aggrieved party suffered loss as a consequence of the breach may be proved relatively easily *ex post facto* by the but-for test.<sup>26</sup> Professor Zeller pointed out the merits of the test, stating that it “prevents occurrences that have no bearing on the course of events from being considered [and] is simple to administer.”<sup>27</sup>

For example, an aggrieved party may recover the exchange rate loss in such a case as where the buyer delayed payment and during the delay there was a decline in the exchange rate between the currency of payment and the currency of the seller’s country.<sup>28</sup> Generally speaking, cases concerning the exchange rate loss have an obvious but-for causal connection between the loss and breach, and therefore they entail no serious problems of proof. The Swiss Fiberglass case<sup>29</sup> is illustrative. While awarding to the seller the damages for the exchange rate loss due to the late payment by the buyer, a Swiss Higher Cantonal Court stated,

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<sup>25</sup> See Ingeborg Schwenzer, *Article 74*, in PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS ¶ 42 at 1074 (Ingeborg Schwenzer ed., 4th ed. 2016) [hereinafter SCHLECHTRIEM & SCHWENZER] (“It is necessary—but generally also sufficient—for the breach to have been the precondition for the occurrence of the detriment (*conditio sine qua non*, ‘but-for rule’).”); see also Milena Djordjević, *Article 74*, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY ¶ 10 at 961 (Stefan Kröll et al. eds., 2d ed. 2018) [hereinafter KRÖLL COMMENTARY] (“[T]he CISG upholds recoverability only of those losses that come as a *consequence* of a breach (‘but-for’ test).”).

<sup>26</sup> Foreseeability is also examined *ex post facto*. See Victor Knapp, *Article 74*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION ¶ 2.14 at 542 (C. Massimo Bianca et al. eds., 1987) [hereinafter BIANCA & BONNELL] (“In practice foreseeability is almost always examined *ex post facto*.”).

<sup>27</sup> BRUNO ZELLER, DAMAGES UNDER THE CONVENTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ¶ 6.63 at 112 (3d ed. 2018).

<sup>28</sup> See *AC Opinion*, *supra* note 14, § 3.6, for a concrete example.

<sup>29</sup> Tribunal cantonal du Valais [KGer] [Cantonal Court of Appeal] Jan. 28, 2009, REVUE VALAISANNE DE JURISPRUDENCE [RVJ] C1 08 45 (Switz.).



Nowadays, the conversion rate of currencies is a *commonly known fact, which does not need to be submitted or evidenced*. It can be checked on the Internet, in official publications and in the written press; thus, it is accessible to everybody.<sup>30</sup>

For another example, the storing cost of goods is incurred to the seller when the buyer wrongfully rejected the goods. The storing cost generally has an obvious but-for causal connection with the breach by the buyer (rejection of the goods), and can be established for example by presenting an invoice issued by a storing company.<sup>31</sup>

Lost profit does not usually involve the difficulty of proof in general.<sup>32</sup> Even the proof of the *amount* of lost profit is not a hard task. If the seller failed to deliver the goods and the buyer had already concluded a resale contract with a third party at a fixed price, the amount of lost profit is the difference between the price the buyer pays to the seller and the price the third party pays to the buyer. If the buyer, to mitigate his damages, made a cover purchase from the market performing the obligation to the third party, and if the price of the cover purchase was higher than the contract price with the seller, the amount of the loss of profit is the difference between the contract price and the market price.

The U.S. Compressed Hay case<sup>33</sup> is illustrative. The buyer entered into a contract with the seller under which the seller would deliver a certain amount of compressed hay for \$5,166,000. The buyer had also entered into a contract with the third party to sell the hay it received from the seller for \$6,806,000. The expected profit buyer would have earned by this resale was \$1,640,000. However, the seller never delivered the hay to the buyer. The court held, “*But for* [the seller’s] breach, [the buyer] would have earned

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<sup>30</sup> *Id.* at I. II. 4 b) aa) (emphasis added).

<sup>31</sup> *See, e.g.*, S.T.S., July 1, 2013 (R.J., No. 438/2013) (Spain) [Abstract] (The plaintiff “had also used invoices to prove the storage costs incurred for the first three deliveries of wheat, which would form part of the *damnum emergens* [direct loss] resulting from the breach, in accordance with CISG article 74.”).

<sup>32</sup> *See* John Y. Gotanda, *Recovering Lost Profits in International Disputes*, 36 *GEO. J. INT’L L.* 61, 88 (2004) (“Tribunals deciding transnational contract disputes typically do not have much difficulty in determining whether a claimant is entitled to lost profits once they have found that there has been a wrongful breach of contract.”).

<sup>33</sup> *Al Hewart Env’t & Pub. Health Establishment v. Southeast Ranch, LLC*, No. 10-80851-CV, 2011 U.S. Dist. LEXIS 128723 (S.D. Fla. Nov. 7, 2011).

approximately \$6,806,000 from reselling the hay to [the third party],”<sup>34</sup> and “total expected profit . . . of \$1,640,000.”<sup>35</sup>

True, in some cases a but-for causal connection between loss and breach is dubious and hard to prove. In some of them, it may turn out to be impossible to establish the but-for causation.<sup>36</sup> However, arduous efforts to identify those cases and contrive a discrete standard for them would not be worth the candle, partly because their number may be extremely limited and partly because the loss involved in them will be excluded anyway by the limitation of foreseeability provided in the second sentence of Article 74. As we will see in detail in Part III, it provides that the damages ascertained by the first sentence “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 . . . as a possible consequence of the breach of contract.”<sup>37</sup> That is, probably almost all the cases where the proof of but-for causation is impossible will be denied recovery on the ground that the loss was not foreseeable. The analysis of causal connection and of foreseeability “should supplement and balance each other.”<sup>38</sup>

### C. Standard of Proof: “Reasonable Certainty” Test

As the CISG Advisory Council Opinion No. 6 (AC Opinion) pointed out, “Article 74 does not explicitly address to what extent aggrieved parties must prove that they have suffered a loss in order to recover damages under that provision.”<sup>39</sup> To solve the problem, the AC Opinion propounded a uniform standard, that is, “the aggrieved party bears the burden of proving with *reasonable certainty* such party has suffered a loss as a result of the breach.”<sup>40</sup> Put differently, the but-for causal relation between the loss and breach must be proven with “reasonable certainty.”

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<sup>34</sup> *Id.* at ¶ 18.

<sup>35</sup> *Id.* at ¶ 19.

<sup>36</sup> One of the examples is the loss of reputation caused by defective goods. *See Saidov, supra* note 24, at 330 (“In practice, a party seldom will be able to recover the damages for loss of (injury to) reputation because of the difficulty of proving such a loss and of meeting the requirements of Article 74. Even if a party proves that he has suffered a loss of reputation, it will be very difficult to calculate his loss.”).

<sup>37</sup> CISG, *supra* note 1, art. 74 (emphasis added).

<sup>38</sup> Saidov, *supra* note 24, at 348.

<sup>39</sup> AC Opinion, *supra* note 14, § 2.1.

<sup>40</sup> *Id.* at § 2.6 (emphasis added).

The AC Opinion justified this test mainly for two reasons. First it emphasizes the advantage of applying the same standard uniformly and hence providing equal treatments to all the CISG cases seeking damages arising in various jurisdictions which have different standards of proof.<sup>41</sup>

The second reason it recited is more plausible for adopting this specific test. It stated that “from the policy perspective, the breaching party should not be able to escape liability because the breaching party’s wrongful act caused the difficulty in proving damages with absolute certainty.”<sup>42</sup> In this statement, it is implied that there is, so-to-speak, a scale of difficulty of proving a loss, and that “absolute certainty” is placed uppermost. The pointer of the scale moves down from the top and stops at “reasonable certainty” before it hits the bottom. It stays there because frequent references to “reasonable” in various provisions of the CISG “demonstrate that under the Convention the ‘reasonableness’ test constitutes a general criterion for evaluating the parties’ behavior to which one may resort in the absence of any specific regulation.”<sup>43</sup>

However, in spite of the scrupulous rationale of the Opinion, and although the “view is receiving increasing support in the recent years,”<sup>44</sup> with due respect, this author believes that the role the test can play is limited for the following two reasons.

First, as the cases in the last section show, generally speaking, as far as the *items* of loss are concerned, the causal connection of the loss and breach can be easily proved simply by applying the but-for test without needing to resort to any additional test. If the connection is dubious, the foreseeability limitation in the second sentence of Article 74 will deny the recovery anyway.

The second reason is more fundamental for the coherent interpretation of Article 74 as a whole. That is, there is a possibility that the reasonable certainty test may eviscerate the second sentence. The test requires us to prove with reasonable certainty that the loss resulted from the breach. In practice, this standard of proof can be converted to the test of causal link

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<sup>41</sup> *Id.* at §§ 2.1–2.3. This rationale is true whatever standard may be adopted.

<sup>42</sup> *Id.* at § 2.4.

<sup>43</sup> *Id.* at § 2.6 (quoting Michael Bonell, *Article 7*, in BIANCA & BONNELL, *supra* note 26, ¶ 2.3.2.2).

<sup>44</sup> Milena Djordjević, *Article 74*, in KRÖLL COMMENTARY, *supra* note 25, ¶ 18, at 965 n.55. *See also* Gotanda, *supra* note 32, at 87.

between the loss and breach, namely the test which inquires whether the loss is a *reasonably certain* result of the breach. In other words, a loss must be regarded “as a *reasonably certain* consequence of the breach.” The *Oxford English Dictionary* (OED) defines the word “certain” as “[s]ure to come or follow; inevitable.”<sup>45</sup> Therefore, under the reasonable certainty test, loss must be something that is “reasonably sure to come or follow from the breach.”

On the other hand, the second sentence of Article 74 limits the damages to the loss which the breaching party “*ought to . . .* have foreseen as a *possible* consequence of the breach.”<sup>46</sup> The OED explains the phrase “ought to” as “by the use of a following [perfect infinitive] with have: you ought to have known = it was your duty to know, you should have known,”<sup>47</sup> and it defines “possible” as “[t]hat may be: that may or can exist, be done, or happen.”<sup>48</sup> To paraphrase the second sentence according to the definitions by the OED, it limits the loss to “what is the duty of the breaching party to foresee as something that may happen.”

Apparently, the foreseeability limitation of the second sentence of Article 74 comprehends more losses than those admitted by the reasonable certainty test. That is, the foreseeability requirement has a “larger hole” than the reasonable certainty test. Anything that can go through the smaller hole (the reasonable certainty test) can go through the larger hole (the foreseeability limitation). Put differently, if an aggrieved party can prove with reasonable certainty that he has suffered a loss as a result of a breach, the breaching party always ought to have foreseen it as a possible consequence of the breach.<sup>49</sup> That is to say, there may be no loss which has passed the reasonable certainty test (smaller hole of the first sentence), but which cannot pass the foreseeability limitation (larger hole of the second sentence). Thus, there is no room for the foreseeability limitation to play its

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<sup>45</sup> *Certain*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) [hereinafter OED].

<sup>46</sup> CISG, *supra* note 1, art. 74 (emphasis added). This provision also refers to “the loss which the party in breach foresaw.” *Id.* This element of the subjective foreseeability is set aside for the reasons explained in Part III, Section A below.

<sup>47</sup> OED, *supra* note 45, *ought to*.

<sup>48</sup> *Id.*, *possible*.

<sup>49</sup> Milena Djordjević, *Article 74*, in KRÖLL COMMENTARY, *supra* note 25, ¶ 30, at 969 (“Art. 74 ‘gauges foreseeability in terms of possible consequences.’ Thus, an aggrieved party need not show awareness that the loss was a probable result of the breach . . . only that it was a possible result.”).

role. The reasonable certainty test nullifies the foreseeability limitation explicitly provided in the second sentence of Article 74.

AC Opinion explicitly made the reservation that its scope was limited and did not examine the issue of foreseeability in depth.<sup>50</sup> However, there is a promising chance that the reasonable certainty test may function well not as a test for first threshold of causation, but as a test for foreseeability. The present author proposes that a reasonably certain test be reformulated as such. It should be used for the losses which have passed the but-for causation test. It would have a similar role to the test the present author presents in this Article. As we will see in Sections V and VI below the foreseeability has much to do with reasonableness. Something will happen with reasonable certainty because it is a reasonable result. Or more simply, something is foreseeable because it is reasonable. This author believes what is postulated below in this Article may serve to give rationale to the reasonable certainty test, if it is used as a test of foreseeability.

### III. SECOND SENTENCE OF ARTICLE 74: FORESEEABILITY TEST AND ITS JUSTIFICATION

#### *A. Relation Between First Sentence and Second Sentence: Lack of Criterion of Foreseeability*

As we have seen, the first sentence of Article 74 announces the principle of full compensation, requiring us to adopt the but-for test to prove the causal connection between the loss and breach. However, the but-for test may unduly expand the damages. For example, an aggrieved party (a manufacturer) may insist that but for the breach by the seller (a material supplier who failed to deliver the material), he would have made a certain number of products, which would have brought a certain amount of profit, by which he would have bought a new machine, which would have enhanced the production level, which would have realized a comparable increase of

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<sup>50</sup> See *AC Opinion*, *supra* note 14, at app. (“The question referred to the Council was: ‘In the case of a breach of contract governed by the CISG, what types of damages are available under Article 74 and how should such damages be calculated?’ The scope of the Opinion is thus limited and does not examine in depth issues concerning causation, foreseeability and mitigation.”).

profit. Thus, the but-for test will give rise to an infinite chain of claims of damages.

The second sentence of Article 74 demarcates the scope of claims of damages which the but-for test may boundlessly engender, by providing “[s]uch damages may not exceed the loss which the party in breach *foresaw or ought to have foreseen*.”<sup>51</sup> Thus, the second sentence limits the item of loss and the amount of damages, including loss of profit, to foreseeable ones.<sup>52</sup>

Foreseeability “includes a subjective as well as an objective test of foreseeability.”<sup>53</sup> The subjective test inquires whether the breaching party actually *foresaw* the loss, while the objective test inquires whether he *ought to have foreseen* it.<sup>54</sup> However, it is doubtful whether the subjective test may play some part in limiting the recoverable loss. If the breaching party honestly admits that he in fact “foresaw” a certain item of loss, he is liable to pay the damages of the loss. If in court the breaching party is asked by the judge whether he foresaw the loss, he probably will answer in the negative. The aggrieved party will present evidence to prove his foreseeability. However, this proof will establish that he “ought to have foreseen the loss” rather than he in fact foresaw the loss. The aggrieved party cannot and need not probe the breaching party’s memory. Thus, the efficacy of the subjective test may be very limited. Therefore, in this Article, with some exceptions, this author deals only with the objective test of foreseeability and calls it “foreseeability test.”

It would be better here to confirm that the first sentence of Article 74 reflects the principle of full compensation. Therefore, the but-for test should not deny any loss “suffered by the other party as a consequence of the breach.”<sup>55</sup> Otherwise, the aggrieved party would not be fully compensated nor placed in the same economic position as if the contract were duly

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<sup>51</sup> CISG, *supra* note 1, art. 74 (emphasis added).

<sup>52</sup> For the history of foreseeability as a legal standard, see Franco Ferrari, *Comparative Ruminations on the Foreseeability of Damages in Contract Law*, 53 LA. L. REV. 1257 (1993).

<sup>53</sup> Jeffrey S. Sutton, *Measuring Damages Under the United Nations Convention on the International Sale of Goods*, 50 OHIO ST. L.J. 737, 743 (1989).

<sup>54</sup> See Victor Knapp, *Article 74*, in BIANCA & BONNELL, *supra* note 26, ¶ 2.8 at 541 (“[T]he party claiming damages need not prove that the party in breach really foresaw the loss. It will be enough if he proves that the party in breach was objectively in a position to foresee it.”).

<sup>55</sup> CISG, *supra* note 1, art. 74.

performed. The but-for test is a criterion to screen out irrelevant or frivolous claims of loss which has nothing to do with the breach. It is not meant to exclude a grounded claim of loss duly arising from the breach.

On the other hand, the second sentence insinuates that the damages recoverable by the first sentence are more than what they should be,<sup>56</sup> by providing, “*Such* damages may not *exceed* the loss . . . ,”<sup>57</sup> and puts a ceiling on a grounded claim of loss suffered as a consequence of the breach.<sup>58</sup> That is, even if a loss has a but-for causal connection with the breach, it cannot be recovered if it was not foreseeable. Thus, the foreseeability test negates the principle of full compensation. Hence, it is clear that Article 74 as a whole with its foreseeability test is not designed to place the aggrieved party in as good a position as if the contract had properly been performed.<sup>59</sup> It is also obvious that the foreseeability test prevails over the principle of full compensation.

It is the foreseeability test, not the but-for test which substantially limits and determines the scope of the damages. Therefore, it is the “foreseeability” which truly needs a definition or criterion uniformly applied in the CISG jurisdictions. It is vital for a judge to have such a definition or criterion in order to duly understand what the “foreseeable” in the second sentence means and to determine whether a certain item of loss be recovered and how much damages be awarded.

The foreseeability test needs justification because it brings about *seemingly* unfair results. The aggrieved party cannot obtain damages for the loss unforeseeable to the breaching party. In other words, it is not the breaching party but the aggrieved party faithful to the contract, who must

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<sup>56</sup> ZELLER, *supra* note 27, ¶ 5.22, at 82 (“This is a very broad definition and theoretically should include all losses suffered by the promisee except those specifically excluded by the contract.”).

<sup>57</sup> CISG, *supra* note 1, art. 74 (emphasis added).

<sup>58</sup> See Saidov, *supra* note 24, at 346 (“[F]oreseeability limits liability to something less than the loss, which the breach is said to have ‘caused.’ Therefore, the foreseeability rule generally should serve as a final ‘cut-off’ of liability.”).

<sup>59</sup> During the Sixth Session of the Working Group of the United Nations Commission on International Trade Law (UNCITRAL), several representatives proposed that the second sentence of Article 74 be deleted “because it is a limitation on the right of full damages.” However, the Working Group decided to retain the sentence. See *Report of the Working Group on the International Sale of Goods on the Work of Its Sixth Session*, 6 Y.B. U.N. Comm’n on Int’l Trade L. 49, at ¶ 114, U.N. Doc. A/CN.9/100 (1975); see also JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 253 (1989).

assume the risk of unforeseeable losses.<sup>60</sup> In the following Section, this author tries to present the reasons for this.

*B. Justification of Foreseeability Test and Shared Tacit Assumption of Risk*

*(1) Foreseeability as Responsibility*

As we have seen in the last Section, the foreseeability test in the second sentence of Article 74 limits the item of loss and the amount of damages to foreseeable ones. It prevails over the principle of full compensation embodied in the first sentence. We need to have justifications of the priority of the foreseeability test.

One possible justification is that the foreseeability is based on the notion of responsibility. That is the notion that the breaching party is not responsible for the outcome which he did not foresee. In the legal world as well as the world at large, foreseeability has much to do with responsibility.<sup>61</sup> If A foresaw that an act of his would cause harm to B and A deliberately did it, A is to blame and responsible for the harm befalling B. Therefore, among many possible options of conduct that A can choose, A must take the option to avoid a conduct which will harm B so long as he can foresee such a result. In other words, A *can respond* to the situation which might injure B, by inhibiting the injurious act.

The same reasoning is applied to the foreseeable loss caused by breach of contract. For example, suppose the seller promises to sell goods to the intermediary B, who will sell them to the third-party. The seller fails to deliver the goods to the buyer. If the seller knows or ought to know that the buyer is an intermediary, the seller can foresee that his failure to deliver the

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<sup>60</sup> See Ingeborg Schwenzer, *Article 75*, in SCHLECHTRIEM & SCHWENZER, *supra* note 25, ¶ 8, at 1091–92 (“Especially in cases of high market fluctuations, the risk of an extraordinary change in price must be imposed on the promisor in breach and not on the promisee, who was faithful to the contract as long as this substitute transaction is reasonable.”).

<sup>61</sup> See H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* 254 (2d ed. 1985) (“It is not surprising to find that lawyers often stress the importance of foreseeability in relation to problems of responsibility, for even outside the law the fact that harm was or was not foreseeable is frequently an important factor in blaming or excusing people for its occurrence.”).



goods will cause the buyer to lose his profit earned by reselling the goods. Therefore, the seller is responsible for the buyer's loss of profit.<sup>62</sup>

Foreseeability requirement as responsibility should be regarded as imposed on the aggrieved party as well. This imposition is not explicitly provided in the CISG, but implicit in the duty of mitigation of damages provided in Article 77.<sup>63</sup> If a possible aggrieved party foresees that a certain unusual loss will result from a certain breach by a possible breaching party and if the possible breaching party does not foresee (or reasonable person in his shoes would not foresee) such a risk, the possible aggrieved party is responsible to the risk. He must warn the possible breaching party of it and negotiate for a proper arrangement of their contract. Thus, foreseeability enables "that party to consider taking the risk, taking out insurance or abstaining from concluding the contract."<sup>64</sup>

What about unforeseeable loss? Unforeseeable loss is excluded because the breaching party is not responsible for the loss.<sup>65</sup> He *cannot respond* to it by taking an action to evade it, because he does not know it will happen.<sup>66</sup>

## (2) Shared Tacit Assumption

We have seen in the last subsection the foreseeability test is justified by the notion of responsibility. The test can also be rationalized in terms of the risk the parties would have agreed to assume by their contract. This rationale is well explained by the "shared tacit assumption" theory which Professor Eisenberg propounded. The theory hypothesizes the agreement which would have been reached if the parties had explicitly considered a matter which was in fact not addressed but tacitly assumed:

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<sup>62</sup> See, e.g., *Al Hewar Env't. & Pub. Health Establishment v. Southeast Ranch, LLC*, No. 10-80851-CV, 2011 U.S. Dist. LEXIS 128723 (S.D. Fla. Nov. 7, 2011).

<sup>63</sup> For the duty of mitigation, see *infra* IV.C.

<sup>64</sup> PETER HUBER & ALASTAIR MULLIS, *THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS* 272 (2007).

<sup>65</sup> See Saidov, *supra* note 24, at 344 n.188 (The CISG "employs the foreseeability rule (Article 74) in order to exclude liability for damage which is so remote as to lie outside the scope of a party's responsibility.").

<sup>66</sup> Article 415(1) of the Japanese Civil Code is also based on the notion of responsibility. It provides in part, "If an obligor fails to perform consistent with the purpose of its obligation or is incapable of performing, the obligee shall be entitled to claim damages arising from the failure, unless it is due to the reasons not attributable to the obligor. . . ." MINPO [Civ. C.] art. 415 (Japan).

Shared tacit assumptions . . . are just as much a part of a contract as explicit terms, so that where the risk of an unexpected circumstance would have been shifted away from the promisor if the assumption had been made explicit, an otherwise identical shared tacit assumption should operate in the same way.

This approach to shared tacit assumptions is an application of the usual hypothetical-contract methodology, under which unspecified terms are usually determined on the basis of what the contracting parties probably would have agreed to if they had addressed the relevant issue.<sup>67</sup>

Application of this theory could lead to the same results as the application of the foreseeability test. For example, usually it is foreseeable that the storage cost would be incurred from the belated acceptance of the goods by the buyer. Even if no contract term existed explicitly stipulating the storage cost, the contracting parties would have agreed that the breaching buyer should compensate the cost if they had explicitly addressed it when concluding their contract. If at the time of the conclusion of the contract both parties had a shared tacit assumption that a certain loss would arise from a certain breach, it could also be said that they foresaw or ought to have foreseen the loss at that time.

The shared tacit assumption theory also operates to exclude the unforeseeable loss, but the explanation should be modified because the parties cannot have a shared tacit assumption about a *certain* unforeseeable loss, because they cannot name it so long as it is unforeseeable. However, they can have a shared tacit assumption about unforeseeable loss *in general*. If at the time of the conclusion of the contract the parties had addressed the issue of unforeseeable loss in general and discussed what they would do if such loss were to arise from a breach of the contract, they would most probably have agreed that it was unnecessary to pay the damages of such a loss. A party who has happened to become an innocent aggrieved party may well be unsatisfied with the foreseeability limitation. However, in principle, one party is as likely to breach as the other, and both parties evenly have apprehension that they may breach. They would not like to compensate for unforeseeable loss, which might infinitely extend in a chain reaction with a but-for causal connection. Parties will assume risks within their contemplation but would not like to take a risk outside the sphere of it. They cannot foretell the magnitude of such a risk. In some cases, the loss might be

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<sup>67</sup> Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207, 214 (2009).

a large amount of money beyond their contemplation. Therefore, in a clean slate, *i.e.*, before or at the time of the conclusion of the contract, parties would most probably agree with the foreseeability limitation if explicitly asked.

Holding a breacher for unforeseeable loss would make contract a very risky undertaking and discourage people from utilizing this socially valuable plan-making device. This provides another reason for Article 74 limiting the loss to foreseeable one.<sup>68</sup> Namely the foreseeability test “aims at limiting the risk of liability to the extent that the party in breach ought to have taken into account at the conclusion of the contract.”<sup>69</sup>

#### IV. REASONABLENESS REQUIREMENT OF ARTICLES 75–77: REASONABILITY PRINCIPLE AND TWO CRITERIA

To understand the nature of the foreseeability test of Article 74, it is very instructive to examine the three articles following, namely, Articles 75–77. These articles, like the foreseeability test, commonly demarcates the scope of the recoverable damages. Especially, Articles 75 and 76 cast light on the identification of the foreseeability test. It provides for the difference between the contract price (price fixed by the contract) and the price of the substitute transaction (current price). The price difference is equivalent to the “loss of profit”<sup>70</sup> which Article 74 has bothered to insert in its first sentence. Comparison of Article 74 with Articles 75 and 76 is enlightening because they deal with the same subject matter. Article 77 is also important. It requires the aggrieved party to take reasonable measures to mitigate the loss. This mitigation principle is underlying Articles 75 and 76, because the measure to minimize the price difference (*i.e.*, loss) is the most reasonable.

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<sup>68</sup> See Ingeborg Schwenzer, *Article 74*, in SCHLECHTRIEM & SCHWENZER, *supra* note 25, ¶ 4, at 1059 (“[T]he foreseeability rule . . . enables both parties to estimate the financial risks arising from the contractual relationship and thus to insure themselves against possible liability.”); see also ZELLER, *supra* note 27, ¶ 6.09, at 95 (The foreseeability rule “encourages both parties to disclose any unusual or special circumstances to be able to claim damages, as only those damages that the other party knew of, or should have been aware of, are subject to a claim.”).

<sup>69</sup> HUBER & MULLIS, *supra* note 64, at 272.

<sup>70</sup> CISG, *supra* note 1, art. 74.

### A. Reasonableness Requirement of Article 75

Article 75 provides,

If the contract is avoided and if, in a *reasonable* manner and within a *reasonable* time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction . . . .<sup>71</sup>

This provision requires a substitute transaction to be made (1) in a reasonable manner, and (2) within a reasonable time after avoidance. Both requirements secure the aggrieved party the profit originally expected by the contract.

#### (1) Reasonable manner requirement

If the buyer refuses to accept the goods whose contract price is \$70,000 and the seller sells them to the third party for \$60,000, the seller can recover the difference between the contract price and the price of the substitute transaction, namely, \$70,000-\$60,000=\$10,000.

The reasonable manner requirement of Article 75 is explained as follows,

For the substitute transaction to have been made in a reasonable manner within the context of article [75], it must have been made in such a manner as is likely to cause a resale to have been made at the highest price reasonably possible in the circumstances or a cover purchase at the lowest price reasonably possible.<sup>72</sup>

If a resale is made at the highest price available and a cover purchase is made at the lowest price available, the difference between the contract price and the price of the substitute transaction will be the smallest, and therefore the loss of profit will be minimum. If the buyer made a cover purchase at the price almost doubled the price offered by the original seller, it cannot be said that the buyer acted in a reasonable manner.<sup>73</sup>

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<sup>71</sup> *Id.* art. 75.

<sup>72</sup> See Secretariat Commentary, *supra* note 16, art. 71, ¶4, at 60.

<sup>73</sup> See, e.g., Cour d'appel [CA] [regional court of appeal] Rennes.com., May 27, 2008, 07/03098 (Fr.) (The buyer avoided the contract because of the defect of the goods, and the seller offered to resell the non-defective goods at the price between 0.93 EURO and 0.98 EURO per pair, but the buyer did not accept this offer and made a cover purchase at 1.98 EURO.).

The reasonableness of the manners of substitute transactions may imply various matters, but its most salient aspect is to minimize the amount of the damages by keeping the price difference as small as possible. In other words, this minimum amount can be described as a “reasonable amount” in that it is realized by transacting “in a reasonable manner.” The aggrieved party should make a substitute transaction if available, and yet do it reasonably. The principle underlying Article 75 is the mitigation of loss under Article 77.<sup>74</sup> If the aggrieved party failed to utilize an available substitute transaction or failed to do it reasonably, the loss may be reduced to the difference between the contract price and the best available price according to the provision of Article 77.<sup>75</sup>

(2) *Reasonable time requirement*

Needless to say, “[w]hat time is reasonable will depend on the nature of the goods and the circumstances.”<sup>76</sup> As to the goods subject to price changes, it is reasonable for the seller to refrain from a hasty resale in a rising market, and for the buyer from a hasty cover purchase in a declining market. Commentators point out that the reasonable time “requirement protects the breaching party from excessive damages caused by the aggrieved party’s attempt to speculate on the market.”<sup>77</sup> However, a reasonable speculation may be permissible if it is made in a bona fide effort to mitigate the loss. If the aggrieved seller successfully resells the goods at the same price as the contract price, his loss of profit will be zero (setting aside the transaction cost). Usually, the aggrieved party will not “speculate on market changes at the breaching party’s expense,”<sup>78</sup> because the loss caused by his clumsy speculation must be tolerated primarily by the aggrieved party himself. He may recover the loss if he sues the party in breach and wins, but the outcome

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<sup>74</sup> The Articles 75 and 76 can be regarded as the specific provisions of Article 77, the general provision of the mitigation of loss.

<sup>75</sup> See Milena Djordjević, *Article 75*, in KRÖLL COMMENTARY, *supra* note 25, ¶ 3, at 993 (“Art. 75 also operates in conjunction with Art. 77; although Art. 75 does not require the aggrieved party to conduct a substitute transaction, failure to do so may breach Art. 77’s obligation to mitigate damages.”).

<sup>76</sup> U.N. Comm’n on Int’l Trade Law, UNCITRAL Digest of Case Law on the U.N. Convention on Contracts for the Int’l Sale of Goods (2016), [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg\\_digest\\_2016.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf).

<sup>77</sup> Milena Djordjević, *Article 75*, in KRÖLL COMMENTARY, *supra* note 25, § 23, at 999.

<sup>78</sup> HONNOLD & FLECHTNER, *supra* note 5, at 585.

of the lawsuit is unpredictable, and he may not be fully compensated even if he wins. In addition, the legal dispute against an overseas party will cost him a large amount of money, sometimes surpassing the loss of profit which may or may not be recovered.<sup>79</sup> For this reason, usually an aggrieved party will not act on the assumption that even if he fails in the speculation, the breaching party will bear the loss.

Therefore, the reasonable time requirement, like the reasonable manner requirement, urges the aggrieved party to make the price difference as small as possible, and it is in line with the mitigation principle under Article 77. The amount of the damages suffered by the aggrieved party after the reasonable efforts to minimize the price difference within a reasonable time can be described as reasonable.

#### *B. Reasonableness Requirement of Article 76*

##### *(1) Paragraph 1 of Article 76*

Article 76(1) provides in part,

If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance . . . .<sup>80</sup>

Article 76 sets forth an alternative means of determining damages when the contract has been avoided. This alternative means is based on the same principle as provided in Article 75, but unlike Article 75, applies in cases in which the aggrieved party did not resell the goods or did not make a cover purchase.

We see no words requiring reasonableness in this provision. This does not mean the provision is indifferent to reasonableness of the damages. It is

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<sup>79</sup> See Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 983 (2005) (“In determining the expected value of any future recovery against the promisor, the promisee must discount prospective damages to reflect litigation risks, litigation costs, and the limits of expectation damages. Litigation risks include the risk of errors by the law-finder or the fact-finder and the possibility that the promisor may successfully establish a defense to the promisee’s claim. Litigation costs, such as attorney’s fees, can run very high.”).

<sup>80</sup> CISG, *supra* note 1, art. 76(1).

also applied in a case where a seller or a buyer made a substitute transaction but not “in a reasonable manner [or] within a reasonable time.”<sup>81</sup> In such a case, Article 75 is not applied, and “damages would be calculated as though no substitute transaction had taken place.”<sup>82</sup> There is no requirement of reasonableness because Article 76(1) itself is an example of a reasonable substitute transaction. It illustrates the reasonable method of calculation of the lost profit when the aggrieved party fails to satisfy the reasonableness requirement of Article 75. In other words, it is reasonable to “recover the difference between the price fixed by the contract and the current price at the time of avoidance.”<sup>83</sup>

The damages are calculated on the assumption that the aggrieved party had hypothetically made a substitute transaction at the current price. The concept of reasonableness implied in this provision is the same as that in Article 75, namely, to minimize the amount of the damages by keeping the price difference as small as possible. The principle underlying Article 76 is also the mitigation of loss under Article 77. Article 76 shows the reasonable measure to calculate the damages to mitigate the loss most.<sup>84</sup> In this sense, the amount of damages calculated by the method specified by Article 76(1) can be described as reasonable.

(2) *Paragraph 2 of Article 76*

Article 76(2) provides in part,

For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a *reasonable* substitute, making due allowance for differences in the cost of transporting the goods.<sup>85</sup>

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<sup>81</sup> *Id.* art. 75.

<sup>82</sup> Secretariat Commentary, *supra* note 16, ¶ 6, at 60.

<sup>83</sup> CISG, *supra* note 1, art. 76(1).

<sup>84</sup> See Ingeborg Schwenzer, *Article 75*, in SCHLECHTRIEM & SCHWENZER, *supra* note 25, at 1092 (“If the goods have a market price, this will generally have to be viewed as the reasonable price in light of the duty to mitigate loss in Article 77.”).

<sup>85</sup> CISG, *supra* note 1, art. 76(2) (emphasis added).

This provision says, “if there is no current price . . . prevailing at the place of delivery,”<sup>86</sup> the current price is “the price at such other place as serves as a *reasonable* substitute.”<sup>87</sup> The reasonableness in this provision requires a substitute price for the current price to be as close as to the price fixed by the contract as possible, taking into account the transporting cost. It will result in the smallest price difference and a minimum loss of profit, leading to the mitigation of loss under Article 77.

### C. Reasonableness Requirement of Article 77

Article 77 setting forth the principle of mitigation of damages provides,

A party who relies on a breach of contract must take such measures as are *reasonable* in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.<sup>88</sup>

This provision also has a requirement of reasonableness. That is, the measures taken to mitigate the loss must be reasonable. If an aggrieved seller resold the goods at a price significantly lower than the current market price, it cannot be said that the seller took “measures as are reasonable in the circumstances to mitigate the loss.”<sup>89</sup> The reasonable measure for the seller to take is to sell the goods at the current market price. Hence, the breaching buyer “may claim a reduction in the damages in the amount by which the loss should have been mitigated.”<sup>90</sup> Thus, it is apparent that the principle of Article 77 is underlying Articles 75 and 76, which require minimizing the

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (emphasis added).

<sup>88</sup> CISG, *supra* note 1, art. 77 (emphasis added). The Japanese Civil Code has no provision stipulating the duty to mitigate the loss. However, in one case Tokyo High Court (Court of Appeal) held that the seller who failed to deliver the goods “knew from the beginning” that the buyer had concluded a resale contract, and that the buyer purchased the substitute goods at “the reasonable price at the time.” See Tōkyō Kōtō Saibansho [Tokyo High Ct.] Sept. 29, 1958, 9 Gyosei Shu 172; *see also* Yasuhei Taniguchi, *The Obligation to Mitigate Damages*, in *EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION* 83 (Yves Derains & Richard H. Kreindler eds., 2006) (The buyer “acted on ‘unspoken’ obligation to mitigate damages.”).

<sup>89</sup> CISG, *supra* note 1, art. 77.

<sup>90</sup> *Id.*



amount of the damages by keeping the price difference as small as possible. This is the first concept of reasonableness embodied in Article 77.

On the other hand, the reasonableness under Article 77 has another aspect. While Articles 75 and 76 concern a (hypothetical) substitute transaction as a measure to mitigate the loss of profit, Article 77 concerns all sorts of measures to mitigate all sorts of losses. The Swiss Sizing Machine case<sup>91</sup> is illustrative. The buyer became insolvent and unable to pay in advance for the sizing machine specifically designed for the buyer's production process. The seller, unable to resell this unique machine in the market, disassembled the machine and sold its parts in an effort to mitigate the loss. This is a typical example of a reasonable measure to mitigate the loss.

As a case in which the aggrieved party was found to have failed to mitigate the loss, the French Brassiere Cup case<sup>92</sup> is illustrative. The buyer is a manufacturer of bathing suits. The buyer purchased brassiere cups from the seller to use them for fabricating the suits. The cups turned out to be defective lacking sufficient adhesion. Nevertheless, the buyer did not stop fabricating the suits using the defective cups for three days after he learned of the defect. During the period, the buyer produced 1,200 suits. The French Court of Appeal in Rennes found that the buyer failed to mitigate the loss.<sup>93</sup>

A reasonable measure to mitigate the loss in this case would be to stop using the defective materials immediately. Continuing to produce 1,200 suits using materials which the buyer knew defective is unreasonable. It is literally unreasonable because we cannot see the reason. Therefore, the buyer cannot claim the damages for the loss of 1,200 suits. In other words, it is an unreasonable item of loss. Article 77 excludes those items of loss which could have been dispensed with by a reasonable mitigating measure. Remaining items which have passed muster should be reasonable. This is the second concept of reasonableness embodied in Article 77. This reasonableness requirement like foreseeability cuts the chain of loss which might extend infinitely by a but-for causation connection.

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<sup>91</sup> Handelsgericht [HG] [Commercial Court] HG.1999.82-HGK, 3 Dec. 2002 (Switz.), <https://iicl.law.pace.edu/cisg/case/switzerland-december-3-2002-handelsgericht-commercial-court-dt-ltd-v-b-ag-translation>.

<sup>92</sup> Cour d'appel [CA] [regional court of appeal] Rennes, May 27, 2008, 07/03098 (Fr.), <https://iicl.law.pace.edu/cisg/case/france-ca-aix-en-provence-ca-cour-dappel-appeal-court-5>.

<sup>93</sup> *Id.* (This case gives us the impression that the aggrieved party himself expanded the loss rather than failed to mitigate the loss. Still, the loss has a but-for causal relation with the breach. In cases like this, the foreseeability test must function to restrict the recoverable items of the loss).

The duty to mitigate the loss provided in Article 77 offers a cogent reason why the damages are limited to the foreseeable loss. Unforeseeable loss is often caused by the failure of the aggrieved party to make reasonable efforts to mitigate the loss, and hence should not be recovered. Such failure shifts the responsibility for the ensuing loss from the breaching party to the aggrieved party.

#### *D. Reasonability Principle and Two Criteria*

We have explored the requirement of reasonableness in Articles 75–77. We have seen that Articles 75 and 76 limit the amount of damages arising from (hypothetical) substitute transactions to the amount which the aggrieved party would realize if he acted *reasonably*. Article 77 denies recovery to those items of loss which could have been dispensed with by a *reasonable* mitigating measure. From these articles, we can abstract the principle of reasonableness. This author calls this principle of reasonableness the “reasonability principle.”<sup>94</sup>

The reasonability principle as abstracted from Articles 75–77 comes down to two criteria. First, *the item of the recoverable loss must be reasonable*. For example, if the aggrieved party did not stop using the raw materials even after knowing they were defective, his claim for the damages of the loss arising from the continued use would be unreasonable, and hence would not be recovered. This criterion differs from the reasonable certainty test in that the item of loss is judged by its inherent reasonableness, not by the certainty of occurrence. Although the outcome would be the same in most cases because when some result is (not) reasonable, it will (not) occur with reasonable certainty.

Second, *the amount of the recoverable damages must be reasonable*. For example, if the aggrieved seller resold the goods unjustifiably rejected by the buyer at a significantly lower price than the current market price, his claim for the damages between the contract price and the resale price would be unreasonable, and hence would not be recovered.

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<sup>94</sup> This author names the principle “reasonability principle” because we usually say that an event is “reasonable,” when we can see the reason for it, namely, we are able to “reason” about it.

This author will argue that the reasonability principle and its progeny (two criteria) are also incorporated in the foreseeability test of Article 74 in the next Section.

## V. TRUE COLORS OF FORESEEABILITY AND REASONABILITY PRINCIPLE

### A. *True Colors of Foreseeability: We Don't Need a Crystal Ball*

In this section, this author tries to identify the “true colors” of foreseeability. This will give a basis of the thesis that the reasonability principle and the two criteria are incorporated in the foreseeability test.

At first, we had better confirm the meaning of the word “foresee.” The OED defines the word as, “To see beforehand, have prescience of.”<sup>95</sup> At a glance, the foreseeability test seems to compel a judge to ride a time machine with a crystal ball in her pocket, go back to the scene of the conclusion of the contract, take out the crystal ball, look into it carefully, and see the future breach and the aftermath of it. Then, she goes back to the future and decides the issue of foreseeability. This author does not believe we must do such a stunt when we interpret Article 74. We do not need a time machine. We do not need a crystal ball, either. It may sound very ironic, but the foreseeability provided in Article 74 commands *present* review of the *past* events. If a party said, “a meteorite will strike the ship carrying our cargo,” and if it actually happened, we could say that she “foresaw” the catastrophe. However, we are not Cassandra, and the foreseeability provided in Article 74 is never a prescient ability which only a prophet has. It is not a prophecy about future events. It is our *present* reasoning of the possibility of future events in light of our *past* experience.

The intermediary buyer example is illustrative. The seller once sold the goods to the buyer before, and in this transaction, the seller learned that the buyer was an intermediary. In their second transaction, the seller failed to deliver the goods. The buyer could not resell the goods to the customers and missed profit. The loss was foreseeable for the seller, not because the seller had a crystal ball at the time of the second contract, but because from the *past* transaction, the seller could reason that the buyer would resell the goods. In

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<sup>95</sup> OED, *supra* note 45, *foresee*.

this sense, the buyer's claim of damages for lost profit was foreseeable and reasonable. What David Hume said gives rationale to this illustration,

The idea of cause and effect is deriv'd from *experience*, which informs us, that such particular objects, in all past instances, have been constantly conjoin'd with each other: And as an object similar to one of these is suppos'd to be immediately present in its impression, we thence presume on the existence of one similar to its usual attendant. According to this account of things, . . . probability is founded on the presumption of a resemblance betwixt those objects, of which we have had experience, and those, of which we have had none.<sup>96</sup>

We have characterized foreseeability as our present reasoning of the possibility of future events in light of our past experience. This characterization is congruous with the notion of reasonableness. Usually, we foresee A will ensue from B when we consider A is a reasonable result of B.

In the next section, this author will elucidate that the reasonability principle is incorporated in the foreseeability test.

#### *B. Reasonability Principle Incorporated in Foreseeability Test*

We have seen that we can abstract a principle from Articles 75–77, namely, the reasonability principle, and that the principle produces two criteria: (1) *the item of the recoverable loss must be reasonable*, and (2) *the amount of the recoverable damages must be reasonable*. The foreseeability test of Article 74 incorporates the reasonability principle and its two criteria.

This conclusion is justified by four reasons. One is that reasonableness is regarded as one of the general principles of the CISG.<sup>97</sup> Second, more intrinsically, is that as we have seen in the last Part, Articles 75–77 are commonly based on the reasonability principle. We can know the tree by its fruit. Article 74 (general provision on damages) as a tree has a nature commonly shared by its fruit, namely, Articles 75–77 (the specific provisions on damages). Therefore, we can consider that the foreseeability test of Article 74 encompasses the reasonability principle together with the two criteria.

It may be objected the criterion 2 (the amount of the recoverable damages must be reasonable) is derived from Articles 75 and 76, which only

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<sup>96</sup> DAVID HUME, A TREATISE OF HUMAN NATURE 64 (Dover Philosophical Classics, 2003) (emphasis in original).

<sup>97</sup> Michael Bonnel, *Article 7*, in BIANCA & BONNELL, *supra* note 26, at 81 (“These references demonstrate that under the Convention the ‘reasonableness’ test constitutes a general criterion for evaluating the parties’ behaviour to which one may resort in the absence of any specific regulation.”).

concern the loss of profit resulting from (hypothetical) substitute transactions, and that the application of the criterion 2 must be limited to such a kind of loss. However, it is unreasonable to argue that the amount of damages caused by other kinds of loss may be unreasonable. The amount of damages from other kinds of loss, for example, the loss caused by the defective goods, must also be reasonable. If 5% of the delivered goods were defective and the buyer claimed the damages amounting to 30% of the price, the claimed amount of damages is clearly unreasonable. If the buyer had the defective machine repaired and claimed the damages of \$10,000 as the cost of repair while the normal cost of comparable repair was \$3,000, the claimed amount of damages is clearly unreasonable, and the buyer is in breach of the duty to mitigate the loss. Therefore, the second criterion can be applied to other kinds of loss. This reasoning may also be justified by Article 77.

Third, the reasonability principle is buttressed by the shared tacit assumption theory explained above.<sup>98</sup> If at the time of the conclusion of the contract, both parties had addressed the issue of unreasonable items of loss and amount of damages caused by a breach of either party, they would have agreed that such loss and damages be excluded.

The fourth justification of the reasonability principle is the letter of Article 74 itself. It provides in part, “ought to have foreseen . . . as a *possible* consequence of the breach . . . .”<sup>99</sup> Focusing on the word “possible,” almost anything in this world is possible in the sense that it may happen. For example, it is possible a huge meteorite will strike the earth tomorrow, annihilating all living creatures. The “possible” element of the foreseeability test may have no efficacy to limit the damages. However, the foreseeability test has another element: “*ought to* have foreseen.” As seen in Part II, Section C, the OED explains the phrase “ought to” as “by the use of a following perf. infin. with have: you ought to have known = it was your *duty* to know, you should have known.”<sup>100</sup> We cannot insist that it be the duty of the breaching party to foresee a meteorite attack when concluding a contract. The tragedy may be possible, but it would be unreasonable to explicitly guard against it in the contract. If it were to be the duty of the breaching party to foresee such

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<sup>98</sup> See *supra* III.B.2.

<sup>99</sup> CISG, *supra* note 1, art. 74 (emphasis added). For the reason explained in Section A in Part III, we do not consider whether the breaching party actually “foresaw” the loss.

<sup>100</sup> OED, *supra* note 45, *ought to* (emphasis added).

a devastating event of the remotest possibility, it would abort the conclusion of the contract, however elaborately negotiated for. In the same vein, the breaching party may foresee as a *possible* consequence of the breach that the aggrieved party will knowingly continue to use defective materials, but it is not the *duty* for a breaching party to foresee such an unreasonable undertaking.<sup>101</sup> The contract could not be made if it had to take account of the possibility of such an irrational ramification. Therefore, the language used in Article 74, namely, “ought to have foreseen” connotes the reasonability principle. To buttress this conclusion the following observation is enlightening. Articles 74 and 75 both deal with the loss of profit, and the former limits the recoverable lost profit to the one “which the party in breach . . . *ought to have foreseen*,”<sup>102</sup> and the latter limits it to the one resulting from a substitute transaction made “in a *reasonable* manner and within a *reasonable* time.”<sup>103</sup> We can see that “ought to” and “reasonable” have a parallel relation.

In sum, the reasonability principle is incorporated in the foreseeability test: “Something is foreseeable (unforeseeable), because it is reasonable (unreasonable).”

### *C. Reasonability Principle Congruous with Court Decisions*

The applicability of the reasonability principle with its two criteria to the foreseeability test is well congruous with the court decisions. The courts seem to be covertly adopting the criteria. A case in which the breaching party was found to have been unable to foresee the loss is the German Stainless Steel Wire Case.<sup>104</sup> The stainless wire which the seller delivered had splinters and therefore was defective. The buyer, using the grinding machine, processed the wire in an effort to cure the defect. After this process, the grinding machine needed refacing. The buyer demanded the setoff of the refacing cost with the unpaid price. The German Federal Supreme Court denied the setoff, holding “These costs to remedy the defects were no longer

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<sup>101</sup> See Cour d’appel [CA] [regional court of appeal] May 27, 2008, (Fr.) *translated in* INST. INT’L COM. L. []; *see supra* note 92 and accompanying text.

<sup>102</sup> CISG, *supra* note 1, art. 74 (emphasis added).

<sup>103</sup> *Id.* art. 75 (emphasis added).

<sup>104</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] June 25, 1997, (Ger.) (German case citations do not identify parties to proceedings) *translated in* INST. INT’L COM. L.

*reasonable* in view of their amount in relation to the purchase price claim still outstanding, so that the seller does not have to assume them according to CISG Art. 74.”<sup>105</sup> The judge used the word “reasonable,” and it should be interchangeable with “foreseeable” so long as he mentioned Article 74.

Another unforeseeable case is the Russian Arbitration Case.<sup>106</sup> It concerns the unforeseeability of the amount of damages. The seller and buyer entered into a sales contract of goods at a certain price. The buyer made a contract of resale with a third party at 1.5 times the price. However, the seller declared that it would not perform the contract. The buyer sued the seller, claiming the damages of lost profit, which was 50% of the price. The Tribunal<sup>107</sup> found that by the evidence of the correspondence between the parties, “the [buyer] had proved the existence of the contract between the [buyer] and the third party and the connection of that contract to the contract made between the parties in the present case.”<sup>108</sup> However, it found that the seller had no knowledge of the terms and conditions, especially the price of the contract the buyer concluded with the third party. It held “the [seller] neither knew nor ought to have foreseen that the [buyer]’s loss of profit would be as much as approximately half the price of contract in dispute.”<sup>109</sup> The tribunal awarded the buyer the damages of lost profit, which was 10% of the price. It based its calculation on the C.I.F., Incoterms 1990 which provided that the insurance should cover the price stipulated in the contract plus 10%, *i.e.*, a total of 110%.<sup>110</sup> It stated “[i]t is commonly known that the mentioned 10% covers the expected profit of the buyer and is the ordinary amount of profit in the practice of international trade.”<sup>111</sup>

Apparently, the Tribunal found the occurrence of the lost profit was foreseeable. However, it found its amount was unforeseeable. Put differently, the loss of profit of as much as half the price of the contract was unreasonable and hence unforeseeable. It resorted to the insurance coverage rate of the

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<sup>105</sup> *Id.* at III.2 (emphasis added).

<sup>106</sup> ICA Arbitral Tribunal 406/1998, June 6, 2000 (Russ.), <http://cisgw3.law.pace.edu/cases/000606r1.html> [hereinafter Russian Arbitration Proceeding].

<sup>107</sup> Tribunal of Russian Federation Chamber of Commerce and Industry.

<sup>108</sup> Russian Arbitration Proceeding, *supra* note 106, § 3.4.2.

<sup>109</sup> *Id.*

<sup>110</sup> The latest version has the same term. See Int’l Chamber of Commerce [ICC], *INCOTERMS*® 2020, *CIF* at A5, ICC Pub. No. 723E (2020) (“The insurance shall cover, at minimum, the price provided in the contract plus 10% (*i.e.*, 110%).”).

<sup>111</sup> Russian Arbitration Proceeding, *supra* note 106, § 3.4.2.

C.I.F.,<sup>112</sup> because the contract designated it in an explicit term,<sup>113</sup> and it was reasonable.

On the other hand, as a case in which the breaching party was found to have been able to foresee the loss, the Serbia Mineral Water Case is illustrative.<sup>114</sup> The sales contract of mineral water obliged the buyer to return to the seller the packaging of the water delivered. The buyer failed to meet this obligation and the seller was compelled to buy other packaging to continue his usual trading operation. The sole arbitrator held, “the [Buyer] could have foreseen that not returning the packaging contrary to the obligation . . . will result in the loss for the [Seller] in the amount equal to the value of received and unreturned packaging,”<sup>115</sup> and awarded the damages of that amount.

It is reasonable that the loss caused by not returning the packaging was estimated as the value of the unreturned packaging, because it was the price the seller needed to pay for the substitute packaging. Both the item of recoverable loss and its amount are quite reasonable and hence foreseeable.

The German Fabric Case is also illustrative.<sup>116</sup> The fabric which the seller delivered to the buyer was defective. Both its texture and color did not conform to the sample. As a result of the deviation, the buyer offered its customer a reduction in price of 10%. The German Provincial Court of Appeal, granting the buyer’s claim for the setoff of the damages with the price, held, “[Buyer] had to offer its customer a reduction in price of 10%,”

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<sup>112</sup> See Juana Coetzee, *The Interplay Between Incoterms and the CISG*, 32 J.L. & COM. 1, 21 (2013) (“INCOTERMS® do not replace the CISG rules *in toto* but only supersede them in so far as they are mutually exclusive. For the rest they will function *in tandem* as complementary and supplementary instruments of sales law harmonization and unification.”) (emphasis in original).

<sup>113</sup> Even if the parties do not explicitly incorporate the CIF or other trade terms of the International Chamber of Commerce, they can be incorporated by Article 9(2) of the CISG, which provides: “The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.” CISG, *supra* note 1, art. 9(2).

<sup>114</sup> Mineral Water (Serb. v. Maced.), Foreign Trade Court of Arbitration T-6/08 Oct. 19, 2009, <https://iicl.law.pace.edu/cisg/case/19-october-2009-foreign-trade-court-arbitration-attached-serbian-chamber-commerce>.

<sup>115</sup> *Id.* at VI.2-2.

<sup>116</sup> Oberlandesgericht Bamberg [OLG Bamberg] [Ct. of App.] Jan. 13, 1999, 3 U 83/98 (Ger.), <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-1>.



that is, DM 7,339.75 (as confirmed by witness S.). [Seller] is obliged to reimburse [Buyer] for this loss of profit under Art. 74 CISG. The damage was foreseeable at the time of the conclusion of contract.”<sup>117</sup> This holding can be interpreted to imply that the item of loss (price reduction for the customer) and its amount (10% of the price) were reasonable and hence foreseeable.

Recently, the Tokyo District Court handed down a decision concerning the scope of damages and foreseeability.<sup>118</sup> Under the framework sales contract, the buyer in Japan purchased from a Korean company a quantity of LDE lights and power supply. The buyer resold them to its customers. A significant number of the goods sold turned out to be defective. The buyer suffered loss by substituting the defective goods sold to its customers. For certain customers, the buyer substituted the entire goods, defective or not, because the defective ratio was so high that those customers were not satisfied with the substitution per defect. The buyer claimed the damages for the cost of substitution, including the entire substitution for certain customers. The seller objected that the cost of substitution of all the goods regardless of defectiveness was “unforeseeable.” The court held it foreseeable, stating “it was a *reasonable* measure for the [buyer] to substitute all the goods sold in order to meet the customers purpose of the purchase of the goods and not to injure the goodwill of the [buyer].”

In sum, the reasonability principle and its two criteria are well congruous with the court decisions above. It can be said that the courts seem as if covertly adopting the criteria. It can be safely concluded that they are also the vital ingredients of the foreseeability test. Therefore, the test commands (1) that *the item of the recoverable loss must be reasonable*, and (2) that *the amount of the recoverable damages must be reasonable*.

This conclusion is based on the idea that Article 74 is a general provision on damages and the following three articles are specific provisions. In the following section, this author will explain the reason.

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<sup>117</sup> *Id.* at 2.e.

<sup>118</sup> Tokyo Chiho Saibansho [Tokyo Dist. Ct.] June 16, 2020, 2015 (Wa) No. 12549, Institute of International Commercial Law, [https://iicl.law.pace.edu/cisg/case/japan-june-16-2020-tokyo-chiho-saibansho-district-court-sanko-lighting-and-technology-v\(Japan\)](https://iicl.law.pace.edu/cisg/case/japan-june-16-2020-tokyo-chiho-saibansho-district-court-sanko-lighting-and-technology-v(Japan)).

## VI. RELATION BETWEEN ARTICLE 74 AND ARTICLES 75 AND 76

A. *Foreseeability Test Applied to Articles 75 and 76*

Article 74 provides for the general rule on damages, specifying the extent and calculation of the damages. Articles 75 and 76 provide for specific rules, presenting “illustrations of the operation of article [74] in particular circumstances.”<sup>119</sup> Article 74 provides, “Damages for breach of contract by one party consist of a sum equal to the loss, including *loss of profit*,”<sup>120</sup> and Articles 75 and 76 illustrate the concrete method of recovering the *lost profit*. In other words, “loss of profit” specifically inlaid in Article 74 is to be calculated according to Articles 75 and 76.

This is apparent by the following example: the buyer as a middleman attempts to earn a profit of \$20 by obtaining goods for \$100 from the seller and selling the same to the subpurchaser for \$120. The seller refuses to deliver the goods and the buyer is compelled to buy them from the market for \$110. The buyer’s “loss of profit” (Article 74) is “the difference between the contract price and the price in the substitute transaction” (Article 75), namely,  $\$110 - \$100 = \$10$ . This calculation can be applied to the buyer who buys raw materials for manufacturing products. If the buyer is compelled to buy raw materials from the market at a price higher than the contract price, the difference of the prices leads to the increase of the production cost, hence to the loss of profit. Above illustrations are also applicable to Article 76 where the parties have not made a substitute transaction (or have not made it reasonably) but can “recover the difference between the price fixed by the contract and the current price at the time of avoidance.”<sup>121</sup>

Because Article 74 is the general rule specifying the extent and calculation of the damages and because Articles 75 and 76 are illustrations of Article 74 concerning the loss of profit, Articles 75 and 76 should be subject to the foreseeability requirement of Article 74. In other words, the “loss of profit [calculated according to Articles 75 and 76] . . . may not

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<sup>119</sup> 1977 3 Y.B. U.N. COMM’N INT’L TRADE L., ¶471 at 58, U.N. Doc. A/CN.9/SER.A/1977, [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/yb\\_1977\\_en.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/yb_1977_en.pdf); see also Milena Djordjević, *Article 75*, in KRÖLL COMMENTARY, *supra* note 25, ¶2 at 993 (“Art. 75 does not replace Art. 74. It supplements and works in conjunction with it.”).

<sup>120</sup> CISG, *supra* note 1, art. 74 (emphasis added).

<sup>121</sup> *Id.* art. 76 (emphasis added).

exceed the loss which the party in breach foresaw or ought to have foreseen.”<sup>122</sup>

However, commentators oppose applying the foreseeability requirement to Articles 75 and 76. Some commentators write, “The major advantage for the buyer of proceeding under Art. 75 or Art. 76 CISG is that, as a rule, the foreseeability requirement (Art. 74 second sentence CISG) will not be applicable. The types of damages described in these two provisions are deemed to be foreseeable,”<sup>123</sup> or “under Art. 75 meeting the requirement of foreseeability is not needed, as it is deemed fulfilled.”<sup>124</sup> These statements are very confusing because they acknowledge that the foreseeability requirement is deemed to be met in the cases under Articles 75 and 76, and at the same time insist that the requirement is not applied. One possible interpretation of these statements is that they argue that the *proof* of foreseeability is unnecessary because it is deemed fulfilled. It is one thing to say that the foreseeability requirement is not applicable, and it is another to say that the proof of the requirement is not needed. The statement that the types of damages described in Articles 75 and 76 are deemed foreseeable implies that the types of damages are subject to the requirement of foreseeability. Even assuming the *types* of damages are foreseeable, what about their *amount*?

Non-application of the foreseeability test to Articles 75 and 76 will give rise to an anomaly. Suppose the following hypothetical. In a lawsuit where the buyer wrongly refuses to accept the goods and the seller seeks damages of lost profit of \$50,000 which is calculated as the difference between the contract price and the substitute sale. The judge tells the seller that he is going to reduce the amount of the damages to \$25,000 because he holds it the maximum amount foreseeable for the buyer. In response, the seller (plaintiff) tells the judge, “We are resorting to Article 75 instead of Article 74.” Then the judge said, “Oh, in that case, I will award you the full damages of \$50,000.”

Another argument against the application of foreseeability of requirement to Articles 75 and 76 states, “Especially in cases of high market fluctuations, the risk of an extraordinary change in price must be imposed on

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<sup>122</sup> *Id.* art. 74 (emphasis added).

<sup>123</sup> HUBER & MULLIS, *supra* note 64, at 283.

<sup>124</sup> Milena Djordjević, *Article 75*, in KRÖLL COMMENTARY, *supra* note 25, ¶ 2 at 993.

the promisor in breach and not on the promisee, who was faithful to the contract as long as this substitute transaction is reasonable.”<sup>125</sup> That is to say, in the case of the high market fluctuation, the innocent promisee cannot recover the damages arising from the difference of the contract price and the market price, and the breaching promisor is exempted from paying them by proving the loss is unforeseeable.

However, Article 74 itself explicitly imposes the risk of an unforeseeable change in price on the promisee, not on the promisor in breach by providing that the damages including loss of profit “may not exceed the loss which the party in breach foresaw or ought to have foreseen.”<sup>126</sup> More precisely, Article 74 imposes all the risk caused by unforeseeable events on the non-breaching party. This may seem to be unjust for the faithful promisee. However, this is what Article 74 unequivocally ordains, and other interpretations are in contradiction to the express wording of the provision. The justification for this *seemingly* unjust result has already been given above.<sup>127</sup>

#### *B. The Application of Articles 75 and 76 Is Mandatory*

In line with the assertion that the foreseeability is not applicable to Articles 75 and 76, it is argued that the applications of Articles 75 and 76 “are not mandatory in nature.”<sup>128</sup> This argument is right because all the provisions of the CISG except for Article 12 is not mandatory.<sup>129</sup> In addition, Article 45 provides, “(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer *may*: . . . (b) claim damages as provided in articles 74 to 77.”<sup>130</sup> Article 61 is the counterpart provision for the buyer.<sup>131</sup> Thus, even if a party suffers a pecuniary loss, he *may* choose not to claim damages for it.

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<sup>125</sup> Ingeborg Schwenzer, *Article 75*, in SCHLECHTRIEM & SCHWENZER, *supra* note 25, ¶ 8 at 1091–92.

<sup>126</sup> CISG, *supra* note 1, art. 74.

<sup>127</sup> *See supra* III.B.

<sup>128</sup> CISG-AC Opinion No. 8, Calculation of Damages under CISG Articles 75 and 76, ¶ 1.2.1 (2008), <http://www.cisgac.com/cisga-opinion-no8/>.

<sup>129</sup> Article 6 of the CISG provides, “[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” CISG, *supra* note 1, art. 6.

<sup>130</sup> *Id.* art. 45 (emphasis added).

<sup>131</sup> *See id.* art. 61.

However, contrary to the conventional view, this author believes that the applications of Articles 75 and 76 are mandatory so long as a party chooses to claim damages of the lost profit arising from a (hypothetical) substitute transaction, unless the parties have agreed on their own method of calculating the damages. In other words, the two articles should be applied to the situations which meet the conditions described in the articles. In case of Article 75, the conditions are (1) the contract is avoided, (2) in a reasonable manner, (3) within a reasonable time after avoidance, (4) the buyer has bought goods in replacement, or the seller has resold the goods. In case of Article 76, (1) the contract is avoided, (2) there is a current price for the goods, or an equivalent price, (3) the party claiming damages has not made a cover purchase or resale or has not made it reasonably and hence Article 75 is not applicable.

Even if a party adheres to claiming damages under Article 74, these same factors must be explained in court anyway if these prerequisites exist.

### *C. Foreseeability Test Makes Differences*

So long as the foreseeability test is applied to Articles 75 and 76, it must produce different outcomes from the cases where only Article 75 or 76 is independently applied. It is supposed to make differences because the relevant time for determining the foreseeability and the relevant time for Articles 75 and 76 are different. As we will see in detail below,<sup>132</sup> the determination of the foreseeability must be made “at the time of the conclusion of the contract.”<sup>133</sup> The relevant time for determining the reasonableness of Article 75 is *some time* after the avoidance of the contract.<sup>134</sup> Under Article 76, it is the time of avoidance or the time of taking over the goods.<sup>135</sup> These differences of reference time should produce

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<sup>132</sup> See *infra* VII.D.

<sup>133</sup> CISG, *supra* note 1, art. 74.

<sup>134</sup> Article 75 inquires whether a substitute transaction was made “within a reasonable time after avoidance.” *Id.* art. 75. Therefore, the relevant time should be described as “some time” after avoidance, which may or may not be held to be reasonable.

<sup>135</sup> Article 76 provides, “(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price *at the time of avoidance* as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price *at the time of such taking over* shall be applied instead of the current price at the time of avoidance.” *Id.* art. 76 (emphasis added).

different outcomes of damages awarded, depending on whether the foreseeability test is applied. Although it is difficult to enumerate examples, there must be some such cases.

One such case is the unforeseeable fluctuation case above. For example, the raw material which the buyer (manufacturer) had contracted to buy from the seller skyrocketed, and the seller was unable to procure the material and hence could not deliver it. The buyer avoided the contract, and without delay bought the same material from the market at the price which was three times of the contract price but the lowest price available at that time. The buyer is considered to have acted “in a reasonable manner and within a reasonable time after avoidance,”<sup>136</sup> satisfying the conditions of Article 75. However, he cannot recover the price difference, because the foreseeability test of Article 74 is applied, prevailing over Article 75. The fluctuating price was unforeseeable for the seller at the time of the conclusion of the contract. The buyer can recover the damages only to the extent foreseeable to the seller.<sup>137</sup> The same is true of the hypothetical substitute transaction under Article 76.<sup>138</sup>

It is extremely difficult to determine how much price change is necessary to be regarded as unforeseeable. It will vary widely depending on manifold variables, such as the speculative nature of the transaction, the kind of goods, the duration of the contract, the availability of a proper market forecast, and so on. Professor Eisenberg suggests a brilliant solution,

What constitutes a reasonably foreseeable increase in the seller’s cost of performance should be historically based; more specifically, it should be the maximum percentage increase in the cost of the relevant inputs over a comparable

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<sup>136</sup> *Id.* art. 75.

<sup>137</sup> The damages to the buyer may not be so serious as it seems at a glance. The increased market value of the raw material will lead to the increased market value of the final products the buyer makes and hence to the price of them; see Eisenberg, *supra* note 67, at 238 (“Cases in which the seller’s cost of performance unexpectedly rises above the contract price often, perhaps usually, involve a cost increase that is market-wide. In such cases, the increase normally will raise not only the seller’s costs but also the buyer’s value for, and the market value of, the contracted-for commodity.”).

<sup>138</sup> Article 79 may be applied to such a radical change situation and parties may be exempted from their contractual obligations. Article 79(1) provides, “[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.” See generally Yasutoshi Ishida, *CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness—Full of Sound and Fury, but Signifying Something*, 30 PACE INT’L L. REV. 331 (2018).

stretch of time during a reasonable past period. In most cases, consideration of price movements during the prior ten to twenty years probably would suffice.<sup>139</sup>

This formula is far more rational and versatile than fixing a percentage of the price change above which the change is regarded as unforeseeable. It can be applied flexibly to all kinds of goods and situations.

#### *D. One Type of Case Foreseeability Should Not Apply To*

In the hypothetical case in the last subsection, the seller was unable to procure the material. What if the seller had procured the material at the lower price before it skyrocketed and, instead of delivering it to the buyer, sold it to a third party at the far higher price than the contract price with the buyer? Can the seller be exempted from paying the damages to the original buyer, insisting that the price increase was unforeseeable? He probably cannot or should not. Making profit by taking advantage of the unforeseeably high price on the one hand and refusing the damages to the buyer for the reason of the unforeseeability on the other should not be allowed by the principle of good faith provided in Article 7(1).<sup>140</sup>

There is a view that application of the good faith principle is limited to “the interpretation of this Convention”<sup>141</sup> and not directly applied to the conduct of the parties.<sup>142</sup> However, if a judge were to interpret Article 74 to condone such a bad faith behavior as above described, it would be a bad faith *interpretation*.<sup>143</sup>

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<sup>139</sup> Eisenberg, *supra* note 67, at 254.

<sup>140</sup> Article 7(1) provides, “[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.” CISG *supra* note 1, art. 7(1) (emphasis added).

<sup>141</sup> *Id.*

<sup>142</sup> See, e.g., Ingeborg Schwenzer & Pascal Hachem, *Article 7*, in SCHLECHTRIEM & SCHWENZER, *supra* note 25, ¶ 17, at 127 (The wording and the drafting history of Article 7(1) lead to the interpretation that it “concerns the interpretation of the Convention only and cannot be applied directly to individual contracts.”).

<sup>143</sup> See Yasutoshi Ishida, *Identifying Fundamental Breach of Articles 25 and 49 of the CISG: The Good Faith Duty of Collaborative Efforts to Cure Defects—Make the Parties Draw a Line in the Sand of Substantiality*, 41 MICH. J. INT’L L. 63, 97 (2020) (“[B]eginning with the phrase ‘In the interpretation of this Convention,’ article 7(1) on its face restricts the observance of good faith to the interpretation of the CISG and seems not to directly govern the conduct of the parties. After all, it is mainly judges who interpret the CISG . . . Article 7(1) is likely not a precept requiring honesty or sincerity from a judge . . . . It would itself be absurd for any law to include a redundant admonition for adjudicators not to make an

## VII. ARTICLE 8 AND REASONABLE MERCHANT STANDARD: WHO IS “WE”?

In defining foreseeability, this author wrote, “it is *our* present reasoning of the possibility of future events in light of *our* past experience.”<sup>144</sup> For the sake of the ordered explanation, the pronoun “our” was used. However, it is not precise. In fact, it is not “our” present reasoning or “our” past experience. In this section, this author will explain whose reasoning and experience it must be for the purpose of the CISG.

Interpretation of the foreseeability test is guided by Article 8, which sets out general rules to interpret the statements and other conduct of the parties to a contract.<sup>145</sup> Article 8 gives substance to foreseeability.

### A. Article 8(1) Subjective Intent

Article 8(1), acknowledging mutual subjective understandings, provides,

For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.<sup>146</sup>

Paragraph (1) is described as the provision to identify the “subjective intent” of the party.<sup>147</sup> the party’s subjective intent prevails over objective interpretation “where the other party knew or could not have been unaware”<sup>148</sup> of it. The following example is illustrative. For a long time, the buyer had ordered 10,000 units of computer components every month. The buyer, an intermediary, had resold the goods and made a profit of \$100 a unit. In a month, the buyer’s fax order form showed 1,000 units, instead of 10,000 units. Having received no notice of change, the seller considered that it was

absurd interpretation. That would be like a public facility posting a sign prohibiting tigers on its front door beside a no-dog sign.”)

<sup>144</sup> See *supra* V.A.

<sup>145</sup> See PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) ¶ 4 at 70 (Peter Schlechtriem ed., 1998) (“The rules of interpretation of Article 8 . . . are applicable not only to declarations of intent leading to the conclusion of a contract but also to the numerous communications and notices provided for in the CISG.”).

<sup>146</sup> CISG, *supra* note 1, art. 8(1).

<sup>147</sup> See Alberto Zuppi, *Article 8*, in KRÖLL COMMENTARY, *supra* note 25, ¶ 8, at 150 (“The first paragraph of Art. 8 presents the so-called ‘subjective intent,’ ‘will theory’ or ‘actual intent.’”).

<sup>148</sup> CISG, *supra* note 1, art. 8(1).



a simple typographical error, and that the buyer's intent was to buy 10,000 units as usual.

The application of Article 8(1) to the foreseeability test of Article 74 is illustrated by using the above example with slight modifications. Just after having received the fax order, the production lines of the seller's factory failed, and the seller could not manufacture the goods. The seller "knew or could not have been unaware"<sup>149</sup> that the number of the units the buyer intended to buy was 10,000, not 1,000. The seller also knew from the long business relationship that the buyer was an intermediary and the profit of resale was \$100 a unit. Therefore, the total amount of the damages the buyer suffered is not \$100,000 (= \$100 × 1,000 units). It is \$1,000,000 (= \$100 × 10,000 units).<sup>150</sup> Applying the foreseeability test, it is for "the loss which the party in breach . . . 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 . . . , as a possible consequence of the breach of contract."<sup>151</sup> Thus, as to the identification of the actual intent of the party, the foreseeability test is commensurate with Article 8(1).

The above calculation should be described as "subjective" because 1,000 is interpreted as 10,000. However, it could also be regarded as objective and reasonable, because a person with average intelligence in the same place as the seller in the above example will have the same understanding and therefore, can see the reason.

### *B. Article 8(2) A Reasonable Merchant Standard*

Article 8(2), introducing the objective standard, provides,

If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.<sup>152</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> See Milena Djordjević, *Article 74*, in KRÖLL COMMENTARY, *supra* note 25, ¶ 28, at 968–69 ("[T]he application of the subjective tests sometimes yields more favourable results for the aggrieved party. This occurs, for example, in cases . . . where the parties have established long-lasting business relations.").

<sup>151</sup> CISG, *supra* note 1, art. 74.

<sup>152</sup> *Id.* art. 8(2).

If paragraph (1) is not applicable, paragraph (2) is applied, which sets an objective test, providing that “the understanding that a reasonable person of the same kind”<sup>153</sup> prevails. This “reasonable person” is construed to be “a reasonable merchant”<sup>154</sup> in the same circumstances. It is depicted as follows,

Since parties to contracts involving international sales are presumed to be merchants, a “reasonable person” may be construed as a reasonable merchant. A reasonable merchant would, therefore, encompass all merchants that satisfy the standards of their trade and that are not intellectually or professionally substandard. The phrase “of the same kind” refers to a merchant in the same business, doing the same functions or operations as the party in breach. The requirement that the reasonable merchant be “in the same circumstances” refers to the market conditions, both regional and world-wide.<sup>155</sup>

This author calls this standard “a reasonable merchant standard.” In the above computer component example, suppose the buyer and seller made the contract for the first time. Yet, the buyer was a well-known intermediary and \$100 per unit was a reasonable amount of profit by resale in light of similar transactions of comparable products.<sup>156</sup> This knowledge is “the understanding that a reasonable [merchant] of the same kind as the [seller] would have had in the same circumstances.”<sup>157</sup> On the other hand, even if the true intent of the buyer was to purchase 10,000 units when he inadvertently wrote the number in the fax order form as 1,000, the seller was in no way in the position to infer the real intent of the buyer. It cannot possibly be said the seller “knew or could not have been unaware what that intent was.”<sup>158</sup> A reasonable merchant of the same kind as S would understand that the number

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<sup>153</sup> *Id.* See also Martin Schmidt-Kassel, *Article 8*, in SCHLECHTRIEM & SCHWENZER, *supra* note 25, ¶ 20, at 153 (“Article 8(2) . . . relies on the view of a hypothetical reasonable person, which in contrast to Article 8(1) is an objective test.”).

<sup>154</sup> Article 2(a) excludes the application of the CISG to the sales “of goods bought for personal, family, household use.” See CISG, *supra* note 1, art. 2(a).

<sup>155</sup> Andrew Babiak, *Defining “Fundamental Breach” Under the United Nations Convention on Contracts for the International Sale of Goods*, 6 TEMP. INT’L & COMP. L.J. 113, 122 (1992). Andrea Björklund, *Article 25*, in KRÖLL COMMENTARY, *supra* note 25, ¶ 22, at 344 (“Ordinarily this will mean merchants with a reasonable degree of knowledge and experience in their trade, including knowledge of the relevant market conditions, whether regional or global.”).

<sup>156</sup> See Victor Knapp, *Article 74*, in BIANCA & BONNELL, *supra* note 26, ¶ 2.11, at 542 (“The party in breach will be considered as knowing the facts and matters enabling to foresee the consequences of the breach of contract if such knowledge generally flows from the experience of a merchant.”).

<sup>157</sup> CISG, *supra* note 1, art. 8(2).

<sup>158</sup> *Id.* art. 8(1).

of the ordered units was 1,000 as unequivocally shown in the order form. The foreseeable loss per unit was \$100 as the seller ought to have known by his expertise. Accordingly, the total amount of foreseeable damages is \$100,000 (= \$100 × 1,000 units), not \$1,000,000 (= \$100 × 10,000 units). Therefore, according to the second sentence of Article 74, \$100,000 should be “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 . . . ought to have known, as a possible consequence of the breach of contract.”<sup>159</sup> In other words, \$100,000 was the objectively foreseeable loss.<sup>160</sup>

To parse the second sentence of Article 74, the use of the subjunctive mood, “the party in breach . . . *ought to have foreseen* . . . in the light of the facts and matters of which he . . . *ought to have known*”<sup>161</sup> implies “*if the party in breach had been a reasonable merchant, he ought to have foreseen (known) . . .*” Thus, the reasonable merchant standard of Article 8(2) is construed to be incorporated in Article 74,<sup>162</sup> and it is congruent with our rationale that the reasonable principle and its two criteria are part of the foreseeability test. Thus, it is the reasonable merchant placed in the same shoes of the breaching party who determines whether (1) *the item of the recoverable loss is reasonable*, and (2) *the amount of the recoverable loss is reasonable*.

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<sup>159</sup> *Id.* art. 74.

<sup>160</sup> See Oberster Gerichtshof [OG] [Supreme Court] Jan. 14, 2002, 7 Ob 301/01t, <http://www.unilex.info/cisg/case/858> (“Generally an objective standard is applied for foreseeability here. The obligor must reckon with the consequences that a reasonable person in his situation (Art. 8(2) CISG) would have foreseen considering the particular circumstances of the case.”).

<sup>161</sup> CISG, *supra* note 1, art. 74 (emphasis added).

<sup>162</sup> As to the reasonableness of Article 75, a similar explanation is made. See Milena Djordjević, *Article 75*, in KRÖLL COMMENTARY, *supra* note 25, ¶ 18, at 997–98 (“To determine whether a substitute transaction was made in a reasonable manner, courts and tribunals typically look to see whether the aggrieved party acted as a ‘*careful and prudent businessman*’ would act while observing the relevant trade practices, and not whether it exhausted all possible avenues of research prior to engaging in a resale or cover purchase.”) (emphasis added).

### C. Article 8(3) Method of Determining Intent

Article 8(3), enumerating sources of relevant information, provides,

In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.<sup>163</sup>

This paragraph furnishes the method to determine the understanding of a reasonable merchant.<sup>164</sup> Article 74 provides in part “in the light of the facts and matters of which he *then* knew or ought to have known.”<sup>165</sup> Article 8(3) tells us the way to identify “the facts and matters”<sup>166</sup> which elucidate the foreseeability of the breaching party. The paragraph says, “all relevant circumstances,” enumerating as examples “negotiations,” “practices,” “usages,”<sup>167</sup> and “subsequent conduct.” Therefore, the reasonable merchant placed in the same shoes of the breaching party must take these factors into consideration to determine the two criteria of the reasonability of the loss and damages.

### D. Who is the “Reasonable Merchant?” and the Time to Determine the Foreseeability

Article 74 provides in part, “the party in breach foresaw or ought to have foreseen *at the time of the conclusion of the contract*.”<sup>168</sup> It unequivocally specifies the time of conclusion of the contract as the time of foreseeability.

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<sup>163</sup> CISG, *supra* note 1, art. 8(3).

<sup>164</sup> See Alberto L. Zuppi, *Article 8*, in KRÖLL COMMENTARY, *supra* note 25, ¶ 29, at 157 (“Last paragraph of Art. 8 presents a list of examples of what should be understood as the relevant circumstances for measuring the intent of the issuer or the understanding of the reasonable recipient. . . . The list does not pretend to be exhaustive.”).

<sup>165</sup> CISG, *supra* note 1, art. 74 (emphasis added). This “then” means “at the time of conclusion of the contract.” As we have seen in Section C in Part VI, and will see in the next section, the information for determining foreseeability is limited to one available at the time of the conclusion of the contract.

<sup>166</sup> *Id.*

<sup>167</sup> As to the usage of parties, Article 9(1) provides, “The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.” See also Saidov, *supra* note 24, at 337–38.

<sup>168</sup> CISG, *supra* note 1, art. 74 (emphasis added).

However, as stated above, we do not have a time machine, and we cannot go back to the time of the conclusion of the contract and have an interview with the breaching party. The time for the *judgment* of foreseeability is never the time of the conclusion of contract, it is made at the time when it is required. Most significantly, that is when the foreseeability of loss becomes an issue in court or arbitration.<sup>169</sup> Therefore, usually it is made by a judge or an arbitrator.

The time of the conclusion of contract is relevant for the appraisal of the loss and damages because such an appraisal is made, taking account of the information of relevant facts and matters available to the breaching party at the time of the conclusion of contract. The phrase in Article 74 “at the time of the conclusion of the contract”<sup>170</sup> is not so much a limitation of the time of the foreseeability as a limitation of the availability of the information. The “reasonability” is clothed with the name “foreseeability” because the available information for its determination is limited to the past. The reasonableness of the loss and damages must be judged *ex post facto* from the perception of the reasonable merchant at the time of the conclusion of the contract. The latter part of the second sentence is a confirmatory paraphrase of this: “in the light of the facts and matters of which he *then* knew or ought to have known.”<sup>171</sup> Foreseeability is the reasonability assessed by the information available at the time of conclusion of the contract.

Under this limitation, the judges presiding over a suit concerning Article 74 must assume the character of a reasonable merchant in applying the two criteria of the reasonability of the loss and damages. They must become a reasonable merchant. It may seem a hard task, but in fact it is not. They do not have to conjure up the spirit of a reasonable merchant. All they have to do is their business as usual. Judges usually do not decide cases by resorting only to their own legal knowledge and cognition of the world at large. Every lawsuit has its own unique facts and technicalities sometimes arcane to ordinary people. Parties (attorneys) usually are very eager to inform the judges of those facts and technicalities in an effort to persuade them. The judges will synthesize the two versions of explanation by both parties and make fair balanced findings of facts, often with the help of expert witnesses.

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<sup>169</sup> See Victor Knapp, *Article 74*, in BIANCA & BONNELL, *supra* note 26, ¶ 2.14, at 542 (“In practice foreseeability is almost always examined *ex post facto*.”).

<sup>170</sup> CISG, *supra* note 1, art. 74.

<sup>171</sup> *Id.* (emphasis added).

This routine process will also be taken in determining the perception of a reasonable merchant who is engaged in the same trade and is placed in the same circumstances as the breaching party.

The judges ask themselves whether such a reasonable merchant would foresee the loss and damages, in other words, whether the merchant would consider the item of the loss and amount of the damages in question reasonable in light of the information available at the time of the conclusion of the contract. “By a gradual process of judicial inclusion and exclusion this ‘[reasonable] man’ acquires a complex personality: we begin to know just what ‘he’ can ‘foresee’ in this and that situation.”<sup>172</sup>

### VIII. CONCLUSION

A claim for damages is an indispensable ingredient in virtually all lawsuits concerning the breach of contract. Virtually all the plaintiffs seek damages. Article 74 is the principal provision that demarcates such damages in the CISG. No doubt, it is a vital provision of the Convention. Foreseeability is a kernel concept of it. However, it has not been spot-lighted enough in the CISG jurisprudence. It is like a leading actor murmuring in the dark without being given a proper script. Although the foreseeability is firmly embedded in Article 74, no elaborate definition or criterion has been given, leaving its determination to the judge’s bare discretion or intuition.

This Article has demonstrated that the foreseeability test in the second sentence of Article 74 demarcates the scope of the loss and damages to reasonable ones. It propounded the reasonability principle and two criteria: (1) *the item of the recoverable loss must be reasonable*, and (2) *the amount of the recoverable damages must be reasonable*. These criteria are congruous with the reasoning of the actual court decisions. The courts seem to be covertly adopting them. The reasonability is determined by a reasonable merchant standard in light of the facts and matters available at the time of conclusion of the contract. The judges sitting for an Article 74 case must assume the character of a reasonable merchant. It is not a novel task for them; it is rather their business as usual. The parties (attorneys) and expert witnesses will be eager to give them the perception of the merchant. It may

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<sup>172</sup> L. Fuller & W. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 51, 85 (1936).

be far easier for judges to decide what is reasonable than what is foreseeable. It is also their business as usual.

This author truly hopes the criteria formulated in this Article will illumine the amorphous notion of foreseeability, and ease the task of judges, giving them a set of rational words which they can persuasively articulate rather than what they would otherwise be obliged to say laconically in a single word: “foreseeable.”