Establishing a Uniform Interpretation of the CISG:

A Case Study of Article 74

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1 Introduction

The debate on whether a satisfactory degree of uniformity in the interpretation of the UN Convention on Contracts for the International Sale of Goods (CISG or Convention) is being achieved seems more relevant than ever. Thus, more than 30 years after the adoption of the convention it is still doubtful whether the aim of establishing uniform rules for the international sale of goods as set out in Article 7(1) is being achieved and this raises the question if it ever will be. In a recent article published in the *Danish Weekly Law Report*,[1] Joseph Lookofsky, a prominent CISG scholar, shows that Danish courts do not take much note of the sources of law relevant to the CISG when dealing with matters pertaining to it. Such an approach is in direct contravention of Article 7(1) and if it applies to the courts and arbitral tribunals in the other CISG jurisdictions as well, it is clear that we are dealing with a serious problem.

The purpose of this article is to address the question of whether said aim of establishing a uniform interpretation of the CISG is being achieved. This is done by doing essentially two things: First, it is examined what potential each of the internationally recognised sources of law pertaining to the convention has for contributing to bringing about a uniform interpretation. This should give a good indication as to the theoretical feasibility of establishing uniformity. Second, in order to show to what extent said sources of law help achieve uniformity in practice, an extensive case study of Article 74 is conducted. In order to embark further on what seems to be a much needed empirical work, one could have wished to conduct case studies of all the articles of the CISG, but this has not been possible within the limits of this article. This is, of course, an important caveat but the study of the unifying potential of the sources of law and the case study of Article 74 do in fact seem to provide a good basis for commenting on the question at hand.

Parts two and three are devoted to a general introduction to the CISG and the command for uniformity laid down in Article 7(1). Part four critically analyses the potential of the wording of the convention for establishing uniformity. This part discusses a number of weaknesses related to the CISG as an international convention and certain inherent linguistic flaws and the general lack of convergence of legal terms are also dealt with,. Part five discusses the quality of the travaux préparatoires as an interpretative guide and part six examines the capability of CISG precedents to create uniformity. In part seven the potential of scholarly writings for contributing to uniformity is examined. Part eight is dedicated to said case study of Article 74. As will become apparent the study shows that many of the (general) problems pertaining to the relevant sources of law (examined in parts four to seven) apply to the important issue of

[1] See *The Danish Weekly Law Report* 2012, at 281ff.

measuring damages and it does not seem that uniformity is being achieved to an acceptable extent.

2 An Introduction to the CISG

Throughout modern history the world has experienced a tremendous increase in the volume of trade among nations. In a legal perspective, this development has created a need for uniform rules governing the rights and obligations of the actors on the global market. With respect to international sale of goods, this need was accommodated in 1980 when the CISG was adopted at a diplomatic conference in Vienna.[2] The CISG is a legally binding piece of legislation, which applies to sale of goods between parties whose places of business are in different states provided that the states are contracting states or that the rules of private international law lead to the application of the law of a contracting state.[3] According to the preamble of the convention its overall purpose is to reduce the legal barriers in international trade by laying down uniform rules for the exchange of goods. There are many advantages associated with such rules. First and foremost, a uniform set of rules, which is applied fairly consistently, enables the parties to more accurately predict and allocate the legal and economic risks connected with the international sale of goods. Prior to the coming into force of the CISG, the parties had to rely on the rules of private international law to determine the applicable substantive law (*lex causae*). This almost invariably led to uncertainty since many rules of private international law are rather elusive. Moreover, the rules of private international law would often enable the parties to *shop* between forums with different choice of law rules. In some cases this enabled a party to *choose* which substantive law should apply.[4] This was and still is a great weakness of the rules of private international law as a tool for determining the choice of law in international disputes.

Prior to the entering into force of the CISG, the parties were obviously able to diminish above problems pertaining to the rules of private international law by including choice of law clauses in the contracts. However, it is a matter of fact that such clauses are often not included in commercial contracts due to either carelessness or the fact that the parties are not able to agree on them. Secondly, such choice of law clauses do not rule out the problem of legal uncertainty

[2] The CISG entered into force in 11 states on 1 January 1988, see further Baasch Andersen, Camilla, "The Uniform International Sales Law and the Global Jurisconsultorium" *Journal of Law and Commerce* 24 (2005) at 161. Today a total of 78 states have adopted the convention, see http://www.cisg.law.pace.edu/cisg/countries/cntries.html.

[3] See Art. 1(1) of the convention. According to Art. 6 the parties may choose to *opt out* of the convention and choose another set of rules to govern the contract, e.g. the rules of the forum.

[4] If a party can sue another party in more than one state, he will be able to *choose* between different substantive laws (*lex causae*) if the rules of private international law of the relevant states lead to different *lex causae*. The possibility of a party *choosing* a certain *lex causae* is problematic because it may cause the dispute to be settled by rules not contemplated by the parties when entering into the contract. There is a great deal of literature on the issue, see e.g. Bell, Andrew S. *"Forum Shopping and Venue in Transnational Litigation"* Oxford University Press 2003.

and unpredictability entirely. Thus, if the domestic law of party "A" is chosen as the governing law, party "B" will have to familiarise himself with the domestic law of party "A" in order to assess his legal rights and obligations in the event of a dispute.[5]

Undoubtedly, the CISG has brought along many advantages for parties involved in international exchange of goods. However, in order for the convention to meet its full potential for creating legal transparency and reducing the risks of cross-border trade, it is crucial that it is interpreted uniformly by the adjudicators[6] of the contracting states.

3 Article 7(1) and the Command for an International and Uniform Interpretation

The CISG deals with the important question of how it should be interpreted in Article 7(1) which provides that:

'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.'

As it appears, the convention provides that it shall be interpreted with regard to its "international character" and the need to promote "uniformity".[7] A plain literal interpretation of the words "is to be had" indicates that Article 7(1) contains a command for the adjudicator to interpret the convention in accordance with the aims set out in its provisions.[8] The reference to the "international character" indicates that the adjudicator must have regard to the origin and unique nature of the convention. In fact, said wording seems to imply that the convention should be perceived and interpreted as a self-contained, autonomous body of law.[9] This means that domestic sources of law or strictly domestic principles of interpretation should not be applied when dealing with matters within its sphere of application. The command that regard

[5] The parties may, of course, choose the rules of a neutral jurisdiction to govern the contract but this means that both parties will have to familiarise themselves with foreign rules.

[6] For purposes of convenience, throughout this article the term *adjudicator* is used as a collective term for both court judges and arbitrators.

[7] Further, it appears that in the interpretation of the CISG regard is to be had to the observance of "good faith" in international trade. This requirement will not be dealt with further in the present article since it is not necessary to answer the question at hand. For research on the requirement of good faith, see e.g. Keily, Troy, "Good Faith and the Vienna Convention on Contracts for the International Sale of Goods" *Vindobona Journal of International Commercial Law and Arbitration* 3 (1999), at 15 and Klein, John, "Good Faith in International Transactions" *Liverpool Law Review* 15 (1993), at 115.

[8] Lookofsky, *Joseph, "Digesting CISG Case Law: How Much Regard Should We Have?" Vindobona Journal of International Commercial Law and Arbitration 8*(2004) at 183.

[9] Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 123.

must be had to the need to promote "uniformity" is a natural consequence of the general unificatory aim upon which the whole convention rests[10] and achieving such uniformity appears to correspond well with and reinforce the aforementioned need for an autonomous and self-contained jurisprudence of the CISG. Thus, a uniform interpretation presupposes that a certain consensus is established among the adjudicators of the various contracting states as to how it should be applied.

Article 7(1) does not elaborate on how such autonomous and international jurisprudence should be established. The overall aims for the interpretation of the convention are clear but essentially it fails to specify how they should be attained. This means that the adjudicator is left with little authoritative guidance as to how to comply with the directives of Article 7(1). Of course, this is a weakness of the convention and an impediment to achieving uniformity. Even though it is not clear how the jurisprudence of the CISG should be crafted, it is clear that an interpretation, which is to be both international and uniform, must be based on the internationally recognised sources of law pertinent to the convention. Below it is examined how and to what extent these sources of law can contribute to establishing an internationally oriented interpretation of the convention.

4 The Language of the Convention

The most notable achievement of the CISG is that it lays down a set of uniformly worded provisions governing the international sale of goods. Indeed, this appears to be a necessary first step on the way towards legal uniformity and predictability in international commerce and therefore, it is clear that the wording of the convention must serve as the obvious starting point when dealing with matters within its sphere of application. Sometimes legal disputes may even be resolved simply by looking up the relevant provision(s). However, for at least two reasons the uniform wording of the convention does not automatically lead to a uniform interpretation. First, the CISG does not appear in a single original language text. There are six official versions that are equally authentic and for that reason no canonical version can be visited in order to resolve interpretative issues. This gives rise to certain problems: Consider, for instance, the notorious Article 3(1) which provides that:

[10] See further Bonell, Michael J., "*Article 7*" in Bianca C. M. & Bonell Michael J. "*Commentary on the International Sales Law*" Giuffré: Milan (1987) at 71-74 and Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 122-127.

'Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.'[11]

As it appears, the English version requires that a "substantial part" of the materials is supplied by the buyer for a contract not to be a sale under the convention. Conversely, the French version provides that the materials must qualify as "*une part essentielle*". This terminological difference gives rise to important concerns. Thus, the English word "substantial" and the French word "*essentielle*" seem to carry different meanings and this may well have the effect that in certain cases a contract is qualified as a sales contract under the English version but not under the French version.[12] Imagine for instance a contract stipulating that a buyer is to provide the seller with a component which is rather insignificant in terms of size and price compared to the final product as a whole. In general, such component, which could be a computer chip,[13] will not be qualified as "substantial" but if the chip is absolutely necessary to the functioning of the end product (perhaps the seller cannot manufacture the product without the component?) it may be regarded as "*essentielle*". In that case the contract would not be a sales contract under the French version.[14]

Schlechtriem and Schwenzer argue that discrepancies among the various official language texts should be resolved by consulting the English or occasionally the French version as they reflect the intentions of the *legislature* of the CISG more accurately. This is allegedly true because the negotiations at the Vienna Conference were carried out in those languages and because the

[11] Article 3(1) has been dealt with in detail by several CISG-scholars; see e.g. Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 64-73 with further references.

[12] See Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 64-66. Further, Bruno Zeller has noted that the German translation, which employs the word "*wesentlich*", corresponds neither with the English nor the French translation; cf. Zeller, Bruno, "International Trade Law – Problems of Language and Concepts?" *Journal of Law and Commerce* 23 (2003) at 43.

[13] See Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 66 where it is argued that a computer chip can even, in some cases, be regarded as '... so essential for the objects to be manufactured that it is more substantial than the tin and plastic of the machines that run on it, even though the latter materials may have cost more.'

See also Schroeter, Ulrich G., "Vienna Sales Convention: Applicability to "Mixed Contracts" and Interaction with the 1968 Brussels Convention" *Vindobona Journal of International Commercial Law and Arbitration* 5 (2001) at 74-75.

[14] Essentially three tests have been proposed in order to determine whether a certain portion of the materials is "substantial" pursuant to Article 3(1); (i) the economic value-test, (ii) the volume/quantity-test and (iii) the importance/essentiality-test, see Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 64-66.

See also Schroeter, Ulrich G., "Vienna Sales Convention: Applicability to "Mixed Contracts" and Interaction with the 1968 Brussels Convention" *Vindobona Journal of International Commercial Law and Arbitration* 5 (2001) at 74-75.

English language was used by the drafting committee.[15] However, these arguments do not appear persuasive since the apparent political unwillingness to adopt a single authentic version must be respected. Otherwise, English, and to a lesser extent French, would be the only authentic languages *de facto* and this would be in direct contravention of the resolution to adopt six equally authentic versions.[16]

Second, there are certain inherent problems regarding the incongruence of legal terms and interpretative principles in the international forum which may impact on the feasibility of creating legal uniformity.[17] Thus, well-known legal terms employed by the convention such as "foreseeability", "loss" and "possible consequence"[18] do not have universal and objective meanings which can be readily ascertained by the adjudicators. On the contrary, they already carry certain domestic prejudices and, as we shall see, this is prone to influence on the interpretation of the convention. With respect to local biases on legal terms and interpretation, particular note should be taken of the dichotomy between the common law and the civil law since these legal schemes represent different approaches to the law.[19] For instance, in the common law, statutes are normally interpreted narrowly because they are generally perceived as exceptions to the common law. By contrast, in civil law jurisdictions, statutes are generally the most important source of law and thus often subjected to expansive interpretation. Now, if these different legal approaches are applied by civil- and common law adjudicators, respectively, uniformity is unlikely to be achieved. Therefore, and this is one of the main purposes of Article

[15] See Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 130.

[16] Further, as will be developed below, one must always be cautious in attempting to discern the *will* or *intention* of the legislature for purposes of interpretation, see part 5.

[17] The *1969 Vienna Convention on the Law of Treaties* contains rules on the interpretation of treaties in articles 31-33 and therefore, it could be argued that it should be applied in the interpretation of the CISG. However, the Vienna Convention seems to have only little relevance for the interpretation of the CISG, as the former, according to article 1, applies solely to obligations that states have undertaken to each other.

The contracting states are (of course) obliged to give effect to the rules set out in particularly parts I-III of the CISG but said rules are not concerned with rights and obligations of states. Rather, they apply to the relationship between parties to an international sale of goods and as such they are to be interpreted according to the rules on interpretation set out in e.g. Article 7 of the CISG, cf. Honnold, John O, "*Uniform Law for International Sales under the 1980 United Nations Convention*" (4th edn, 2009) Kluwer Law International at 148-149.

In all, therefore, the Vienna Convention solely applies to the Part IV of the CISG ("Final Provisions") which contains certain obligations of the contracting states. One Scholar, Bruno Zeller, claims that the principles of interpretation laid down in the Vienna Convention may in fact contribute toward creating a uniform interpretation of the CISG even though the former convention is not directly applicable, cf. Zeller, Bruno, "*Four-Corners – The Methodology for interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*" (May 2003) [visited at Pace Law School at http://www.cisg.law.pace.edu/cisg/biblio/4corners.html on 1 April 2013] at Chapter 3, 3(b). Looking at Articles 31-33 of the Vienna Convention it is, however, difficult to see how these principles can contribute to said end.

[18] See article 74 and below part 8.

[19] On the differences and similarities of common law and civil law, see e.g. Markesinis, Basil (ed), "*The Clifford Chance Millenium Lectures. The Coming Together of the Common Law and the Civil Law*" (2000).

7(1), the adjudicators must set aside their domestic legal idiosyncrasies and adopt an *international* approach. However, certainly it is not an easy task for the adjudicators to disregard the legal tradition and methodology they are accustomed to and have practiced throughout perhaps their entire careers.

The draftsmen of the CISG apparently realised that the language could cause serious difficulties. Hence, the wording of the various provisions appears to have been chosen with great care and abstract legal concepts have been avoided where possible. Instead, as observed by Honnold, the convention generally employs a "plain" language referring to *'... things and events for which there are words of common content in the various official languages'*.[20] Articles 15 and 31 regarding formation of the contract and delivery of goods illustrate this point well. Thus, Article 15 provides that an offer becomes effective when it "reaches the offeree" and Article 31 provides that the seller's obligation to deliver consists – if the contract of sale involves carriage of the goods – in "handing the goods over" to the first carrier. Further, in Article 24 it is even specified what is exactly meant by the term "reaches" referred to in Article 15. Due to the strong domestic prejudices carried by certain legal concepts, the extensive use of plain language deserves support. However, the impact of this must not be overestimated. Even plain language leaves *room* for interpretation and other problems may ensue from using essentially non-legal language.[21]

5 The *Travaux Préparatoires*

When the wording of the convention does not provide sufficient guidance as to how a certain question should be decided, the adjudicator may find interpretative support in the *travaux préparatoires* (TP). The TP of the CISG comprise three legs: The first leg includes the deliberations of the UNCITRAL Working Group which was established in 1969. The Working Group was given a mandate to prepare a draft convention for the international sale of goods and by 1977 the Working Group had produced two draft conventions; a draft convention on sales and a draft on formation of the sales contract.[22] The second leg covers the review of the sales- and formation drafts by a full UNCITRAL-Commission[23] which was assembled in 1977. The Commission united the two drafts into one document (which came to be known as the 1978 Draft Convention on Contracts for International Sale of Goods) and recommended that

[20] See Honnold, John O, "*Uniform Law for International Sales under the 1980 United Nations Convention*" (4th edn, 2009) Kluwer Law International at 118.

[21] See Honnold, John O, "*Uniform Law for International Sales under the 1980 United Nations Convention*" (4th edn, 2009) Kluwer Law International at 118.

[22] See Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 3.

[23] The full commission consisted of 36 states, cf. Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 3.

a diplomatic conference would be convened in order for the document to be finalised and adopted. The third leg contains the proceedings at the Vienna Conference held in 1980.[24]

The volume of the TP is comprehensive and they are easily accessible through the official records of the proceedings in Vienna and the UNCITRAL year books. Prima facie this makes them well-suited for determining how the convention should be properly interpreted according to its legislature. However, there are a few issues that must be taken into consideration when assessing the interpretative value of the TP. First of all, some courts have traditionally not even recognised them as a relevant source of law. This view has been maintained particularly in the common law jurisdictions,[25] where many courts argue that the interpretation of the text itself must determine the scope of the legislation.[26] Further, said view has been supported by a number of judges and scholars such as, for example, Steyn, who contends that it is 'a fairy tale to think that the subjective views of members of Parliament, sitting in two separate chambers, can be determined'.[27]

The dismissive attitude towards the TP of common law courts has long standing but for some time now it has been at least somewhat relaxed. For example in the context of international treaties, in the landmark English case of *Fothergill v Monarch Airlines*,[28] the House of Lords (cautiously) appreciated that the common law approach to statutory interpretation should not apply to an international instrument such as the Warsaw Convention. Lord Wilberforce said that:

> «... I think that it would be proper for us, in the same interest, to recognise that there may be cases where such travaux préparatoires can profitably be used. These cases should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention."[29]

[24] See Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 3; Honnold, John O, "*Uniform Law for International Sales under the 1980 United Nations Convention*" (4th edn, 2009) Kluwer Law International at 119.

[25] An important exception to this is the United States where the legislative history is commonly recognised as a source of law, cf. Honnold, John O, "*Uniform Law for International Sales under the 1980 United Nations Convention*" (4th edn, 2009) Kluwer Law International at 120.

[26] See, Honnold, John O, "*Uniform Law for International Sales under the 1980 United Nations Convention*" (4th edn, 2009) Kluwer Law International at 121.

[27] See Steyn, Johan, "*Interpretation. Legal Texts and their Landscape*" in Markesinis, Basil (ed), "*The Clifford Chance Millenium Lectures. The Coming Together of the Common Law and the Civil Law*" (2000) at 85.

[28] [1981] A.C. at 251.

[29] [1981] A.C. at 278.

In the same case, Lord Wilberforce cited *James Buchanan & Co. Ltd. v Babco Forwarding & Shipping (U.K.)* Ltd. [30] where his Lordship said that an international convention "should be interpreted unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation." In *Fothergill v Monarch Airlines* their Lordships[31] further held that the TP should be examined in order to ascertain the meaning of the word "damage". In this connection Lord Diplock stated:

> »So I think the case is one where it is right to have recourse to the minutes of the conference at The Hague to see if they confirm or contradict or contain nothing capable of affecting the prima facie view which consideration of the terms of the convention itself has led your Lordships to form as to the meaning which the expression "damage" in art 26 was intended to bear.»[32]

In the context of UK legislation, in the equally important case of *Pepper v Hart*[33] the House of Lords confirmed the incipient recognition of the interpretative value of the TP by accepting that parliamentary debates were relevant to statutory interpretation.[34] Lord Griffiths recapitulates the development as follows:

> «The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves

[30] [1978] A.C. 141, 152

[31] Only Lord Fraser of Tullybelton found that the TP should not be taken into account, cf. [1981] A.C. at 287-289.

[32] [1981] A.C. at 283.

[33] *Pepper v Hart* [House of Lords] [1993] A.C. at 593.

[34] However, according to Lord Browne-Wilkinson, who gave the leading speech, this applies only if 'the legislation is ambiguous or obscure, or leads to an absurdity; the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect, and the statements relied upon are clear.'

> off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament?»[35]

With the increased recognition of the interpretative value of the TP even in the common law jurisdictions, it is probably safe to say that this source of law enjoys a widespread acceptance within the CISG area. This means that the TP must be taken seriously in the interpretation of the convention. The mere recognition of the TP does not, however, say anything about the extent to which they may contribute to elucidating the meaning and purpose of the various articles of the convention. Indeed, there is extensive legal history pertaining to several articles and in some cases the TP certainly are helpful to clarifying doubts as to how the convention should be interpreted. Yet, in many cases it seems a rather unhelpful task to establish for what reasons the contracting states collectively decided to adopt a certain article (or provision) in its present shape. This is true for several reasons but perhaps most importantly because the negotiations do not always expose a unified and clear intent which can be readily applied. Rather, on close scrutiny, the TP reveal great controversy and disagreement as to the scope of several articles and the final wording often represents a compromise among different legal systems and traditions.[36]

Further, it must be appreciated that the TP are merely historic manifestations of opinions and intentions, which may not correspond well – or perhaps at all – with the current interests of the contracting states. Thus, the negotiations reflected in the TP were carried out more than 25 years ago and subsequent changes in society could possibly mean that they no longer represent the positions of the contracting states. As noted by Zeller the demise of the Eastern Bloc is a good example of this.[37] For example, the views expressed by the Eastern countries prior to the fall of the Iron Curtain are most likely of only little relevance today since the political context has changed (remarkably) in these jurisdictions. And even if major, political reforms have not

[35] *Pepper v Hart* [House of Lords] [1993] A.C. at 617. Also see Lord Carswell in *Harding v Wealands35*, referring to another House of Lords case: '*Pepper v Hart* has been out of judicial favour in recent years (no doubt largely because there were some instances of its over-use, though there have been some trenchant and irreconcilable critics), and courts have constantly striven to avoid resorting to it. I do consider, however, that the principle has a place in statutory interpretation. As Lord Nicholls of Birkenhead remarked in *R (Jackson) v Attorney General* [2006] 1 AC 262, 291-292, para 65, it would be unfortunate if *Pepper v Hart* [1993] AC 593 were now to be sidelined, as there are occasions when ministerial statements are useful in practice as an interpretative aid, perhaps especially as a confirmatory aid. I would simply remark myself that it would be wilful blindness for courts to deprive themselves of its assistance in proper cases. The conditions for the application of the *Pepper v Hart* principle have been authoritatively stated in a number of cases and do not require repetition.' See further the several expressions by Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme* [2001] 2 AC 349 at 396-399, *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at 840-841, paras 56-59 and *R (Jackson) v Attorney General* [2006] 1 AC 262 at 291-292, paras 65-66.

[36] See also Felemegas, John (eds), "*An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*" Cambridge University Press 2007 at 19.

[37] Zeller, Bruno, "Four-Corners – The Methodology for interpretation and Application of the UN Convention on Contracts for the International Sale of Goods" (May 2003) [visited at Pace Law School at http://www.cisg.law.pace.edu/cisg/biblio/4corners.html on 1 April 2013] at Chapter 3, 3(c).

occurred, the interests of the contracting states may have changed due to modern trends such as globalisation and the emergence of e-commerce.[38] Last, even though the TP are generally quite comprehensive, they do not provide sufficient guidance on many key issues. This point is developed further below.[39]

6 Case Law on the Convention

6.1 The Precedent Value of CISG Case Law

As the only source of law which shows how the convention is actually interpreted, case law is perhaps the most important vehicle for establishing uniformity. However, due to first and foremost the international character of the convention, the use of case law raises several questions. First, it must be clarified what overall approach to case law the courts and arbitral tribunals of the contracting states must adopt. The CISG is an international convention but in contrast to several other conventions, an international court of law vested with the power to authoritatively decide issues pertaining to it, has not been established. Rather, convention related issues are decided by the various domestic courts and arbitral tribunals which are competent in accordance with either the rules of private international law or an agreement deciding on the forum. The lack of an established court hierarchy makes it necessary to ascertain to what extent the adjudicators should have regard to foreign precedents. The convention does not deal expressly with the issue but the command of Article 7(1) that regard should be had to its "international character" and the need to promote "uniformity" indicates that the adjudicator should – at least – consider foreign court decisions.[40]

Since the exact scope of the duty to consider foreign court decisions cannot be elucidated from the convention itself, it seems necessary to look for an appropriate approach in the domestic law of the contracting states. Overall, two different approaches can be identified; the common law and the civil law approach. In the common law the doctrine of *stare decisis* applies but if this were transplanted - *mutatis mutandis* – to the convention, in certain circumstances the domestic courts would be legally bound by foreign court decisions. This would be quite radical and such an expansive interpretation of Article 7(1) does not seem to have bearing in the wording of the CISG or the TP. Further, as a matter of public international law, such duty cannot be imposed on the domestic courts without an express and clear agreement to this effect

[38] Zeller, Bruno, "Four-Corners – The Methodology for interpretation and Application of the UN Convention on Contracts for the International Sale of Goods" (May 2003) [visited at Pace Law School at http://www.cisg.law.pace.edu/cisg/biblio/4corners.html on 1 April 2013] at Chapter 3, 3(c).

[39] See part 8.3.

[40] Lookofsky, Joseph, "Digesting CISG Case Law: How Much Regard Should We Have?" *Vindobona Journal of International Commercial Law and Arbitration* 8 (2004) at 182-183.

among the contracting states.[41] For these reasons it is not conceivable that domestic courts, including the common law courts, will be - or consider themselves - bound by foreign court decisions. It is well known that the approach of the civil law jurisdictions is somewhat different. Here, court decisions, even those handed down by courts at the highest level of the court hierarchies, are not binding. However, the decisions do have persuasive value and in practice the courts often have regard to decisions delivered by superior courts or even courts at the same level. This is indeed a more flexible approach to the binding force of precedent which allows the courts to disregard decisions which are outdated or perhaps even erroneous.[42] Moreover, it is not in contravention of public international law and appears to correspond somewhat better with the purpose of Article 7(1). Most commentators and an increasing number of courts appear to agree on this.[43] For example, Hackney has observed that:

> «When interpreting the Convention, a court should look to other courts' interpretations of the Convention, including the interpretations of courts from other countries. These interpretations, however, would not be binding, but only persuasive. The use in the U.S. of case law to interpret the Uniform Commercial Code (UCC) can serve as a model for courts using case law to interpret the Convention. No state within the U.S. is bound by an interpretation of the UCC from another state, but the interpretations of the UCC from other jurisdictions are extremely persuasive.»[44]

Furthermore, cases from, inter alia, the U.S. and Italy such as *Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.r.l.*[45] and *Al Palazzo S.r.l v. Bernardaud di Limoges S.A.*[46] evidence that foreign decisions, when considered, are actually considered as being merely persuasive. This also follows from the bulk of cases reviewed in the case study of Article 74 conducted below.[47] It seems clear that the command to have regard to foreign cases should be understood in accordance with the civil law approach. However, this approach does not itself make it clear what value foreign cases have and when they should be taken into account. For example, it is not clear what the adjudicators should do if the relevant CISG case law is

[41] See further Baasch Andersen, Camilla,"The Uniform International Sales Law and the Global Jurisconsultorium" *Journal of Law and Commerce* 24 (2005) at 167.

[42] Whether a precedent is applied or not thus depends entirely on the cogency of the reasoning by relevant the courts, see for instance Lookofsky, Joseph, "Digesting CISG Case Law: How Much Regard Should We Have?" *Vindobona Journal of International Commercial Law and Arbitration* 8 (2004) at 184.

[43] For further references, see Baasch Andersen, Camilla, "The Uniform International Sales Law and the Global Jurisconsultorium" *Journal of Law and Commerce* 24 (2005) at 167.

[44] Hackney, Philip, "Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?" *Louisiana Law Review* 61 (2001) at 479.

[45] Decided on 17 May 1999 by U.S. District Court, Eastern District of Louisiana (case no. 99-0380), see http://cisgw3.law.pace.edu/cases/990517u1.html.

[46] Decided on 26 November 2002 by Tribunale di Rimini (case no. 3.095), see http://cisgw3.law.pace.edu/cases/021126i3.html.

[47] See part 8 (in particular part 8.4).

ambiguous or contradictory on a certain matter. Further, in practice the discrepancies in the procedural law of the various contracting states may deter the adjudicators from applying foreign cases even when they are relevant prima facie.

6.2 Contradictions in CISG Case Law

In two recent articles Mazzacano argues that, with respect to the interpretation of Article 79, we are experiencing an increased consistency in case law.[48] If this analysis is accurate it is indeed an encouraging development. However, as a matter of fact much of the case law dealing with the convention *is* contradictory and in some areas rather consistent divergences have emerged. This is, of course, an impediment to achieving uniformity and it makes it difficult for the adjudicators to ascertain what interpretation of the convention should be adopted. Article 39(1), which provides that notice should be given by the buyer within "reasonable time" in cases of non-conformity, serves as a good example of an area where a consistent interpretative divergence has emerged among the courts of two different legal systems. Thus, in several decisions the Austrian Supreme Court has interpreted "reasonable time" as being a period of 14 days[49] whereas the German Federal Supreme Court has set the limit at one month.[50] At first, this may seem insignificant but only minor discrepancies as to the interpretation of such key articles may harm the pursuit of uniformity and cause the parties to speculate where legal proceedings should be instigated. For example, a buyer who seeks legal redress against a seller for non-conformity may be inclined to try to swap forums from the Austrian courts to the German courts if his notice is not given within two weeks and this is certainly not what is intended by the convention. Due to the lack of a central and authoritative court, it is difficult to see how such divergent interpretations should be overcome. Perhaps it could be argued that the adjudicator should merely keep in mind the command of Article 7(1) and extrapolate the *proper* interpretation from all relevant international case law on the disputed matter. However, this is not easily done and if case law (together with the additional sources of law discussed in the present article) truly does not provide any clear guidance, the adjudicator may find himself in an *interpretative deadlock*.

It is disputed how such deadlocks should be resolved. Bonell, argues that, in cases of insurmountable divergences, the only possible response is to fall back on the rules of private

[48] See Mazzacano, Peter J. "The Treatment of CISG Article 79 in German Courts: Halting the Homeward Trend" *Nordic Journal of Commercial Law* (2012#2) at 1-30 and "Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG" *Nordic Journal of Commercial Law* (2011#2) at 1-54.

[49] Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 631.

[50] Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 633.

international law. In this way, Bonell argues, the adjudicator should employ the interpretation applicable according to the designated *lex causae*.[51] On the other hand Felemegas, argues that this alternative "should be avoided by anyone who believes that uniformity is a goal that is worth pursuing"[52] and that such an approach would jeopardise the "a-national" frame of mind which is the ultimate goal of the convention. Instead, Felemegas insists that the problem should be solved by a "... careful consideration of foreign experience".[53] Regrettably, neither of said propositions is persuasive. Bonell's approach is in direct contravention of Article 7(1) and Felemegas merely reiterates the command for an international and uniform interpretation without specifying how the deadlock should be resolved. Moreover, in practice, it seems unlikely, at least in the Danish jurisdiction, that a court would revert to the rules of private international law in order to find substantive rules of interpretation, perhaps from distant jurisdictions such as Cuba and Mongolia, which could be applied in the interpretation of the convention. Thus, it must be appreciated that divergent interpretations do occur and sometimes there will be deadlocks which cannot be resolved by simply referring to the command of Article 7(1) or the rules of private international law.

6.3 Procedural Discrepancies

There are many differences in the procedural law of the various contracting states which may impact how and to what extent foreign case law is applied by the courts and arbitral tribunals. All of these cannot be dealt with here but (again) it is possible to identify two different approaches to procedural law among the contracting states: the civil law- and the common law approach. According to the former, the courts normally have an ex officio duty to discover and apply the law, including case law, which is pertinent to the matter at hand. This is also known as the *jura novit curia* approach.[54] Such duty does not exist (to the same extent) in most of the common law, where the review of the courts is based more firmly on the pleadings of the parties.[55] In this regardFentiman has noted that "the English judge has not traditionally been regarded, as he might be in many non-common-law jurisdictions, as a custodian of a body of

[51] Bonell, Michael J., "Article 7" in Bianca C. M. & Bonell Michael J. "*Commentary on the International Sales Law*" Giuffré: Milan (1987) at 92.

[52] Felemegas, John, "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation" [visited at Pace University Law School at http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html on 1 April 2013] at 6 (a).

[53] Felemegas, John, "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation" [visited at Pace University Law School at http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html on 1 April 2013] at 6 (a).

[54] See further, Salung Petersen, Clement, "*Treaties in Domestic Civil Litigation: Jura Novit Curia? Nordic Journal of International Law* 80 (2011) at 369-402.

[55] See also Baasch Andersen, Camilla, "The Uniform International Sales Law and the Global Jurisconsultorium" *Journal of Law and Commerce* 24 (2005) at 171.

rules which morality and public policy require him to apply. Traditionally, he is perceived more as an umpire, whose task is to adjudicate in the dispute between the parties before him on the terms they have set for themselves."[56]

The civil law approach seems to facilitate best the aim of establishing a uniform interpretation of the convention. Thus, the duty of the court to *actively* identify the law (including pertinent case law) will obviously – other things being equal – increase the likelihood of CISG precedents being considered. Further, the impartiality of the adjudicator ensures that the case law, which is considered by the court, is selected in an unbiased way for the sole purpose of laying down the law. The common law approach, on the other hand, seems to involve a considerable risk that important precedents are ignored since it is primarily for the parties and their respective lawyers to produce them. Thus, lawyers are always arguing a case from the client's point of view and obviously precedents will be ignored if they do not support his case.

The discrepancies in the procedural law of the contracting states make it difficult for the adjudicators to ascertain the exact circumstances under which foreign decisions have been delivered. This is problematic because an adjudicator who is unsure and perhaps even uncomfortable with the proceedings of a foreign case is less likely to consider it persuasive. In fact, it does not seem unlikely that he would disregard a case entirely on this basis. Therefore, it must be assumed that said discrepancies have an adverse effect on the pursuit of uniformity and unfortunately this seems to be a systemic weakness which is difficult to overcome. At least it does not seem possible to mend it in a manifest way (e.g. by law) unless major amendments were made to the CISG regime.

7 Scholarly Writings

Since scholarly writings do not originate from an authoritative source it is debateable whether they should be regarded as a source of law at all. Traditionally, particularly in the common law jurisdictions, it seems to have been the position that this was not the case.[57] However, for quite some time this restrictive attitude has been relaxed in most common law jurisdictions.[58] A good example isthe case of *Fothergill*.[59] As mentioned above this case concerned the interpretation of the Warsaw Convention but most commentators seem to agree that its *ultima ratio* applies to

[56] See Fentiman, Richard, "Foreign law in English courts" 108 *Law Quarterly Review* (1992) at 143.

[57] A prominent exception to this is the United States, cf. Honnold, John O, "*Uniform Law for International Sales under the 1980 United Nations Convention*" 4th edn, (2009) Kluwer Law International at 130.

[58] This includes, for example, the USA, cf. Honnold, John O, "*Uniform Law for International Sales under the 1980 United Nations Convention*" 4th edn, (2009) Kluwer Law International at 123-124.

[59] [1981] A.C. at 251.

the interpretation of treaties in general.[60] In *Fothergill* the House of Lords expressly recognised that recourse may be had to literature as aid to the interpretation of the legislative text. *Inter alia*, Lord Wilberforce noted that "... The text-books and articles, however, do take the matter further".[61] Also, his Lordship referred to various scholarly writings showing a consensus as to the meaning of the term "avarie" ("damage").[62] Moreover, Lord Diplock made the following important statement:

> «To a court interpreting the Convention subsequent commentaries can have persuasive value only ... It may be that greater reliance than is usual in the English courts is placed upon the writings of academic lawyers by courts of other European states where oral argument by counsel plays a relatively minor role in the decision-making process. The persuasive effect of learned commentaries, like the arguments of counsel in an English court, will depend upon the cogency of their reasoning.»[63]

Above all Lord Diplock's statement must be construed as an unequivocal recognition of scholarly writings as a source of law in international contexts. The reservation concerning the cogency of the reasoning in such writings seems rather unsurprising and common place. Thus, for many reasons, including obvious democratic ones, the point of view that scholarly writings can be persuasive only (as opposed to binding) seems to be accepted in most jurisdictions (including the common law jurisdictions). This means that the differences between the approaches to literature as a source of law in the contracting states are at a minimum.

[60] See e.g. Felemegas, John, "*The United Nations Convention on contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*" Kluwer Law International at 132 and Honnold, John O, "*Uniform Law for International Sales under the 1980 United Nations Convention*" 4th edn, (2009) Kluwer Law International at 123-124. See also [1981] A.C. 251 at 270 per Lord Wilberforce: "It [the appeal] does, in addition, require discussion of some important issues concerned with the interpretation of treaties."

[61] [1981] A.C. at 274.

[62] [1981] A.C. at 272-275.

[63] [1981] A.C. at 284. See also per Lord Scarman: 'I come now to consider to what aids our courts may have recourse in interpreting an international convention.... Rules contained in an international convention are the outcome of an international conference; if, as in the present case, they operate within the field of private law, they will come in the consideration of foreign courts; and uniformity is the purpose to be served by most international conventions, and we know that unification of the rules relating to the international air carriage is the object of the Warsaw Convention. It follows that our judges should be able to have recourse to the same aids to interpretation as their brother judges in the other contracting states.... To deny them this assistance would be a damaging blow to the unification of the rules which was the object of signing and then enacting the Convention. Moreover, the ability of our judges to fulfil the purpose of the enactment would be restricted, and the persuasive authority of their judgments in the jurisdictions of the other contracting states would be diminished. We know that in the great majority of the contracting states the legislative history, the "*travaux préparatoires*", the international case law ("*la jurisprudence*"), and the writings of jurists ("*la doctrine*") would be admissible as aids to the interpretation of the Convention. We know also that such sources would be used in the practice of public international law. They should, therefore, also be admissible in our courts: but they are to be used as aids only. Aids are not a substitute for the terms of a convention: nor is their use mandatory. The court has a discretion.'

The appreciation of scholarly writings as a source of law in the CISG area seems to be a necessary precondition for them to help bring about uniformity. However, the mere appreciation does not tell us to what extent they are actually capable of doing this. Basically, scholarly writings are carefully prepared documents giving well-informed and easily accessible opinions on various legal issues of the convention. This makes them well-suited for clarifying what the law is and several commentators agree that the increasing volume of literature on the CISG will provide good help on the way towards achieving uniformity.[64] The said positive attitude towards literature as a vehicle for creating uniformity is certainly not unfounded. Yet, it must be borne in mind that the literature on the CISG is not a consensual body of opinions. Rather, as will be further examined below, there is much controversy among CISG scholars as to how many issues should be dealt with and in such cases literature does not take us much further.

8 Uniformity and the Measurement of Damages: A Case Study of Article 74

8.1 Preliminary Remarks

The above analysis has shown that there are many obstacles to achieving a uniform interpretation of the CISG. The purpose of this part is to examine how these obstacles impact on achieving uniformity with respect to the important issue of measuring damages set out in Article 74. In part 8.2. the purpose and content of Article 74 is explained and in part 8.3. three obstacles to achieving uniformity are dealt with. In part 8.4. it is examined what effect CISG case law has on the interpretation of Article 74. This is done by examining to what extent courts and arbitral tribunals actually have regard to foreign decisions when deciding matters pertaining to Article 74. In part 8.5. it is discussed to what extent uniformity is being achieved with respect to Article 74.

8.2 The Purpose and Content of Article 74[65]

The purpose of the foreseeability doctrine laid down in Article 74 is to provide a mechanism for measuring damages in contracts governed by the CISG.[66] The article reads:

[64] See e.g Hackney, Philip, "Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?" *Louisiana Law Review* 61 (2001) at 476.

[65] There is extensive commentary on Article 74, see e.g. Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods* (CISG)" 3rd ed. (2010) Oxford University Press at 999-1026 with further references. See also Kröll, Stefan, Mistelis, Loukas & Viscasillas, Pilar Perales: *UN Convention On Contracts for the International Sale of Goods (CISG)* at 990-1011 with further references and Zeller, Bruno, "*Damages under the Convention on Contracts for the International Sale of Goods*" 2nd ed. (2009) Oxford University Press at 113-127.

> '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.'

Article 74 is based on the principle of full recovery. Thus, the aggrieved party is to be placed in the same position he would have been in had the contact been duly performed. This applies to claims made by both sellers and buyers.[67] The principle of full recovery is, however, subject to an important limitation since the amount of damages cannot 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."

As it appears, the Article provides for both a subjective and an objective test of foreseeability.[68] The former is concerned with the actual foresight of the aggrieved party and takes into account, for example, any special claims made about potential losses at the time of the conclusion of the contract. The latter provides for a test which is based on the reasonable expectations of the aggrieved party.[69] This makes it a normative test.

Article 74 is obviously of great importance and therefore, it is essential that it is interpreted homogenously by the courts and arbitral tribunals of the contracting states. If not, the purpose of having a uniform rule for measuring damages seems to collapse as the parties are unable to ascertain what they are entitled to in cases of breach.

[66] On the calculation of damages according to CISG Articles 75 and 76, see e.g. CISG-AC Opinion No. 8, Calculation of Damages under CISG Articles 75 and 76. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA. Adopted by the CISG-AC following its 12th meeting in Tokyo, Japan, on

15 November 2008. Available at *Nordic Journal of Commercial law* (2009#1) at http://www.njcl.utu.fi/1_2009/commentary1.pdf.

[67] See further Schlechtriem, Peter & Schwenzer, Ingeborg, *"Commentary on the UN Convention on the International Sale of Goods (CISG)"* 3rd ed. (2010) Oxford University Press at 1002.

[68] Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 1019-1020. See further Kröll, Stefan, Mistelis, Loukas & Viscasillas, Pilar Perales: *UN Convention On Contracts for the International Sale of Goods* (CISG) at 1003.

[69] Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 1019-1020.

8.3 Three Obstacles to a Uniform Interpretation of Article 74

The introduction of a uniform mechanism for measuring damages in Article 74 is, of course, an important first step towards achieving a homogenous interpretation in practice. However, there are at least three obstacles that impede upon such interpretation being achieved by the courts and arbitral tribunals. The first obstacle has to do with the vagueness of Article 74. Thus, some important questions are left unanswered and this makes a lot of room for interpretational discrepancies. For example, the article does not designate a clear method for calculating "the loss (...) suffered by the other party as a consequence of the breach."[70] This is problematic because a number of important specifics regarding calculation of losses thereby remain murky. Of course this is an inherently difficult question and no matter how such a basic limitation mechanism is drafted it will leave room for interpretation and dissent. But perhaps more could have been done to deal with some of these controversial questions.

The second obstacle, which is closely related to the first, has to do with the many prejudices pertaining to Article 74. Thus, the limitation mechanism laid down in the article carries significant local prejudices and this makes it likely for the courts and arbitral tribunals to revert to *lex fori* when assessing damages. This is a problem because losses are calculated differently in the various contracting states (even among the European states). For example, in English law damages are measured pursuant to the well-known principles laid down in the landmark case of *Hadley v Baxendale* from 1854. In this case the court held that damages are recoverable only if the loss has been "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." In Denmark and several other states damages are measured according to the doctrine of adequate causation.[71] This doctrine used to be construed in accordance with the concept of "objective probability" laid down in von Kries' article "Über den Begriff der objektiven Möglichkeit und einige Anwendungen desselben"[72] but today most scholars seem to agree that it comprises a variety of different considerations such as (i) foreseeability, (ii) causal proximity, and (iii) the purpose of the contract in question.[73] Even though it is difficult to pin down the exact contents of the doctrine of adequacy, it is probably safe to say that it differs somewhat from the *Hadley*-rule. This is also emphasised by, among others, Lookofsky, who argues that the "kind of

[70] See below part 8.5. for more examples.

[71] See e.g. Ehlers, Andreas Bloch "*Om adækvanslæren i erstatningsretten*" (2011) at 77-182.

[72] See Kries, Johannes von: *Über den Begriff der objektiven Möglichkeit und einige Anwendungen desselben, 12 Vierteljahrsschrift für wissenschaftliche Philosophie* (1888) at 179.

[73] See e.g. Ehlers, Andreas Bloch "*Om adækvanslæren i erstatningsretten*" (2011) at 118-147, 81-117 and 148-180. There is quite a lot of literature on this topic, see e.g. Hart, H.L.A. og Honoré, Tony: *Causation in the Law*, 2nd. ed. (1985), Lookofsky, Joseph, "*Consequential Damages in Comparative Context*" Jurist- og Økonomforbundets Forlag (1989), Green, Leon: The Causal Relation Issue in Negligence Law, 60 *Michigan Law Review* (1961-1962) at 543, Foreseeability in Negligence Law, *Columbia Law Review* 61 (1961) at 1401 and The Rationale of Proximate Cause, (1930).

conceptual thinking" embodied by *Hadley* does not correspond entirely with the doctrine of adequate causation laid down in Danish law.[74]

The third obstacle concerns the quality of the TP. As developed above in some cases this source of law may give helpful support as to how concrete issues should be decided. With respect to Article 74 one could, for example, expect them to reveal how the above issue regarding the calculation of loss should be dealt with and how the foreseeability limitation should be properly understood. Perhaps one could even expect them to deal with more specific questions such as how non-pecuniary loss should be assessed. However, the TP do not give any clear guidance as to how these questions, or any other questions for that matter, should be dealt with. Rather, they reveal significant disagreement as to how the article should be understood. Already in the Working Group there was disagreement about the proper understanding of the principle of full compensation. Most speakers in the group agreed that some restriction on consequential damages was necessary but some were concerned that the foreseeability test of the ULIS was not sufficiently objective.[75] Certain representatives expressed the opinion that the foreseeability limitation was not even necessary.[76] Further, some representatives, including the USSR, preferred that full damages for all proven loss be allowed.[77] The Working Group took note of these reservations but decided to adopt the following version of the foreseeability doctrine:

> "Such damages cannot 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 which he then knew or ought to have known, as a possible consequence of the breach of contract.»[78]

Before the Commission it was proposed that the foreseeability doctrine, as adopted by the Working Group, was replaced by the following paragraph:

> «Such damages shall not include compensation for loss of a nature which the party in breach could not reasonably have foreseen at the time of the conclusion of the contract

[74] Lookofsky, Joseph, "*Consequential Damages in Comparative Context*" Jurist- og Økonomforbundets Forlag (1989) at 176.

[75] Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 190.

[76] Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 190.

[77] Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 238 and 253.

[78] Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 190.

> or of an extent which would be excessive in relation to the price, the ability of the party in breach to foresee or prevent the loss as well as other circumstances of the case.»[79]

This proposal was supported by arguments alleging that the text prepared by the Working Group 'contained a limitation on the amount of damages which was hypothetical and gave little effective guidance in practice'. However, there was only little support for this proposal since it was considered to introduce too many difficulties. Thus, the Commission found that no substantial change was necessary and gave the Working Group's proposal its unanimous approval with only minor editorial amendments.[80] This proposal was incorporated into the 1978 Draft Convention.[81] From the proceedings at the Diplomatic Conference it appears that Pakistan proposed to amend the foreseeability doctrine to the effect that damages could not exceed the "reasonable expectation of" loss.[82] The purpose of this amendment was presumably to clarify that 'damages for loss of profit could not be claimed automatically when, for example, the party in breach could not reasonably have foreseen the risk of loss.'[83] However, this proposal was rejected and the foreseeability doctrine laid down in the present Article 74 was adopted by 48 votes to none[84] on the 10th plenary meeting.[85] Thus, no amendments were made to the foreseeability doctrine at the Diplomatic Conference.[86]

The TP of the foreseeability doctrine evidence well the general problems pertaining to their usefulness as a source of law. First of all, comments on the doctrine are sparse and this makes it difficult to discern clear guidance as to the extent of liability under the convention. For example, it is not specified how essential concepts such as "loss", "foreseeability", and "possible

[79] Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 352.

[80]Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 352.

[81] Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 352 and 404. Further, the Commission asked the Secretary-General to prepare a commentary on the various provisions of the draft. This document, which is known as the "secretariat commentary", reflects the Secretary-General's impression of the Commission's work and it is the closest one comes to an official commentary on the Convention. However, despite the complexity and importance of the foreseeability doctrine, the secretariat commentary seems to contribute with merely one clarifying note on its applicability, see ibid at 404. Thus, it is made clear that the foreseeability-limitation on the principle of full compensation applies even in cases of fraud; see ibid at 449-450.

[82] Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 615 and 703.

[83] Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 615.

[84] There were two abstentions, cf. Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 756.

[85] Honnold, John O, "*Documentary History of the Uniform Law for International Sales*" (1989) Kluwer Law and Taxation Publishers at 356.

[86] Compare ibid at 352 and 756.

consequence" should be construed or if the doctrine as such should be interpreted expansively or narrowly in comparison with e.g. the Hadley rule or the doctrine of adequate causation. We can observe the genealogy of the doctrine but the deliberations carried out at the various stages of its genesis do not clarify how far liability for breach of contract should be extended. Second, the comments that actually do concern the doctrine fail to set out unified and unequivocal guidelines as to how it should be properly understood. Rather, they contain mostly abstract observations on the vagueness of the doctrine and unfeasible proposals regarding the extent of liability. For example, we can learn that some representatives criticised the doctrine for providing too little effective guidance and that some wished to allow for all proven loss to be recovered. Furthermore, most proposals to amend the doctrine were firmly rejected by the Working Group and the Commission respectively, so even if they had been instructive on certain points they would not have been of much help. In all, therefore, the only useful piece of information seems to be the Secretary General's commentary on the applicability of the foreseeability doctrine in cases of fraud.

The said obstacles to uniformity seem to leave the pursuit of uniformity almost entirely to the adjudicators and the legal scholars. Below it is examined to what extent case law and literature contribute to achieving uniformity with respect to the calculation of damages.

8.4 The Effect of CISG Case Law: Is Regard Actually Being Had?

It is a basic presupposition for achieving uniformity that the adjudicators actually do have regard to foreign case law when measuring damages pursuant to Article 74. If they fail to do so each state is prone to develop its own (domestic) understanding of the article. It is not an easy task to examine whether such due regard is being had. The main reason for this is that there are no rules or principles providing clear guidance as to when foreign decisions should be taken into account. Rather, this is highly controversial and therefore it is difficult to say when a certain adjudicator should apply the *ratio* of a foreign decision in order to solve a particular problem.[87] Further, the only empirical data available to test this are the transcripts of CISG cases. The transcripts are indeed helpful but they do not reveal everything that has been said and done during the cases and for that reason it can hardly be assumed that all foreign cases, having in some way affected the courts' or arbitral tribunals' decisions, appear from them. To the extent this is true, it is, of course, impossible to ascertain what influence foreign cases may have had. Furthermore, official (or at least reliable) translations are not always available for CISG cases. This may also exclude valuable data from the examination. Last, it is important to note that in some jurisdictions courts do not, by tradition, refer to foreign case law (or other

[87] This is not to say that there are not cases where the courts obviously should have considered foreign case law. For a good example of this, see Henschel, René Franz "Danske domstoles anvendelse af fremmed retspraksis som set i sager om mangler i internationale køb reguleret af CISG", *Erhvervsjuridisk Tidsskrift* (2006) at 134.

sources of law for that matter) when interpreting international instruments but this does not necessarily mean that such sources are disregarded.

Due to said difficulties it cannot be answered unequivocally whether foreign cases are being duly considered. However, this need not lead to some kind of methodological defeatism since there are indeed some ways to test this. First, it can be examined to what extent *foreign case law* is actually being cited by the various courts and arbitral tribunals in the CISG area. Below this

is done by way of a systematic review of CISG cases decided in the period from 2005 to 2013.[88] Second, by looking at the said cases, it can be ascertained to what extent *domestic case law* is

[88] In the present review a total of 107 cases dealing with Article 74 have been examined. The cases have been identified by searching the CISG database at Pace Law School which contains a comprehensive collection of cases on Article 74 decided from the entering into force of the convention to the present. The review comprises cases decided from January 2005 to February 2013 only. Unfortunately, the transcripts are not always sufficiently comprehensive or detailed to ascertain how Article 74 has been construed. In such cases the transcripts have been excluded from the review (save for some cases where it has been possible to obtain the original case transcript from the local jurisdiction in question). Further, to this author it has only been possible to examine case transcripts in Danish, German, English, and Spanish. The reviewed cases, which are all available at http://www.cisg.law.pace.edu/cisg/text/digest-cases-74.html, are: Decision by Bundesgerichtshof of 26 September 2012 (no VIII ZR 100/11), decision by Bundesgerichtshof of 18 July 2012 (no VIII ZR 337/11) decision by Bundesgericht of 17 April 2012 (no 4A_591/2011), *Al Hewar Environmental & Public Health Establishment v. Southeast Ranch*, LLC and Joel Gutierre (decision by U.S. District Court, Southern District of Florida of 7 November 2011 (no 10-80851)), *Semi-Materials Co., Ltd. v MEMC Electronic Materials, Inc.*, et al. (decision by U.S. District Court, Eastern District of Missouri, Eastern Division of 10 January 2011 (no 4:06CV1426 FRB)), decision by LG Lübeck of 30 December 2010 (no 6 0 160/10, decision by Juzgado Nacional en lo Comercial de Buenos Aires of 5 October 2010 (no 5), decision by Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires of 7 October 2010 (no unavailable), decision by HG Zürich of 22 November 2010 (no HG070223/U/dz), decision by OLG Hamm of 30 November 2010 (no 19 U 147/09), *Castel Electronics Pty. Ltd. v Toshiba Singapore Pte. Ltd.* (decision by Federal Court of Australia, Victoria District Registry, General Division of 28 September 2010 (no VID 141 of 2008)), decision by Audiencia Provicial de Murcia of 15 July 2010 (no 439/10), *ECEM European Chemical Marketing B.V. v The Purolite Company* (decision by U.S. District Court, Eastern District of Pennsylvania of 29 January 2010 (no 05-3078)), decision by Bundesgericht of 17 December 2009 (no 4A_440/2009), decision by LG Stuttgart of 29 October 2009 (no 25 0 99/09), decision by Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce of 19 October 2009 (no T-6/08), decision by LG Stuttgart of 15 October 2009 (no 39 0 31/09 KfH), *Doolim Corp. v R Doll, LLC*, et al. (decision by U.S. District Court, Southern District of New York of 29 May 2009 (no 08 Civ. 1587 (BSJ) (HBP)), decision by Audiencia Provicial de Alicante of 24 April 2009 (no 72/2009), *Barbara Berry, S.A. de C.V. v Ken M. Spooner Farms, Inc.* (decision by U.S. District Court, Western District of Washington at Tacoma of 3 April 2009 (no C 05-5538FDB)), decision by OLG Hamm of 2 April 2009 (no 28 U 107/08), decision by Audiencia Provicial Madrid of 10 March 2009 (no 759/2008), decision by Obergericht of 3 March 2009 (no ZOR.2008.16/eb), decision by Tribunal contonal du Valais of 28 January 2009 (no C1 08 45), decision by Rechtbank Breda of 16 January 2009 (no 197586/KG ZA 08-659), decision by Polymeles Protodikio Athinon of 2009 (no 2228/2009), decision by Multi-Member Court of First Instance of Athens of 2009 (no 4505/2009), decision by Kantonsgericht Zug of 27 November 2008 (no A3 2004 112), decision by OLG Brandenburg of 18 November 2008 (no 6 U 53/07), decision by Supreme Court of the Slovak Republic of 28 October 2008 (no Obo 250/2007), decision by Rechtbank Rotterdam of 15 October 2008 (no 295401/HA ZA 07-2802), *Norfolk Southern Railway Company v Power Source Supply, Inc.* (decision by U.S. District Court, Western District of Pennsylvania of 25 July 2008 (no 07-140-JJF)), decision by Foreign Trade Court of Arbitration attached to the Sertian Chamber of Commerce of 15 July 2008 (no T-4/05), decision by Cour d'appel de Rennes of 27 May 2008, decision by Kantonsgericht St. Gallen of 13 May 2008 (no BZ.2007.55), decision by OLG Stuttgart of 31 March 2008 (no 6 U 220/07), decision by OLG München of 5 March 2008 (no 7 U 4969/06) decision by OLG Hamburg of 25 Januar 2008 (no 12 U 39/00), decision by Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce of 23 January 2008 (no T-9/07), decision by Judicial Board of Szeged of 22 November 2007 (no Gf.I.30.372.2007/3), decision by Bundesgericht of 13 November 2007 (no 4A_362/2007), *Macromex SRL v Globex Int'L Inc* (decision by the International Centre for Dispute Resolution of the American Arbitration Association of 23 October 2007 (no 50181T 0036406)), *Annika Gustavsson v LRF N.V.* (decision by Københavns Byret of 19 October 2007), decision by Supreme Court of Denmark of 17 October 2007 (no 56/2006), decision by Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce of 1 October 2007 (T-8/06), decision by China International Economic and Trade Arbitration Commission of October 2007 (no 2007/03), decision by Regional Court in Nitra of 17 September 2007 (no 16 Cbm/30/2004), decision by Kontonsgericht Zug of 30 August 2007 (no A3 2006 79), decision by AG Freiburg of 6 July 2007 (no 4 C

4003/06), decision by OLG Köln of 2 July 2007 (no 16 U 5/07), decision by China International Economic and Trade Arbitration Commission of 30 June 2007 (no 2007/04), decision by Handelsgericht des Kantons Zürich of 25 June 2007 (no HG 050430/U/ei), decision by Handelsgericht Aargau of 19 June 2007 (no HOR.2005.83/ds/tp), decision by Pretore del Distretto di Lugano of 19 April 2007 (no OA.2000.459), decision by OLG Dresden of 21 March 2007 (no 9 U 1218/06), decision by Audiencia Provincial de Madrid of 20 February 2007 (no 683/2006), decision by Hov van Beroep of 22 January 2007 (no 2004/AR/1382), decision by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry of 29 December 2006 (no 54/2006), decision by Obergerict Zug of 19 December 2006 (no OG 2006/19), decision by LG Coburg of 12 December 2006 (no 22 0 38/06),decision by Obergericht des Kantons Thurgau of 12 December 2006 (no ZBR.2006.26), decision by China International Economic and Trade Arbitration Commission of December 2006 (no 2006/05), decision by Tribunal of International Commercial Arbitration at the Russion Federation Chamber of Commerce and Industry of 15 November 2006 (no 98/2005), decision by Zivilgericht Basel-Stadt of 8 November 2006 (no P 2004 152), decision by OLG München of 19 October 2006 (no 23 U 2421/05), decision by LG Berlin of 13 September 2006 (no 94 0 50/06), decision by China International Economic and Trade Arbitration Commission of September 2006 (no 2006/09), decision by OLG Köln of 14 August 2006 (no 16 U 57/05), *TeeVee Toons, Inc. (d/b/a) TVT Records) & Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH* (decision by U.S. District Court, Southern District of New York of 12 August 2006 (no 00 CIV 5189 (RCC))), decision by China International Economic and Trade Arbitration Commission of 3 August 2006 (no 2006/15), decision by China International Economic and Trade Arbitration Commission of August 2006 (no 2006/13), decision by China International Economic and Trade Arbitration Commission of 25 July 2006 (no 2006/22), decision by Rechtbank Arnhem of 19 July 2006 (no 125903/ HA ZA 05-682), decision by AG Landsberg am Lech of 21 June 2006 (no 1 C 1025/05), decision by China International Economic and Trade Arbitration Commission of 31 May 2006 (no 2006/01), decision by Tribunal cantonal Valais of 23 May 2006 (no C1 06 28), decision by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry of 19 May 2006 (no 122/2005), decision by China International Economic and Trade Arbitration Commission of May 2006 (no 2006/18), decision by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry of 13 April 2006 (no 105/2005), decision by OLG Köln of 3 April 2006 (no 16 U 17/05), decision by China International Economic and Trade Arbitration Commission of April 2006 (no 2006/21), decision by Rechtbank Arnhem of 1 March 2006 (no 125903/HA ZA 05-682), decision by OLG Köln of 13 February 2006 (no 16 U 1705), decision by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry of 13 February 2006 (no 102/2005), decision by OLG Karlsruhe of 8 February 2006 (no 7 U 10/04), decision by Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce of 24 January 2006 (no T-12/04), decision by OLG Linz of 23 January 2006 (no 6 R 160/05z), decision by Regional Court in Trnava of 12 January 2006 (no 36 Cbm/6/2003), *American Mint LLC, Goede Beteiligungsgesellschaft, and Michael Goede v GoSoftware, Inc.* (decision by U.S. District Court, M. D. Pennsylvania of 6 January 2006 (no Civ.A. 1:05-CV-650)), decision by China International Economic and Trade Arbitration Commission of 26 December 2005 (no 2005/21), decision by Handelsgerich Zürich of 22 December 2005 (no HG 04 0374/u/ei), decision by China International Economic and Trade Arbitration Commission of December 2005 (no 2005/23), decision by China International Economic and Trade Arbitration Commission of 9 November 2005 (no 2005/04), decision by Cour d'appel Versailles of 13 October 2005 (no 04/04/128), decision by Audiencia Provincial de Palencia of 26 September 2005 (no 227/2005), decision by New Pudong District People's Court of Shanghai of 23 December 2005 (no (2004) Pu Min Er (Shang) Chu Zi Di No. 3221), decision by OGH of 8 November 2005 (no 4 Ob 179/05k), decision by Rechtbank van Koophandel Hasselt of 20 September 2005 (no A.R. 04/3568), decision by China International Economic and Trade Arbitration Commission of 22 August 2005 (no 2005/13), decision by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry of 27 May 2005 (no 95/2004), decision by HO Turku of 24 May 2005 (no S 04/1600), decision by China International Economic and Trade Arbitration Commission of 10 May 2005 (no 2005/02), decision by China International Economic and Trade Arbitration Commission of 7 April 2005 (no 2005/01), decision by Audiencia Provincial de Valencia of 31 March 2005 (no unavailable), decision by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry of 16 March 2005 (no 75/2004), decision by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry of 24 January 2005 (no 68/2004), decision by Alexandria Center for International Arbitration of 16

applied in the interpretation of Article 74. Basically, the application of domestic case law is not in contravention of the convention. However, if the courts and arbitral tribunals apply such case law only each contracting state may end up having its very own interpretation of the convention and therefore, a proclivity towards such cases is problematic. Further, it is problematic if the courts apply domestic case law dealing with domestic pieces of legislation (e.g. a domestic sale of goods act) to solve matters pertaining to the CISG. Third, it can be tested to what extent *domestic doctrines* on the measurement of damages (such as the *Hadley*-rule or the doctrine of adequate causation) are employed in the interpretation of Article 74.

As adumbrated above, Article 74 leaves a lot of questions unanswered and therefore, it seems reasonable to expect that the adjudicators rely heavily on case law (including foreign case law) in order to find appropriate answers. However, the review clearly shows that this is not the case. In fact, among the 107 cases reviewed, there do not appear to be a single case in which a foreign decision is employed in order to ascertain the scope of Article 74. Even though references to foreign cases are generally rare,[89] this finding is rather surprising and alarming and it is difficult to see how an internationally-oriented interpretation can be established on this basis. Of course it can be argued that in some cases there is no need to look at foreign case law but this does not account for said (complete) disregard. With respect to domestic case law the review shows a somewhat greater willingness to be persuaded on behalf of the adjudicators. A total of six cases where a court or an arbitral tribunal employed domestic case law in the interpretation of Article 74 were found. In four of these cases the domestic case law, which was referred to, dealt with the interpretation of Article 74, cf. *Norfolk Southern Railway Company v. Power Source Supply, Inc.*[90], *American Mint LLC, Goede Beteiligungsgesellschaft, and Michael Goede v GOSoftware, Inc.*,[91] *Semi-Materials Co. Ltd. v MEMC Electronic Materials, Inc., et al*,[92] and decision 4505/2009 by the Multi-Member Court of First Instance Athens.[93]

January 2005 (no 6/2003), decision by China International Economic and Trade Arbitration Commission of 2005 (no 2005/25), decision by Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade of 2005 (no 2005/48).

[89] See e.g. Henschel, René Franz:"*The Conformity of Goods in International Sales. An analysis of Article 35 in the United Nations Convention on Contracts for the International Sale of Goods (CISG)*" 2005 at 38 (with further reference).

[90] Cf. decision by U.S. District Court, Western District of Pennsylvania of 25 July 2008 (no 07-140-JJF) available at http://cisgw3.law.pace.edu/cases/080725u1.html.

[91] Cf. decision by U.S. District Court, M. D. Pennsylvania of 6 January 2006 (no Civ.A. 1:05-CV-650) available at http://cisgw3.law.pace.edu/cases/060106u1.html.

[92] Cf. decision by U.S. District Court, Eastern District of Missouri, Eastern Division of 10 January 2011 (no 4:06CV1426 FRB) available at http://cisgw3.law.pace.edu/cases/110110u2.html.

[93] Available with extensive editorial remarks by Dionysios P. Flambouras at http://cisgw3.law.pace.edu/cases/094505gr.html. See further commentary on said case in Flambouras, Dionysios P., "Case Law of Greek Courts for the Vienna Convention (1980) for International Sale of Goods", *Nordic Journal of Commercial Law* (2009#2) available at http://www.njcl.fi/2_2009/flambouras_dionysios.pdf.

In the *Norfolk* case, a buyer from Canada (Power Source Supply, Inc.) and a vendor from the U.S. (Norfolk Southern Railway Company) had entered into a contract for the sale of locomotives. Subsequently, the buyer refused to pay the (full) purchase price as specified in the contract claiming, among other things, that delivery had not been made on time. This led the vendor to sue the buyer for damages. The court found that the vendor had duly performed the parties' agreement and awarded damages pursuant to Article 74. With respect to the interpretation of Article 74, the court referred to the case of *Delchi Carrier S.p.A. v Rotorex Corp*.[94] where it was said that the article is "designed to place the aggrieved party in as good a position as if the other party had properly performed the contract". On that basis the vendor was due the outstanding balance of the contract of $784,315. However, the court did not find that Article 74 allowed the vendor's attorneys' fees to be recovered. This finding was based on the *ratio* of the case of *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Company, Inc. d/b/a Maurice Lenell Cooky Company*.[95] In that case the U.S. Circuit Court of Appeals (7th Cir.) found that, for a number of reasons, attorneys' fees were not recoverable under Article 74. First of all the court emphasized the need to distinguish between substantive and procedural law.[96] Further, it found that the question of reimbursement of attorneys' fees was a question of procedural law not covered by the CISG.[97] Second, the court found no evidence in the drafting history of the convention that such fees should be recoverable. Accordingly, the court reverted to domestic law to answer the question.

In the *American Mint* case, the vendor, a U.S. software company, had sold software to another U.S. company which was a subsidiary of a German firm. The software was installed at the place of business of the buyer's parent company in Germany but allegedly it did not function

[94] See decision by U.S. Circuit Court of Appeals (2d. Cir.) of 6 December 1995 (no 95-7182, 95-7186) available at http://cisgw3.law.pace.edu/cases/951206u1.html.

[95] See decision by U.S. Circuit Court of Appeals (7th Cir.) of 19 November 2002 (no 01-3402, 02-1867, 02-1915) available (with editorial remarks) at http://cisgw3.law.pace.edu/cases/021119u1.html.

[96] *Inter alia* the court said that "The Convention is about contracts, not about procedure. The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural law. For example, the "American rule," that the winner must bear his own litigation expenses, and the "English rule" (followed in most other countries as well), that he is entitled to reimbursement, are rules of general applicability. They are not field-specific."

[97] *Inter* alia the court supported this finding by saying that "Article 74 of the Convention provides that "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," provided the consequence was foreseeable at the time the contract was made. (...) There is no suggestion in the background of the Convention or the cases under it that "loss" was intended to include attorneys' fees, but no suggestion to the contrary either. Nevertheless it seems apparent that "loss" does not include attorneys' fees incurred in the litigation of a suit for breach of contract, though certain pre-litigation legal expenditures, for example expenditures designed to mitigate the plaintiff's damages, would probably be covered as "incidental" damages. *Sorenson v. Fio Rito,* 413 N.E.2d 47, 50-52 (Ill.App.1980); cf. *Tull v. Gundersons, Inc.,* 709 P.2d 940, 946 (Colo.1985); *Restatement (Second) of Contracts* § 347, comment c (1981)." On the recoverability of litigation costs, see Schlechtriem, Peter & Schwenzer, Ingeborg, "Commentary on the UN Convention on the International Sale of Goods (CISG)" 3rd ed. (2010) Oxford University Press at 1010f.

properly due to its incompatibility with certain German numeric standards. This led the buyer, the parent company, and the person in charge of the German parent (Mr. Michael Goede) to sue the seller for breach of contract and damages. The damages comprised lost profits and attorneys' fees (incurred as a result of the litigation). The buyer argued that the case should be decided in accordance with the CISG but this argument was rejected because the court did not find that the immediate parties to the contract were located in different contracting states as set out in CISG Article 1(1). In this respect the court expressly noted that the German parent company could not be regarded as a party to the contract. Consequently, the CISG did not apply to the contract but in *obiter dictum* the court made some interesting remarks which correspond well with above dictum in *Norfolk*. Thus, the court noted that attorneys' fees were not recoverable under Article 74 as part of the "foreseeable loss". This finding was supported by references to the above case in *Zapata* and in *Chicago Prime Packers, Inc. v Northam Food Trading Co.*[98] In the latter case, the U.S. District Court briefly noted that "the term "loss" in Article 74 of the CISG does not include attorneys' fees incurred in the litigation of a suit for breach of contract." In the *Semi-Materials* case, which concerned a U.S. vendor and a Korean buyer, the court found that in a case of breach of contract (where there is no avoidance of the contract by either party), only article 74 (not Article 76) applies. This finding was based on the case of *Macromex SRL v Globex Int'L Inc.*[99] which concerns the interpretation of Article 74.

The case before the Multi-Member Court of First Instance of Athens[100] concerned the sale of bullet-proof vests from a vendor in the Netherlands to a buyer in Greece. The basic question of the case was whether the bullet-proof vests were in conformity with the contract entered into by the parties. Both the vendor and the buyer raised a number of claims against each other. *Inter alia* the vendor claimed damages for loss of professional reputation and clientele due to the alleged wrongful avoidance of the contract by the buyer. Since it does not follow (immediately) from Article 74 whether such loss is recoverable the question was considered carefully. First, the court found that 'The criterion for the affirmation of subjective foreseeability is the ability to foresee of the "ideal promisor", i.e., of the prudent and "reasonable" representative of the circle of transactions in which the breaching promisor belongs, also in the light of the purpose of the specific sales contract'. This finding was supported by reference to two domestic cases also dealing with Article 74, cf. *Case 22513/2003* decided by the Multi-Member Court of First Instance Thessalonika[101] and *Case 63/2006* decided by the Court of Appeals of Lamia.[102]

[98] See decision by U.S. District Court, Northern District of Illinois, Eastern Division of 21 May 2004 (no 01 C 4447) available at http://cisgw3.law.pace.edu/cases/040521u1.html.

[99] See decision by the International Centre for Dispute Resolution of the American Arbitration Association of 23 October 2007 (no 50181T 0036406) available at http://cisgw3.law.pace.edu/cases/071023a5.html.

[100] See op. cit. at fn 86.

[101] For a brief editorial remark on this case by Eleni Zervogianni, see http://cisgw3.law.pace.edu/cases/030513gr.html.

[102] For a brief editorial remark on this case by Dionysios P. Flambouras, see http://cisgw3.law.pace.edu/cases/060001gr.html.

Moreover, references were made to literature published by prominent Greek scholars. Second, the court found that 'The object of the foreseeability is the nature [type] and extent of the damage as a possible consequence of the contractual breach, but not the contractual breach itself. Therefore, the breaching promisor is not liable for just any damage; instead his liability under CISG is limited to the foreseeable damage, even if the promisor has intentionally breached his contractual obligations.' The said findings finally made the court conclude that 'non-material damage is not compensated, as well as damage suffered by the party to his professional reputation and damage from loss of clientele due to the non-conformity [of the goods] by the counter-party to the terms of the sales contract, since the said damage is not, as s general rule, considered to be foreseeable.'

In the remaining two cases the courts referred to domestic cases dealing with domestic law only, cf. *Castel Electronics Pty. Ltd. v. Toshiba Singapore Pte. Ltd.*[103] and *ECEM European Chemical Marketing B.V. v. The Purolite Company.*[104] In Castel, an Australian wholesaler and distributor, Castel Electronics Pty Ltd, had contracted to buy certain electronic products from a Toshiba subsidiary in Singapore (Toshiba Singapore Pte Ltd. (TSP)). The main issues before the Federal Court of Australia were whether the products were in conformity with the contract and whether Castel was entitled to damages. First the court noted that '... Australia and Singapore, at all material times, [had] been "Contracting States" within the meaning of the CISG. That has the effect that the CISG governs the rights and liabilities of Castel and TSP under each sales contract to the exclusion of any operation which the Goods Act might otherwise have'. Then the court went on to discuss the questions of breach of contract and damages. With respect to the latter the court held that Castel was entitled to damages for expectation interest and reliance interest.[105] The court observed correctly that Article 74 was applicable but when measuring the recoverable amount of damages it relied on domestic common law cases only.

When measuring the expectation interest, for example, the court found that 'a difficulty in apportioning expenses, which have clearly been incurred, between amount properly allowable as damages and those which are not does not excuse a court from making the apportionment.' This finding was based on the following *ratio* laid down in *Enzed Holding Ltd v. Wynthea Pty Ltd.*:[106] 'If the court finds damage has occurred it must do its best to quantify the loss even if a degree of speculation and guess work is involved. Furthermore, if actual damage is suffered, the award must be for more than nominal damages. We should add that we can see no reason why

[103] See decision by Federal Court of Australia, Victoria District Registry, General Division of 28 September 2010 (no VID 141 of 2008) available at http://cisgw3.law.pace.edu/cases/110420a2.html.

[104] See decision by U.S. District Court, Eastern District of Pennsylvania of 29 January 2010 (no 05-3078) available at http://cisgw3.law.pace.edu/cases/100129u1.html.

[105] In the amount of $6,097,543. A deduction of $3,484,406, which Toshiba Singapore Pte. Ltd. had already paid in part compensation, was made from this sum. Thus, the judgment for Castel was made in the sum of $2,613,137.

[106] 1984 FCA 373.

this principle should not apply in cases under the Trade Practices Act as well as in cases at common law. We emphasize, however, that the principle applies only when the court finds that loss or damage has occurred. It is not enough for a plaintiff merely to show wrongful conduct by the defendant.' In order to further substantiate its finding on the measurement of the expectation interest the *Castel* court referred to a number of other Australian cases, cf. *Callaghan v. William C Lynch Pty Ltd*,[107] *Commonwealth v. Cornwell*,[108] *Ginza Pte Ltd v. Vista Corp Pty Ltd*,[109] and *Playcorp Pty Ltd v. Taiyo Kogyo Ltd.*[110]

In *ECEM* a company based in the Netherlands, ECEM European Chemical Marketing B.V., had agreed to sell "styrene monomer", an essential ingredient in products used to remove impurities from water and other liquid and gas media, to a buyer in the U.S. (The Purolite Company). The case arose from the The Purolite Company's alleged failure to pay for five shipments of styrene monomer received in the last quarter of 2004. With respect to the interpretation of Article 74, as in Castel, the key question concerned the degree of certainty required in order for a plaintiff to claim damages. By reference to the domestic case of *Kituskie v. Corbman,*[111] the U.S. District Court held that 'Damages are considered remote or speculative only if there is uncertainty concerning the identification of the existence of damages rather than the ability to precisely calculate the amount or value of damages.' Another important question considered by the court was whether overhead was recoverable. This was accepted by the court with reference to the domestic case of *Vitex Mfg. Corp. v. Caribtex Corp* decided by the United States Court of Appeals Third Circuit.[112] In *ECEM* also, no foreign cases were considered.

It is a well-known fact that courts and arbitral tribunals sometimes apply domestic doctrines on the measurement of damages or domestic legislation in order to decide matters rightly pertaining to Article 74. Perhaps the most prominent example of this is the case of *Delchi Carrier, S.p.A. v Rotorex Corp.*[113] In this case, Delchi, an Italian manufacturer of units for air conditioning, purchased 10,800 compressors from a U.S. vendor, Rotorex. The compressors were to be delivered in three instalments by 15 May 1988. On 26 March 1988 the first instalment was successfully delivered. However, when the second instalment was in transit, Delchi discovered that the first instalment of compressors was not in conformity with the contract. Delchi suffered a loss and successfully sued Rotorex for damages pursuant to the

[107] 1962 NSWR 871.

[108] 2007 HCA 16.

[109] 2003 WASC 11.

[110] 2003 VSC 108.

[111] 682 A. 2d 378 - Pa: Superior.

[112] 377 F.2d 795, 798, 6 V.I. 166 (3d Cir. 1967).

[113] See decision by The United States Court of Appeals for the Second Circuit of 6 December 1995 (no 95-7182, 95-7186) available at http://cisgw3.law.pace.edu/cases/951206u1.html. The case was decided in the first instance by United States District Court for the Northern District of New York on 9 September 1994, cf. http://cisgw3.law.pace.edu/cases/940909u1.html.

CISG. The court rightly observed that the convention should be interpreted with regard to 'its international character and … the need to promote uniformity in its application and the observance of good faith in international trade'. Subsequently, however, the court employed a line of arguments which eliminated entirely the possibility of achieving such international interpretation. With respect to Article 74 the court found that '… the CISG requires that damages be limited by the familiar principle of foreseeability established in *Hadley v. Baxendale* …'

This is problematic because, as discussed above, the *Hadley*-rule is not identical with the foreseeability doctrine laid down in the Convention.[114] Fortunately, the present review shows that it is not common for the courts to refer to domestic doctrines in order to solve matters pertaining to Article 74. In fact, only two examples of this could be found, cf. *TeeVee Toons, Inc & Steve Gottlieb, Inc v. Gerhard Schubert GmbH*[115] and decision of 15 October 2009 by the Landgericht of Stuttgart.[116] In *TeeVee*, the plaintiffs claimed, *inter alia*, damages for breach of contract alleging that a certain packaging system delivered by the defendant was malfunctioning. In its reasoning on the foreseeability of the damages incurred by the plaintiff, the U.S. District Court said that the foreseeability requirement 'is identical to the well-known rule of Hadley v. Baxendale … such that relevant interpretations of that rule can guide the Court's reasoning regarding proper damages.'

Here the court employed the same erroneous interpretation of Article 74 as in *Delchi*. The case before the Landgericht of Stuttgart concerned the sale of a printing machine from a German vendor to a Hungarian buyer. The buyer claimed that the printing machine was not in conformity with the contract and sued the vendor for an amount of EUR 244,276. The vendor rejected this claim and launched a counterclaim for costs of repair in the amount of EUR 14,696.93. The court found that the dispute was governed by the CISG. This meant that the buyer was required to give notice within "reasonable time" about the lack of conformity pursuant to Article 39(1) of the convention. In this respect the court noted that 'according to jurisprudence and the leading doctrine, the gross average is approximately one month'. Since almost three months lapsed between the buyer's discovery of the lack of conformity and his notice, the court rejected the claim. With respect to the vendors counterclaim it was accepted in full by the court. However, although the court found that the CISG was applicable, this claim was measured pursuant to Article 632 BGB (rather than Article 74 CISG). There does not seem to be a good reason why the court reverted to domestic German legislation in order to deal with this particular issue.

[114] See part 8.3.

[115] See decision by U.S. District Court, Southern District of New York of 12 August 2006 (no 00 CIV 5189 (RCC) available at http://cisgw3.law.pace.edu/cases/060823u1.html.

[116] See decision by LG Stuttgart of 15 October 2009 (no 39 0 31/09 KfH) available at http://cisgw3.law.pace.edu/cases/091015g1.html.

In sum, the review shows that courts only rarely consider CISG case law when interpreting Article 74. This is highly problematic because it may undermine the whole idea of having an international convention on the sale of goods. In particular, the disregard of foreign case law is a problem and the somewhat greater willingness to apply domestic cases does not seem to do much to rectify this. First of all it is not likely that a uniform interpretation can be achieved by application of domestic case law only. Rather, in this way a *sui generis* interpretation of article 74 is likely to arise in each contracting state. Second, in two out of the six domestic cases found, the courts referred to case law which did not even deal with Article 74. Such approach seems to undercut the possibility of establishing a uniform interpretation of Article 74. The only encouraging finding of the review seems to be that there were merely two cases in which a domestic liability doctrine or a domestic piece of legislation was employed in the interpretation of Article 74. However, this does not help much to achieve uniformity.

8.5 To What Extent Is Uniformity Being Achieved?

Article 74 regulates a very complex and ambiguous issue and for that reason it is unfortunate that said sources of law do not provide much clarification as to how it should be interpreted. Thus, as developed above, the wording of the article is vague and the TP contain hardly any interpretative guidelines which can be employed to ascertain how it should be understood. Further, as evidenced by the empirical study of cases decided from 2005 to 2013, the adjudicators only seldomly apply case law to ascertain how Article 74 should be interpreted. And when they actually do so, it is most often domestic cases dealing with impertinent domestic legislation or doctrines on the measurement of damages which are employed. As a consequence of the lack of guidance in the relevant sources of law and the adjudicators' failure to make use of case law most of the central concepts of Article 74 have not been made sufficiently clear.

First, it is not entirely clear how the basic principle of the article, i.e. the principle of full compensation, should be construed.[117] From the wording of the article it appears merely that damages consist of a sum equal to the loss (including loss of profit) suffered as a consequence of a breach of contract. This leaves undecided how certain fundamental problems on the measurement of damages should be dealt with and what kinds of losses are covered by the principle of full compensation. With respect to the former problem it is, for example, not clear if (and how) loss suffered by the claimant is to be set off with gains he may have had.[118] With respect to the latter it is, for example, not settled to what extent a claimant may recover for costs

[117] See further Schlechtriem, Peter & Schwenzer, Ingeborg, "Commentary on the UN Convention on the International Sale of Goods (CISG)" 3rd ed. (2010) Oxford University Press at 1001 who note that "While the principle of full compensation is undisputed, its precise meaning it yet to be determined."

[118] Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 1016-1017.

incurred in pursuing his rights.[119] In particular, it is debated to what extent extra-judicial costs (such as costs incurred in order to retrieve the claim) can be reimbursed under Article 74. Even though it seems to be generally accepted that attorney's fees can be recovered only if the applicable procedural law allows for it,[120] the above empirical study shows that the question is still litigated upon cf. e.g. the *Norfolk case* and the *American Mint case*. In the former case the court found that the principle of full recovery is 'designed to place the aggrieved party in as good a position as if the other party had properly performed the contract'. However, the court did not find that this allowed for attorney's fees to be reimbursed. In the latter case the *ratio* of *Norfolk* was supported in an obiter dictum. Also, it is not entirely clear to what extent compensation for non-material loss is allowed. This applies to e.g. loss of goodwill where apparently three different interpretations have been launched.[121] According to perhaps the most dominant interpretation such loss can be compensated if it amounts to a concrete financial loss but according to another interpretation this is not always a necessary condition. On the third interpretation damages for loss of goodwill seems to be ruled out *ipso facto* due to lack of foreseeability, cf. the above decision of the Multi-Member Court of First Instance of Athens where the court held that "damage from loss of clientele" could not, as a general rule, be considered "foreseeable".

Second, it is not clear how the foreseeability limitation should be interpreted. Since this basic limitation mechanism is relevant to many cases this is a significant problem. It appears from the wording of Article 74 that both a subjective and an objective test may be applied but these tests can be construed in several different ways. For example, what does it take for a certain subjective expectation to justify an award for damages and how is the exact amount of such damages to be calculated? And how is the objective test to be interpreted? Does one, for example, need to employ a *bonus pater* or a *vir optimus* standard when assessing the limits of liability? And to what extent may the adjudicators consider other criteria such as the purpose of the contract, the allocation of risk, and basic notions of fairness? Further, if it is indeed allowed to consider a variety of different criteria, how are these criteria to be weighed and balanced? These questions are important to clarify and a large number of cases show that the courts make great efforts to try to achieve a better understanding of them. This appears also from the above empirical study, cf. the case before the Multi-Member Court of First Instance of Athens which

[119] Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 1010-1012.

[120] See further Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 1011.

[121] See Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 2nd ed. (2005) Oxford University Press at 753. In the third edition of said publication the authors argue that the controversy about damages for loss of goodwill has diminished, see Schlechtriem, Peter & Schwenzer, Ingeborg, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*" 3rd ed. (2010) Oxford University Press at 1013.

held that the foreseeability standard is that of an "ideal promisor". Accordingly, damages were measured on the basis of the foresight of the "prudent and "reasonable" representative of the circle of transactions in which the breaching promisor belongs".

Third, it is not entirely clear what the object of the foreseeability test is and what degree of probability that is to be applied when assessing whether there is a relevant loss. With respect to the former problem, it is necessary that the object of the foreseeability test is *fixed* before the assessment of probability can be made. Otherwise it is not clear what it is (exactly) the promisor needs to foresee as a consequence of the breach of contract and this seems to make it impossible to carry out even a rough an assessment of probability.[122] That this is indeed a *real* problem, which must be considered by the courts, is evidenced also by above empirical study, cf. the case before the Multi-Member Court of First Instance of Athens where the court (among other things) observed that 'The object of the foreseeability is the nature [type] and extent of the damage as a possible consequence of the contractual breach, but not the contractual breach itself.'[123]

The lack of clarity as to how the basic concepts of Article 74 should be interpreted is problematic because it makes it difficult to see how uniformity and predictability can be established with respect to the measurement of damages. This jeopardises the whole purpose of the convention and it could be argued (with some credence) that the parties are better off choosing the law of a well-known and well-established legal system (such as e.g. English or German law) to govern the contract. Certainly the law of such legal systems is also not entirely settled on the matter in question but a more homogenous legal tradition and legal culture, well established court hierarchies, and many more decisions do make it more clear what the law is. In particular it seems that a well-established court hierarchy is necessary to furnish a clear understanding of the complex problem of measuring damages.

9 Conclusion

The article has shown that neither of the internationally recognised sources of law provides clear an unequivocal guidance as to how the CISG should be interpreted. In fact, they are all susceptible to serious criticisms and a high degree of uniformity seems unlikely to be achieved in the imminent future. Some scholars believe that the ever increasing amount of case law and literature will solve many of these problems. However, it is not certain that such centripetal development will occur. In fact, the inevitable disagreement among adjudicators and legal scholars appear to be a good breeding ground for dissident and inconsistency. This is supported also by the study of Article 74. It is – at least to the present author – quite surprising how little

[122] See further Ehlers, Andreas Bloch "*Om adækvanslæren i erstatningsretten*" (2011) at 124-127 and at 137-144.

[123] See above part 8.4.

relevant interpretative data that can be elucidated from the sources of law pertaining to this article. This applies first and foremost to the TP and case law. The former is almost completely silent as to how said article should be interpreted and the latter shows a remarkable disregard for case law, including particularly foreign case law. Thus, not a single case could be found where the *ratio* of a foreign decision was applied and this reduces significantly the value of case law as a source of law.

The little interpretative guidance of the sources of law and the disregard of case law pose a serious obstacle to achieving uniformity and this raises the question of what can be done to improve the situation. The immediate answer would be to set up some sort of supranational court of appeals with the capacity to authoritatively decide on matters pertaining to the convention. But this does not appear to be politically or practically realistic and perhaps not even desirable since it would inevitably draw out the cases to the detriment of the parties. Moreover, such a drastic measure is perhaps not even necessary since much progress could be made already within the present framework. Most importantly, it seems clear that the lawyers, the arbitrators, and the court judges could make much better efforts to confer with and employ the rich body of easily accessible CISG case law when arguing and deciding cases pertaining to the convention. This would ensure that in each case the relevant CISG case law is at least considered.