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NON-PECUNIARY LOSS IN COMMERCIAL CONTRACTS

WITH SPECIAL EMPHASIS ON THE UNITED NATIONS CONVENTION
ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

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A Introduction

How should we deal with situations where non-pecuniary loss is caused by a breach of contract? While non-pecuniary loss is often discussed and broadly accepted in the field of tort law, it has remained rather unnoticed in writings concerned with contract law. The question shall be examined in this thesis with regard to different countries and with particular emphasis on the United Nations Convention on Contracts for the International Sale of Goods.¹ The perspective on this issue is a personal one; one of a lawyer coming from a civil law system familiar with Swiss terminology.²

A comparative approach of damages implicates several difficulties. First of all, there is no commonly accepted definition of damage. As a principle, damage can be recovered only if the loss or harm occurred is damage in the eyes of the law.³ One can therefore only ask if non-pecuniary loss is acknowledged by a certain system rather than generally. Furthermore, the issue of limiting damages is an integral part of any legal regulation of damages. Certainty and predictability in the rules on damages is achieved on the theoretical basis for regulation of the mechanism of limiting damages.

The present thesis is concerned with non-pecuniary loss in consequence of a breach of commercial contracts: Non-pecuniary loss as opposed to pecuniary loss; breach of contract as opposed to tortious actions; and commercial contracts as opposed to personal or consumer contracts. Pecuniary loss is a common form of damages which diminishes the plaintiff's patrimony, whereas, non-pecuniary loss affects the plaintiff's personality, emotional life or comfort. Typically, tort law accepts more likely non-pecuniary loss as a consequence of a tortious action. It is common sense that pain and suffering in consequence of a personal injury have to be considered as damages.⁴ Different kinds of non-pecuniary damages deriving from personal injury are usually standardized in tables and tariffs.⁵ This is not readily possible in contract law. The CISG deals with commercial and non consumer contracts, therefore, the latter shall not be part of this work. Among consumer contracts, loss of enjoyment of holiday is the most popular non-pecuniary loss type, whereas in commercial relationships, loss of reputation plays a leading role.

¹ Hereinafter CISG or 'Convention'.

² I tried however to use terms which are commonly accepted in a respective field.

³ See U Magnus (ed), *Unification of tort law: damages* (2001) 190.

⁴ In non-personal injury cases compensation for non-pecuniary loss is discussed in cases of: infringement of reputation; invasion of privacy; interference with liberty or constitutional rights or human rights; infringement of copyrights and other intellectual property rights; interference with, damage to or loss of tangible property; wrongful interference with business (see WVH Rogers (ed) 'Damages for non-pecuniary loss in a comparative perspective' (2001) vol 2 *Tort and Insurance Law*).

⁵ Most always, the challenge in this field of law consists in finding the 'matching' category or a similar award in order to even-hand all the litigants.

In the field of contracts the opinions tend to diverge fundamentally. Any position from the absolute rejection of non-pecuniary loss to the rather far-reaching acceptance of any kind of discomfort can be found. Different countries have adopted very different approaches. The goal is to find a common sense basis of what non-pecuniary loss is and whether there is a practical need for such claims. When a legal system awards non-pecuniary loss for a breach of contract a distinction is usually made between two or more types of contract. Generally, non-pecuniary interest can be found in both personal and commercial contracts.⁶ However, the law is more reluctant to confer non-pecuniary damages to the parties of commercial contracts because the aim of commercial contracts is focused on profit. Thus, claims for distress and the like seem rather out of place. Nevertheless, non-pecuniary loss in commercial contracts shall be discussed in the first place since the scope of the CISG is limited on contracts for the international sale of goods for a commercial use (CISG article 2 (a) e contrario). It will be seen that courts and arbitral tribunals face immense difficulties with claims for non-pecuniary loss while damage for loss of reputation or good will has the most support.⁷

This work starts off with the definition of non-pecuniary loss and some general considerations on this special type of damage. The second chapter contains a comparison of different countries with regard to their position on non-pecuniary loss. Three countries will be examined in more detail: England and France because of their rather sophisticated way of dealing with such loss and Switzerland because of the present author's closest connection it. Some other countries will be covered briefly before the attention is given to the CISG. In order to determine the unsettled issue of non-pecuniary loss under the Convention the interpretation rules of article 7 CISG are of importance. In this context, general principles of international law will also be examined. The closing chapters will deal with cases of damage to reputation or good will including an evaluation of case law on the CISG.

One of the great aspirations of international law and main purpose of the CISG is to achieve uniformity in application so that commercial transactions can proceed with the greatest efficiency. Different approaches under the Convention lead to different results for similarly situated parties. In

⁶ See E. McKendrick and K. Worthington 'Damages for Non-Pecuniary Loss' in N Cohen and E McKendrick (eds) *Comparative remedies for breach of contract* (2005) 288: 'The value which a party expects from completion frequently involves benefits above and beyond those seen strictly in financial terms. Indeed, a number of recent [English] cases show that the courts have recognised and continue to recognise the need for a more expansive notion of loss that can translate and absorb non-pecuniary benefits/harms.'

⁷ See F Blase and P Hötter, Remarks on the damages provisions in the CISG, *Principles of European Contract Law (PECL)* and *UNIDROIT Principles of International Commercial Contracts (UPICC)* (2004) 3(c).

the long run, this undermines predictability and the primary purpose of the Convention.⁸ In this context, my analysis serves as a contribution to uniform interpretation and development of the CISG.

It has been argued that in light of the needs of modern life the law of damages is not yet settled. Instead, there is still room for further development – especially in the field of non-pecuniary loss.⁹

⁸ See JY Gotanda ‘Awarding damages under the United Nations Convention on the International Sale of Goods: a matter of interpretation’ (2005) 37 *Georgetown Journal of International Law*, 94.

⁹ See introduction to D Saidov, *Methods of limiting damages under the Vienna Convention on Contracts for the International Sale of Goods* (2001). McKendrick, *supra* note 6, at 322: ‘Growing recognition that consumers and employees in particular do not enter into contracts simply in order to enhance their financial position is a first tentative step in the right direction, an acknowledgement that a more expansive conception of loss is required to reflect the values of modern day society.’

B The special nature of non-pecuniary loss

I. Definition

It goes without saying that non-pecuniary loss cannot be properly described without submitting pecuniary loss to a careful examination. This distinction is considered to be most important in the assessment of damages, ‘since the method of computing damages – either objective calculation or subjective estimation – varies for both according to the nature of damage.’¹⁰ The presumption is that non-pecuniary loss begins where pecuniary damage ends.¹¹ Sometimes other terms are used for the category of loss in question; examples include non-patrimonial loss, non-material loss, immaterial loss or mental distress. One scholar suggested intangible loss to be a more accurate description than non-pecuniary loss.¹² Nevertheless, the very widespread term of non-pecuniary loss shall be used for the purpose of this work.

In general terms, damage is defined as ‘any loss that somebody suffered with respect to his legally protected rights, goods and interests,’¹³ or in broader terms, ‘damage is any negative modification in the injured party’s legally protected sphere.’¹⁴ The definition of damage can vary in different legal systems. It has been stated that contract law knows no general limitations as to types of loss (or damage).¹⁵

Instead of defining non-pecuniary loss, it is easier to define the opposite first ie pecuniary loss. Afterwards, we can simply conclude that all other losses must be non-pecuniary. To be classified as pecuniary, the loss has to be concerned with a person’s wealth, whether money – this includes loss of profit or future earnings – intangible property such as shares or copyrights, or tangible property such as land and goods. In principle, loss to somebody’s wealth can be determined by comparing the quantity before with the quantity after the event that caused the damage. On the other hand, non-pecuniary loss does not diminish the plaintiff’s wealth but rather affects his feelings, his emotional stability or his general wellbeing ie his non-material values.¹⁶ This type of loss has been described as damages caused by a violation of rights of personality.¹⁷ Typical

¹⁰ Magnus, *supra* note 3, at 193.

¹¹ See Rogers, *supra* note 4, at 307 para 31.

¹² See MG Bridge ‘Contractual damages for intangible loss: a comparative analysis’ (1984) 62 *The Canadian Bar Review*, 326.

¹³ Magnus, *supra* note 3, at 93.

¹⁴ *Id.*, 191.

¹⁵ See Case No S 00/82 (decision dated 26 October 2000) by Helsinki Court of First Instance.

¹⁶ See Saidov-Methods, *supra* note 9, at 9: ‘Namely, non-material values can include the following: life, health, dignity, honour, reputation, etc.’

¹⁷ See Magnus, *supra* note 3, at 11.

examples for non-pecuniary loss include: pain and suffering and loss of amenity in a case of personal injury; loss of reputation in a case of libel; social discredit in a case of malicious prosecution; mental distress; or physical inconvenience and discomfort.¹⁸

There is a considerable realm where a distinction can be rather difficult. It is, where at the same time things have an objective and subjective (ie what the user makes of them) value, eg cases of pure loss of use or pure loss of earning capacity. Also, pecuniary and non-pecuniary loss can occur in one and the same case when destroyed property has an affection value. Apart from the classic cases of non-pecuniary loss (eg emotional shock) the definitions vary from country to country. All this makes it quite impossible to draw a clear line between pecuniary and non-pecuniary loss.

It is in the nature of non-pecuniary loss that it is much harder to determine, to prove and to measure. There is no objective market price, therefore, non-pecuniary loss must and can only be subjectively estimated. This might be one reason why some legal systems generally exclude their compensation in the field of contract law. In tort law most European countries acknowledge non-pecuniary loss in cases of injury to the person.¹⁹ Some legislators may set up claims for non-pecuniary loss where they want to sanction certain violations indirectly, or to make up for pecuniary loss not covered by the usual rules, or, where pecuniary loss cannot be readily determined. These legislative actions can be used to fill in certain gaps in the social system.²⁰

Finally, non-pecuniary losses should not be confused with punitive damages. Non-pecuniary loss seeks to compensate while punitive damages are a form of punishment. Whereas the former is a special type of loss, the latter has to do with assessment of damages with regard to the defendant's fault.²¹ However, courts in countries familiar with the concept of punitive damages may sometimes combine the two.

II. Categories of non-pecuniary loss

Not many scholars (not to mention courts) dare to define different categories of non-pecuniary loss. The question whether or not to allow non-pecuniary loss at all seems too controversial. In the light of the CISG and the related discussion on non-pecuniary loss such an attempt would stretch too far.

¹⁸ See Rogers, *supra* note 4, at 54 para 1.

¹⁹ See Magnus, *supra* note 3, at 192. It seems appropriate that, in the further course of this thesis, also tort law will be consulted because both contract law and tort law follow identical principles in terms of compensation.

²⁰ See Rogers, *supra* note 4, at 309 para 38.

²¹ See N Enonchong 'Breach of contract and damages for mental distress' (1996) 16 *Oxford Journal of Legal Studies*, 639: '... to award damages for mental distress caused by a breach of contract is non necessarily to award exemplary or punitive damages.'

Nevertheless, some structure would be beneficial in the attempt to draw a line between recoverable and non recoverable losses of a non-pecuniary nature. There is an urge for more structural thinking especially in the field of commercial contracts.

One of the only scholars who elaborate some system of non-pecuniary loss is McKendrick. He defines two senses in which contracting parties may suffer non-pecuniary loss. First, a non-pecuniary benefit can be a term of the contract. The breach of the implied or expressed promise to confer such a benefit consequently results in liability of the party in breach (positive loss). Secondly, the parties may not have contracted for a certain non-pecuniary benefit. Nevertheless, they may have suffered some non-pecuniary loss (consequential loss) as a result of the breach.²²

Following McKendrick's system the first category can be sub-divided into five groups. One group consists of cases in which the defendant expressly promises to confer a non-pecuniary benefit upon the claimant.²³ These cases cause few problems but they occur rarely; especially in commercial contracts.²⁴ However, if they do occur it cannot be doubted that a claimant must be entitled to non-pecuniary damages if the defendant failed to provide the promised non-material benefit. This result is reflected in the general principle of freedom of contract.²⁵

The second group consists of cases in which the defendant impliedly promises to perform a non-material benefit. This type of case may occur more often, but here again, the law seems rather reluctant to apply the idea to commercial contracts. Parties to commercial contracts normally deal with financial issues rather than pleasure, enjoyment and the kind. However, in commercial relationships sanguine and extravagant promises (of satisfaction, pleasure and the like) are sometimes made so that it suggests risk assumption by the speaker.²⁶ Courts should be very cautious to assume an implied promise of a non-pecuniary benefit in commercial contracts. Generally, it is advised that the parties expressly contract for any non-material interest if they contemplate such interests to be an important point in their agreement. In any case, those cases must be excluded in which the defendant does not impliedly promise to confer a non-material benefit on the claimant but the claimant nevertheless expects to obtain such benefit as a consequence of the defendant's performance.

The third group consists of cases in which the defendant does not promise – either expressly or impliedly – to confer a non-pecuniary benefit on the claimant but the contractual breach, even

²² See McKendrick, *supra* note 6, at 288. While McKendrick's system deals with contracts in general it is now tested in terms of its applicability on commercial contracts.

²³ In Austrian law the same is considered to be true where 'the contract aims at the protection of immaterial interests.' (Magnus, *supra* note 3, at 12).

²⁴ See hereto Bridge, *supra* note 12, at 362.

²⁵ I cannot see a reason why this should not apply under the CISG provided that the other preconditions are fulfilled.

²⁶ See Bridge, *supra* note 12, at 362-363.

though it may not have intrinsic financial value, may objectively be accorded an added value. This kind of case is particularly rare in commercial contracts because they are more remote to the negotiations between the parties. In the light of the CISG the contemplation rule usually prevents this type of case from being awarded (see below).

In a fourth group of cases an added value is only subjectively added by one party to particular contractual specifications. Such type of case should not be awarded in pure commercial contracts.²⁷ The last group does not provide anything more than a general commitment to non-pecuniary loss.²⁸ It follows that where it is one of the objects of the contract to enhance the reputation of the claimant, the defendant may become liable for losses as a result of a breach of that promise.

The second category, ie consequential loss, can also be divided into different groups: physical injury caused by the breach of contract; psychiatric illness as a consequence of the breach; embarrassment or loss of reputation; physical inconvenience and mental distress, anxiety and loss of enjoyment or pleasure.²⁹ In the context of commercial contracts only the third group is of some interest. Even though commercial parties will often not consider loss of reputation in their negotiations (just as little as any other non-material interest) they will regularly experience such loss as a consequence of a contractual breach. However, it will be very difficult to establish such loss in commercial contracts when it is rather detached from the parties' agreement. Such a remote cause of an action is hardly acceptable to the trade community and it has an unfamiliar look in the face of common practice.

III. Whether non-pecuniary damages shall be recovered

1. In general

In a majority of cases the damages are primarily pecuniary and the aggrieved party claims only compensation for them; even if she could claim for non-pecuniary loss in addition. Only based on special circumstances non-pecuniary loss may sometimes be the only or the predominant

²⁷ See McKendrick, *supra* note 6, at 306: 'The courts are extremely unlikely to recognise the existence of any 'added value' in the case of a contract concluded between two commercial parties. The reason for this is that the courts generally presume that parties to commercial contracts enter into a contract in order to make profit, with the consequence that the aim of the award of damages is principally to entitle the innocent party to recover in respect of the financial losses which it has suffered as a result of the breach. ... The remedies of specific performance and damages assessed on a cost of cure basis can adequately protect the claimant's performance interest and there is no need to go further and recognise that a party to a commercial contract attaches an 'added value' to performance, whether that added value is ascertained on an objective or a subjective basis.'

²⁸ See *id.*, at 308. For the whole paragraph see *id.*, at 300-308.

²⁹ See *id.*, at 311. For the whole paragraph see *id.*, at 308-313.

consequence of the breach, and to cover the financial loss alone (if there is any at all) may not do fairness to the aggrieved party.³⁰ These are the cases which become the centre of the discussion concerning non-pecuniary loss.

There are manifold objections against recovering non-pecuniary loss. One of the most popular is the fear to overcompensate the victim of a breach of contract.³¹ Therefore, it is not a surprise that many laws seem to be more concerned with limiting liability for example, articles 74 and 77 of the CISG. In fact, the effort to minimize potential overcompensation often produces under compensation.³² Instead, the fact should be recognised that the concept of loss extends beyond purely financial loss and the focus should be on the performance for which the claimant contracted whether or not that performance was designed to enhance the claimant's financial well-being.³³ Criticism is often rooted in a far-reaching sense of non-pecuniary loss which embraces loss of amenity or comfort and which is connected with the fear of opening the floodgates to actions for such losses.

On the other hand, the principle of full compensation is used to countervail these objections. The above principle underlies most of the laws of damages including article 74 CISG, states that the aggrieved party is to compensate fully by putting her in the same position as she would have been had the contract been performed. Strictly applied, this principle not only allows but demands an award for non-pecuniary loss.

2. *In contract law*

A growing acceptance can be noticed regarding the extent to which non-pecuniary damages are to be awarded in cases of breach of contract. There are compelling reasons that this development has not yet come to an end. Rather, the legal ground for recognition of non-pecuniary loss should be prepared as explained by the following scholar:

*In a world where contracts are increasingly entered into for reasons other than to enhance the financial well-being of one or more of the parties to the contract, it is important that legal systems give careful considerations to the circumstances in which damages can be awarded for non-pecuniary losses suffered as a result of a breach of contract.*³⁴

³⁰ See McKendrick, supra note 6, at 289: 'Since such remedy [for non-pecuniary loss] remains the exception rather than the rule ...'

³¹ Its origin lies in the concern that such types of damage recoveries are open-ended and difficult to control (see JA Sebert 'Punitive and non-pecuniary damages in actions based upon contract: toward achieving the objective of full compensation' 1986 *UCLA Law Review*, 1648).

³² See id., 1591 and, 1654: 'By ignoring such nonpecuniary losses, the contract damage system fails to compensate plaintiffs fully and thus encourages inefficient breach.'

³³ See McKendrick, supra note 6, at 306.

³⁴ McKendrick, supra note 6, at 289.

While a tort plaintiff is normally entitled to recover for pain and suffering, non-pecuniary remedy is still exceptional to the contract plaintiff.³⁵ For contract law, the law of delict (or tort law) is the point of reference in terms of non-pecuniary loss. Compensation for moral damage in contract cases stands as a derivative relationship to compensation for delict.³⁶ As a fact, contract law is generally reluctant to compensate for non-pecuniary loss. However, in cases where a breach of contract features tortious aspects – which happen quite often when non-pecuniary loss is under consideration – the aggrieved contract party should have no problems recovering such loss. In some legal systems claims based on tort law can be raised parallel to claims based on contract provided that the requirements for each are met.³⁷ Thus, the line-drawing exercise should not be over-emphasised in a comparative study and this is because the distinction between tort law and contract law varies from civil law to common law. When assessing the common law treatment of non-pecuniary loss claims in contract ‘one is struck by the absence of structure and the conceptual underdevelopment of the subject.’³⁸ On the other hand, ‘civil law has long accepted non-pecuniary loss within the framework of a unified law of obligations.’³⁹ Therefore, civil law can be said to have a much more sophisticated structure.

More specifically, consumers have a better chance to be compensated for their non-pecuniary loss than parties involved in commercial contracts. In several jurisdictions consumer can now claim harm to personality interests, eg loss of enjoyment of holiday.⁴⁰ Often in consumer contracts the exchange of some non-pecuniary advantage is involved and this excess utility is not necessarily reflected in the market price. This feature is called the consumer surplus and is unique to non-commercial context.⁴¹ Commercial relationships are different in nature because ‘contract-breaking is “an incident of commercial life which players in the game are expected to meet with mental fortitude”.’⁴² As this work progresses, it will be demonstrated that the idea that non-

³⁵ See Sebert, *supra* note 31, at 1565-1571.

³⁶ See Bridge, *supra* note 12, at 330-331.

³⁷ For instance Switzerland. See McKendrick, *supra* note 6, at 298: ‘... the tortious duty cannot normally extend beyond the scope of the contractual duties which the parties have, expressly or impliedly, accepted. It is for the parties to define for themselves the scope of their respective contractual duties. The fact that the law of tort does not recognise the existence of a particular duty cannot of itself operate to prevent the parties from agreeing to accept such a duty as a matter of contract.’ – This can be understood that tort law and contract law overlap for some part but contract law is an open system of duties while tort law resembles a closed catalogue of duties.

³⁸ Bridge, *supra* note 12, at 327.

³⁹ *Id.*, at 323.

⁴⁰ For one of many examples see V McFarlane, Non-patrimonial loss: the case for the award of contractual damages in South Africa, unpublished article, University of Cape Town, 21: ‘Consumer contracts which have as their object the provision of an intangible benefit are a fact of our society; they cannot be wished away.’

⁴¹ See McKendrick, *supra* note 6, at 307.

⁴² *Id.*, 290, who refers to Lord Cooke of Thorndon in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 49.

pecuniary loss is a quantity inappropriate to commercial relations cannot be upheld.⁴³ Instead, one should become aware that in a commercial environment there are very diverse players with unequal knowledge and unequal economic and negotiating power.⁴⁴ In such cases, the bargaining power of the parties can be as unequal as in the power structure of consumer-company-relationships.

Another objection concerns the parties to most commercial contracts ie legal entities.⁴⁵ Commercial players are usually legal entities which are not regarded as being capable of suffering non-material loss.⁴⁶ Again, this objection cannot withstand a critical analysis. At the end of the day, it remains a question of policy whether non-pecuniary loss in consequence of a breach of contract should be allowed or not. Does the object of an obligation (only) have a pecuniary interest for the creditor of that obligation or should non-pecuniary losses be allowed based on the concept of civil responsibility? The former view prevailed in France of the nineteenth century whereas the latter has been dominant in France of the twentieth century.⁴⁷ The example of France shows that the views on this question can change over the course of time. To sum up the general attitude towards non-pecuniary loss reference is made to Bridge's comparative analysis in 1984 where he predicted quite correctly that:

*... over the next few years, remoteness rules, coupled with a judicial disinclination to compensate for trivial emotional losses, will be refined so as to control and rationalize intangible loss claims. In the process, one can anticipate a tendency for the courts, in dealing with certain factual categories such as employment and holiday contracts, to take almost for granted an entitlement to compensation.*⁴⁸

If the answer to the question whether or not to allow non-pecuniary loss is affirmative the next question follows how to reasonably limit one's liability.

⁴³ Saidov discovered at least two situations in which non-pecuniary loss may be compensated (Saidov-Methods, supra note 9, at 9): 'The first situation is one where the purpose of the transaction is entirely non-material, and the parties are aware of such a purpose. ... The second situation is where an injured party's business reputation was negatively affected as a result of the breach.' Enonchong (supra note 21, at 631) agrees with Saidov when he says: 'The idea that mental distress as a consequence of a breach of contract can never be within the reasonable contemplation of the parties to a commercial contract is now considered "unsound".'

⁴⁴ For example, one just thinkg of situations like a convenient store that buys its supply of beverages from Coca-Cola, or, the one-man accountancy firm which orders its software directly on www.microsoft.com.

⁴⁵ See Saidov-Methods, supra note 9, at 9.

⁴⁶ See Enonchong, supra note 21, at 638: '... companies cannot claim mental distress damages at all because they have no feelings.' However, the Swiss Supreme Court has decided in constant legal practice that also legal entities are subject of honour and therefore entitled to claims in libel cases (see 6S.290/2004; BGE 114 IV 14 E. 2a; 108 IV 21 E. 2 S. 22; 96 IV 148; 71 IV 36).

⁴⁷ See Bridge, supra note 12, at 353.

⁴⁸ Id., at 364.

IV. Necessary constraints

One thing that is for sure is that the acknowledgment of non-pecuniary loss has to come together with certain limitations. Where to draw the line will fall upon the wilful decision of a legislator. At the second stage, it is in the discretion of courts to extract and determine the relevant principles, with possible assistance from scholars' writings. What are the justified and necessary constraints is a question for which the international discussion on non-pecuniary loss should concentrate.

A possible model requires that a plaintiff alleging that he or she has suffered injury of some kind must prove the loss with a reasonable degree of certainty. Additionally, he or she must prove that the loss was caused by a breach (causality). This might signify a special burden for the plaintiff claiming non-pecuniary loss; nevertheless, the prerequisites in place apply to all types of damages in the same way. What is more, in order to avoid the 'creation of a society bent on litigation'⁴⁹ trifling inconveniences shall be ignored on the *de minimis* principle. '[I]f non-patrimonial loss is to be compensable, it must cross a threshold of gravity if it is to be regarded as loss at all.'⁵⁰ This idea seems to be common to most legal systems. Only in cases where the encroachment is particularly serious, ie when to leave the victim defenceless might appear inequitable, pecuniary-loss should be reimbursed.⁵¹ Other limitation mechanisms include remoteness, foreseeability and mitigation of damages. Finally, the award of damages in such cases should be reasonable and rather moderate; namely, non-pecuniary damages should not be exemplary or punitive in nature.⁵²

V. The problem of assessment

It has been said that '[n]on-pecuniary loss is not only harder to detect and harder to prove than financial losses, but it is also notoriously difficult to measure.'⁵³ The comparative method can serve as a good starting point. Generally speaking, the impaired state is compared with the state that would exist without the impairment.⁵⁴ However, this requires that a non-pecuniary value can be determined first.

Not much is gained by stating 'awards should be generally modest.'⁵⁵ It is characteristic for non-pecuniary loss that there is no measurable reduction of one's wealth and therefore other means have to be examined to determine the amount of damage. The figure can only be an artificial one

⁴⁹ *Farley v Skinner* [2002] 2 AC 732 at 751 H.

⁵⁰ McFarlane, *supra* note 40, at 26.

⁵¹ See Rogers, *supra* note 4, at 309 para 40.

⁵² See McFarlane, *supra* note 40, at 28.

⁵³ McKendrick, *supra* note 6, at 320.

⁵⁴ See Magnus, *supra* note 3, at 194.

⁵⁵ McKendrick, *supra* note 6, at 321.

not based on market valuation. As a matter of logic, a precise calculation of such damages is not possible. The challenge is to establish justice and equity among litigants without depending on idiosyncrasies of the assessor. This is only possible if the figure is derived from experience and from awards in similar cases.⁵⁶ This idea is not new and almost every legal system has developed standards for personal injury actions.⁵⁷ For example, criteria such as the nature, intensity, seriousness and duration of the harm are evaluated when the claim is for pain and suffering.⁵⁸

It is questionable whether similarly clear criteria can be defined for non-pecuniary damages flowing from a breach of contract. Furthermore, business entities 'suffer' differently than natural persons. In commercial contracts, it would be spurious to take into account subjective aspects, ie consider the effect on different plaintiffs. The motivation to enter contracts with unknown persons would be considerably undermined and as a consequence international trade would become practically impossible. Nevertheless, if non-pecuniary loss shall be recognised in commercial contracts it cannot be accomplished without certain standards or guidelines. For instance, accounting rules exist to determine the value of company's reputation. However, it might well be a different and very difficult exercise to calculate the damage to a fixed value representing a company's reputation. A concept that is constantly articulated in civil law is for a court to consider how much it would cost to provide the plaintiff with a source of satisfaction that would appease the hurt or distress he has suffered.⁵⁹ Again, this idea might apply better on natural persons (eg the spoiled holiday cases) as opposed to cases involving commercial standards. A court could come to the conclusion that it requires measures such as discounts to disappointed customers, increased advertising or a (positive) publicity campaign in order to repair a flawed reputation.

To say a sum for non-pecuniary loss should be 'reasonable' or 'fair' cannot distract from the fact that the discretion of courts in these questions is considerable.⁶⁰ The most courts can do when dealing with a claim for non-pecuniary loss is to evaluate available decisions under the same legal system.⁶¹ Decisions must be fully explained and based on logical argumentation in order to make

⁵⁶ See *Wright v BRB* at 777.

⁵⁷ Sebert suggests the following standards for assessing damages for inconvenience, annoyance and emotional distress (supra note 31, at 1655): 'Compensation for inconvenience caused by breach is the least problematic and the easiest to monetize, since inconvenience may frequently be measured by the amount of the plaintiff's time that is consumed in dealing with breach and its effects. ... To reduce the risk of overly generous awards, recovery should be limited to situations in which either substantial annoyance or emotional distress both occurred and were reasonably foreseeable. In addition, a clear and convincing evidence standard or proof should apply to claims for annoyance or emotional distress.'

⁵⁸ See Magnus, supra note 3, at 13.

⁵⁹ See Bridge, supra note 12, at 364.

⁶⁰ See Saidov-Methods, supra note 9, at 10.

⁶¹ See Bridge, supra note 12, at 369: 'Predictability in this matter is probably a hopeless venture and perhaps the most one can expect is an informal tariff established at an authoritative judicial level.'

them plausible to other courts. Guidelines can be developed over time from well reasoned decisions. Further, it should also be recognised that the problem of incommensurability is a practical difficulty rather than one of principle.⁶² Judges are actually well accustomed to putting figures to intangibles and as Lord Mustill further noted, there is ‘no reason why the imprecision of the exercise should be a barrier, if that is what fairness demands.’⁶³

C Comparison of different legal systems

The examination of different countries with regard to their position on non-pecuniary loss is worthwhile because of two reasons: first, differences and similarities in the way different countries deal with the matter in question can be discovered. This may enable us to identify a prevailing opinion on non-pecuniary loss or at least some tendency. Secondly, according to article 7(2) CISG allows courts to examine domestic law in order to decide an unsolved issue in the Convention.⁶⁴ Therefore, proven principles of domestic law which correspond with approaches in other legal systems and observe the principle of good faith in international trade can help solve issues not settled by the Convention.⁶⁵ However, great caution has to be employed when inferences are drawn because it can easily result in inconsistent approaches.⁶⁶ In a comparison of different European systems regarding non-pecuniary loss, it was stated that ‘[t]he legal systems differ not only in the extent to which they award damages but also as to which harm they will compensate.’⁶⁷

I. England

1. Generally

The compensation of non-pecuniary loss plays a major role in cases of personal injury and of invasion of liberty and personality rights. Meanwhile, in cases of tort liability for interference with

⁶² See Enonchong, *supra* note 21, at 619.

⁶³ *Ruxley Electronics and Construction Ltd v Forsyth* at 316 C-D.

⁶⁴ However, the significance of domestic law is in general rather small. See Gotanda, *supra* note 8, at 123-124: ‘Only in the event that there are no principles on which new rules could be based, or if the principles discernable are too vague to allow rules on specific issues, should a court or tribunal turn to domestic law to settle the matter. ... In short, the application of domestic law to resolve gaps in the Convention should be used as a last resort.’

⁶⁵ See P Schlechtriem (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, translation by G Thomas (1998), 556. Similarly Saidov-Methods, *supra* note 9, at 2: ‘It is merely thought that comparison is, probably, one of the most efficient ways to underline some of the unique features inherent in some legal regimes (especially in such a document as the CISG because of its self-standing position) and to develop solutions to existing theoretical problems.’

⁶⁶ See *id.*, 66.

⁶⁷ O Lando and H Beale, *Principles of European Contract Law*, parts I and II (2000) 437, notes to article 9:501.

property or business interests and in contract law compensation plays a very limited role.⁶⁸ In English law three types of non-pecuniary loss can be distinguished: the first involves physical injury to the body no matter what the cause of action may be (assault, negligence or breach of contract). Secondly, psychic injuries which, as far as damages go, are treated the same way as an injury to the body. The third category contains non-physical injuries which cause worry, anxiety, distress or injury to feelings. While the English law is liberal in providing recovery of non-pecuniary loss in torts concerned with liberty and reputation, contract law is much more restrictive. As a general rule, non-pecuniary loss is wholly excluded when there is a breach of contract. The reason seems to be that contracts deal with commercial loss rather than feelings.⁶⁹ However, there are two exceptions for this rule. The first exception concerns contracts that the object of which is to provide pleasure, relaxation and peace of mind. The second exception deals with mental distress that was caused by the physical consequences of the breach of contract.⁷⁰ It is now admitted that it is not necessary for the claimant to have a corresponding claim in tort for negligence but the claim can now lie in contract alone.⁷¹

2. Case Law

Damages for ‘inconvenience’ have been awarded for inadequate performance of a carriage contract where there was no other obvious grounds for the recovery of damages.⁷² In *Ruxley Electronics*, the court was also driven by the intention to award some damages even if only a modest sum for what was described as ‘loss of amenity’ because no pecuniary loss was given and the cost of fixing the work right would have been out of proportion.⁷³ *Jarvis v Swans Tours Ltd.*⁷⁴ made clear that there is no rule in English law that damages are unavailable in contracts for non-pecuniary loss (ie loss of enjoyment in the case at hand). After *Jarvis* it has been suggested that non-pecuniary claims can be controlled by the remoteness rules of English law.⁷⁵ Some of the recent decisions dealing with non-pecuniary loss in contracts are either concerned with employment contracts⁷⁶ or contracts with a

⁶⁸ See McKendrick, supra note 6, 290: ‘The starting point therefore remains that the law of contract does not compensate a claimant for mere disappointment or annoyance suffered as a result of the defendant’s breach of contract.’

⁶⁹ See Rogers, supra note 4, at 56 para 7.

⁷⁰ See Enonchong, supra note 21, at 633.

⁷¹ See Rogers, supra note 4, at 66 para 31.

⁷² *Hobbs v London & SW Ry* [1875] LR 10 QB, 111.

⁷³ *Ruxley Electronics v Forsyt* [1996] AC, 344, HL.

⁷⁴ [1973] Q.B. 233, [1973] 1 All E.R. 71 (C.A.).

⁷⁵ See Bridge, supra note 12, at 344.

⁷⁶ *Johnson v Unisys Ltd* [2001] UKHL 13; [2003] 1 AC 518.

solicitor⁷⁷ or surveyor⁷⁸. The special treatment of some types of contracts in English law may sometimes seem arbitrary. In cases where financial profit was the object of the contract courts are more disinclined to award damages for mental distress.⁷⁹

Cases involving loss of reputation can be divided into two groups: injury to reputation as a non-pecuniary loss and pecuniary loss flowing from an injured reputation. Only the latter – pecuniary loss caused by the loss of reputation – has been held recoverable in several cases. This view does not do justice to the real value that reputation has in the contemporary world of business.⁸⁰

II. France

1. Generally

The relevant article 1382 of the Civil Code is understood as reflecting the drafters' wish to allow compensation for all kinds of loss, irrespective of their nature. In light of article 1382, no argument can be derived that 'dommage moral' is less favourably regarded than 'dommage matériel'.⁸¹ Both are equally compensable provided that they are certain, personal and legitimate. Today, it is well established in French law that the general principle of article 1382 is applicable to moral damages. The same principle has been established in article 1149 of the Civil Code which governs damages for breach of contract. Since this interpretation was recognised, non-pecuniary losses have been constantly expanding. This is particularly true for death and personal injury cases, but also for non-personal injury cases. The concept of non-pecuniary harm has even been acknowledged by the legislation body. It has been said that the status of non-pecuniary loss is a very important one in the modern French law of torts. Non-pecuniary loss might be equivalent to the position of pecuniary loss in personal injury cases but in non-personal injury cases, it is not more than one of the various remedies open to the victims.

In the law of contract there seems to be no restriction on compensation for non-pecuniary loss. If 'dommage moral' has been caused through a breach of contract the defendant must compensate the plaintiff for that loss. The question of whether a moral damage can be proved or not

⁷⁷ *Johnson v Gore Wood & Co* [2002] 2 AC 1.

⁷⁸ *Farley v Skinner* [2001] UKHL 49; [2002] 2 AC 732.

⁷⁹ See Enonchong, *supra* note 12, at 634.

⁸⁰ See Saidov-Methods, *supra* note 9, at 9-11: 'Regardless of whether damage to reputation has led to loss of profit or not, reputation in itself will represent a separate non-material category, which has its own value. Consequently, damage, inflicted upon reputation, will, in the first place, entail *non-material loss* of the value that reputation had.'

⁸¹ See Bridge, *supra* note 12, at 331-332.

is often answered affirmatively due to the extreme broadness and flexibility of the concept. As a result, a wide range of injured feelings and moral suffering can be taken into account.

Usually, the plaintiff can still claim damages for pecuniary loss in consequence of a breached contract. However, this does not mean that non-pecuniary loss is not compensated. The plaintiff is entitled to damages including ‘moral inconveniences as a result of a defective performance of contract, or of its wrongful termination by the defendant.’⁸² In labour law, an employee can recover moral damages if he or she is dismissed in a humiliating way. Furthermore, wrongfully deceived consumers can be compensated for their feeling of disappointment.

2. Case law

Delict cases of ‘dommage moral’ can be divided into two categories: cases dealing with external and public feelings and cases dealing with internal and private feelings. The first category deals with intangible injuries immediately experienced by plaintiffs and comprise of cases for defamation, invasion of privacy and cognate injuries. When analysing case law one obtains the impression that article 1382 enacts a standard of utmost generality which creates the impossibility of knowing where liability stops. Extravagant demands can be controlled by the application of causation rules requiring that the injury be direct and certain.⁸³ In contract law four categories of ‘dommage moral’ can be distinguished: cases of disfiguring personal injuries; employment cases; and cases of contracts where intangible interests are clearly and immediately engaged; contracts where ‘dommage moral’ recovery is allowed as an alternative to damages for a pecuniary loss that is real, yet uncertain and unprovable. The first and second category do not have much relevance in terms of this paper. In the third category, some rather odd cases are reported which have in common that the parties agreed upon the infringed non-pecuniary interest. The last category consists of cases where ‘dommage moral’ serves to circumvent the difficulty of proving speculative losses or loss of a chance.⁸⁴

III. Switzerland

1. Generally

In line with most other laws the principle of full compensation is central to the Swiss law of damages. The measure of damages is concluded by comparing the situation in which the promisee

⁸² Rogers, *supra* note 4, at 105 para 74.

⁸³ See Bridge, *supra* note 12, at 335-338.

⁸⁴ See *id.*, at 555-557.

finds herself as a result of the breach of contract with the situation in which she would have found herself if the contract had been correctly performed (positive contractual interest). This also includes loss of profit (*lucrum cessans*). Alternatively, the plaintiff can choose to be placed in the situation as if the contract had never been concluded (negative contractual interest). Swiss liability law is based on the basic concept that it should be left to the practice to further determine the recovery for non-pecuniary loss. Further, it has been argued that in the course of development of culture the question will be answered how far the law will allow such recovery. A broad recognition of comprehensive protection of legal entities has taken place; namely, a company's right of respect of its commercial and professional honour as well as its social repute.⁸⁵ The protection reaches as far as no personal goods are involved which are characteristic to natural persons.

Under Swiss law practice the impairment or reduction of *joie de vivre* (ie love of life) or enjoyment of life is not qualified as indemnifiable damage because they are not deemed as perquisite goods. Here, only compensation of pain and suffering can be claimed. For cases of emotional distress, articles 47 and 49 Code of Obligations provide special remedy (ie satisfaction or 'Genugtuung'). Article 47 constitutes *lex specialis* to article 49 and provides compensation for pain and suffering in cases of physical injury and death. Article 49 contains a right to compensation when personal rights have been seriously harmed. The impairment has to reach a certain intensity (objectively and subjectively) and, it has to cause harm to a value that is protected by personality rights of the infringed person. Compensation shall balance the felt wrong by increasing the well-being on a different level and the wrong can be compensated by other means such as forgiveness. Today, it is generally admitted that a person has a right to reparation for non-pecuniary loss if the loss is the result of a breach of contract. This solution extends not only to cases of physical injury but tends to apply to all forms of breach of contract where the claimant seeks reparation for major inconvenience suffered as a result of the non-performance.⁸⁶ However, in commercial matters the inconvenience must reach an exceptional level of gravity which is a very rare event.

2. *Case Law*

The law concerning loss of enjoyment of life was confirmed by the Swiss Supreme Court in Case No 115 II 474 when the court stated that no damages can be claimed for loss of enjoyment of holiday. Given the preconditions satisfaction would have been a possible claim. However, in this case the court even denied satisfaction. This decision remains the leading case on non-pecuniary

⁸⁵ See Case No 95 II 481 at 488-499 by the Supreme Court of Switzerland.

⁸⁶ Rogers, *supra* note 4, at 307 para 28.

loss in Switzerland. It could be challenged in the not too distant future as European law becomes more and more influential in Switzerland (see directive no. 90/314/EEC).⁸⁷

In Case No 95 II 481, a company claimed loss of reputation caused by a caricature (satire) in a newspaper ('Club Medityrannis'). The claim was dismissed because such loss seemed rather improbable and unsubstantiated. Regarding the claim for satisfaction (with respect to the company's injured personality), the court left no doubt that such claim was possible, even though the elements of fault and infringement were not grave enough.

3. *Article 45e of the preliminary draft bill of a new liability law*⁸⁸

The draft strives for the unification of liability law in Switzerland taking into account recent developments. It is important to note that it has not yet entered the law-making process. The new article 45e dealing with non-pecuniary loss can be translated as follows:

- (1) Whoever suffers harm to personality has a right to satisfaction for non-pecuniary loss if warranted by the gravity of the harm, notably physical or mental suffering.*
- (2) The court may award a fair amount to the victim or add to or replace this indemnity by another form of satisfaction that is more appropriate.*
- (3) In case of death or grave bodily injury, the victim's relatives shall also have a right to satisfaction for non-pecuniary loss.*

It can readily be said that this provision reflects the existing law on non-pecuniary loss in Switzerland and underpins its exceptional character. Article 45e is significant in the way that it establishes systematic equality for pecuniary and non-pecuniary loss. The provisions of the draft also apply to contracts as long as the breach constitutes an infringement of legally protected interests of the legal system in general (see article 42 of the draft), eg the property of the other party to the contract and also the honour of legal entities. Despite the fact that some recent decisions of lower courts (on province level) approved claims for loss of enjoyment (of holiday), the new article 45e of the draft appears not to alter the existing treatment on non-pecuniary loss. At least, no such argument could be found in the explanatory report to the draft bill. Loss of enjoyment of life would therefore remain uncompensated as long as there is no serious infringement in terms of article 49 Code of Obligations.⁸⁹ Meanwhile, other parties welcomed article 45e because it would draw clear

⁸⁷ Hereto see W Wiegand, 'Zwei Urteile des EuGH zu Pauschalreisen und ihre Bedeutung für die Schweiz' 17 June 2007 *Jusletter*. Available at www.weblaw.ch [Accessed 15 September 2007]. This is a consequence of EU-conform interpretation of law which finds its way into Swiss law via 'follow-up implementation' (of EU legislation in Switzerland).

⁸⁸ 'Vorentwurf für ein Bundesgesetz über die Revision und Vereinheitlichung des Haftpflichtrechts'. Results of the consultation procedure about the preliminary draft bill of a new liability law for Switzerland (2004).

⁸⁹ See explanatory report to the draft bill by Professors P Widmer and P Wessner.

limitations to tendencies (of other jurisdictions) – under the unhappy influence of American law – to extend liability to the matter of moral harm.⁹⁰ A strict limitation can be doubted just as much as if one says article 45e would make non-pecuniary loss generally available. The question of whether legal entities are capable of moral harm has not yet been decided. The Swiss concept seems generally open to an extensive interpretation of recoverable damages.

IV. Other legal systems

1. South-Africa

In line with the common-law, South African courts have been reluctant to award damages for breach of contract resulting in non-pecuniary loss. It has been suggested that three common-law exceptions may also be valid for South Africa. They are these: breach of promise to marry; the wrongful dishonour of a cheque; and the award of nominal damages where the breach involves the denial of a contractual right which may be valuable in the future and where the action is brought to vindicate the right. Furthermore, the Conventional Penalties Act 15 of 1962 provides for another exception when assessing a penalty agreed to by parties to a contract.⁹¹ In terms of ordinary commercial contracts entered into by both parties with a view to profit, non-pecuniary loss is out of question. For consumer contracts, an exception to the rule may be appropriate in cases where consumers ‘have specifically contracted for an intangible benefit and where parties are subjected to physical discomfort or suffer personal injury in consequence of a breach of contract.’⁹² According to McFarlane, it should even suffice that such injury is within the contemplation of the parties to be recoverable. However, this new rule has not yet been expanded into the court rooms. So far not even the three exceptions currently admitted in the United Kingdom and in Australia (as mentioned above) have been recognised in South Africa. Therefore, South Africa’s position on non-pecuniary damages can therefore be best described as ‘anachronistic’.⁹³

2. Germany

The German Civil Code (BGB § 253) expressly stipulates that non-pecuniary damage cannot be compensated in money unless statute provides so. Only in three cases statutes allow non-pecuniary damage. The three cases include: for pain and suffering from bodily injuries in tort law (BGB §

⁹⁰ See Results, supra note 88.

⁹¹ See McFarlane, supra note 40, at 4-5.

⁹² Id., at 23-24.

⁹³ See id., 30.

847); for ruined holidays under a package tour contract; and for sex discrimination under an employment contract. In addition, the courts have recognised monetary compensation for grave infringements of the right of personality.⁹⁴ BGB § 847 has been applied in cases giving rise to liability for non-pecuniary loss in both tort and contract, but not where the claim was based on contract only.⁹⁵

In a case where a defendant after selling goods to a middleman was sued for good will damages resulting in lost profits and lost customers because of the delivery of defective goods, the German court applied the (formerly unknown) foreseeability limitation.⁹⁶ At this point no decision in re was made but the court clearly signalled that it would award damages for loss of good will if sufficient proof was delivered.

3. USA

Traditionally, American contract law provides very limited opportunity for a plaintiff to recover for non-pecuniary loss that may result from a breach of contract such as emotional distress, inconvenience and annoyance. There are mainly a few stylised categories for which damages for mental suffering have regularly been awarded: the death and burial cases; cases of public embarrassment or humiliation; and cases when contracts for medical treatment are not properly or not at all performed.⁹⁷

Over the years, the same justifications for the refusal to avoid damages for non-pecuniary loss appear again and again. On the one hand, the foreseeability ground is used (or rather abused) to ‘mask fundamental policy judgments under the guise of the foreseeability doctrine.’⁹⁸ The certainty limitation and the difficulties of measuring and monetizing emotional distress are other barriers to recovering such losses. Finally and probably most satisfactorily, the explanation for the refusal to permit recovery of non-pecuniary loss is found in the distinction between the personal and commercial interest. Damages for emotional distress are more likely to be awarded when the contractual breach affects a plaintiff’s personal interest.⁹⁹

In *Delchi* the court did not allow evidence on the amount of damages for future indicated orders on the basis that such evidence would be ‘speculative’ and there was ‘no evidence that ...

⁹⁴ See Magnus, *supra* note 3, at 94.

⁹⁵ See Comment and notes: PECL article 9:501: right to damages, at F.4.(c). Available at <http://cisgw3.law.pace.edu/cisg/text/peclcomp74.html> [Accessed 10 September 2007].

⁹⁶ See EC Schneider ‘Consequential damages in the international sale of goods: analysis of two decisions’ (1995) 16 *Journal of International Business Law* 615-668, at 3.3.

⁹⁷ See Sebert, *supra* note 31, at 1584-1585.

⁹⁸ *Id.*, at 1587.

⁹⁹ See *id.*, at 1588.

Delchi's [the plaintiff and buyer] inability to fill those orders was directly attributable to [or caused by] Rotorex's [the defendant and seller] breach.'¹⁰⁰ Thus, the court denied damages for loss of good will (ie indicated orders) because the damages could not be proved with reasonable certainty.¹⁰¹ Other American courts are in line with this rationale. Recently, most American states have begun to allow evidence of damages of loss of good will and such damage is now recoverable if it is causal to the breach, foreseeable and reasonably certain.¹⁰²

4. *Others*

At this juncture, a brief reference to the comparative report by Rogers is necessary to discuss the results of some other countries and how they deal with non-pecuniary loss in the case of breach of contract. In summary, '... the systems with broad principles of damages draw no rigid distinction between contract and tort so that damages for non-pecuniary loss are recoverable in principle in a contract action'¹⁰³ Spain can be involved in this category. In the Netherlands, the core provision on non-pecuniary loss particularly article 6:106 applies to all cases in which statutory law states that an obligation to pay damage exists. Article 6:106 covers, inter alia, breach of contract and tort law.¹⁰⁴ On the other hand, Greece practices the rule that damages for non-pecuniary loss may not be awarded where the claim is based on contract alone.¹⁰⁵ A different picture is presented in Austria and England where such damages for breach of contract are only allowed where the purpose of the contract is to protect an immaterial interest such as comfort, pleasure or peace of mind (eg holiday).¹⁰⁶ In Belgium, the Cour de Cassation held that a legal entity can suffer immaterial damage when its reputation is harmed. In a case of breach of contract, non-pecuniary loss has also been awarded (eg ruined holiday).¹⁰⁷ Finally, the Italian courts have decided that breach of contract may cause damage to the psychological and affective sphere and can be recovered. One particular case awarded damages when the video-taping of a wedding was not properly done.¹⁰⁸

¹⁰⁰ 1994 WL 495787, at *6.

¹⁰¹ See Schneider-Analysis, supra note 96, at 2.2.4.3.

¹⁰² See Schneider-Analysis, supra note 96, at 2.2.4.

¹⁰³ Rogers, supra note 4, at 286 para 62.

¹⁰⁴ See id., at 169 para 70.

¹⁰⁵ See id., at 286 para 62.

¹⁰⁶ See id., at 286 para 62.

¹⁰⁷ See id., at 49 para 71 with reference to Cour de Cassation, 7 October 1985 [1986] Pas. I, 113-116. See also id., 51 para 79.

¹⁰⁸ See id., at 151 para 96 with reference to Pretura Salerno, 17 February 1997, [1998] Giust. civ., I, 2037.

V. Preliminary conclusion I

English contract law is traditionally reluctant towards non-pecuniary claims but allows two exceptions where non-pecuniary interests are expressly concluded and where they occur in consequence of a physical injury. English judges tend to award non-pecuniary damages when it would be unfair to leave the claimant without recovery at all. Where only commercial interests are concerned, English courts seem rather disinclined to award non-pecuniary loss. At present, loss to reputation as a value in itself has not been recognised in English law.

To the contrary, France enjoys a very broad and flexible concept of loss which in principle acknowledges non-pecuniary loss in all commercial contracts. Where the parties agreed upon non-pecuniary interests and in cases where pecuniary loss was impossible to prove (eg loss of reputation without lost profits) recovery has usually been awarded. Swiss law even though flexible by its initial maxim has shown a rather conservative view when dealing with non-pecuniary loss; however, the protection of legal entities has become quite developed. Accordingly, damage to a company's reputation is to be compensated, but the demanded exceptional level of gravity is difficult to meet. In all three legal systems, claims for non-pecuniary loss in a contract can be raised independently from claims in tort. South Africa is lacking a modern concept of non-pecuniary loss and therefore cannot contribute to the discussion. German law contains rather strict rules with regard to non-pecuniary loss and generally requires a tort aspect; nevertheless, an award for loss of good will seems possible. While the United States is rather reluctant to accept non-pecuniary loss in commercial contracts, loss of good will has a good chance to be recognised in many states. Other legal systems tend to recognise non-pecuniary loss in consequence of a breach of contract rather than to deny it completely.

In conclusion, although most legal systems show a certain reluctance to accept non-pecuniary loss in commercial contracts the majority tends to recognise it in special cases. In this context, claims for loss of reputation have the best chance to be compensated. The approaches in different systems are far from being consistent and rather, we should speak of a development or trend towards a broader recognition of non-pecuniary loss in commercial contracts.

D The United Nations Convention on Contracts for the International Sale of Goods (CISG)¹⁰⁹

I. Scope of application

The United Nations Convention on the International Sale of Goods applies to ‘contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.’¹¹⁰ The Convention does not govern sales of consumer goods (for ‘personal, family or household use’) or of stocks, money, investment securities, or negotiable instruments. According to article 5, the Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person. Consequently, moral harm suffered in connection with such cases must be excluded. If the Convention applies to a contract and a party fails to perform its contractual obligations, the injured party has various remedies including damages.¹¹¹ Furthermore, contracting parties may alter the effect of the Convention or exclude its application altogether. Article 6 demonstrates the Convention’s emphasis on freedom of contract and as a result, the Convention does not object to any contract clause under which the parties cover each other against non-pecuniary loss.

II. Damages under the CISG

It should be pointed out that there is no specific notion of non-pecuniary loss or any other term with similar meaning in the CISG. Clearly, such an emotional element would be very difficult to incorporate into an international multilateral agreement like the CISG. Indeed, a statement often made is: ‘*Generally, CISG does not cover non-material loss.*’¹¹² Apparently, the drafting history of the Convention testifies to this assumption’s correctness. An outsider to the negotiations can just try to imagine how difficult it must have been to find acceptable solutions for the diverse group of

¹⁰⁹ The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a treaty offering a uniform international sales law that, as of 2006, had been ratified by 70 countries that account for three-quarters of all world trade. The CISG was signed in Vienna in 1980 and so is sometimes referred to as the Vienna Convention. It came into force as a multilateral treaty on January 1, 1988, after being ratified by ten countries. See also Sutton for more information.

¹¹⁰ Article 1(1) CISG. Articles 45(1)(b) and 61(1)(b) establish the right to claim damages.

¹¹¹ See Gotanda, *supra* note 8, at 98.

¹¹² Saidov-Methods, *supra* note 9, at 9.

countries involved in this process.¹¹³ The voices of developed and undeveloped, socialist and capitalist, colonized and colonizing countries had to be acknowledged. In this context, the Convention has to be regarded as achievement of a minimum influenced by the particular interests of the many states involved in the negotiations. Thus, great caution has to be employed in the interpretation of the Convention and we may not over hastily recourse to the same term in domestic law but try to interpret independently.¹¹⁴ Additionally, some provisions might call for revision after 20 years and besides that, when applying the Convention one must try to adapt it to (new) contemporary situations. The meaning of any law is not fixed for all times, but over the years it is open to interpretation and development within certain boundaries.¹¹⁵

As mentioned earlier, different legal systems deal with non-pecuniary loss differently and this should have been a strong reason for the drafters of the Convention to determine this matter once and for all. Saying that, doubts are allowed why the Convention does not settle the issue in order to avoid uncertainty and prevent non-uniform interpretation as it has been done with lost profits where recoverability is clearly stated.¹¹⁶ Is it because the issue was one that was deliberately left to national laws? According to the view advanced in this work, the answer must be no. There are good arguments in favour of this position.

It has been argued that commercial contracts are primarily focused on pecuniary goals. Therefore we can follow, since transactions within the scope of the CISG serve commercial ends, compensation for non-pecuniary loss should not be claimed within the Convention.¹¹⁷ This assumption shall be challenged in the following because there can be no doubt that such damages also occur in international sales and some examples can be found in the case law on article 74 CISG.¹¹⁸

In this chapter, the question examined is whether the CISG provides remedies for non-pecuniary loss. First, such an issue can be decided according to the literal text or the plain and natural reading of the relevant article. Secondly, a court can refer to general principles underlying

¹¹³ See JS Sutton 'Measuring damages under the United Nations Convention on the International Sale of Goods' (1989) 50 *Ohio State Law Journal* 737-752, at II.A: 'The Convention represents the culmination of over fifty years of negotiation.'

¹¹⁴ See Schlechtriem-Commentary, *supra* note 65, at 61-62.

¹¹⁵ The juristic-technical tools of extended interpretation and analogy facilitate to balance weaknesses and gaps of the law.

¹¹⁶ Schlechtriem (Commentary, *supra* note 65, at 563) points out that the Convention emphasises the recoverability of lost profit because some legal systems make reparation for loss of profits subject to special requirements or exclude it altogether.

¹¹⁷ See *id.*, at 558.

¹¹⁸ See The UNCITRAL digest of case law on the United Nations Convention on the International Sale of Goods, para 18: 'Article 74 does not exclude losses arising from damage to non-material interests, such as the loss of an aggrieved party's reputation because of the other party's breach.'

the Convention to resolve the issue. This means, the court should try to liberally apply specific provisions of the Convention by analogy. Further, it is commonly accepted that rules of private international law can assist filling gaps and only if the issue cannot be resolved using these methods the court should turn to domestic law.¹¹⁹ Lastly, it has been said that the lack of uniform rules in this area is particularly problematic and the Convention has failed in this most important issue to the parties.¹²⁰

Section II of the CISG deals with damages for the breach of contract and contains four articles (74 to 77). Article 74 is considered to be the main article whereas articles 75 and 76 regulate special situations when the contract has been avoided. Article 77 stipulates the duty of mitigation. It should be borne in mind that the right to damages as well as the right to all remedies for lack of conformity of the goods is related to the inspection requirement recited in article 38 and subject to compliance with the notice requirement recited in article 39.¹²¹

III. Article 74 CISG

For the purpose of this thesis, article 74 is the central provision. Thus, this section is concerned with the literal interpretation of article 74 which reads as follows:

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.

In this surprisingly brief description, article 74 provides damages for loss, including loss of profit suffered by the other party as a consequence of the breach, but it does not differentiate other types of loss for which compensation can be obtained.¹²² Such unfamiliar and broad terminology leaves many questions open.¹²³ In order to define the extent of loss covered by article 74, courts and

¹¹⁹ See Review of the Convention on Contracts for the International Sale of Goods (CISG), Pace international law review (ed) (1998) 32. I cannot content myself with Zuppi's statement that a party can obtain moral damages as long as the gap-filling law is that of a country that allows them (at id.). See also Gotanda (supra note 8, at 120) who seems to forget the principles of international law.

¹²⁰ See Gotanda, supra note 8, at 94, who points out that of all the articles in the Convention, the articles on damages and payment of interest are the most litigated and written about. Moreover, the lack of uniformity can lead to similarly situated parties receiving vastly different results. There is no doubt that such situation undermines the purpose and usefulness of the Convention.

¹²¹ See Schneider-Analysis, supra note 96, at 2 and 12.

¹²² See Schlechtriem-Commentary, supra note 65, at 558.

¹²³ See Blase/Höttler, supra note 7, at 1.: 'The result of a first scan, however, can hardly be satisfying, as more questions seem to be raised than answered.'

tribunals should interpret ‘matters governed by this Convention’ broadly.¹²⁴ Since a narrow definition would have a negative impact on the development of uniform rules because it has the result that anything not explicitly addressed by the Convention must be resolved by referring to domestic law.¹²⁵ When interpreting the Convention one should not forget that matters may have been overlooked by the draftsmen. One should also bear in mind that the CISG reflects the state of knowledge up to 1980. The drafters of the Convention did not and could not foresee new technical and economic developments.¹²⁶ In my view, certain forms of non-pecuniary values are new developments.

From the plain reading of article 74, one can observe that it is formulated in such a way as to cover any situation which causes any type of form of loss provided that all other requirements are met.¹²⁷ An interpretation of the phrase ‘damages ... of a sum equal to the loss’ leads to the result that ‘[i]t is the *entire loss* suffered as a result of the breach of contract which has to be compensated, *including possible losses that are the result of defects.*’¹²⁸ The literal interpretation of article 74 gives rise to the opinion that the issue of non-pecuniary loss should be qualified as a matter governed by the Convention even though not expressly settled in it.¹²⁹

IV. Article 7 CISG and uniform interpretation

1. The purpose of article 7 CISG

When no specific regulation can be found in the CISG or the meaning of an article remains unclear article 7 comes into play. The literal interpretation of article 74 has not provided a definitive answer to the question of non-pecuniary loss. Therefore, the methods of interpretation in terms of article 7 are employed. For this purpose, the Convention’s international character, the need to promote uniformity in its application and the observance of good faith in international trade are to take into account.¹³⁰ According to the uniformity principle (para 1), a solution to gaps *praeter legem* has to be

¹²⁴ Article 7(2) CISG.

¹²⁵ See Gotanda, *supra* note 8, at 122.

¹²⁶ See P Schlechtriem, Interpretation, gap-filling and further development on the UN Sales Convention, preliminary remarks.

¹²⁷ See Saidov-Methods, *supra* note 9, at 4.

¹²⁸ F Enderlein and D. Maskow, *International sales law* (1992) 297.

¹²⁹ See Blase/Höttler, *supra* note 7, at 3. Meanwhile, the Advisory Council states that article 74 does not permit recovery of non-pecuniary loss, adding only that, ‘recovery of damages for loss of goodwill is available only if the aggrieved party can establish with reasonable certainty that it suffered a financial loss because of a breach of contract.’ CISG-AC Opinion No. 6, Calculation of damages under CISG article 74, at 7.1. This is not derived from article 74 but from the general principle of full compensation.

¹³⁰ Article 7(1) CISG.

found within the Convention itself.¹³¹ Open questions concerning matters of the Convention are to be settled in 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. In para (2), a commitment to gaps is implied and by saying that, the drafters of the Convention admit that the CISG is not an exhaustive body of rules. The gap-filling methodology of article 7 (2) combines a multi-level approach. First, the gap can be filled by analogical application of specific provisions of the CISG. Second, the general principles underlying the CISG as a whole should be considered. Lastly, one has to recourse to the rules of private international law. These methods are now conducted with regard to the question of non-pecuniary loss.¹³²

Whenever seeking the ‘true’ sense of the Convention, the motivation for its creation has to be kept in one’s mind. This ‘true sense’ deals with unification:

*The United Nations Convention on Contracts for the International Sale of Goods attempts to unify the law governing international commerce, seeking to substitute one law for the many legal systems that now govern this area.*¹³³

To achieve the broadest degree of uniformity, national principles or concepts taken from national law should not be allowed in the interpretation of the CISG because this would mean that tribunals in different countries would be of liberty to fill in the loss term in article 74 CISG with their local terminologies.¹³⁴ This freedom will inevitably lead to contradictory results, ie the same situations would be decided differently. Therefore, the analysis should ‘focus on whether the matter is governed by the Convention by examining the purposes and policies of individual provisions as well as the Convention as a whole and giving due regard to the need for a uniform interpretation.’¹³⁵ As a final note, international treaties such as the Convention should generally be interpreted independently.

2. Article 5 CISG

According to article 5, the Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person. In fact, non-pecuniary loss often arises in cases of personal injury and as a result, these cases are excluded from the scope of the CISG. However, there are other situations where non-pecuniary loss can occur eg in contracts where a specific non-

¹³¹ See Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000/1, 270.

¹³² See id., at 279-282. This last step should be avoided whenever possible in order to maintain the integrity of the CISG’s uniform and international application and interpretation.

¹³³ Review 2000/1, supra note 131, at 163.

¹³⁴ See Review 2000/1, supra note 131, at 238.

¹³⁵ AC-Opinion, supra note 129, at 2.5.

material success is promised or damage to a company's reputation. The provision of article 5 should be restrictively interpreted.¹³⁶ It is clearly not the intention of article 5 to exclude cases of non-pecuniary loss all together.

3. *Article 6 CISG*

Another significant principle is set out in article 6 of the Convention. It is the priority enjoyed by the intention of the parties.¹³⁷ It can be followed that in contracts where the parties have agreed on a non-pecuniary purpose, the CISG should allow claims for specific performance of that promise.¹³⁸ Indeed, this type of promise is not very common in commercial relationships.

No other CISG provisions that could help to interpret article 74 are available. The only thing one can say so far is that neither a general objection against nor a clear approval of non-pecuniary loss has been established. Since the interpretation – whether literal or via travaux préparatoires – of relevant CISG articles has not provided a clear answer, we should refer to the general principles on which the Convention is based.¹³⁹

4. *General principles in the CISG*

a) *The principles in article 7 CISG*

What can the principles of article 7 (1) CISG – international character, need to promote uniformity of application, and observance of good faith in international trade – provide for the present discussion? As previously explained, the question of whether the damage term of the CISG embraces non-pecuniary loss or not has to be decided on the basis of the Convention alone without regard to the position of any domestic law on non-pecuniary loss. In order to achieve uniformity in application, a court or tribunal dealing with a case governed by the CISG should have due regard to the available CISG decisions from other courts or tribunals.¹⁴⁰ The protection of good faith in article 7(1) CISG deserves closer examination 'because legal principles not expressly laid down in the Convention can be derived from it.'¹⁴¹ One of these principles is loyalty which has been

¹³⁶ See S Eiselen, Remarks on the manner in which the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement article 74 of the CISG (2004) para (d).

¹³⁷ See Schlechtriem-Commentary, supra note 65, at 67.

¹³⁸ It is important to note that the argumentum e contrario that only such contracts should be awarded would be wrong.

¹³⁹ However, there is no reason why non-pecuniary damages should not fall under the CISG.

¹⁴⁰ See Case law on the CISG, below F.IV.

¹⁴¹ Schlechtriem-Commentary, supra note 65, at 61 and 65.

recognized by courts and legal scholars.¹⁴² Accordingly, the parties to a contract have to act in favour of the common goal, ie they have to reasonably consider the interests of the other party.¹⁴³ Furthermore, the notion of fairness states that it is unfair to leave the injured party totally uncompensated despite the fact she cannot prove loss where it is clear that some loss has been suffered. Thus, the CISG should be regarded as ‘pursuing a policy of liberal treatment of the claim for damages and prevention of an ‘all-or-nothing’ result in the award of damages.’¹⁴⁴ Finally, good faith can be seen as a general commitment to an ethical course of conduct inherent in the CISG. Therefore, one could say that ‘moral’ damages are not an alien concept to the Convention.

b) The principle of full compensation

The principle of full compensation underlying article 74 includes both the effective loss, ie a reduction in the fortune of the party in loss (*damnum emergens*) and the loss in profit (*lucrum cessans*).¹⁴⁵ The party in breach must compensate the other party for loss caused by the breach and nothing less than that.

The principle of full compensation has a double meaning. The reliance interest means to put the aggrieved party into the situation in which she would have been had the contract never been performed.¹⁴⁶ In other words, the consequence of full compensation allows calculating the interest in such a way as to place the aggrieved party, by means of monetary compensation, in the position in which she would have been if she had not relied on the due performance of the contract.¹⁴⁷ When the contract is rescinded the question that follows is whether all losses a party incurred in reliance on the contract without exception should be recovered or just the wasted expenses? Due to logical deduction all (negative) consequences of the breach must be reversed which also includes non-pecuniary damages. Furthermore, the relief to the promisee has to be measured by her expectations, sometimes called ‘the benefit of the bargain’, and is not limited to the extent of her reliance interest. The purpose of this aspect (benefit of the bargain) is to place the aggrieved party in the same position it would have been in if the contract had been correctly performed.¹⁴⁸ It is self-explanatory

¹⁴² See for example Case No S 00/82 (decision dated 26 October 2000) by Helsinki Court of First Instance. See also LA DiMatteo et al ‘The interpretive turn in international sales law: an analysis of fifteen years of CISG jurisprudence’ (2004) 34 *Northwestern Journal of International Law & Business*, 316-317.

¹⁴³ See Case No S 00/82 (decision dated 26 October 2000) by Helsinki Court of First Instance.

¹⁴⁴ See D Saidov ‘Standards of proving loss and determining the amount of damages’ (2006) 22 *Journal of Contract Law*, 71.

¹⁴⁵ See Enderlein/Maskow, *supra* note 128, at 298.

¹⁴⁶ See EA Farnsworth ‘Damages and specific relief’ 1979 *American Journal of Comparative Law*, 248. Although not clearly stated in the CISG, expectation loss should also include reliance loss.

¹⁴⁷ See Schlechtriem-Commentary, *supra* note 65, at 554.

¹⁴⁸ See *id.*, at 553, or Treitel, *supra* note 95, at 76.

that a correct performance should have no other consequences to the other party than the agreed and certainly no negative ones.

It follows that article 74 'is to be liberally construed to compensate an aggrieved party for all disadvantages suffered as a result of the breach.'¹⁴⁹ In other words, the principle of full compensation should be understood as to cover all kinds of loss.¹⁵⁰ There is no reason why a claim for non-pecuniary loss should not be successful under the CISG and the literal understanding of the principle of full compensation gives rise to exactly that result, ie the compensation of all pecuniary and non-pecuniary losses which occur as a result of a breach of contract.¹⁵¹

Critics may argue that by compensating the aggrieved party for non-pecuniary loss she would be placed in a better position than she would have enjoyed if the contract had been properly fulfilled. In fact, over-compensation would be contradictory to the CISG, but the situation should be regarded differently. First, it is the promisor who acts contradictory to his promise by breaching the contract and therefore, he is responsible and able to consider all the consequences of his actions as well as to avoid all damages to the other party. Not making the promisor liable for all loss caused would result in an incentive to ignore duties in situations where a party loses interest in the contract. Secondly, from the fact that no pecuniary loss can be established one cannot conclude that no harm at all was caused. In fact, the loss can and will often be even more serious especially when there is no pecuniary loss or perhaps only a minute loss. Therefore, I conclude that the principle of full compensation advises us to consider all kinds of losses not only losses that are readily and directly available.

c) The foreseeability limitation

(i) Definition

The contemplation or foreseeability rule can be best described as the outer limits of damages.¹⁵² It comes into play only when damages were caused by a breach of contract and serves to reasonably limit liability.¹⁵³ According to the second sentence of article 74 the liability to pay damages is limited to the loss which the party in breach 'foresaw or ought to have foreseen at the time of the

¹⁴⁹ AC-Opinion, supra note 129, at 1.1. See also Saidov-Methods, supra note 9, at 2-3. Saidov gets to the heart of the matter when he states that 'perfect expectation interest will leave an injured party indifferent between performance and breach.'

¹⁵⁰ See Saidov-Methods, supra note 9, at 3.

¹⁵¹ See id. Saidov claims that the principle of full compensation will lead to the conclusion that all kind of loss, suffered by the party and caused by the breach, are recoverable. Seberr (supra note 31, at 1591) agrees on that. When the principle of full compensation is consequently applied 'then the courts should recognize that emotional distress will often be an actual, substantial, and foreseeable consequence of breach in a wide variety of contracts.'

¹⁵² See <http://www.cisg.org/74/BArt74.html> [Accessed 4 October 2007].

¹⁵³ See Schlechtriem-Commentary, supra note 65, at 567.

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.’ In other words, the Convention employs an objective and subjective test.¹⁵⁴ The foreseeability rule contains an instruction to the judge to limit the promisor’s liability for damages having regard to the risk which the promisor could foresee upon conclusion of the contract. The extent of liability can also be described as developments which are not entirely unexpected to a reasonable man.¹⁵⁵ At first sight, the use of ‘possible consequence’ seems to cast a relatively wide net; however, its application has to be decided on the facts.

(ii) Critical remarks

Under the Convention, foreseeability is the most important rule in terms of limitation of damage claims. It turns out that its role has never been as important as when non-pecuniary loss is claimed. Non-pecuniary loss needs clear boundaries in order to make the idea acceptable that such loss should be recovered in principle. The handling of foreseeability in the context of non-pecuniary loss has not yet been defined. This is a vicious circle however, because the handling of foreseeability in this context cannot be defined before such loss has been recognised in the first place.

At the other hand, it could be argued that it is exactly the limitation function of the rule that prevents recognition of non-pecuniary loss. For instance, it cannot be denied that psychiatric injury is harder to foresee or even to discern than traditional (financial) loss. In other words, non-pecuniary loss is not as naturally a consequence of commercial contracts and it is not so closely linked with the commercial purpose of those agreements.¹⁵⁶ However, the same thinking that wants to make general unquantifiable economic disadvantages compensable should be applied on non-pecuniary loss:

*The reasonable limitation of liability for compensation ought not to be achieved by adopting a restrictive definition of ‘loss’, but by using the foreseeability rule (Article 74, second sentence) while taking into account the specific purpose of the contract.*¹⁵⁷

¹⁵⁴ See Gotanda, supra note 8, at 102.

¹⁵⁵ See Schlechtriem-Commentary, supra note 65, at 567. Similarly, Gotanda, supra note 8, at 102: ‘Thus, a claimant needs not show awareness that the loss was a “probable result” or a substantial probability, only that it was a possible result of the breach.’ However, the foreseeability rule does not extend liability quite as far as the theory of the adequate causal connection which applies in eg Swiss law.

¹⁵⁶ Some may even call it an individual configuration, hardly measurable and thus an arbitrary assertion of the self-nominated victim. Except for mental damages proved by medical certificate, how could such damage be assured at all? Or in a casual way of speaking, how am I supposed to know what somebody else’s feelings are? This is however not the view the present author will advance in the progression of this work.

¹⁵⁷ Schlechtriem-Commentary, supra note 65, at 558.

This principle can readily be elevated to a general rule in the meaning that the contemplation rule should not be employed more or less strictly when it is applied to non-pecuniary loss.

(iii) Three factors

In the evaluation of foreseeability three factors have been determined. First, foreseeability directly depends on the party's knowledge which is to be understood in a subjective and an objective way ('knew or ought to have known'). This understanding helps the plaintiff who has to prove foreseeability by the other party because potential knowledge based on the ordinary course of things suffices. Where this knowledge comes from – the other party or any other source available – does not matter.¹⁵⁸ However, this distinction is not as important where non-pecuniary interests were promised expressly.¹⁵⁹

Secondly, whether the promisor should be liable must be decided by reference to the spirit and purpose of the contract and all the particular circumstances. A reasonable interpretation of the contract must reveal if the parties intended a protective purpose of the contract in order to cover certain losses. The liability is limited in accordance with the risk inherent in the contract which the parties accepted by concluding it.¹⁶⁰ Thus, the intentions of the parties must be to protect the other party from exactly the risk that has been actualised.¹⁶¹ Only if the party in breach is or ought to be aware of this specific risk, he can be held liable. Therefore, it is not enough to foresee a loss but it must also have been intended to protect the specific interest which has been injured by causing the loss. This cannot simply be derived from the fact that the parties entered a contract and as a result, owe trust to each other.¹⁶² Rather, the parties must have discussed the risk during the negotiations. The party who has to bear a risk must be able to take that risk into account when fixing the conditions or to decline warranty in this regard.

However, I would not go so far to say that the non-material purpose must be the sole content or the dominating part of the contract nor can I see why the non-material loss needs to be the typical

¹⁵⁸ It has been stated that modern business practices (and equipment), accounting methods and extensive communication and accessibility to information make more knowledge available to both parties (see Saidov-Methods, supra note 9, at 12). As a consequence, a potential breacher will find himself in a difficult position when he negligently neglects to consider all the available information.

¹⁵⁹ See Schneider-Analysis, supra note 96, at 3 and, at 12: 'In situations where the breaching party was informed of unusual losses which might occur in case of a later breach, there is little difference between the objective and subjective standard.'

¹⁶⁰ See Schlechtriem-Commentary, supra note 65, at 555.

¹⁶¹ Notice that such intentions may be express or implied.

¹⁶² See culpa in contrahendo liability which is derived from the fact that the relationship between contracting parties implies expectation of non-damaging.

consequence of a breach of that contract.¹⁶³ Such requirements would incorporate a stricter application of foreseeability with regard to non-pecuniary loss than to pecuniary loss. Instead, a risk should be regarded as foreseeable as long as it was sufficiently clear when the parties entered the contract. Besides the wording of the contract and direct communications between the parties there are other elements which are essential in evaluating the foreseeability of risks. Such elements are knowledge from other sources or trade usage.

The protection of a non-material interest may not be *essentialia negotii* of the agreement but it might nevertheless be part of the agreement because the breaching party is already liable when he 'ought to have foreseen' the loss as a possible consequence of the breach of contract.¹⁶⁴ On the other hand, the assumption of a tacitly agreed non-pecuniary interest should not be allowed because it would stretch too far in the context of commercial contracts. Finally, one should pay attention to the usage in a certain trade sector in order to determine foreseeability.¹⁶⁵

(iv) Suggested application of foreseeability

For English law it was said that the difficulties of foreseeability and the difficulties inherent in discerning the various (often interlinked) causes behind such injury highlight the need to consider issues such as causation and remoteness when evaluating claims for non-pecuniary loss.¹⁶⁶ The same methods cannot easily be realised under the CISG. The use of (English definitions of) causation and remoteness in order to limit damages would mean that preconditions foreign to article 74 are added.¹⁶⁷ It has been submitted that causation can also be found in the words 'suffered ... as a consequence of the breach'. These words can be understood as causation in the sense of cause and effect which is somewhat less effective in limiting liability than the foreseeability rule.¹⁶⁸ The damage can also be caused indirectly as long as the harmful event is *sine qua non* for it.¹⁶⁹ Nevertheless, in some cases causality may be the decisive test in order to determine whether a certain loss was really caused by a poor performance. The aggrieved party may be exposed to other

¹⁶³ Which seems to be Schlechtriem's opinion. 'However, expectations are conceivable if the contract has a non-material purpose, so that non-material loss would be the typical consequence of a breach of contract.' (Commentary, *supra* note 65, at 558).

¹⁶⁴ As a result of Schlechtriem's reasoning that (only) non-pecuniary loss is recoverable which is a typical consequence of the breach of contract there will be seldom awards of non-pecuniary loss. Schlechtriem gives us the example when both parties understood the purpose of a contract for the sale of a motor vehicle to be to enable the buyer to undertake a holiday trip (Commentary, *supra* note 65, at 558 note 44). This does not make much sense since, by virtue of article 2(a) CISG, this example would not be within the scope of the Convention.

¹⁶⁵ See Saidov-Methods, *supra* note 9, at 13.

¹⁶⁶ See McKendrick, *supra* note 6, at 300.

¹⁶⁷ Even though remoteness and foreseeability may overlap to some extent.

¹⁶⁸ This is reflected in the words '... foreseeability limits liability to something less than the loss, which the breach is said to have caused.' (Saidov-Methods, *supra* note 9, at 16).

¹⁶⁹ See Schlechtriem-Commentary, *supra* note 65, at 558. However, most of the times non-pecuniary loss will be caused directly.

causes at the time when the contract is broken eg while the delivery of defective goods damages a company's reputation, a newspaper publishes an article on the bad customer service of the same company.¹⁷⁰ In common law the remoteness rule as laid down in *Hadley v. Baxendale*¹⁷¹ is used to control damages for mental distress.¹⁷² According to the *Hadley* rule, non-pecuniary losses are recoverable when they are not too remote a consequence of the defendant's breach of contract.¹⁷³ Therefore, damages should be awarded if the defendant has expressly or impliedly promised to confer a non-pecuniary benefit on the claimant and such promise is breached.¹⁷⁴ Compared to the English definition of remoteness, article 74 CISG has a wider scope of recovery.¹⁷⁵

I suggest the following concept: According to the purpose of the contract, the risk of non-pecuniary damages must appear so near, logical and natural that a diligent person has to anticipate them. A loss is foreseeable if the materialized risk is essentially the same as the risk which was foreseeable at the conclusion of the contract and which the promisor impliedly assumed. In this context, also the extent of the loss must have been more or less foreseeable. If the actual loss is considerably more extensive, the liable party has to cover only for the foreseeable part.¹⁷⁶ Plaintiffs will experience difficulties to meet these prerequisites with regard to non-pecuniary loss. As a consequence, the courts could tend to award rather low sums for non-pecuniary losses.

Another solution is to apply the strict procedure for consequential loss.¹⁷⁷ Accordingly, a seller should be held responsible for any loss if the buyer pointed the respective risk out to him and established whether the seller was willing to accept liability.

Finally, fact is that emotional distress and other forms of non-material loss are frequently a foreseeable consequence of a breach of contracts even commercial ones. The contemplation rule should not be used as an instrument to prevent non-pecuniary loss at all but to control this unruly figure in order to keep such cases in small numbers. Furthermore, the amounts of non-pecuniary

¹⁷⁰ Generally, see Saidov-Standards, supra note 144, at 17.

¹⁷¹ *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854).

¹⁷² See Enonchong, supra note 21, at 638.

¹⁷³ See *Hadley*, 156 Eng. Rep. at 151: '[w]here two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.' On the application of the *Hadley* Rule on non-pecuniary loss Lord Millet stated in *Johnson v Unisys Ltd* [at 70] that non-pecuniary damages 'are so commonly a consequence of contract that the parties must be regarded not only as having foreseen it but as having agreed to take the risk of its occurrence.'

¹⁷⁴ See McKendrick, supra note 6, at 317.

¹⁷⁵ See F Ferrari 'Comparative ruminations on the foreseeability of damages in contract law' (1993) 53 *Louisiana Law Review*, 1267.

¹⁷⁶ See Schlechtriem-Commentary, supra note 65, at 568-569.

¹⁷⁷ The Convention recognises consequential loss even though it has an indirect character and, in some way, it is therefore less foreseeable than (directly caused) non-pecuniary loss.

loss should be moderate exempt from special cases. In view of a consequent application of foreseeability, critical voices arguing that non-pecuniary loss seems inappropriate in the world of international trade could fall silent. It should be mentioned that in the jurisdiction to ULIS which contained the same rule of foreseeability in its article 82, cases where the defect of goods caused a loss of clients of the buyer were characterized as foreseeable.¹⁷⁸

Nevertheless, it is advised that ‘a party who fears suffering an extraordinary loss as a consequence of the breach of contract by the other party, should make this known to the latter at the conclusion of the contract so as to enable him to calculate the risk.’¹⁷⁹

V. Preliminary conclusion II

Based on the wording of article 74 CISG, the interpretation of relevant articles and the general principles inherent in the Convention, the better arguments point at including some forms of non-pecuniary loss rather than excluding these losses all together. The principle of full compensation provides the main argument to recognise non-pecuniary loss. Using foreseeability to generally deny claims for non-pecuniary loss abuses the real meaning of this rule. Therefore I conclude that the contemplation rule is at the same time the key to deal with non-pecuniary loss and to keep such cases in acceptable amounts but also the biggest hurdle on the way to general recognition of non-pecuniary loss.

VI. Proving and calculating non-pecuniary loss

1. The problem

Cases dealing with non-pecuniary loss have in common that the proving of such loss is a particularly difficult and costly exercise.¹⁸⁰ The additional difficulty of calculating makes it extremely difficult for the plaintiff to seek for recovery of a non-pecuniary loss.¹⁸¹ The aggrieved party is obliged to prove the breach of contract, her damage and that she has suffered a loss ‘as a

¹⁷⁸ See Enderlein/Maskow, *supra* note 128, at 301.

¹⁷⁹ *Id.*

¹⁸⁰ See Saidov-Methods, *supra* note 9, at 10: ‘In practice, the damages for loss of (injury to) reputation in itself will hardly be recoverable because of the difficulty of proof and meeting the requirements of Article 74.’

¹⁸¹ Once decided that an award should be made, the question on how that award should be calculated should be regarded as an issue falling within the scope of the CISG (see S Eiselen ‘Proving the quantum of damages’ 2005-06 *Journal of Law and Commerce*, 379).

consequence of the breach' (causality).¹⁸² Unfortunately, the CISG is silent as to the standard of proving loss.¹⁸³

The fact that the damage is difficult to prove is not reason to dismiss a claim completely as the existing position on loss of opportunity demonstrates. Although there is no indication in CISG that compensation for loss of opportunity is granted, these losses are awarded in certain cases ie when the aggrieved party purposely enters a contract in order to obtain a chance of earning a profit.¹⁸⁴ Obviously, the loss of a chance to profit is replaceable even though such loss is rather theoretical and almost impossible to measure.¹⁸⁵ More than that, loss of opportunity is not only difficult to measure but also the fact of the loss itself is uncertain. In contrast, non-pecuniary loss will often be regarded as a proved fact and only the amount is hard to determine.¹⁸⁶ Considering the treatment of loss of opportunity, no general objections against the provability of non-pecuniary loss should be allowed. However, previous claims have not been successful because the plaintiff did not put enough effort into proving the non-pecuniary loss.

2. *Suggestion of a solution*

From the wording of article 74 CISG no specific rules can be derived for the appropriate method of determining 'the loss ... suffered ... as a consequence of the breach.'¹⁸⁷ In support of the uniformity principle underlying the Convention, it has been suggested that proving loss should be regarded as governed by or being within the scope of the CISG.¹⁸⁸ Particularly in the context of non-pecuniary loss the issue of proving such loss and determining the amount of damages is crucial.

¹⁸² See Enderlein/Maskow, supra note 128, at 297.

¹⁸³ See Saidov-Standards, supra note 144, at 44 and, Gotanda, supra note 8, at 125. Whether the standard of proving loss is a matter of substantive or procedural law is not part of this work. For a broad discussion on this issue with various approaches see Saidov-Standards, supra note 144. It is however my firm opinion that these question should be treated in a uniform way, ie as a matter of the Convention. For a dissenting opinion see Case No T 171/95 (decision dated 20 February 1997) by Bezirksgericht der Saane.

¹⁸⁴ See AC-Opinion, supra note 129, at 3.15 and 3.16. This does not embrace recovery the aggrieved party is seeking for abstract chances.

¹⁸⁵ To what extent some courts recognize damages for loss of chance see for instance: *Chaplin v. Hicks* [1911] 2 KB 786. There, the court ruled that an aggrieved party could recover damages for loss of chance to win a beauty pageant, because such damages should have been within the contemplation of the parties at the time the contract was formed.

¹⁸⁶ For instance, a wine producer adulterates wine by adding too much water. Subsequently, a wine-shop owner buys that wine and delivers it to his clients. Becoming aware of the defect, the clients will blame the wine-shop for the poor quality of the wine and stop buying from him. As a fact, the wine-shop owner has suffered loss of reputation but he will struggle to determine the extent of such loss.

¹⁸⁷ See Guide to CISG article 74, secretariat commentary (closest counterpart to an official commentary). See also Case No 331 (decision dated 10 February 1999) by Handelsgericht Zürich (Commercial Court Zürich).

¹⁸⁸ See Saidov-Standards, supra note 144, at 67-68: 'Accepting that there is a unified standard ... of proving losses and determining the amount of damages ... is more likely to lead to a greater degree of uniformity in their application than if this matter were dealt with on the basis of the applicable legal system each potentially containing different standards.'

The used standards decide on the question whether an injured party is reimbursed or not.¹⁸⁹ Absolute certainty in evidence relating to the loss should not be required because the nature of some types of loss such as non-pecuniary loss will often prevent the injured party from presenting evidence which proves the alleged loss with absolute certainty. It has been suggested to supplement article 74 CISG with the rules of article 7.4.3 UNIDROIT Principles of International Commercial Contracts (UPICC).¹⁹⁰ According to the latter, compensation is granted only for such harm that is established with a reasonable degree of certainty. Where the amount of damages cannot be established with a sufficient degree of certainty the assessment is at the discretion of the court (article 7.4.3(3) UPICC). Furthermore, the burden of proof requires damages to be at least reasonably certain in their existence but not necessarily in their exact amount.

*The aggrieved party has the burden to prove, with reasonable certainty, that it suffered a loss. The aggrieved party also has the burden to prove the extent of the loss, but need not do so with mathematical precision.*¹⁹¹

A claimant should prove his loss with such a degree of precision that can be reasonably expected of him taking into account the nature of the alleged loss and other relevant circumstances of the case.¹⁹² Several courts and tribunals have adopted this view.¹⁹³ The standard of ‘reasonable certainty’ is therefore impossible to define in abstract terms but depends always on concrete facts as well as the one applying this standard.¹⁹⁴ ‘Reasonable certainty’ applies to both the fact and the amount of loss.¹⁹⁵ Undoubtedly, proving non-pecuniary loss with reasonable certainty will be more difficult than proving the pecuniary loss of a party. This is, because non-pecuniary loss involves

¹⁸⁹ See *id.*, supra note 144, at 3: ‘... although the injured party is entitled to full compensation for the loss suffered, he or she nevertheless will not be allowed to claim damages for the losses which he or she failed to substantiate with the required degree of precision.’

¹⁹⁰ Since neither the CISG nor PECL contain a similar provision. See Blase/Höttler, supra note 7, at 3(c): ‘The application of Article 7.4.3 UPICC would thus allow for compensation of commercial damages even in cases where the degree of damages is difficult to quantify and the applicable procedural law does not provide for an abstract sum to be granted. ... The application of the UPICC then helps to further the ultimate goal of fostering uniformity in the application.’

¹⁹¹ AC-Opinion, supra note 129, at digit 2. Other authors support the view that the idea of reasonableness is a general principle underlying the CISG (eg Saidov-Standards, supra note 144, at 69-70).

¹⁹² See Saidov-Standards, supra note 144, at 5.

¹⁹³ For instance, ICC Award No. 78445 of 1996 where the tribunal held the Indian manufacturer met its burden of proof, because the claimant only has to provide a ‘reasonable estimate of the loss, based on such elements as are available,’ rather than to prove it with absolute certainty.

¹⁹⁴ See AL Corbin, Corbin on contracts: a comprehensive treatise on the working rules of contract law, vol 5 (2002), 107: ‘Thus, the meaning of this standard can only be determined in relation to a particular set of facts. The meaning of the notion or reasonableness is inseparable from a concrete situation.’

¹⁹⁵ See Saidov-Standards, supra note 144, at 12.

inquiry into hypothetical events and because we do not possess perfect knowledge.¹⁹⁶ However, the risk of uncertainty in establishing damages should be born by the breaching party.¹⁹⁷

Confronted with uncertainty in proving loss, a glance at the UNIDROIT Principles should be taken. In article 7.4.3(2) the Principles provide a method of calculating loss of a chance. It is suggested that recoverability of this type of loss is an expression of the ‘policy of disfavour of an all-or-nothing result’ in the award of damages.¹⁹⁸

In order to prevent the claimant from being left with no compensation where exact calculation is the problem, the courts may exercise their discretion.¹⁹⁹ The requirements upon the courts are extremely demanding especially because it is about the Convention and not domestic law.²⁰⁰ Before measuring non-pecuniary loss the courts have to determine the value of the non-material interest which was infringed. The burden to provide useful evidence regarding this value is on the plaintiff. It follows that the courts should only exercise discretion when lack of certainty in proving the loss is not due to the plaintiff’s failure or omission.²⁰¹

To conclude, standards of proving loss and determining the amount of damages are ‘*directly connected with the exercise of the injured party’s right to damage.*’²⁰² Therefore, proving and calculating non-pecuniary loss should be regarded as within the scope of the Convention in order to effectuate greater uniformity for injured parties’ right to damage.²⁰³ Damages should be awarded if they can be proved and calculated with reasonable certainty.²⁰⁴ By applying de minimis limitations trivial and minimal non-pecuniary damages can be excluded. Again, the plaintiff has to prove that the non-pecuniary loss suffered is significant.

¹⁹⁶ Saidov explains this problem with respect to loss of profit (id., supra note 144, at 17). Opposed to loss of profit, loss of reputation is considered as ‘loss suffered’. However, proving such loss is far more difficult because such loss cannot simply be proved on the basis of records and documents. Rather, the claimant will have to provide the evidence of the existence of the alleged reputation and damage thereto (id., at 21).

¹⁹⁷ See *Mid-America Tablewares, Inc. v. Mogi Trading Co* 100 F.3d 1353.

¹⁹⁸ See Saidov-Standards, supra note 144, at 39.

¹⁹⁹ See id., supra note 144, at 8-12 and 42. Note: this is typically the case when loss of reputation is claimed.

²⁰⁰ It should be mentioned that the question whether the ‘judicial discretion’ standard is needed is highly controversial. If the answer is an affirmative great caution should be used so as not to undermine such considerations as fairness to the defaulting party and certainty in international business (see Saidov-Standards, supra note 144, at 76).

²⁰¹ See id., supra note 144, at 42.

²⁰² D Saidov ‘Damages: the need for uniformity’ (2005-06) 25 *Journal of Law and Commerce*, 399. See again Saidov who calls the exercise of proving loss a necessary prerequisite for the right to claim damages. Since, even though the injured party is entitled to full compensation for the loss suffered, she will fail with her claim if she fails to substantiate the loss with the required degree of certainty (Standards, supra note 144, at 3).

²⁰³ For a descriptive analysis of the problem see Schneider-Analysis, supra note 96.

²⁰⁴ See Saidov-Damages, supra note 202, at 4: ‘... it is possible to argue that since Article 74 provides that proving loss is a necessary precondition for the right to claim damages, the claimant should be required to prove loss with such a degree of precision or certainty which can be reasonably expected of the claimant taking into consideration the particular circumstances of the case. This essentially means that losses will have to be proved with a “reasonable degree of certainty”.’ See also ICC Award No. 8362 of 1995 (non-CISG case) where the tribunal held: While there must be a sound basis for calculation, the breaching party cannot escape liability simply because the amount of damages cannot be determined.

VII. Mitigation

The principle of mitigation is laid down in article 77 CISG where it reads:

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.

In the context of non-pecuniary loss, article 77 does not have the same effects as normally. Most often, non-pecuniary loss is much harder to mitigate and I cannot see what a company could undertake to decrease its loss of reputation caused by the other party's defective performance. Mitigation might be possible in a case where the cost of obtaining substitute performance is considerably lower than the damages likely to be awarded in respect of the claimant's non-pecuniary loss. To the contrary, mitigation can be a matter where the claimant is allowed to recover non-pecuniary loss rather than claim for specific performance because it would be out of all proportion to the benefits he can thereby obtain.²⁰⁵ As a final note, a reasonable practice of mitigation could contribute to establish non-pecuniary loss as a possible form of remedy under the CISG.

E General Principles of International Law

In order to fill in the gaps of the CISG, article 7 refers to the general principles on which it is based. It is suggested that a distinction must be drawn between those principles extracted from the CISG and the general principles of comparative law on which the CISG as a whole is founded. Among the latter, the UNIDROIT Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL) claim the greatest importance.²⁰⁶

At this point, it might be useful to look at another controversial type of damage, the loss of a chance or opportunity to profit. Even though there is no indication in article 74 that it should be awarded, the assumption is an affirmative because there is sufficient indication in the UNIDROIT Principles and in PECL as well as in the principle of full compensation.²⁰⁷ Future loss of profits is also held to be recoverable under article 74 despite the Convention being silent on this question. Again, it is said that the recovery of future loss is consistent with the principle of full compensation

²⁰⁵ See McKendrick, *supra* note 6, at 318-320.

²⁰⁶ See Review 2000/1, *supra* note 131, at 289.

²⁰⁷ See S Eiselen 'Unresolved damages issues of the CISG: a comparative analysis' 2005 *Comparative and International Law Journal of Southern Africa*, 40-41.

and that the same approach is supported by PECL and UNIDROIT.²⁰⁸ Apparently, general principles of international law have been used before to determine new types of loss which are not expressly settled in the Convention.

As seen above, the Convention does not provide a satisfactory solution to the present discussion. In order to further illuminate the issue of non-pecuniary loss, recourse is taken to the two documents mentioned above. Additionally, the *European Convention of Human Rights* has an interesting contribution to offer.²⁰⁹

*I. UNIDROIT Principles of International Commercial Contracts (UPICC)*²¹⁰

In the preamble, the purpose of the Principles is set out. Accordingly, the Principles may be referred to in order to interpret or supplement international uniform law instruments. Despite some controversy, the UNIDROIT Principles are used by both State courts and private arbitrators to interpret and supplement the CISG but also to fill gaps in its individual provisions. It is said that the Principles should be used 'in a persuasive sense as embodying rules which fill the need for a modern international sales law.'²¹¹ Article 7.4.2 is the relevant provision and provides the following wording:

- (1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.*
- (2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.*

Para (2) of article 7.4.2 expressly provides for compensation for non-pecuniary harm. According to the official comment, this may be 'pain and suffering, loss of certain amenities of life, aesthetic prejudice etc, as well as harm resulting from attacks on honour or reputation.'²¹² To define the form

²⁰⁸ See AC-Opinion, supra note 129, at 3.19.

²⁰⁹ See Blase/Höttler, supra note 7, at digit 1.

²¹⁰ UNIDROIT is the abbreviation for 'International Institute for the Unification of Private Law'. The Institute is an independent intergovernmental organisation with its seat in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and, in particular, commercial law as between states and groups of states. Set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute. The integral version of the 2004 edition of the UNIDROIT Principles of International Commercial Contracts exists in three official language versions – English, French and Italian. See www.unidroit.org.

²¹¹ Eiselen-Unresolved, supra note 207, at 34.

²¹² See UNIDROIT Principles of International Commercial Contracts (1994), 197.

of compensation – be it an award for damages and/or other forms such as publication of a notice in a newspaper – is in the discretion of the courts.²¹³

Apart from some shared basic premises underlying both the provisions of article 74 CISG and articles 7.4.1 and 7.4.2 of the UNIDROIT Principles, the latter contain more detailed provisions regarding full compensation. Therefore, the UNIDROIT Principles can be truly helpful in interpreting and applying article 74 CISG with regard to non-pecuniary loss.²¹⁴

One of the main reasons why non-pecuniary damages are not mentioned in the CISG as opposed to the UNIDROIT Principles lies in the different regulation extent. Only the latter include liability for death or personal injury. The Convention excludes these damages in article 5 and the most common case of non-pecuniary damages ie in connection with personal injury cases is not regarded either.²¹⁵ Additionally, the UNIDROIT Principles include service contracts which lead more often to non-pecuniary damage claims.²¹⁶ Therefore, the Principles cannot serve as reference for the international recognition of non-pecuniary damages. However, they are supportive arguments towards this assumption. It has been argued that the term ‘harm sustained’ in article 7.4.2(1) of the Principles is wider than the words ‘a sum equal to the loss ... suffered’ in article 74 CISG. In case of doubt, the interpretation of article 74 should lean toward full compensation for ‘harm’ and the wording of article 74 CISG should be wide enough to include non-pecuniary loss.²¹⁷

Case law based on the Principles seems to be inconsistent to some extent. For instance, in an arbitral award from Italy a claim for emotional harm and distress was dismissed because the injured party was a corporate entity.²¹⁸ In another case the Centro de Arbitraje de México rejected the claimant’s request for compensation for loss of reputation on the Californian market as a result of the defendant’s non-performance of a contract for the sale of vegetables. The court reasoned that even though the aggrieved party was entitled to compensation for non-pecuniary harm as a result of the other party’s non-performance according to article 7.4.2 of the Principles, the claimant failed to prove both the existence and amount of such harm.²¹⁹

²¹³ See *id.*, article 7.4.2.

²¹⁴ See Eiselen-Remarks, *supra* note 136, at (c).

²¹⁵ See *id.*, at (d).

²¹⁶ See Principles, *supra* note 212, at 197-198.

²¹⁷ See Eiselen-Remarks, *supra* note 136, at (e).

²¹⁸ National and International Arbitral Tribunal of Milan Award No A-1795/51 (1 December 1996).

²¹⁹ Award by Centro de Arbitraje de México (decision dated 30 November 2006).

II. *The Principles of European Contract Law (PECL)*²²⁰

Like the UNIDROIT Principles, the Principles of European Contract Law aim to effect international harmonisation within the European Union.²²¹ Although a European structure, the scope and complexity of PECL is considered to be wide enough to provide valuable assistance in the process of interpreting and filling the gaps of the CISG.²²² The right to damages is settled in article 9:501 of PECL and reads as follows:

- (1) *The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108.*
- (2) *The loss for which damages are recoverable includes: (a) non-pecuniary loss; and (b) future loss which is reasonably likely to occur.*

Under PECL, recoverable loss is not confined to pecuniary loss but may cover pain and inconvenience resulting from a failure to perform. Regarding the fact that PECL is law governing all kind of types of contracts this rule does appear as no surprise. The term 'non-pecuniary loss' in article 9.501(2) focuses primarily on attacks on natural persons' personality, reputation or honour. However, based on a literal interpretation of article 9.501(2) there is no indication of an exception with regard to commercial contracts. As a minimum, recovery of non-pecuniary loss should not be a problem where non-pecuniary interests are promised expressly and where the breaching party is lacking a reasonable degree of care and skill.²²³

III. *European Convention of Human Rights (ECHR)*

For the purpose of interpretation of the CISG the European Convention of Human Rights of 1950 drags behind the two international treaties discussed before. However, the ECHR is a highly reputable and well known international agreement that has something to add to the present discussion. In *Comingersoll SA v Portugal*²²⁴ the European Court of Human Rights had granted an

²²⁰ The European Principles have been drawn up by an independent body of experts from each Member State of the European Union under a project supported by the European Commission and many other organisations. Part I of the Principles dealing with performance, non-performance and remedies was published in 1995. PECL Parts I and II was published in 1999 and Part III in 2003. See http://frontpage.cbs.dk/law/commission_on_european_contract_law/ [Accessed 1 October 2007].

²²¹ See Eiselen-Unresolved, supra note 207, at 4: 'The European Principles are intended to reflect a common core of solutions found to problems with quite diverse legal systems and legal traditions and in this share a common characteristic with the UNIDROIT Principles and the CISG.'

²²² See id.

²²³ See comment 9:501, supra note 95, at B.

²²⁴ Application no 35382/97, 6 April 2000.

award to a company for a breach of article 6 of the Convention. Portugal was ordered to pay damages because it had failed to provide legal machinery for the enforcement of a debt. This case

*... gave rise to an issue of principle, namely whether legal entities (as opposed to individuals) could claim compensation for the non-pecuniary damage occasioned by the anxiety, inconvenience and uncertainty caused by the alleged violation. The Court reiterated that the Convention had to be interpreted and applied in such a way as to guarantee rights that were practical and effective. Since the principal form of redress which the Court could order was pecuniary compensation, it necessarily had to be empowered, if the right guaranteed by Article 6 of the Convention was to be effective, to award pecuniary compensation for non-pecuniary damage to commercial companies too. In the case before it, the Court considered that the applicant company had been left in a state of uncertainty that justified making an award of compensation.*²²⁵

It follows, as well from a human rights perspective it should be recognised that legal entities can suffer non-pecuniary loss. Hereby, an additional argument is delivered against the over-simplifying prejudice that commercial parties cannot be subject to intangible damage such as inconvenience.

F Cases of damage to reputation or good will

I. Introduction

The value of reputation has been appreciated not before recently and its real significance is still underestimated. In an article about the challenge of protecting reputation, the problem was explained like that: ‘Why is it so easy for executives to think about and plan for financial risks, but still so hard for them to understand that intangible risks to an organisation’s reputation are far more likely to destroy shareholder value?’²²⁶ However, the awareness of business reputation and the question how the respective loss should be compensated is gaining in importance.

In a commercial environment, cases of loss of reputation or good will in consequence of a breach of contract occur more than any other cases of non-pecuniary loss. This is why I will now concentrate on this type of loss. Cases are not always classified under the term of ‘non-pecuniary loss’ but under ‘unquantifiable economic disadvantages’.²²⁷ This is though a rather subtle distinction because every non-pecuniary loss is by its nature very difficult to quantify and conversely, unquantifiable economic disadvantages can also be understood as loss without a clear financial impact.

²²⁵ Human Rights Information Bulletin No. 49, March-June 2000, 15-16.

²²⁶ See PA Argenti, The challenge of protecting reputation. Available at www.ft.com (Financial Times) [Accessed 7 October 2007].

²²⁷ See Schlechtriem-Commentary, supra note 65, at 558.

II. Case characteristics

To be able to answer the question whether loss of reputation is recoverable under the Convention (as well as other legal systems) we need to agree what we mean by this term.²²⁸ On Wikipedia the following definition can be found:

*Reputation is the general opinion of the public towards a person, a group of people, or an organization. It is an important factor in many fields, such as business, online communities or social status.*²²⁹

The same website explains that ,[i]ncidents which damage a company's reputation for honesty or safety may cause serious damage to finances.'²³⁰ It should be recognised that in any form of commercial activity and particularly in the field of international sales reputation is an important factor for financial success. In the era of mass media and electronic communications, a company's reputation becomes a vulnerable good. There are examples enough for the enormous potential of reputation.²³¹

A strict test has to be applied with regard to foreseeability of a buyer's loss of good will as a result of defective goods or non delivery. As a minimum, the seller is liable for loss of good will if the buyer pointed the risk of that particular type of loss out at the conclusion of the contract.²³² In addition, a party should be liable if he or she ought to have foreseen it as a logical consequence of a breach of contract. In the more usual case, parties do not think of the consequences to their reputation which the performance or non performance of the contract could have but good will comes only to their mind when it is already injured.

²²⁸ See Saidov-Damages, supra note 202, at 396. Saidov then gives us the definition of 'what others think of one's business activity, qualities, and performances.'

²²⁹ [Http://en.wikipedia.org/wiki/Reputation](http://en.wikipedia.org/wiki/Reputation) [Accessed 25 September 2007]. For more definitions of reputation or good will see Saidov-Damages, supra note 202, at 2, and, KM Kolaski and M Kuga 'Measuring commercial damages via lost profits or loss of business value: are these measures redundant or distinguishable?' (1998) 18 *Journal of Law and Commerce*, 14.

²³⁰ Sergeyev mentions causes of impairment of business reputation such as loss of customers, heavier conditions of obtaining a credit, and he emphasises that 'a positive reputation can serve as a guarantee that a businessman will remain 'afloat', even when his business goes down.' (AP Sergeyev and YK Tolstoy (eds), *Civil law*, part 1 (1998)).

²³¹ For one out of many see <http://en.wikipedia.org/wiki/Reputation> [Accessed 25 September 2007]: '[I]n 1999 Coca Cola lost \$60 million (by its own estimate) after schoolchildren reported suffering from symptoms like headaches, nausea and shivering after drinking its products. ... Company's reputation is an asset and wealth that gives that company a competitive advantage because this kind of a company will be regarded as a reliable, credible, trustworthy and responsible for employees, customers, shareholders and financial markets.'

²³² See Schlechtriem-Commentary, supra note 65, at 571.

III. *Measuring loss of reputation*

1. *How to measure*

First of all, the value of reputation must be determined. Afterwards, the history of developments before and after the breach of contract must be taken into account in order to reasonably estimate the decrease (ie damage or loss) in reputation. Proving such loss will always involve some speculation.²³³ Many different factors influence the future development of a business and its reputation. To what extent the breach of a single contract is accountable compared to other factors is a difficult question. For that, general conditions on the relevant market, development of comparable business, state of competition, mismanagement of the business, and increased costs need to be evaluated by means of market surveys. This is a costly enterprise for the plaintiff and often entails that he has to disclose secret business data. The result of this investigation must then be accounted for and deducted from any calculation of lost profits.²³⁴

2. *Double recovery?*

In this context, loss of profit and loss of business value have to be distinguished. The question is whether they overlap one another or whether such distinction is completely redundant? Some courts doubted if reputation can be regarded as a value in its own and tend to take profit as a yardstick for reputation. In analysing the issue for the United States a scholar noted:

*Lost profits are measured over a specific time period whereas the value of a business, in principle, represents the value of all future expected profits to be earned over the life of a business. These two measures of damages can overlap and great care must be exercised when both measures are used simultaneously (perhaps additively) in a damage calculation.*²³⁵

Obviously, the fear of double compensation is a prominent reason to deny compensation for loss of reputation completely.²³⁶ The questions are: Is only loss of profit flowing from the defendant's harmful behaviour relevant? Above all, is this just a question of timing?²³⁷ Is it correct and fair that

²³³ See Kolaski, supra note 229, at 2: 'Damage estimates are by their very nature somewhat speculative.'

²³⁴ See id., at 3.

²³⁵ Kolaski, supra note 229, at 1.

²³⁶ See id., at 15, for the United States: 'Because goodwill is measured by customers' tendency to patronize the business, any decline in the value of the business' goodwill will "be reflected by, and included in, any recovery of lost future profits." Accordingly, one cannot make a meaningful distinction between business reputation and good will in the accounting sense. Because [plaintiff] was awarded lost future profits, it cannot also recover damages for loss of goodwill.'

²³⁷ Kolaski (id., at 20) advocates the theory that claims for lost profits and loss of business value cannot be for the same time period.

only either lost profits or loss of business value are recovered? These questions shall be further examined in the following.

IV. Case Law on the CISG

1. Overview and important remarks

In the context of the Convention, the Advisory Council acknowledges recovery of damages for loss of good will if the aggrieved party can establish with reasonable certainty that it suffered a financial loss because of a breach of contract.²³⁸ This is not an absolute threshold but must be decided upon the facts and circumstances of each case. Additionally, both PECL and UNIDROIT Principles allow recovery of good will. The difficulty of proving such loss ‘should not result in a requirement of a higher level of proof to obtain such damages.’²³⁹ Indeed, according to the principle of full compensation no such thing as exact calculation can be required.²⁴⁰ The UNICITRAL Digest summarizes the case law in terms of loss arising from damage to reputation as follows:

*Some decisions have implicitly recognized the right to recover damages for loss of reputation or good will, but at least one other has denied such recovery under the Convention. One court found claims for both loss of turnover and loss of reputation to be inconsistent.*²⁴¹

In the following, a more detailed look shall be given at cases dealing with loss of reputation under the CISG. This analysis shall provide additional arguments in order to settle the Convention’s position on non-pecuniary loss. As far as uniformity is concerned, the study of case law will reveal how successful the Convention is in meeting this (its own) goal. It is absolutely significant for this purpose that courts concerned with a matter of the CISG take into account other decisions on the same issue. Since the focus of this work is on the remedy of non-pecuniary loss, only the treatment of the respective aspects shall be investigated.

²³⁸ AC-Opinion, supra note 129, at 7.1. See also Saidov (Standards, supra note 144, at 8) who states that in a lot of these cases ‘it may be virtually impossible to establish the amount with a reasonable degree of certainty and yet a court/tribunal may be satisfied that some damage has been done to one’s commercial reputation.’

²³⁹ AC-Opinion, supra note 129, at 7.3.

²⁴⁰ See Saidov-Standards, supra note 144, at 21: ‘Proving these facts could involve a variety of types of evidence such as, for example, witness statements, experts’ reports, survey amongst relevant business circles, records of the claimant’s business activity prior and after the breach, etc.’

²⁴¹ Digest, supra note 118, at para 18.

2. *Case analysis*²⁴²

A first case dealing with loss of reputation is provided by the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry.²⁴³ There, the seller refused to deliver an additional lot of the goods because, in his opinion, no contract was concluded. In consequence, the buyer failed to pay the full price of the delivered goods demanding that the additional lot of goods should be delivered. The seller claimed for the outstanding sum. In a counterclaim the buyer demanded compensation of damages caused by the non-delivery of the additional lot of the goods and compensation for moral harm. The Arbitration Court denied compensation for moral harm because it did see no grounds for meeting the claim. The main problem in this case was that the respective demand (in the counterclaim) was not based on the same contract as the principal claim; therefore, the claim could not be subject to the present procedure. The amount of the claim was also held to be unjustified. Furthermore, the court stated that neither the Vienna Convention nor the applicable national law contain provisions for the compensation of moral harm in cases of moral harm.²⁴⁴ Unfortunately, the reasons for this absolute denial were not accessible.

In another case decided by the ICC court of Russia, the action was brought by an American firm (buyer) against a Russian company (seller).²⁴⁵ The contract involved the delivery of two consignments of which the first did not meet the contract requirements and as a result, reached the end user reduced in value. Subsequently, the buyer claimed for a price reduction equal to the sum that remained unpaid by the end users. On the second consignment the buyer sought damages for lost profit on the grounds that the goods of the first consignment had been defective which led to loss of reputation of these goods on the market. In fact, the claim was concerned with lost profit and not the infringement of a separate value of reputation. The court held that the rules stipulated by article 74 CISG are ‘fully applicable to the claim for loss of profit caused by the sale of the second instalment of the goods under lower prices due to infliction of damage upon the reputation of the goods in the market as a result of the non-conforming quality of the same goods in the first instalment.’²⁴⁶ With these words the court suggested that it would have allowed damages for loss of

²⁴² Note: It might not always be possible to refer to the original decision because some cases were only available in the form of case commentaries or in the works of legal scholars.

²⁴³ Case No 304/1993 (decision dated 3 March 1995).

²⁴⁴ See case commentary by Rozenberg para (i).

²⁴⁵ Case No 054/1999 (decision dated 24 January 2000) by the International Court of Commercial Arbitration Chamber of Commerce & Industry of the Russian Federation.

²⁴⁶ Ruling of the Tribunal, digit 7. Synopsis and commentary by M Rozenberg.

profit flowing from loss of reputation of the goods given the required conditions.²⁴⁷ However, no conclusion can be drawn for recovery of reputation when no profits have been lost.²⁴⁸ Despite the court's positive statement, the claim was dismissed with regard to the second consignment of goods. First, it could not have been established that the breach had caused the claimed loss. The court held that the seller's breach of contract could not have resulted in serious harm to the reputation of the goods or difficulties in selling the second consignment. Second, the court determined that the buyer had not proven that the breach of the contract committed by the seller had lead to infliction of serious damage in the market on the reputation of the goods delivered by the seller. It was noted that the claims brought forward by the customers had been unsubstantiated and therefore wrong and the buyer knew about that. Moreover, it was the court's opinion that the seller did not foresee and ought not to have foreseen that the breach of contract would lead to loss of reputation by the goods which brought about the buyer's loss. The court did not explain why it held that loss of reputation by the goods was not foreseeable. In my opinion, a seller should be able to foresee that the resale price of products might drop after previous instalments of the same product (delivered to the same end users) were already defective.

The next case involved a Swiss buyer (plaintiff) and a Finish seller (defendant).²⁴⁹ The parties had business relations with one another over more than a year in a manner that the buyer had bought plastic and (later) Powerturf- carpets from the seller in an aim to resell them in the Swiss market. In December 1996, the seller informed the buyer that he granted exclusive rights of Powerturf- grass carpets in Europe to a multinational corporation starting 1997. While the buyer assumed that the parties agreed on deliveries for the year 1997 and sought for damages, the seller denied the claim in its totality. Besides loss of profit, the buyer claimed also Sf 30'000 for loss of good will and some sum for general expenses. In terms of loss of good will, the court of first instance took into consideration that the buyer had not done business in this trade sector before the coming about of the business relationship now in question. On the other hand and according to the buyer's own statement, the buyer was still doing business in another trade section in Switzerland at the moment of the judgement. Nevertheless, in the amount finally awarded by the court there must have been a part for loss of good will included. Unfortunately, there is no statement how the court used its discretion. The seller appealed against this decision to the Court of Appeals which denied overturning the amount of damages awarded by the court of first instance. In a dissenting opinion the foreseeability issue was raised. The dissenting judge stated that the seller ought not to have

²⁴⁷ See Saidov-Methods, supra note 9, at 11.

²⁴⁸ See id., at 10.

²⁴⁹ Case No S 00/82 (decision dated 26 October 2000) by Helsinki Court of First Instance (Judgment 28966).

foreseen the amount of damage (article 74 CISG) and had caused no damage whatsoever to the buyer.²⁵⁰

In a French case the buyer in France placed an order with the Spanish seller for 8651 pairs of shoes.²⁵¹ The seller denied having received any orders and refused to deliver. The buyer had to resort to substitute manufacturers. As a consequence, the buyer was late in supplying its retailers and 2125 unsold pairs were returned to the buyer. The buyer filed a claim for the 2125 unsold pairs and for loss of company's brand image due to the retail dealers' dissatisfaction with late deliveries. In order to prove his non-material loss, the buyer had produced affidavits of two representatives who testified to the dissatisfaction of the retail dealers and the difficulties which the buyer will encounter to keep them in the future. In the affidavits the statement was made that clientele for future seasons was lost and discounts had to be granted to keep customers. Additionally, the buyer accused the Spanish company of acts of unfair competition. In the first instance, the Commercial Court of Vienne (France) awarded damages to the buyer for contractual breach by the seller and the loss of its brand image (FF 100'000). The seller lodged an appeal and the court of appeal upheld the ruling to the extent that it granted compensation for the loss suffered as a result of the refusal to deliver. Regarding the loss of reputation, the court overturned the ruling. It held that compensation for the impairment of trading image was not recoverable in itself under the CISG. According to the court, article 74 CISG does not provide recovery for deterioration of commercial image or reputation in itself if it does not entail proved pecuniary damages. The affidavits produced by the buyer were considered to be only hypothetical. In this case, the distinction was laid down between an injury to reputation as being non-pecuniary loss and pecuniary loss flowing from such an injury. The view that reputation in itself should be recognised as a separate non-material category with its own value was not shared by the present court.²⁵²

Still another case involved a German seller (plaintiff) and a Swiss buyer (defendant).²⁵³ The latter ordered 8000 video recorders and other electrical appliances from the German manufacturer. After having received them, the Swiss buyer complained about defects of some recorders. The parties agreed that the purchase price would be reduced for 4000 recorders which had to be repaired. When the buyer asserted more defects and refused to pay the purchase price, the seller

²⁵⁰ Namely, the dissenting opinion based on the assumption that there was no valid agreement.

²⁵¹ *Sté Calzados Magnanni v SARL Shoes General International* by Cour d'appel de Grenoble (decision dated 21. October 1999).

²⁵² See Saidov-Methods, supra note 9, at 9-10, who concludes then: 'Consequently, damage, inflicted upon reputation, will, in the first place, entail *non-material loss* of the value that reputation had.' It seems however that in this question, more than ever, theory and practical feasibility drift apart. On that, Saidov says: 'In practice, the damages for loss of (injury to) reputation in itself will hardly be recoverable because of the difficulty of proof and meeting the requirement of Article 74.'

²⁵³ Case No 10 O 72/00 (decision dated 9 May 2000) by Landgericht Darmstadt.

sued him. The buyer alleged different shortcomings which caused a loss in revenues of over DM 2 millions. Additionally, the buyer explained that due to the inferiority of the products expenditures for advertising became useless and discounts had to be given to the retail sellers. As a consequence, the good name of the defendant would have been damaged irreparably. This damage to reputation could not be determined precisely but it was estimated to be not less than SF 500'000. In any case, the determination of the final sum was left to the court's discretion. The county court found that the defendant's claims were in general not consistent and not substantiated. In terms of the alleged damage to reputation it was held that reputation in itself does not have an own value. The buyer could not claim loss of turnover which could be calculated in the form of resulting pecuniary loss (ie loss of profits) and additionally try to transform loss of reputation into money. As long as loss of reputation did not have an effect on turnover and profit, it was absolutely irrelevant according to the German court because a merchant runs his business applying commercial standards. Shockingly, the court explained that as long as sales figures are sufficient merchants should be rather indifferent about reputation. It was not substantiated that loss of reputation would have an effect on turnovers and the court dismissed the buyer's claim. The court only admitted that the further business development could be less normal when defective products come onto the market. However, a claimant should then be capable to establish this fact by means of business documentations.²⁵⁴ The court was not ready to acknowledge loss of reputation in itself in the sense that reputation is more than turnover and profit. At least for one reason, this decision can be criticised. It is this: The German court did not refer to the damage term of the CISG but seemed to express its general view.

Another German case involved an Italian seller (a wine producer) who sued a German buyer (the owner of a wine shop).²⁵⁵ The seller had delivered a fixed amount of wine to the buyer. As the buyer was not willing to pay the invoice, the seller sought payment of the purchase price at the court. Besides other claims, the buyer argued that he suffered 'considerable damages' as a result of lack of conformity of the deliveries. The argumentation was that due to non conforming deliveries, turnover loss was caused by the loss of customers who failed to place new orders (loss of profits). According to the judges, the alleged loss did not constitute a direct loss of wealth caused by the seller's breach of contract in the meaning of article 74. In addition, the buyer failed to submit any corresponding facts. This case was only concerned with loss of profits because the buyer had claimed loss of reputation only in connection with the reduction of wealth. The more interesting question of damage to reputation in itself was therefore, once more, left outside.

²⁵⁴ This paragraph is (more or less) my own translation from the original German text.

²⁵⁵ Case No 12 HKO 5593/01 (decision dated 30 August 2001) by Landgericht München.

In a dispute between a Spanish buyer and a foreign seller the former rejected to pay for supplied goods which were defective in his opinion.²⁵⁶ The Appellate Court Barcelona had to deal with several counterclaims of the buyer; one of them was a claim for loss of reputation. Unfortunately, the court did not further discuss the question of loss of reputation under the Convention but stated only that the buyer did not provide any evidence to show his loss of clients or loss of reputation in his commercial field as well as the knowledge of it that the seller could have had (foreseeability). It can only be assumed that the court would have stated clearly if it had been convinced that there is no such loss at all under the Convention. From the fact that loss of reputation was mentioned additionally to loss of profit and loss of clients, one could further assume that the court recognized reputation as a separate asset.

Furthermore, a Swiss case has made pronouncements with relation to loss of reputation.²⁵⁷ A Swiss buyer (defendant) commissioned an Italian seller (plaintiff) on several occasions, to print, bind and supply art books. When the buyer failed to pay outstanding invoices he was sued by the seller. Subsequently, the buyer argued that he was entitled to set off the seller's performance with counterclaims for reduction of the price as well as damages. In one shipment of art books, a different type of paper than the agreed had been used. According to the buyer, this amounted not only to a lower value of the books but caused damage to his image. All the buyer's claims were dismissed due to lack of legal basis and a sufficient substantiation regarding the facts. With respect to the claim for loss of reputation the court stated that '[w]hile the "good will-damage" can certainly be compensated under the CISG ... it also needs to be substantiated and explained concretely.' Once more, the question is whether the court in this case referred to financial loss flowing from damage to reputation or whether it was concerned with compensation for damage to reputation as a value in itself. I subscribe to the view that the court recognised that 'a commercial "reputation" is an asset or a value in itself.'²⁵⁸

Research would be incomplete without including case law on the 1964 Hague Uniform International Sales Law (ULIS) because article 74 CISG was taken from and is for all practical purposes substantially identical to article 82 of ULIS.²⁵⁹ A case by the Supreme Court of Germany on article 82 ULIS offers interesting insights.²⁶⁰ A German cheese importer entered into a contract to purchase cheese from a Dutch exporter. When three percent of the cheese delivered was

²⁵⁶ Case No 755/95-C (decision dated 20 June 1997) by Audiencia Provincial de Barcelona, sección 16a.

²⁵⁷ Case No 331 (decision dated 10 February 1999) by Handelsgericht Zürich.

²⁵⁸ Saidov-Damages, supra note 202, at 3. Besides the use of the term 'good will-damage', the court treats this question separately from other claims for loss of profit.

²⁵⁹ See EC Schneider, Cross-references and editorial analysis: article 74.

²⁶⁰ Case No VIII ZR 210/78 (decision dated 24 October 1979) by Bundesgerichtshof (Supreme Court of Germany).

defective, the buyer sought damages including lost profits as a result of the loss of four wholesale customers. Additionally, damages were claimed for money paid to one customer who lost his own customers as a result of the defective cheese. Here, the plaintiff was claiming for lost profits flowing from loss of reputation and not for a diminished value of reputation.²⁶¹ The court of appeal examined foreseeability on the basis of a market survey. The Supreme Court held that the objective test of foreseeability could be met by a survey demonstrating a trade custom of foreseeability, in the present case however, the survey was considered to be procedurally flawed. Therefore, the decision of the court of appeal was remanded for re-examination of the foreseeability issue. Despite the fact that the foreseeability considerations of the lower court were criticised, a diminution of the buyer's good will and as a result, a considerable loss through the abandonment of important customers was held to be foreseeable. '[S]ince it is to be expected in the usual course of delivery of defective goods to a middleman.'²⁶²

V. Preliminary conclusion III

In none of the cases above, the parties did consider or discuss consequences of their contract to the parties' reputation. Consequence could be either an increase of reputation thanks to a trouble-free performance or a decrease or loss of reputation when business contacts (customers, suppliers, shareholders, employees) are disappointed by a poor performance.

Some courts seem more reluctant to follow international principles and preferred to apply their own national law instead. This is critical because '... disallowing evidence of loss of good will damage as a matter of law undermines the predictability and harmonization of litigation results under the CISG.'²⁶³ Some countries may have less formal rules of evidence and may limit the application of foreseeability less than others. This situation can lead to forum shopping – an outcome the CISG drafters sought to avoid.²⁶⁴

One question seems to bother the courts more than others. It is this: Should reputation be recognized as an asset with a value in itself or only when financial loss flows from damage to reputation? In the latter case, a claimant should have few problems to receive compensation as long as the damage can be proved with reasonable certainty. This is, because article 74 CISG contains an express mention of lost profits. The controversy focuses on claims for loss of reputation without or

²⁶¹ See the buyer's damage claim (a) 'Four of his customers who were bulk buyers (wholesalers) discontinued doing business with him, which cost him lost profits over four years totaling 288,000 DM.'

²⁶² P Schlechtriem, Uniform sales law in the decisions of the Bundesgerichtshof, 50 years of the Bundesgerichtshof, a celebration anthology from the academic community, 2.

²⁶³ See Schneider-Analysis, supra note 96, at digit 4.

²⁶⁴ See id., at digits 2.2.4 and 4.

additionally to loss of profits. By contrast with other international instruments, the solution is not clearly determined by the Convention. It has been submitted that the question whether loss of reputation is recoverable should be largely regarded as a question of policy. There are sufficiently important considerations to justify recoverability of such loss under the CISG. Even though one cannot always prove immediate economic and financial damage, loss of reputation will have, sooner or later, repercussions on the business.²⁶⁵ One should look at loss of reputation as anticipated profits which have a current discounted value.²⁶⁶ Such profits may involve some uncertainty of proof but to disallow evidence of such damages as a matter of law would result in an unjust denial of compensation.²⁶⁷

Reputation is more than future profits. Loss of reputation can force the company to re-establish its former value by investing more money in public relations and the like. One should think of situations where the stock exchange price drops or valuable employees resign or cannot be hired due to a negative image and the profits stay unvaryingly high at the same time. Therefore, I do not agree with the opinion that 'cases involving claims for lost future profits in addition to loss of goodwill business value are not appropriate as they would allow double recovery.'²⁶⁸ A broad recognition of reputation as an asset in itself is a necessary precondition for the recognition of loss of reputation. Finally, loss of reputation as a separate type of damage would be crucial towards a broad acceptance of (other forms of) non-pecuniary loss under the CISG.

However, the evaluation of cases shows a humbling result. Not one court awarded damages for loss of reputation as an asset in itself. Among the decisions dealing with this issue, three absolute denials face three more or less clear approvals. In two cases, only loss of profit was claimed. On top of that, it is rather doubtful whether the courts always interpreted the CISG in terms of article 7. They often seemed to express general opinions or positions of domestic law. I conclude therefore that case law does not provide a clear statement regarding how we should deal with non-pecuniary loss under the Convention.

Proving and measuring loss of reputation turn out to be a critical point in the present discussion. In order to calculate loss, one has to determine the value of reputation first. Even though strong reputation at company leads to measurable results, apart from lost profits such value can hardly be determined. Unsurprisingly, claims were often denied because of lack of evidence. Sometimes, damage to reputation might be proved by means of market surveys (on current

²⁶⁵ See Saidov-Damages, *supra* note 202, at 3.

²⁶⁶ See Argenti, *supra* note 226: '... a potential loss in reputation that could lead to negative publicity, loss of revenue, costly litigation, a decline in the customer base or the exit of key employees.'

²⁶⁷ See Schneider-Analysis, *supra* note 96, at 2.2.4.3.

²⁶⁸ Kolaski, *supra* note 229, at 21.

standings and further developments in the current environment), in rarer cases it might even be evidenced in a drop in share prices or a decline in market shares. Apart from such cases, the chance of compensation for loss of reputation barring lost profits will be rather small because discontent in communities is practically not measurable.²⁶⁹

G Final Conclusion

Looking at different jurisdictions and how they deal with non-pecuniary loss, one can see two things: first, it is mainly a question of policy whether a society tends to recognise such loss or not and second, a growing recognition of non-pecuniary loss can be noticed through all systems. From a historical point of view it is to consider that views can change over the course of time. Under the influence of new ideologies and needs, old law can be (and constantly is) interpreted differently. The same should be true for the Convention. I dare the prognosis that the issue of non-pecuniary loss will continue to gain in significance in the legal systems around the world.

It should be recognised that ‘loss’ in article 74 CISG is an open and rather broad term. I have found no convincing reasons why non-pecuniary loss should be excluded upfront rather than being included subject to the usual limitations. Based on broad support in domestic legal systems, general principles underlying the CISG and principles of international law, recovery of non-pecuniary loss should be allowed by the Convention. Not to do so will result in contradictory decisions because courts and tribunals must refer to domestic law. This clearly undermines the uniformity in the application of the Convention. Considering the increasing significance of non-pecuniary loss, this result could jeopardise the Convention as a whole. Whether non-pecuniary loss was caused and to what extent it is to compensate should be decided by means of foreseeability and by taking the purpose of the contract into account. Additionally, the facts and other circumstances of a case are to be regarded.

Under the Convention, cases in which the defendant expressly promises to confer a non-pecuniary benefit upon the claimant should be recognised as long as the term broken was an important term of the contract known by both parties.²⁷⁰ These kinds of clauses occur rarely in commercial contracts. On the other hand, cases are out of question where non-pecuniary damages are excluded by a clause of the contract. Cases of an implied promise of non-pecuniary benefits will be difficult to establish. However, the foreseeability rule keeps these cases in small numbers. Most

²⁶⁹ See Argenti, *supra* note 226.

²⁷⁰ See McKendrick, *supra* note 6, at 301; Saidov-Methods, *supra* note 9, at 9; Schlechtriem-Commentary, *supra* note 65, at 558.

commonly, the parties do not contemplate possible consequences to non-pecuniary interests caused by the breach of contract. Nevertheless, the relevant interests exist, need and deserve protection. The parties ought to consider non-pecuniary consequences where such a conclusion is based on the facts and circumstances of the case. Recovery should be allowed as far as such damages exceed lost profits. It seems self-evident to me that in cases of intentional default the defendant should bear all costs. Otherwise, an incentive for the malicious party to break the contract would be created.

It is not easy to imagine non-pecuniary interests in a commercial environment. The most important group of cases turned out to be the growing issue of business reputation and respective losses. As explained above, in commerce and in particular in international sales, business reputation is of growing significance.²⁷¹ There are strong reasons to recognise reputation as a value in itself. Unfortunately, case law on the CISG reveals an inconsistent not to say disappointing picture. At present, I have to concede that the time has not yet come for non-pecuniary values to be fully recognised under the Convention. Other than very clear cases have hardly a chance to be awarded. At the time of the conclusion of this thesis, no such decision was available.

Therefore I prompt that the general treatment of non-pecuniary loss is turned around. Instead of a general rejection of non-pecuniary loss, it should be broadly recognised under article 74 CISG. The focus can then turn to reasonable limitations. Careful attention should be paid to the standards of awarding non-pecuniary loss and courts must apply well recognised principles of international law to limit liability for non-pecuniary losses. It needs no further explanation that foreseeability, refined with respect to non-pecuniary loss, is the most important limitation rule. Meanwhile, the prudent attorney inserts specific clauses into the contract (or standard forms) to protect the non-pecuniary interest of his client. We shall take notice that the Convention does not govern the validity of such clauses.

To sum up, I would like to emphasise the importance of further development of this issue. Uniformity in application of the Convention can only be achieved on a firm theoretical basis.

²⁷¹ Convincingly, Saidov points out that reputation can affect and sometimes pre-determine the state of affairs of a business (Methods, *supra* note 9, at 9).

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