November 22, 2007

"Possible Consequences" as contained in Article 74 of the Convention for the International Sale of Goods (CISG): Friend of Foe?

Norbert Altvater, Osgoode Hall Law School of York University

Available at: https://works.bepress.com/norbert_altvater/1/
"Possible Consequences* as contained in Article 74 of the Convention on Contracts for the International Sale of Goods (CISG): Friend or Foe?"

Norbert Altvater*

INTRODUCTION

On April 11, 1980, at a conference in Vienna, the United Nations adopted the Convention on Contracts for the International Sale of Goods1 (CISG), arguably the greatest, legislative achievement to date to unify international law on the sale of goods:2 66 countries3, including Canada, have ratified it. Canada acceded to the Convention on April 23, 1991.4 It is part of the law of each province and territory in Canada, as well as of the federal government.5

The attitude of Canadian lawyers towards Article 74 derives from their need to have some certainty in their advice to clients. Without certainty the economic costs of transactions would escalate. As common law lawyers we are trained to find that certainty in decided decisions with the principle of stare decisis6. Without case law we are lost.

METHODOLOGY

In this article I will proceed by considering the foreseeability requirement for damages under CISG, the common law, and in the case law, to see if they substantiate a well grounded reason for not using CISG. Is Article 74 of CISG so dissimilar to the common law contemplation principle that it should be a foe to Canadian lawyers? In PART I, I will provide a general overview of the background of the Convention, and a short overview of the contemplation principle (which is the law as to foreseeability in Canada). In PART II, before considering the history of the creation of Article 74, I will first provide a somewhat detailed
history of the creation of its predecessor, ULIS Article 82. Because the Convention is intended as a transnational law the usual rules of interpretation to which we are accustomed may or may not apply. In Part III, I will examine CISG in respect of its interpretation, good faith and reasonableness requirements and ultimately both Sentence 1 and Sentence 2 with respect to the meaning of “possible” consequences and causation. In PART IV, I will examine Canadian and American case law as it relates to Article 74. Lastly, in the CONCLUSION I will compare the phrase “possible consequences” in Article 74 to the contemplation principle in common law.

PART I

GENERAL OVERVIEW

CISG was the culmination of over 50 years of endeavour to unify international law relating to the sale of goods. This endeavour began in the 1920’s at the 6th session of the Hague Conference on Private International Law in 1928 and Ernst Rabel's initiative at UNIDROIT in 1929. In the 1920's and 30's the participants came from the industrialized countries of Europe. It was interrupted by World War II, but in the following years it again was taken up by UNIDROIT. The initiative found it's first iteration in the 1964 Hague Conventions adopting the Uniform Law on International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts to the International Sale of Goods both of which were prepared by UNIDROIT. The convention at which it was adopted was attended by only 28 states, being mainly European countries, and as such was regarded as a civil law convention. As well, because none of the developing countries attended neither convention received
much acceptance.\textsuperscript{18}

On December 17, 1966 (by which time only 3 countries had ratified ULIS\textsuperscript{19}) the United Nations General Assembly established the United Nations Commission on International Trade Law\textsuperscript{20} (UNCITRAL or the “Commission”). The Commission was established to promote the progressive harmonization and unification of the law of international trade by \textit{inter alia}, preparing or promoting the adoption of new international conventions, model laws and uniform laws.\textsuperscript{21} Among the topics most frequently suggested for inclusion in its work was the promotion of the Hague Conventions of 1964.\textsuperscript{22} Accordingly, the international sale of goods was a topic which the Commission decided should be given priority.\textsuperscript{23} UNCITRAL struck various Committees. Committee I examined the law on the international sale of goods.\textsuperscript{24} The General Assembly requested it to ascertain what modifications of ULIS might render it capable of wider acceptance.\textsuperscript{25} It was from the work of this committee that CISG derived.

The Convention is seen as a combination of common law, civil law and socialist law ideas.\textsuperscript{26} At times it takes its basis from one or the other of these sources. At times it is clearly a compromise solution between all the sources. At times it is not found in any of these laws.\textsuperscript{27} I would suggest that Article 74:

\begin{quote}
Damages for breach of contract by one party consists 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 is a party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the fact and matters of which he then knew or ought to have known, as a possible consequence of the breach.
\end{quote}

is one such article that does not derive from any one of these systems.\textsuperscript{28}

It has been suggested that Article 74 by itself is a sufficient reason for opting out of
CISG,\textsuperscript{29} and, I dare say, as such an enemy to lawyers in Canada. It has been suggested, in fact, that not opting out of CISG in sales contracts between businesses in jurisdictions with advanced sales of goods laws could be tantamount to professional negligence.\textsuperscript{30} The difficulty causing this for Canadian lawyers relates to the “foreseeability” principle enunciated in Article 74. Otherwise, for Canadian lawyers, CISG in various other aspects should be preferable: e.g. CISG is similar to Canadian law and dissimilar to the United States' Uniform Commercial Code\textsuperscript{31} (UCC), when it relates to the “Battle of the Forms” problem. As well, I suspect that we all would only be too happy to see the requirement for consideration vanish from contract law. Neither the Convention nor the UCC require consideration for a agreement to be binding. It is lawyers only, not business persons, who think in terms of consideration being needed to make a contract binding.\textsuperscript{32}

\textbf{COMMON LAW}

The common law foreseeability principle is generally accepted as being set out in three English cases: 1) \textit{Hadley v Baxendale}\textsuperscript{33}, 2) \textit{Victoria Laundry}\textsuperscript{34}, 3) \textit{The Heron II}\textsuperscript{35}. It is also referred to as the contemplation principle.

\textit{Hadley v Baxendale} was an appeal from a jury trial in a breach of contract. As such, the Appeal Court considered the principle which ought to be put to the jury for it to determine the damages. Alderson B. stated firstly:

\begin{quote}
the damages which the other party ought to receive in respect of such breach of contract should be such as made fairly and reasonably be considered as arriving naturally, ie, according to the usual course of things, from such breach of the contract itself, or such as may be reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as a probable result of the breach of it.\textsuperscript{36}
\end{quote}
He thus starts with the same basic philosophy as CISG Article 74.

There is some controversy over the exact test in *Hadley v. Baxendale*. Most commentators have considered it to be two tests.\(^37\) The first test being: “the damages ... should be such as made fairly and reasonably be considered as arriving naturally, ie, according to the usual course of things, from such breach of the contract itself...” The commentators then introduce the second test: “or such as may be reasonably be supposed to have been in the contemplation of both parties.” The law lords in *The Heron II* deal with the second test, but do not comment on the first part of *Hadley v. Baxendale*.

Lord Reid's view expressed that “the chance of the occurrence of the event which caused the damage would have appeared to him to be rather less than an even chance. ... that event would have appeared to the defendant as not unlikely to occur.”\(^38\) Lord Pearce's view\(^39\) was that the expressions used in the *Victoria Laundry* case that it is enough if the loss is a “'serious possibility', or a 'real danger'. For short [the court] used the word 'liable' to result" were right. The views of the various other law lords in *The Heron II* are seen as closer to Lord Reid's view than Lord Pearce's view.\(^40\)

The House of Lords in *The Heron II* is seen as expanding recovery for consequential damages.\(^41\) If recovery is expanded, it must mean that the concept of foreseeability is expanded, which implies that the possibility of what is foreseen is expanded. If the damages must be substantially foreseeable, as Prof. Ziegel suggests\(^42\), exactly what does that mean? Is it different from the foreseeability test under Article 74 of CISG? Lord Reid was willing to settle for something less than 50% probability. The other law lords seem to require even less.
This test from *Hadley v. Baxendale* also has been accepted as part of the common law of all the states of the United States, and impliedly has been adopted into the UCC by virtue of § 1-103(b). Thus the test for foreseeability, by whatever appellation it is expressed in the UCC, remains the contemplation principle of the common law. The UCC distinguishes between incidental damages and consequential damages, neither of which is defined by the UCC. Incidental damages are recoverable whether they are foreseeable or not. In this it mirrors the first part of the contemplation principle in *Hadley v. Baxendale* and sentence 1 of Article 74. It is only consequential damages which are subject to the limitation that the breaching party must have foreseen or have had reason to have foreseen then as a probable result of the breach at the time the contact was made. It has been accepted that *Hadley v. Baxendale* is the source of UCC §2-715 (2) even though it neither uses the phrase “contemplation” nor “foreseeable” but the phrase “had reason to know.”

**PART II**

**ULIS ARTICLE 82**

It is accepted that Article 74 derived from ULIS Article 82 and they are, in fact, almost identical. ULIS Article 82, in its relevant part, states:

Where the contract is not avoided, damages for a breach of contract by one party shall consist of sum equal to the loss, including loss of profit, suffered by the other party. Such damages shall not exceed 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 which then were known or ought to have been known to him, as a possible consequence of the breach of the contract.

Because there was so little change from ULIS Article 82 to CISG Article 74, it has been
suggested many times that the case law from ULIS Article 82 can be used to interpret CISG Article 74. The Convention was intended to be neutral\textsuperscript{52} and as such until it is further examined it must be considered to be neutral as compared to ULIS as well.

The history of ULIS Article 82 is interwoven with ULIS itself. The efforts by UNIDROIT to unify the law relating to the sale of goods can be traced back to Ernst Rabel in 1929.\textsuperscript{53} At the first session of the “Comité du conseil pour l’unification de la vente\textsuperscript{54}” in October 1930 the English delegate suggested that only through foreseeability can a definite boundary to the limit on damages be established.\textsuperscript{55} At the third session the first formulation of an article respecting a limit on damages was drafted:

\begin{quote}
L'acquéreur aura également le droit d'être indemnisé de tout autre dommage subi par lui dans des situations particulières que le vendeur a connu ou aurait dû connaître, par exemple si le vendeur a su \textsuperscript{sic} ou aurait dû savoir que l'acheteur achetait en vue d'une revente\textsuperscript{56}
\end{quote}

but it was at the 7\textsuperscript{th} session that the Comité first considered foreseeability.\textsuperscript{57}

As a consequence of the criticism of the English delegate Gutteridge:

\begin{quote}
La raison pour laquelle la partie est responsable d'un préjudice ayant un caractère particulier n'est pas dans le fait qu'elle a prévu le montant du dommage, puisque cela serait souvent impossible à établir. La partie est responsable du fait qu'elle était au aurait dû être à connaissance de faits qui pouvaient causes un préjudice ayant un caractère particulier.\textsuperscript{58}
\end{quote}

the Comité in its 10\textsuperscript{th} session changed various Articles so that it was not the degree of damages which needed to be foreseen but the nature of the damages. With slight drafting changes these became the draft of 1935.\textsuperscript{59} Articles 33, 38, 39, 75, 78 and 79 all then referred to either “raisonablement prévu” or “raisonablement prévoir.”\textsuperscript{60} These were seen as comparable to the
English concept of foreseeability, and were generally accepted except by Belgium. Rabel proposed to combine damages for Buyer and Seller and to leave only a distinction between whether the contract was repudiated or not. These thoughts were incorporated into the 1939 draft and the concept of reasonable disappeared.

At the Hague Conference of 1951 no basic objection was raised to the 1939 draft. A special committee resignedly commented:

La Commission n'a pas cru qu'il était possible d'écarte une régle admise à la foi dans la common law et dans de nombreux droits continentaux ... La Commission n'a pas pensé ... qu'il soit opportun de sa part de renverser un principe qui continue à être généralement admis dans la pratique.

At the discussions in 1963 Great Britain proposed a rule limiting damages to those which are “a reasonably probable result of the breach.”

At the Hague Conference of 1964 a working group again examined these rules and suggested that foreseeability should be based on the degree of damages:

[Les dommage-intérêts] sont égaux à la perte effectivement subie at au gain manqué que l'autre partie aurait dû prévoir à la conclusion du contrat, étant donné les faits qu'il connaissait ou qu'il aurait dû connaître comme étant des conséquences possible de la violation du contrat.

The Article was placed before the Working Group and further revisions were made before the plenary session. As a consequence the next draft stated:

Ces dommages-intérêts ne seront pas supérieurs à la perte subie et au gain manqué que la partie en défaut aurait dû raisonablement prévoir comme probables au moment de la conclusion du contrat.

At the plenary session the Article was attacked because “comme probable” was seen to indicate a
greater than 50% possibility and it was changed to the form we find in Article 82 of ULIS.70

**CISG ARTICLE 74**

During the course of the deliberations by UNCITRAL Committee I Article 74 went through various iterations: from ULIS Article 82, to draft Article 55, then to draft Article 70, and ending up as CISG Article 74.71 ULIS Article 82 was not considered until late in the process of the Committee. As Prof. Honnold commented, the procedures of the Committee bore a striking resemblance to those of a Quaker meeting.72 The wording of Article 74 is convoluted. In light of the clarity of Article 7.7.4 of the UNIDROIT Principles73 and Article 9:503 of The Principles of European Contract Law74 (PECL) it is almost as if they were too weak to tackle it.75 The discussions to Article 82 were sparse.

The CISG Working Group requested the various representatives to examine various articles. Mexico with Austria, India and Japan were requested *inter alia* to look at ULIS Article 82. They proposed the Article remain in substantially the same form with only some minor changes. In the analysis of comments and proposals by governments and international organizations on the draft convention the ICC suggested the deletion of the second sentence of the Article and reliance on a limitation of damages of a more general nature.76 There were other comments by Mexico, Hungary and Norway in respect of ULIS Article 82.77

It was again considered at a meeting in Geneva from 21 Jan to 1 Feb 1974.78 At the 30th meeting of the first Committee what had them become draft Article 70 (and which became CISG Article 74) again was considered and an amendment proposed by Pakistan.79 There was not
much support for the amendment by Pakistan and as such the committee considered it rejected.

The next consideration of Article 70 (CISG Article 74) was at the 37th meeting on April 7, 1980 at which it was adopted. It is clear that drafters considered the second sentence of Article 74 to be the limit on the foreseeability on the damages for breach of contract. Unless one relates CISG Article 74 back to ULIS Article 82, this would be somewhat surprising considering the convoluted wording of that second sentence. Accordingly even though ULIS was rejected by much of the world community, Article 82 did find its way directly into CISG and the meaning remains the same as it was in ULIS.

PART III

INTERPRETATION

Too often, I think, commentators have made comments such as V. Suzanne Cook:

> Decisions rendered by a U. S. court under the Uniform Commercial Code are very relevant and as the Delchi court observed, such decisions "may also inform a court where the language of the relevant CISG provisions tracks that of the UCC." The court cautioned, however, that the “UCC case law is not per se applicable.” Unfortunately, the court never explained why the Uniform Commercial Code was relevant at all or why it was not per se applicable. (emphasis mine)

She argues that UCC cases may be applicable where the language of CISG tracks that of UCC. Not only may or may not the UCC case law be applicable, but to give effect to its international character, the presumption should be the other way around. Whether or not the language of one tracks that of the other, no local or other law should be relevant without first having been examined and found that it should in some way be used to interpret CISG.
Any analysis of CISG must consider the methods which may be used in its interpretation. Certainly the preamble is intended to assist in the interpretive process. The preamble outlines its objectives including the establishment of a “New International Economic Order”. It is a further consideration that this be done with “equality” and a “mutual benefit” adopting “uniform laws which would thereby contribute to removing legal barriers” to, and “promoting development of international trade.” I think, therefore, that any interpretation should not be bound by the old, but should deal with the various national fori with equality, mutual benefit, uniformity, removing legal barriers and promoting trade. It should, therefore, follow that the more (or less) of these factors any interpretation satisfies, the more (or less) it is in accordance with the general principles upon which CISG is founded.

Article 7 of CISG directly incorporates this process by stating:

7(1) In the interpretation of this convention, regard shall be handed to its international character and to promote uniformity in its application and the observance of good faith in international trade.

7(2) Questions concerning matters covered by this convention which are not expressly settled in it are to be settled in the conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Thus, while Article 7(1) governs the rules of interpretation, Article 7(2) provides rules for filling any gaps if an issue does not fall squarely within an article of CISG.

Regardless of the academic debate respecting the full extent of the use of Article 7 it should, as a minimum, lead as much as possible to a uniform interpretation of the Convention. To have it other wise would lead to forum shopping. Unless every effort is made to enure that a
case would have the same outcome regardless where it is litigated, I would think the Convention has failed in one of its major goals: to promote international trade. International trade will be promoted if there is certainty of the outcome of a dispute, and there can only be certainty if the outcome will be the same regardless of the jurisdiction in which the litigation is prosecuted.

The drafters did not see the Convention as supplying all the answers. As a last resort Article 7(2) refers to matters being decided “in conformity with the law applicable by virtue of the rules of private law” and that could bring the domestic law to bear on the question. It should be a last resort since it would be the least likely to lead to uniformity and good faith and as such would be the least likely to promote international trade. Indeed, it has been stated that if there is a gap in CISG there are 7 potential sources a tribunal can look at for guidance. If there is no particular CISG provision that is directly applicable the tribunal, in order of persuasiveness, could look at the following:

1) General principles of contract law contained in CISG;
2) The legislative history of CISG (the Travaux Préparatoires);
3) Case law from foreign jurisdictions interpreting CISG;
4) Commentary and notes from imminent scholars on CISG;
5) General principles of private International Law,
6) Case law from domestic jurisdictions interpreting CISG;
7) Case law from domestic jurisdictions interpreting domestic law.

Certainly differences will occur between jurisdictions, but if Prof. Berman is correct, that in “no other major branch of law is there more uniformity than in the law of international trade”
then any differences may be more imagined than real. Even were the legislatures of more than one Canadian province to pass exactly identical legislation, the outcome in some instances would be different. These instances are the boundary uncertainties which Prof. Cook shows will always exist if we look closely enough at two objects (or concepts), whether that is in the physical world or the conceptual world of law. It, nevertheless, still would be a major and worthwhile unification effort, where it is possible within the various needs of the provinces.

GOOD FAITH

In interpreting CISG, it must of course always be kept in mind that the expressions used were intended to be neutral. It is irrelevant that the terms and concepts used correspond to terms which in a domestic legal system have a determined meaning. Nevertheless, I will continue with the presumption that we sufficiently know what “good faith” means for the Convention since it is not within the scope of this Article to consider its meaning in detail. Good faith has been stated to be one of the fundamental incidents of an international transaction. Although CISG states that it is to “interpreted” having regard to the observance of good faith in international transactions, this requirement of good faith has been seen to go even further. I would agree: good faith is fundamental to such transactions. If is to be “interpreted” having regard to or to promote the “observance of good faith”, and there were no such good faith in international transactions there would be nothing with which to interpret CISG or nothing to promote. CISG does not govern state to state affairs, but private international transactions. It should be those parties who observe good faith and have their conduct is measured by it. Thereby it should be all the conduct by parties to which good faith applies. Indeed, some
conduct of a party has been recognized and sanctioned because it was inconsistent with the good faith requirement of Article 7(1). 103 I think good faith is most important in international transactions. The parties will often be a long way apart. Without any overarching requirement of good faith, which is enforceable as a term of the contract, it would certainly open the door to sharp practice. Business people can only look that others will be forthright with them 104 and this becomes more important the less the counter-party to the contract is known. Anything else would do exactly the opposite of what the convention is intended to do: it would restrict rather than promote international trade.

REASONABLENESS

Keeping in mind that the proviso 105 respecting the term "good faith" applies equally to reasonableness, I again will take it that we sufficiently know the meaning of that term for the purposes of this paper. As does A. S. Hartkamp, I think that reasonableness is an incident of good faith. 106 A reasonable person is generally taken to act and react in a good faith manner. 107 I agree and believe that the converse is true as well. A person acting in good faith must act as a reasonable person. I would also suggest that someone acting unreasonably does not act in good faith. Article 8(2) of CISG states:

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 circumstances.

“Other conduct” is seen to include all conduct, whether pre-contractual, in the performance of the contract, and in the non-performance of the contract. 108 I cannot imagine otherwise than that a
reasonable person would interpret conduct in a reasonable way. It would seem to be anomalous if conduct would only include an active act and not include an omission. An omission would seem to be conduct just as much as an active act. Whether somebody walks or does not walk, and stands still, there is still conduct by that party. As such, both what is done and not done are interpreted by a reasonable person and as such, should be interpreted reasonably. It would seem contrary to good faith to deal with conduct on the basis of an unreasonable party.

It is in the conduct of the parties that their intention can be determined. Article 8 provides both a objective and subjective test to determine that intention under the Convention. In practice it is the objective test that will generally be important. The conduct of the parties is firstly to be interpreted according to their intent where the other party knew or ought to have known that intent. This is the subjective test. But people do not remember events accurately. What they remember they will remember according to their own predispositions and would be more likely to forget an intent which resulted in an outcome not advantageous for them. This is not a comment on the integrity of the parties, it is how people react. If the subjective test cannot be used, the objective test is used. The objective test must be that of a reasonable person, otherwise on what do we base it? If we base it on an unreasonable person, any conclusion could be obtained from any facts or basis.

**MEANING OF “POSSIBLE”**

Merely because the same word is used does not necessarily mean that it always means the same thing. As Prof. Cook aptly points out:
The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.  

As he points out, what frequently happens is that “a court will unthinkingly assume that a definition given to a word in one legal rule is to be followed blindly in a different rule having a different social, economic, or political purpose.” If that holds true for a word it holds true for a phrase. While it can certainly be said that the phrase “possible consequences” has the same social and economic, and perhaps even political purpose as the phrase “in the contemplation of the parties”, they do come from different legal traditions. One from domestic law, the other from the convoluted machinations of international negotiations. This is confirmed by Prof. Ferrari who comments:

Furthermore, one must not forget that the choice of one term rather than another is the result of compromise and does not necessarily correspond to the reception of a concept peculiar to specific domestic law: the interpreter has to be aware of so-called faux-amis.

All words as the “‘skin of a living thought’ and that ‘words [and the concepts for which they stand] are flexible’ and should be defined so as to best meet our needs.” That seems to be as well what Lord Morris of Borth-y-Gest also was driving at when he said: “language is the dress of thought.”

Thus it is certainly accepted that in law, at least in common law, the same word in different legislation can have different meanings depending upon the policy objectives of the legislation. If that can be so within the same legal system, I would think that different words from different legal backgrounds should be able to mean the same or essentially the same thought or concept. Prof. Ferrari points out that between the UCC and CISG: it is impermissible
and *dangerous* to assert that the concepts of CISG and the UCC are analogous, and Prof. Honnold points out: “[o]ne threat to international uniformity is a natural tendency to read the international text through the lenses of domestic law.” It is, therefore necessary, to look somewhat more circumspectly at the word “possible” as it is used within Article 74 than would seem necessary at first glance.

It is, therefore, well to consider the meaning of the word “possible" in various contexts. In the Oxford Dictionary its meaning, as an adjective, which is the sense in which it is used in Article 74, is given as:

1. That may be (i.e. is capable of being); that may or can exist, be done, or happen (in general, or in given or assumed conditions or circumstances); that is in one's power, that one can do, exert, use, etc. (const. to the agent).
   a. Qualifying a noun or pronoun, attributively or (more usually) predicatively.
2. a. That may be (i.e. is not known to be); that is perhaps true or a fact; that perhaps exists. (Expressing contingency, or an idea in the speaker's mind, not power or capability of existing as is 1; hence sometimes nearly = credible, thinkable)
   ...  
   c. *Philos.* Logically conceivable; that which, whether or not it actually exists, is not excluded from existence by being logically contradictory or against reason. Freq. In phr possible world; also *attrib.* Also in gen. Use, orig. with allusion to Voltaire's *Candide* (see quote 1759).
3. Having the power to do something; able, capable. *Obs. Rare.* (Cf. POSSIBILITY 3).
4. *Math.* = REAL a \(2\) ld; opp. To IMPOSSIBLE a. 2
5. With ellipses of some qualification. Possible to deal with, get on with, understand, take into consideration, etc. (opp. to IMPOSSIBLE a.

It is interesting to contrast these meanings with those for “possibly”:

1. In a possible manner; according to what may or can be (in the nature of things); by any existing power or means; within the range
of possibility; by any possibility. (Usually, now always, as an intensive qualification of can or could.)

2. Qualifying the statement, and expressing contingency or subjective possibility (cf. POSSIBLE a. 2): According to what may be (as far as one knows); perhaps, perchance, maybe. (Often as intensive qualification of may or might.)

Black’s Law Dictionary, which is from the United States, does not define the word “possible” but only “possibility”, as:

1. An event that may or may not happen.

2. A contingent interest in real of personal property.

Stroud’s Judicial Dictionary of Words and Phrases, being English, refers to “possible” as:

(1) Where a manufacturer undertakes to supply an article “as soon as possible,” that means with all reasonable promptitude and in the shortest practicable time, regard being had to the manufacturer’s ordinary means of business, and the orders he may reasonably be assumed to have already in hand ... 

(2) ... “to do a thing “ as soon as possible” means to do it within a reasonable time, with an understanding to do it within the shortest possible time” ...

(4) A duty to do a thing “if possible” means generally, if reasonably possible in a business sense ...

... 

(8) “If possible”: see Wilson v. Kynock [1877] W.N. 164

The Oxford Companion to Law, does not have the word “possible” but it does have the word “Possibility”:

A future event which may or may not happen; ...

A Dictionary of Modern Legal Usage, has an interesting notation for “Possible” possible; practicable. The author of the following advise was ill-informed: “Do not use possible when you should use practicable, as it may make a world of difference whether an act is to be done if possible or only if practicable.” Notes on the Art of Drafting Contracts 11 (Cornell Law School 1934). Rather, practicable (= feasible) is virtually a synonym of possible; the words to be distinguished are practical q.v., and practicable.
I suggest there is a slight difference, especially leading from the primary meaning in the Shorter Oxford Dictionary. The word “possible” is more concrete. The word “possibility” offers a greater contingency of the noun described. Prof. Jacob Ziegel considers the word “possible” in the mathematical, scientific sense with the example or drawing one specific card from a set of cards, but I question whether that is the view intended since in the *Travaux Préparatoires* it is stated that merchants will also use it. This is, I suggest, one of those times when under Article 7(2) of CISG it would also be appropriate to also refer to the domestic law as a final resort: to determine the various usages and meanings of the word in a specific language.

Barry, J. in considering these words uses Webster New Dictionary and Thesaurus and quotes:

> It defines “possibility” as “that which may be possible; a contingency” and “possible” as “not contrary to the nature of things; that may be or happen; that may be done, practicable.”

The word “possible” has also been variously interpreted as “a term that includes all chances of an event taking place, and extends from just above zero to just below certainty.” It has more often been described as “I think it is very clear that the strictly ‘mathematical’ or ‘scientific’ meaning of the word ‘possible’ ... should not be given to it. It should rather be interpreted as meaning ‘reasonably possible’ or ‘practicable’” and that “the word possible could in some circumstances be coloured by the text to mean more likely than not” I think that Barry, J. is closer to the correct meaning of “possible” and has the nuances of the words more correct. Generally the word “possible” evinces something more than a mere chance of something occurring.
The meaning of “possible” is further restricted by the fact that the party in breach must not only have foreseen or ought to have foreseen the possible consequences, but it must be in the light of the facts and matters of which he then knew or ought to have known. It is not all possible consequences that are compensated: only those that by the subjective or objective test he foresaw or ought to have foreseen.

Certainly, if the party in breach foresaw consequences and knew of facts and matters, I suggest it is wholly appropriate for liability to be imposed. The more difficult situation is when the objective test is used: what he ought to have foreseen in the light of the facts and matters which he ought to have known. That, I suggest, needs firstly to be proved (to a certain degree of certainty) before liability will result, but is outside the scope of this paper. The possible consequences are those which he ought to have known. But reasonableness must still be a factor. As such I suggest it is the possible consequences which he reasonably ought to have known, that are included. Can a reasonable person be said reasonably to have known anything other than reasonable possible consequences? If he can, I suggest it is not much more than that which he can reasonably foresee.

Because “possible consequences” is so restricted, I suggest that the word possible is not intended in the scientific or mathematical meaning of the word. Ask any businessman what his possible profit or loss for the next year, or on a transaction, may be, and I suggest his reaction would be a range which would factor in various economically significant contingencies. I suggest it would only be on pressing him that he would agree to the scientific or mathematical meaning of the word “possible.” Indeed this accords with Prof. Schlechtriem’s comment that: On the whole, the foreseeability rule does not generally extend liability quite as far as the theory of the adequate causal connection (Adäquanzlehre) often applied in German law, under which only loss whose occurrence is outside the bounds of all probability is excluded.
SENTENCE 1 AND CAUSATION

Sentence 1 of Article 74 appears to me to correspond to the first part of the rule in *Hadley v. Baxendale*. The loss which is suffered by the other party as the consequence of the breach must be limited. Because of the economic reasons for including a limitation on damages, this should be seen as a general principle on which CISG is based. Stated as is the second sentence of Article 74: that the loss can not exceed a certain parameter certainly does not imply that this parameter is the same parameter by which the loss is determined in the first place. Indeed, I would suggest its ordinary meaning seems to imply the opposite. If one thing exceeds another, there must be something for it to exceed. If the loss is not limited by the foreseeability of “a possible consequence” of the breach of the contract, then the limitation on damages must be inherent in sentence 1. Certainly such a limitation could be read into sentence 1 in the same manner as the calculation of interest on damages has been incorporated into Article 78. If it were to go on *ad infinitum* the most improbable losses would be compensated.

There are then be 2 separate rules determining damages under Article 74. It would be worthwhile to examine the permutations more abstractly. Each of Sentence 1 and Sentence 2 would lead to a set of damages that could be recovered by it. If there are two such sets of damages, one could be termed Set $S_1$ and the other Set $S_2$. There are then 5 permutations:

1. $S_1$ and $S_2$ are mutually exclusive (no element in $S_1$ is contained in $S_2$);
2. $S_1$ is greater than $S_2$ and contains all of $S_2$ (plus other elements);
3. $S_2$ is greater than $S_1$ and contains all of $S_1$ (plus other elements);
4. \( S_1 \) is identical to \( S_2 \) and each contains the exact elements of the other set;

5. \( S_1 \) and \( S_2 \) have some common elements and there some elements of each set which are not included in the other.

Permutations 2 and 3 are, in fact, for all intents and purposes the same, (since we do not yet know which is \( S_1 \) and \( S_2 \) and we could designate either as \( S_1 \) or \( S_2 \)) except reversing which set is larger. If one takes all these permutations and applies them to the wording of Article 74, various permutations seem to be excluded. Consider \( S_1 \) as the damages recovered by sentence 1 and \( S_2 \) to be the damages recovered by sentence 2. If the damages allowed by sentence 1 were exclusive from the damages allowed by sentence 2 (option #1) no damages would ever be allowed. Very fairly, that doesn't make sense. If the damages from sentence 1 are always greater than the damages from sentence 2, (option #2) then why not just state the damages are governed by sentence 2? If the damages from sentence 1 is less than the damages from sentence 2, (option #3) or they are identical (option #4), then sentence 2 is superfluous. This seems a less logical result than the prior one. As such, only 2 of the permutations (options #2 and #5) seem reasonable. As stated above, the most obvious interpretation would seem to be option #5: that the loss allowed by the limiting rule in sentence 1 is different from the loss allowed by the foreseeability principle and some loss from the limiting rule in sentence 1 is excluded by that foreseeability principle.

If the principle of foreseeability is derived from the second sentence of Article 74, (option #2) why it is expressed so obliquely? It could have been just as easily expressed as the foreseeability principle is expressed in PECL Article 9:503 (leaving aside the exception when the non-performance was intentional or grossly negligent) and so much clearer:
The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as a likely result of its non-performance, unless the non-performance was intentional or grossly negligent.

It, as does CISG, also links the liability for loss to the time of the conclusion of the contract. It has no oblique reference in it as does Article 74 that the damages “may not exceed the loss which the party in breach foresaw” [emphasis mine]. The same is true of the foreseeability principle enunciated in the UNIDROIT Principles, 2004 Article 7.4.4:

The non-performing party is liable only for harm for which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result in its non-performance.142

If the rule which limits damages to breach of contract derives from the second sentence of Article 74, one wonders why the drafters of ULIS (which was UNIDROIT)143 were so incapable of coming to as clear a statement as in the UNIDROIT Principles Article 7.4.4?

That leaves open the question as to what rule for limiting damages should be incorporated into sentence 1 of CISG. Because CISG is to be interpreted in regards to its “international character” and the need to “promote uniformity”,144 I would suggest that it would not be appropriate for this rule to derive from domestic law, no matter how cogent that domestic law may be. To derive the rule for limiting damages from a domestic law would result in each jurisdiction incorporating its own domestic law. Certainly each jurisdiction would have a predilection towards considering its own rule for limiting the damages as being superior to that of another jurisdiction. If the rule by which the damages are limited does not derive from domestic law, then I would suggest that the best source of deriving it would be the causality principle145 inherent in sentence 1.
As Djakhongir Saidov points out, causality has two functions in legal theory: a) what events caused the event in question? or b) is the causal link between the two events [between the breach and the damages] sufficient to establish either liability or the required extent of liability? The second part could form a basis of a limiting rule inherent in sentence 1 of Article 74. The full extent of that argument does not appear to have been considered and would be too nebulous to serve any useful function for the purposes of this article. I do, however, agree with him that causality seems much more restricted to the situation where there are intervening factors between the breach and the damages.

**SENTENCE 2 AND FORESEEABILITY**

If the limiting rule is in fact only in sentence 2 of Article 74 (even though it is always less than the damages that would be allowed by sentence 1) it would seem fruitful to first consider what the possible responses might be given to the hypothetical question: is this (or that) a possible result from a certain breach? I would suggest that the responses might colloquially be the following five:

1) "You are out of your tree, that will never happen;"
2) "It may happen, but I can't imagine it;"
3) "That may or may not happen;"
4) "That will probably happen;"
5) "I'm very certain that's going to happen."

Reasonableness, of course, is a consideration in the interpretation of CISG as well the fact that it was written for merchants. The drafters made comments that the prior law was “practically impossible for a businessman to know ...”, and “artificial and, consequently, was difficult to
apply." In considering the Convention generally, the Commission noted: “The omission seriously impairs the clarity and work ability of the law. Merchants need a clear, unified picture as to where and when payment in to occur,” “current conditions is a legalistic concept not readily understandable by merchants or even by lawyers from different legal system.” that the new law on sales should supply “clear and practical answers” and that “a unified presentation of substantive duties makes it easier for merchants to understand, and perform, their obligations.”

It would not be in good faith to use the foreseeability of an unreasonable party. Not only must it be plain for merchants, it must also be read by a reasonable party. As such, I suggest, it must be read from the view point of a reasonable merchant. Lawyers look at matters differently. That becomes ingrained into us from law school. When in class, no matter how far fetched or improbable a fact situation is described, we quickly learn that it will come together for the worst scenario: otherwise the case would not be discussed. A lawyer, like a mathematician, would never say that anything could not happen. For us all is possible. We have been indoctrinated with case after case in which the most improbable has in fact occurred. But I do not think that this is not the proper interpretation of the word “possible” in CISG. It is meant for business dealings for reasonable merchants. I would suggest that for a merchant only the last three of the responses above would in fact be seen as possible consequences of a breach of a contract and as such would result in damages being awarded.

PART IV

CASE LAW

In 2004 Henning Lutz could only find 8 Canadian cases on CISG and 95 cases from the
United States. In 2005 Peter Mazzacano found 9 Canadian cases, but as he pointed out 3 of them did not consider CISG in any significant manner. He concentrated on the remaining 6. A search of the same website in 2006 found 14 Canadian cases, but not all of those refer to the Convention.

Very few of these cases, or cases from the civil law jurisdictions, consider Article 74. That is not surprising. Of all myriad of Canadian cases respecting breach of contract, very few consider the contemplation principle.

How does the foreseeability principle in Article 74 fare? It does not seem of much benefit to consider the contemplation principle in any great detail because, if anything, the common law test is more restrictive than the CISG test. As such, whenever there is liability at common law there would be liability under CISG. More heuristic are the cases in which liability is imposed under the foreseeability test in CISG Article 74 (or ULIS Article 82) for which there is no corresponding liability under the common law. These are the boundary cases which Prof. Cook observes whenever 2 concepts are compared and which would be present in this situation as well.

2) Canadian Cases

Of the six cases Peter J. Mazzacano reviews only two of them have any reference which might imply a consideration of the foreseeability concept in Article 74. The six cases he considers are:

- *Nova Tool & Mould Inc. v. London Industries Inc.* (herein *Nova Tool*) which only mentions that the Plaintiff relies *inter alia* on Article 74 of CISG, but states nothing else
about CISG or Article 74.

- *La San Guiseppe v. Forti Moulding Ltd.*\(^{162}\) which does not mention Article 74.

- *Mansonville Plastics (B.C.) Ltd. v. Kurtz GmbH.*\(^{163}\) which while it did mention Article 74, did not consider the issue of the foreseeability limitation respecting damages.

- *Shane v. JCB Belgium N.V.*\(^{164}\) which is in substance a tort case but which did mention CISG and in which the court makes the most interestingly confusing statement in para. [50]: “The applicable law of contract is the CISG which provides that the law of Belgium would apply to the contractual provisions”\(^{165}\)[emphasis mine]. How CISG would make the law of Belgium apply perplexes me.

- *Diversitel Communications Inc. v. Glacier Bay Inc.*\(^{166}\) which has the distinction of being the first Canadian case to consider international decisions respecting CISG,\(^{167}\) but in which the foreseeability concept in Article 74 did not have any relevance.

- *Brown & Root Services Corp. v. Aerotech Herman Nelson Inc.*\(^{168}\)(at p. 75) which also did not consider Article 74.

The additional Canadian cases now on the web site are:

1. *Cherry Stix Ltd. v. President of the Canada Borders Services Agency*\(^{169}\), which relates to Canadian Customs law;

2. *GreCon Dimter Inc. v. J.R. Normand Inc. et al*\(^{170}\), which obliquely refers to Article 6;

3. *Sonox Sia v. Albury Grain Sales Inc. et al.*\(^{171}\), which refers to Articles 4 and 19;

4. *Chateau des Charmes Wines Ltd. v. Sabaté USA, Inc. et al.*\(^{172}\), which refers to Articles
As such, none of the Canadian cases consider the meaning of the phrase “possible consequences.” The most significant mention of Article 74 is as a footnote in *Nova Tool* but that case goes on to deal with the issues applying common law standards and tests. These concepts are well known to Canadian lawyers. In the decisions up to the present, I do not think one can truly find the judicial reasoning called for by CISG. If courts do suddenly see the light and begin to try to see CISG solely from its view point, what kind of decisions will they come up with? The fear must be that if the courts do begin to try seriously to apply CISG, what weird and wonderful results will come from it. And if that isn’t a possibility, consider the reasoning in para [50] of *Shane v. JCB Belgium N.V.*. There are no guarantees.

3) *Delchi Carrier*

I believe, the best known case in North America relating to CISG Article 74 is the United States case of *Delchi Carrier SpA v. Rotorex Corp.* Unfortunately, it also does not add much to the analysis and has been justly criticized. As V. Suzanne Cooke properly points out:

> Although the court correctly identified “the principle of foreseeability” as the applicable limitation to recovery under Article 74 of the Convention, it incorrectly assumed, without further investigation, the “the familiar principle of foreseeability established in *Hadley v. Baxendale*” applied without any deviation to the principle of foreseeability established in the Convention.

The court goes from Article 74 to the common law foreseeability test in one fell swoop without considering why that logical leap is made. The Court simply says:

> Under UNCCISG Delchi is entitled to [*12] collect monetary damages for Rotorex's breach in “a sum equal to the loss, including loss of profit." although not in excess of the amount reasonably envisioned
by the parties

This begs the question of whether there are other greater amounts which it could recover under
the qualification that they are a foreseeable “possible consequence” of the breach.

Even though the court in Delchi Carrier came, I think, to the right conclusion, it came there by the wrong road. As such it must be seen as an accident that it got there. It did not do justice to CISG. At a minimum, I suggest the process the court should have gone through is:

1. The limiting factor for damages is those foreseen as “possible consequences”;
2. Good faith, reasonableness, and the Convention's background, require that this phrase be considered from a business, not a scientific or mathematical, viewpoint;
3. As such the court could have easily come to the conclusion that not all theoretical consequences are possible within the meaning of Article 74; the consequences for which damages will be awarded are those which a business person foresees from an business economic point of view.

The result would have been exactly the same\textsuperscript{176}, but the right road would have been travelled.\textsuperscript{177} Using the wrong road will never guarantee, whether in legal reasoning, or in a physical sense, that we will arrive where we want to be.

4) Zapata Hermanos

The other United States decision to consider Article 74 is Zapata Hermanos Suasers, S.A. v. Hearthside Baking Co. Inc.\textsuperscript{178}(herein Zapata Hermanos). It considered whether legal costs are foreseeable. Legal costs are one item that may be recoverable under Article 74 but which are not generally recoverable under common law principles. I question whether that is due to the foreseeability principle in Sentence 2 or the causality principle in Sentence 1. To me, at least, it
seems beyond credibility to say that if a matter comes into dispute there would not be some legal costs which would be payable. In business it must be expected that if that contested matters will involve lawyers. They need and want to be paid too. The trial court in Zapata Hermanos stated that:

It smacks of a shell game ... [to] urge that [sellers’] admittedly foreseeable legal expenses (‘which the party in breach [buyer] foresaw or ought to have foreseen,’ in the language of Article 74) was not ‘suffered by the other party [seller] as a consequence of the breach” (again the language of Article 74).179

The appellate court does not comment on the trial judge's statement that the payment of legal fees was foreseeable but found that the “loss” in Article 74 does not include attorney's fees on other grounds.180 As such I suggest the reason legal costs are not included in damages under common law can be said to be based on the causality principle: the necessary connection between the breach and the costs is not established in law.

**CONCLUSION**

So where does all of that lead to? CISG is to be interpreted to remove legal barriers and promote international trade. The way to do that is by interpreting it from its own express terms and its general principles. Those terms and principles lead to the conclusion that damages must be limited and that limitation is contained in the second sentence of Article 74. But at all times good faith is a factor as is the reasonable merchant. A reasonable merchant could foresee reasonable consequences which are limited to his manner of seeing.

The judges and arbiters have wide discretion. Certainly any rule as Lord Morris of Borth-y- Gest stated181 can only provide approximate answers. If one returns to the responses that might occur from the hypothetical situation put to a reasonable business person, I would
suggest again, that it is the last three of those phrases which would result in damages being awarded. I suggest that those approximate answers are the same approximate answers as provided by CISG.182

The Convention is a unique piece of legislation. Because it is not founded in any one legal system it has no legal system on which to fall back. CISG is a creation which its creators intended would pull itself up by its own bootstraps, through interpretation based solely on itself. As a common law jurisdiction Canada could be in the forefront of CISG interpretation. In the process we

* Norbert Altvater, B.Sc., LL.B., LL.M., Ph. D. Candidate, Osgoode Hall Law School, York University, Toronto, Ontario, is a practicing solicitor in Alberta, Canada. An earlier version of this paper was submitted as part of the LL.M. PDP programme requirement by Osgoode Hall Law School, York University, Toronto, Ontario. I would like to thank Michael J. Robinson, Q.C. for his encouragement and comments respecting its earlier version. Any errors remain my own.


http://www.treaty.un.org/LibertyIMS::/Cmd=Request;Request=TREATYBYLOC;Form=none;VF_Volume=UNVOL53;VF_File=0000620;Page=1;Type=page [hereafter “CISG” or the “Convention”]. In accordance with Article 99 (1) CISG entered into force on January 1, 1988. (see Harjani, infra, note 7)


3See http://www.uncitral.org/en-index.htm including Greek Cyprus where it came into force April 1, 2006 and Gabon where it came into force January 1, 2006.


The full maxim apparently is *stare decisis et non quieta movere*, translated to mean approximately "let the decision stand and do not disturb things which have been settled", David Frisch, "Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit" (1999-2000) 74 Tul. L. Rev. 495 at 520


10The International Institute for the Unification of Private Law [hereafter UNIDROIT], in Rome which is generally referred to by its French acronym was created in 1926 under the auspices of the League of Nations. Presently it is an independent international institution with seat in Rome. Dr. Mª del Pilar Perales Viscasillas, “UNIDROIT Principles of International Commercial Contract: Sphere of application and General Provisions” (1996) 13 Ariz. Int'l & Comp. L. 381, at 383, note 2; see also [http://www.unidroit.org](http://www.unidroit.org)

11F. Faust, *Die Vorschärfbarkeit des Schadens gemäß Art. 74 Satz 2 UN-Kaufrecht (CISG)*, (Tübingen, Mohr, 1966) at 51


14While it was a starting point for parts of CISG, it does not affect the matters under discussion in this paper.

16. S. R. Harjani, supra note 7, at 54.


20. UN General Assembly Resolution 2205 (XXI), UNCITRAL Yearbook 1970, Vol I, p 72, para 1, (herein UNCITRAL or the “Commission”).

21. Ibid. 72, para 4.

22. Ibid. 75 para 34; ibid. 78, para 78.

23. Ibid. 77, para 40.

24. Ibid. 96, para 9.


30. Ibid.


32. Consider the contrived reasoning required by the Supreme Court to find consideration and uphold the business practice that


36 *Hadley v Baxendale, supra* note 33, 151


38 *The Heron II, supra* note 35, 388

39 Arthur G. Murphey, Jr., *supra* note 37, 441; cf *The Heron II, supra* note 35, Lord Reid, 388 and Lord Pierce, 417

40 Arthur G. Murphey, Jr., *supra* note 37, 441

41 *ibid* 423

42 Jacob S. Ziegel, “Canada Prepares to Adopt the International Sales Convention” (1991) 6 C. B. L. J. 1 at 14

43 Except perhaps Louisiana which is a mixed common law - civil law jurisdiction, just as is Quebec in Canada


46 UCC §2-715(2)

47 Arthur G. Murphey, Jr., *supra* note 37, 454

48 *ibid* 432

49 UCC §2-715(2) (a); Arthur G. Murphey, Jr., *supra* note 37 432

50 *ibid* 4328


53F. Faust, supra note 11, 51

54herein the “Comité”

55F. Faust, supra note 11, 51

56ibid 52

57 ibid 53

58 ibid 55

59 ibid 56

60 ibid 57-58

61 ibid 57-58

62 ibid 57-58

63 ibid 58

64 ibid 58

65 ibid 59

66 ibid 62

67 ibid 62

68 ibid 63

69 ibid 64

70 ibid 64


73http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/doc [hereafter UNIDROIT Principles] the Article was the same in prior versions

74http://www.jus.uio.no/lm/unidroit.international.commercial.contracts.principles.2004/ [hereafter PECL]
It certainly would be intriguing to have the view of one of the delegates on this point.


Yearbook 1975, supra note 72, 82, observation 9; ibid. 113, para 45

http://www.cisg.law.pace.edu/cisg/summariesfirst.html

http://www.cisgw3.law.pace.edu/cisg/firstcommittee/Meeting30.html

http://www.cisgw3.law.pace.edu/cisg/firstcommittee/Meeting37.html

E. C. Schneider, supra note, 52


CISG, Preamble

See S. R. Harjani, supra note 7, 57 - 60 respecting the debate between Professors John Honnold, Harry Flechtner, Alejandro Garro, Robert Hillman and Michael Van Alstine.

Yearbook 1975, supra note 72, 79, observation 55 by the representative from Mexico

Those “rules of private law” could have 3 meanings: 1. What is generally referred to as the rules of conflicts of laws; 2. Domestic rules interpreting CISG; 3. Domestic rules interpreting domestic law. The first two would not advance interpretation, so I suggest it is in the third meaning that the phrase is intended.


S. R. Harjani, supra note 7, 60

S. R. Harjani, supra note 7, 61

S. R. Harjani, supra note 7, 64, note 92; in civil law these are called the “Travaux Préparatoires”

cf. L. A. DiMatteo, supra note 84, 133, who considers the case law from other jurisdictions to be considered before the Travaux Préparatoires.
Article 38 1. d. of the Statute of the International Court of Justice

http://www.icj-cij.org/icjwww/ibasedocuments/Basetext/istatute.htm


Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws (1932 - 1933) 42 Yale L. J. 333 generally

Franco Ferrari, supra note 53, 201
