Damages in Lieu of Performance because of Breach of Contract

John Y. Gotanda
Villanova University School of Law, gotanda@law.villanova.edu
Chapter 1

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I. INTRODUCTION

In contract disputes between transnational contracting parties, damages are often awarded to compensate a claimant for loss, injury or detriment resulting from a respondent’s failure to perform the agreement. In fact, damages may be the principal means of substituting for performance or they may complement other remedies, such as rescission or specific performance.

Damages for breach of contract typically serve to protect one of three interests of a claimant: (1) performance interest (also known as expectation interest); (2) reliance interest; or (3) restitution interest. The primary goal of damages in most jurisdictions is to fulfill a claimant’s performance interest by giving the claimant the substitute remedy of the “benefit of the bargain” monetarily. This typically includes compensation for actual loss incurred as a result of the breach and for net gains, including lost profits, that the claimant was precluded from realizing because of the respondent’s actions.

All legal systems place limitations on damage awards. The most common limitations are causation, foreseeability, certainty, fault, and avoidability. In order to obtain damages, there must be a causal connection between the respondent’s breach and the claimant’s loss. In
addition, the claimant must show that the loss was foreseeable or not too remote. Further, the
claimant is required to show with reasonable certainty the amount of the damage. Many civil
law countries also require, as a prerequisite to an award of damages for breach of contract, that
the respondent be at fault in breaching the agreement. Damages may also be limited by the
document of avoidability, which provides that damages which could have been avoided without
undue risk, burden, or humiliation are not recoverable.

It also should be noted at the outset that parties may agree upon the remedies available
for breach of contract. For example, they may limit the scope of liability in the event that a
party terminates the contract because of certain events. In addition, they may include a
liquidated damages provision, which provides for a specified amount of damages to be paid by a
party who repudiates the agreement. However, some jurisdictions may refuse to enforce such a
clause, particularly if the amount to be paid in liquidated damages is grossly disproportionate to
the actual loss or loss that could reasonably arise under the circumstances.

The rules concerning damages for breach of contract are complex and vary greatly from
country to country. Furthermore, in some federal countries, such as the United States and
Canada, the applicable rules differ among states and provinces. This study thus surveys only the
general rules concerning damages awarded in lieu of performance because of a breach of
contract (“performance damages”). It begins with an overview of the purposes served by
awarding damages. It then examines performance damages for breach of contract in common
law and civil law countries. The study subsequently analyzes the awarding of damages under the
Convention on the International Sale of Goods (CISG), which applies to “a sales contract
between a buyer and seller, each of which has its place of business in different countries that are
a party to the Convention, unless the buyer and seller provide otherwise.” Finally, the study
discusses the awarding of damages under general principles of law and principles of equity and fairness.

II. OVERVIEW OF THE PURPOSES OF DAMAGES

Damages for breach of contract in civil and common law jurisdictions have a common source, the Roman law principle *casum sentit dominus* – that each person bears his or her own accidental damages.\(^5\) In addition, in most civil and common law jurisdictions, damages are designed to protect one or more of the following three interests: performance, reliance and restitution.

*Performance Interest.* The usual goal of damages is to put the claimant in the position that it would have been in had the contract been performed; that is, to give the claimant the “benefit of the bargain.”\(^6\) This is known as performance or expectation interest.\(^7\) Damages for performance interest may involve claims for three types of loss: direct loss, incidental loss, and consequential loss. Direct loss is the loss in value to the claimant that results from the failure of the respondent to perform its contractual obligations. It is typically measured by the market value of the benefit of which the claimant has been deprived through the breach, or the costs of reasonable measures to bring about the situation that would have existed had the contract been properly performed. In some circumstances, a breach of contract may cause a claimant to incur additional costs in an attempt to avoid further loss. These expenses are referred to as incidental loss. For example, in the case of a breach by a seller, incidental damages may include the costs incurred in preserving or storing goods that have been delivered late, or goods that are defective and are to be returned to the seller. A breach of contract may not only cause a claimant to suffer direct and incidental losses, but it may also cause a claimant to suffer losses from dealing with third parties, which is called consequential loss. For example, in the case of a breach by a buyer,
a seller may suffer consequential damages resulting from the termination of contracts with suppliers, or fees resulting from a dishonored check. The circumstances under which claimants may recover damages for direct, incidental and consequential loss vary among jurisdictions.

Reliance Interest. Reliance interest attempts to put the claimant in the position the claimant would have been in had the contract never been made. There are two types of reliance interest: essential reliance and incidental reliance. Essential reliance allows recovery for preparation and performance under the agreement, while incidental reliance allows recovery for preparations for collateral transactions that were to occur when the contract at issue was to have been performed. However, reliance interest generally does not include lost opportunities to make other contracts. Unlike performance interest, the burden may be placed on the respondent to prove that the claimant’s expenses would have been incurred even if the contract had not been breached.

Restitution Interest. The object of restitution interest is to return or to restore to the claimant the gain or benefit that the respondent received as a result of the breach of the contract. Basically, it prevents unjust enrichment of the respondent. Thus, the focus is not upon the claimant, but upon the breaching party. Restitution interest requires the respondent to turn over to the claimant any benefit that the respondent received because of the respondent’s failure to perform the contract. Damages for restitution interest are typically smaller than for performance interest or reliance interest because restitution interest does not include the claimant’s lost profit or expenditures made in reliance on the contract that did not confer a benefit on the respondent. Restitution may be an appropriate remedy for breach of an unenforceable contract.

The following example illustrates recovery of damages under the various interests. Suppose a company from country A (the claimant) enters into a contract to build a water bottling
plant with a company in country B (the respondent) for US$10 million. Assume that it will cost the claimant US$8 million to build the facility, thus earning a US$2 million profit. Also assume that, immediately after the contract is executed and before the claimant has spent any resources on the project, the respondent intentionally repudiates the agreement. In this circumstance, the claimant’s performance interest is US$2 million, which is the amount needed to put the claimant in the position it would have been in had the contract been performed. The reliance interest is US$0 because the claimant has incurred no expenses in reliance prior to the repudiation of the agreement. Similarly, the restitution interest is US$0 because the respondent has not been unjustly enriched. Assume instead that the respondent does not repudiate the agreement until after the claimant has spent US$5 million on the project and the facility, in its unfinished state, is now worth US$1 million (at the time of breach). The claimant’s performance interest is now US$7 million because this is the sum needed to give the claimant the benefit of the bargain. By contrast, the claimant’s reliance interest is US$5 million and the restitution interest is US$1 million.

III. SURVEY OF NATIONAL LAWS

A. Europe

1. Common Law System

In England, an award of damages is the usual remedy for breach of contract. The purpose of such damages is not to punish the respondent, but rather to place the party who has sustained a loss, in so far as money can do it, in the same situation as if the contract had been performed. That is, damages are compensatory, commonly awarded to protect a claimant’s performance interest.
Common law systems classify damages for breach of contract into three types: nominal, general and special. Nominal damages may be awarded when the respondent is liable for a breach of contract, but the claimant is unable to prove any actual damages.\textsuperscript{15} General damages are those that result from the infringement of a legal right or duty. They are characterized as the natural and probable consequences of the particular breach and include both pecuniary and non-pecuniary losses.\textsuperscript{16} Special damages, on the other hand, are pecuniary losses precisely quantifiable at the date of the trial, such as expenses, loss of earnings and loss of profits. Special damages arise out of special and extraordinary circumstances.\textsuperscript{17}

English courts have drawn a number of other distinctions between general and special damages. Special damages must be specifically pleaded and proved in order to be awarded.\textsuperscript{18} By contrast, general damages are recoverable without proof of loss\textsuperscript{19} so that it need only be “averred that such damage has been suffered.”\textsuperscript{20} Special damages, unlike general damages, also cannot be claimed in contract suits, “unless such damages were within the contemplation of both parties at the time of the contract.”\textsuperscript{21}

Damages for mental distress are typically not awarded in breach of contract actions, unless such damages were within the contemplation of the parties at the time they entered into the contract.\textsuperscript{22} For example, damages for mental distress may be recovered if the object of the contract was to provide peace of mind or freedom from distress.\textsuperscript{23}

Damages for breach of contract to pay money are normally limited to the amount of the debt together with such interest from the time when it became due.\textsuperscript{24} Similarly, the cost of raising the money elsewhere may be recoverable as a natural result of a breach of contract to lend money.\textsuperscript{25} In addition, whether a contract is to pay or lend money, where the circumstances
are such that a special loss is foreseeable at the time of the making of a contract, damages may be recoverable for that loss.26

Sale of Goods. The law governing remedies for breach of contract involving the sale of goods is codified in the English Sale of Goods Act of 1979. The Act divides the remedies available depending on whether the claimant is a seller or buyer. Under the Act, a seller has an action for the contract price where the buyer has failed to pay for goods after taking delivery or after a specified day.27 In addition, a seller has a right to damages where the buyer has wrongly refused to take delivery of goods.28 The measure of damages “is the estimated loss directly and naturally resulting, in the ordinary course of events.”29 A market is typically available in the sale of goods. In that case, a seller’s damages are measured by the difference between the contract price and market price at the time at which delivery should have taken place.30 In a falling market, which might possibly encourage a buyer to breach, a seller may be forced to resell the goods at a price lower than the contract price. By allowing the seller to recover the difference between the contract and market price, the Act theoretically places the seller in the same position the seller would have been in had the contract been performed.

In the case of a seller’s breach of contract, a buyer’s damages are measured the same way as the seller’s damages. The buyer is compensated for any losses it suffered which were the direct and natural result of the seller’s breach.31 When there is a market available for the goods, damages are assumed to be equal to the difference between the contract price and the market price at the time delivery should have been made.32 This enables buyers to receive the “benefit of the bargain” and, if forced to purchase more expensive goods on the market, the buyer can recover the difference between the more expensive goods and the goods for which it contracted. In cases where the seller breached the contract under a breach of warranty, the buyer may
maintain an action for damages.\textsuperscript{33} Damages are generally measured by the difference in value between the defective goods and the contracted for goods.\textsuperscript{34} This essentially compensates buyers for any gain of which they have been deprived by receiving inferior goods.

Buyers of goods are often involved in contracts with third parties for the resale of the goods, presumably at a profit. This raises the issue of whether those lost profits are recoverable as damages.\textsuperscript{35}

\textit{Requirements and Limitations.} Common law jurisdictions impose several requirements and limitations on damages for breach of contract. These include: (a) a claimant may only recover loss that was directly caused by the respondent; (b) a claimant may only recover for loss that was foreseeable as a probable result of the breach of contract; (c) a claimant may not recover for loss that could have been avoided; and (d) a claimant may only recover for loss that can be proved with reasonable certainty.\textsuperscript{36}

\textit{Causation/Foreseeability.} In most common law jurisdictions, in order to receive damages for breach of contract a causal connection must exist between the claimant’s loss and the respondent’s breach of contract.\textsuperscript{37} Thus, the issue becomes whether the respondent’s breach was so connected with the claimant’s loss or damage that “as a matter of ordinary common sense and experience it should be regarded as the cause of it.”\textsuperscript{38} Typically, the claimant is required to show that, if the respondent had not breached the contract, the claimant could have performed its obligations under the agreement.

If the breach of contract is one of two causes, both co-operating and both of equal efficacy, sufficient causation exists. However, causation may be negated by “the voluntary act of a third person intervening between the breach of the contract by the [respondent] and the loss suffered by the [claimant].”\textsuperscript{39}
Even if the claimant is able to show that the respondent’s breach of contract caused the claimant’s loss, the claimant must still show that the damage is not too remote. In general, common law jurisdictions limit the recovery of damages to losses which were within the contemplation of the parties when the contract was made or foreseeable as a probable result of the breach. This concept of foreseeability originates from the Court of Exchequer’s landmark decision in *Hadley v. Baxendale.*

In *Hadley*, a miller contracted with carriers to deliver a broken shaft to a manufacturer for repair. The carriers failed to deliver the shaft to the manufacturer by the time to which they had agreed. This resulted in the miller having to delay the reopening of the mill. The miller then sued the carriers for the profits he would have made had the mill been able to resume operations without the delay. The court held that the loss of profits was not recoverable because the facts known to the carrier were not sufficient to “show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carriers to the third person.” The court explained:

> We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties,
the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.42

There are thus two main principles of Hadley. First, a loss is recoverable if it can be said to flow naturally from certain breaches of contract.43 Second, if a loss does not flow naturally from the breach, it must be shown that the respondent possessed such knowledge that would enable an ordinary person, at the time of entering into the contract, to foresee that extraordinary loss would ensue from a breach of contract.44 The main significance of these rules is to limit the availability of recovery of compensation for anticipated profits and consequential damages.45

This test of foreseeability covers both general and special damages. This determination is evaluated in light of the special knowledge that the respondent possessed (actual knowledge) as well as any knowledge it should have possessed (imputed knowledge). Thus, both an objective (reasonable person) and a subjective (in light of the facts known) standard is applied. In
addition, the ability of a breaching party to foresee damages is evaluated at the time the contract was made.\textsuperscript{46}

In England, a slightly different limitation of foreseeability applies with regard to the sale of goods. Section 50(2) of the Sale of Goods Act, 1893 provides: “[t]he measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer’s breach of contract.”\textsuperscript{47}

\textit{Certainty}. Damages must also be proven with reasonable certainty.\textsuperscript{48} The certainty rule applies only to the fact of damages, not to the amount of damages.\textsuperscript{49} Thus, if the claimant provides sufficient evidence of loss or damage, the fact that the amount of damages is difficult to assess is generally no bar to recovery.\textsuperscript{50} Damages can be uncertain for a variety of reasons. There can be uncertainty as to how to measure the loss.\textsuperscript{51} Or, it can be uncertain that a loss will occur from a breach of contract, such as the loss of profits due to a breach of contract. Accordingly, courts in common law countries have been willing to award damages for lost profits and the loss of a chance.\textsuperscript{52}

The classic example of a court awarding damages for loss of chance is \textit{Chaplin v. Hicks}.\textsuperscript{53} In Chaplin, a woman was denied the opportunity to compete in a beauty contest with fifty other contestants for the chance to win one of twelve acting contracts. The organizer of the contest unsuccessfully argued that the woman’s loss of chance was incapable of assessment. Instead, the court held for the beauty contestant and denied that “the mere fact that it is impossible to assess the damages with precision and certainty relieves a wrongdoer from paying any damages in respect of the breach of a duty of which he has been guilty.”\textsuperscript{54} The court ruled that the beauty contestant’s chance of winning was something to which a monetary value could be assigned. The court reasoned that if the beauty contestant had tried to sell her position as one
of the fifty beauty contestants in the running for twelve possible acting contracts, an individual could have bought it from her for a fixed price. With respect to damages, the court let stand the jury’s decision to award the beauty contestant 100 pounds. In doing so, it noted that the beauty contestant, as one of fifty contestants competing for twelve prizes, was entitled to damages equal to roughly one quarter of the potential prize money.\textsuperscript{55}

\textit{Avoidability.} In England, a claimant may be precluded from recovering damages for loss that the claimant could have avoided through appropriate measures.\textsuperscript{56} The purpose of this principle is to preclude wastefulness on the part of the claimant at the expense of the respondent.\textsuperscript{57} It is important to point out that this principle does not impose a positive duty on the claimant. In other words, there is no affirmative “duty to mitigate,” as the failure to mitigate would not result in liability. Rather, the failure to take the appropriate mitigation measures precludes the recovery of damages that could have been avoided.\textsuperscript{58} Typically, the burden is on the respondent to prove that the claimant failed to take the appropriate mitigation measures.\textsuperscript{59} Claimants need not “do anything other than in the ordinary course of business,”\textsuperscript{60} or take steps that would subject them to “undue risk, burden or humiliation,” including steps that would injure their commercial reputation.\textsuperscript{61}

What constitutes appropriate mitigation varies depending on the circumstances. In general, a claimant must “take all reasonable steps to mitigate the loss consequent on the breach.”\textsuperscript{62} The duty to mitigate, however, arises only after claimants have accepted the repudiation by the breaching party.\textsuperscript{63} In some cases, a claimant need not “mitigate loss, even after the [respondent’s] performance of the contract which he has repudiated falls due, by accepting the repudiation and suing for damages.”\textsuperscript{64} Once claimants accept the breach of contract they are “debar[red] . . . from claiming any part of the damage which is due to [their]
neglect to take such steps." In other words, the failure to mitigate results in damages being calculated as if the claimant did not act reasonably to minimize its loss. If the claimant takes steps to mitigate its loss, the claimant may recover loss or expense incurred in reasonably attempting to do so, even where the mitigating steps in fact led to greater loss.

2. Civil Law Systems

In civil law jurisdictions, the law of contracts is codified in the law of obligations (the civil code) or in the commercial code. However, it is important to point out at the outset that, in contrast to common law countries, specific performance is at least in theory a preferred remedy in civil law systems. In the new German Statute on Modernisation of the Law of Obligations, damages may be sought only if certain conditions are met. In other systems, such as France, courts have discretionary power over the appropriate remedy and may order the payment of damages instead of specific performance, even where the latter is possible, especially if the claimant prefers damages.

Civil law systems base an award of damages on two Roman law concepts of compensation. The first is known as damnum emergens, which is compensation for actual losses suffered. For example, where a contract to build a house is breached, the contractor/claimant may seek to recover damages for the value of the wood that it purchased from a lumber yard. The second concept is known as lucrum cessans, which is net gains prevented. This concept relates to the expectation of putting the bargained for performance to good use. For instance, in the above example, the claimant may also claim damages for the profit it would have made from building the house. Damnum emergens and lucrum cessans are sometimes described as being equivalent to reliance and performance interest measures. However, such a characterization can be misleading. Lucrum cessans is necessarily a
performance interest loss. Conversely, \textit{damnum emergens} may be either a reliance or performance interest loss.\textsuperscript{73} For instance, in a contract for the sale of goods, the \textit{damnum emergens} may be measured by the difference between the contract price and the market price, which also represents the performance interest.\textsuperscript{74} In any event, the distinction between reliance and performance interest typically is only useful in common law; in France, at least, such a distinction is not made.\textsuperscript{75}

Some civil law jurisdictions classify damages for breach of contract into two categories called positive interest and negative interest.\textsuperscript{76} The purpose of positive interest is to place the claimant in the financial position it would have been in had the contract been performed. This amount may include any profits it would have received if the breach had not occurred. By contrast, the purpose of negative interest is to restore the claimant to the position it would have been in had the transaction not taken place. That is, it furthers the claimant’s reliance interest.\textsuperscript{77}

Some civil law countries also allow non-pecuniary damage to be claimed, which is known as moral damage.\textsuperscript{78} Moral damages are damages occurring from “intangible injury to feelings, honor, or moral principles, causing pain or suffering.”\textsuperscript{79} In France, for example, a court awarded an actress damages for harm to her reputation after a theater failed to put her name in letters of the agreed size.\textsuperscript{80} Other countries, such as Germany, do not usually allow recovery for moral damage.\textsuperscript{81}

In general, damages “constitute a substitute for performance, that is, full compensation for the loss resulting from the breach of contract.”\textsuperscript{82} Thus, many civil codes provide that a claimant may recover for the loss incurred (\textit{damnum emergens}) and for the gain of which it was deprived (\textit{lucrum cessans}).\textsuperscript{83} This awards claimants the “benefit of the bargain,” essentially awarding claimants their performance interest.\textsuperscript{84} The goal is the same as in common law, to put
claimants in the position they expected to be in had the contract been performed. Depending on the jurisdiction, it is often important under civil law to characterize various breaches of contract. While French law treats breaches the same way common law does, by comprehensively grouping them together, other countries categorize the various types of breach. In Austria, breaches of contract are categorized into impossibility, delay, breach of warranty and positive violation. The available remedies depend on the type of breach. For example, in the case of delayed performance, where performance is late but still possible, damages are available when the delay is due to the obligor’s fault.

Not every breach of contract enables the injured party to rescind the contract. The breach must be material. Each country approaches this requirement differently. In Italy, rescission will not be granted if the breach has only “slight importance” to the other party’s interest. In France, courts have wide discretion in granting a rescission of a contract and damages (known as a résolution of a contract) by looking at the level of the breach and whether or not damages would be adequate. German law provides separate standards for the right to terminate, but generally requires a serious breach. In Switzerland, a party can terminate a contract if the obligor failed to perform after having been given an additional time for performance.

In contracts which involve the payment of a sum of money, damages are often expressly spelled out in civil codes as limited to the sum and interest. There is also no requirement that the claimant show proof of loss.

Sale of Goods. In sale of goods cases in civil law countries, like in common law countries, different methods exist for determining the value of a claimant’s damages. The first is the “concrete” method, where damages equal the difference between the contract price and the price the buyer paid in a substitute contract. The second is the “abstract” method, where no
substitute transaction has taken place and damages equal the difference between the contract price and the market price at the time substitute goods could have been obtained. In the case of breach by buyers, “concrete” refers to the actual resale price, and “abstract” refers to the market price. It is worth noting that, in France, the injured party to a sale must obtain a court order before it can go into the market for substitute goods.

Where goods have been delivered but are defective, civil law countries allow the buyer to reduce the price of the contract, the actio quanti minoris. For example in Germany, if goods are defective, a buyer has the right to terminate the contract, demand compensation, or demand “reimbursement for wasted expenditures.”

Some civil law countries have sale of goods acts similar to common law countries’ acts and codes governing the sale of goods, like the English Sale of Goods Act of 1979. These acts prescribe remedies in the event a breach of a contract for the sale of goods occurs. Moreover, they divide remedies for a breach of contract into buyers’ remedies in the event of a breach by a seller and sellers’ remedies in the event of a breach by a buyer. For example, in the event of a breach by a seller under both Finland’s and Norway’s Sale of Goods Acts, a buyer is entitled to a reduction in price (if a seller delivers defective goods), or specific performance or monetary damages (if a seller fails to deliver a buyer’s goods), or both. Likewise, in the event of a breach by a buyer, a seller is entitled to specific performance or monetary damages. Damages may consist of direct loss or indirect loss (which includes lost profits). Moreover, in the event a breach of a sales contract occurs and a buyer replaces goods unjustifiably not delivered or a seller resells unjustifiably rejected goods, damages are calculated as the difference between the contract price and the price of the substitute transaction. If a breach of contract occurs but a buyer does not procure substitute goods or a seller does not resell rejected goods, damages are
calculated as the difference between the contract price and the current price of the goods at the
time and place of cancellation where the goods were to be delivered. Also, a number of
countries in Europe, such as Austria, Denmark, France, Germany, Italy, the Netherlands,
Sweden and Switzerland, have adopted the U.N. Convention on the International Sale of Goods
(CISG).

Requirements and Limitations. In order to recover either damnum emergens or lucrum
cessans, or both types of damages, the claimant usually must satisfy several requirements,
including causation, fault and certainty. In general, the claimant bears the burden of proof with
respect to these issues. Some jurisdictions also require that the claimant notify the respondent
of its failure to fulfill its contractual obligations. In addition, many preclude recovery for
damages that the claimant could have avoided. Furthermore, the requirements for the recovery
of lost profits in civil law countries vary from country to country and, as a general rule, damages
are more difficult to obtain than in common law countries.

Causation/Foreseeability. Like common law countries, many civil law countries require
some form of causation before liability attaches. In general, under the French model, causation
is employed under the concept of foreseeability. Under French law, a respondent is liable only
for damages “which were foreseen or which could have been foreseen at the time of the
contract,” except in cases of a willful breach. The foreseeability requirement, which applies to
both the type of damages and to the amount of damages, has the effect of limiting damages,
especially for lost profits. In addition to the requirement that damages be foreseeable, French
law also requires that damages be the direct result of the breach.

As noted, the foreseeability requirement does not apply in cases of a willful breach (dol)
or, in some jurisdictions, a breach resulting from gross negligence. In the case of a willful
breach (or one made with gross negligence), the respondent is typically liable for both *damnum emergens* and *lucrum cessans*, as long as they are an immediate and direct result of the breach.109

By contrast, German law does not recognize the concept of foreseeability.110 Nevertheless, German law still limits damages through the concept of adequate causation. The test for whether adequate causation exists has been expressed as whether “the obligor’s default, as judged by ordinary human standards at the time of its occurrence, render, more likely, damages of the kind actually suffered.”111 Under Austrian law, adequate causation exists if “the damage was not totally unforeseeable in the normal course of events.”112

**Certainty.** In general, damages must be certain in their existence, but not in their amount.113 Countries following this rule allow recovery for future damages as long as the damages are certain to occur in the future.114 The loss of chance also may constitute compensable damages if the circumstances show that the chance was certain.115 The requirement that a claimant prove damages to a reasonable degree of certainty is sometimes treated as part of substantive law and is found in the civil code of a country, as it is in Italy.116 In other countries, such as Germany and Switzerland, however, the requirement of certainty is treated as a procedural requirement.117

**Fault.** An often commented on distinction between common law and civil law is that in civil law there is generally no liability for damages unless the respondent was “at fault” in breaching the agreement.118 This could be satisfied by a willful breach or a breach resulting from negligence.119 In some countries, such as Germany and Austria, the burden is on the breaching party to prove the lack of fault.120 By contrast, in France, Belgium, Spain, and Italy the law places the burden to prove fault on the claimant.121 Under Austrian law, lost profits are not recoverable for breach of contract unless the breach was caused intentionally or with gross
negligence, or the respondent is a merchant who caused the damage during the course of business.

*Notice.* In many civil law countries, liability for breach of contract does not attach to non-performing parties until they have been put in default. Once a non-performing party is placed in default, damages begin to run against it. Putting the respondent in default is accomplished by providing notice, *mise en demeure,* to the respondent that performance, damages, or rescission of the contract is being demanded. The purpose of *mise en demeure* is for the claimant to assert a demand for performance, because failure to do so results in an assumption that the claimant has acquiesced to the respondent’s delayed performance. The *mise en demeure* is not required in certain instances, typically where performance must be within a set time, or where agreed to by the parties.

In Germany, in order for a claim for damages to arise, the respondent must fail to perform and the claimant must not only make a demand for performance, but must also fix an additional time for performance. Once the respondent is put in default and has been given additional time to perform, it becomes liable for damages. This concept of providing a party who has failed to perform with additional time is known as *Nachfrist.*

*Avoidability.* There is no uniform approach to the reduction of damages due to the failure of claimants to use reasonable efforts to mitigate their losses. The rules in civil law countries, however, often achieve the same result by refusing to award damages if a claimant’s losses were caused by the claimant’s reckless attitude, or by reducing damages in accordance with the extent of the claimant’s fault. Under Swiss law, a judge may reduce the amount of damages for reasons “which he [the injured party] is responsible for having caused or aggravated. . . .” In France, it is accepted that the claimant “should not be allowed to *increase* damages for losses.
which were avoidable.” In Dutch law, an innocent party is under an obligation to reduce the damage caused by the breach of contract. For instance, if a claimant acted negligently in not reducing its damages, the court will reduce the claimant’s award of damages accordingly. When a claimant undertakes efforts to avoid loss, the expenses incurred in doing so are usually recoverable as reasonable costs of mitigation. In contracts for the sale of goods, for instance, there may be a duty to mitigate loss by going into the market and obtaining substitute goods.

The ICC Tribunal’s decision in Final Award in Case No. 8423 of 1994 illustrates the application of the causation requirement in a transnational dispute and the awarding of lost profits. There, two Portuguese companies (the claimants) entered into an association agreement with a subsidiary of a French company, the purpose of which was the exploitation of certain plants through a jointly owned company (the “Joint Company”). The agreement also contained a non-competition clause. The claimants then claimed that the French parent company (the respondent) breached the non-competition agreement by submitting offers for the construction and exploitation of four separate projects in which the Joint Company was also interested. The tribunal noted that, under applicable “Portuguese law (Art. 798 Civil Code), contractual liability presupposes a wrongful failure to perform an obligation, a damage and a causal relationship between the wrongful failure to perform and damage.” It ruled that, while the French parent company violated the non-competition clause, there was no causation between the Joint Company’s claimed damage and the French parent company’s wrongful participation in the first three projects. The Joint Company did not submit bids to participate in those projects and failed to prove it had the ability to do so or would have done so. Because it failed to submit bids in the first three projects, the tribunal held that the Joint Company’s alleged lost profits from those projects would have occurred even if the French parent company had not breached its
obligations. However, with respect to the fourth project, the tribunal ruled that adequate causation existed because the Joint Company did submit an offer for that project, and while the Tribunal noted that it could not “affirm with certainty that [the Joint Company] would have obtained the contract if the defendant French parent company had not submitted an offer[,]” the French parent company’s action “was such as to diminish, according to the ordinary course of things and general business experience, the chance of success of the submission by the [Joint Company].”\textsuperscript{140} Turning to the quantification of damages, the tribunal noted that it was “difficult to assess [the Joint Company’s] loss of opportunity to the French parent company’s breach of contract,” in part, because the claimants “failed to submit sufficient evidence of [their lost] profit.”\textsuperscript{141} Nevertheless, the Tribunal awarded the claimants as damages what it estimated to be the claimant’s share of the loss of possible profit, which was set at 12\% of the [Joint Company’s] benefit.\textsuperscript{142}

B. \textit{North America}

1. Canada

The primary purpose of damages in Canada is to protect claimants’ performance interest. Damages in Canada are designed to place claimants in as good a position as they would have been in had a breach of contract never occurred.\textsuperscript{143}

Nominal damages are awarded for breach of contract in Canada if the claimant can prove a respondent breached a contract, but did not suffer any pecuniary loss.\textsuperscript{144} The amount courts have awarded for nominal damages differs from decision to decision and has ranged anywhere from CAN$0.20 to CAN$250.\textsuperscript{145}

In addition, although punitive damages are normally not awarded in breach of contract disputes, Canadian courts have awarded them in certain instances, such as when the injury
caused is an independent actionable wrong sufficiently outrageous to warrant exemplary relief.  
Although damages for non-pecuniary loss, such as physical harm, have always been awarded in Canada if the harm was foreseeable, damages for emotional harm have not typically been awarded. More recently, however, damages for emotional harm have been awarded. 

Sale of Goods. In Canada, contracts for the sale of goods are governed by provincial sale of goods acts. These acts are substantially similar to each other. 

The provincial sale of goods acts in Canada typically provide that damages awarded in a breach of contract dispute should account for the loss “directly and naturally resulting” from the breach. These damages in sale of goods cases include losses incurred by a lost volume seller. The damages also include all losses incurred by a seller manufacturing specially manufactured items.

Where the buyer wrongfully refuses to accept a seller’s goods, the measure of damages is ascertained by calculating the difference between the contract price and the market price. Likewise, where the seller wrongfully refuses to deliver contracted-for goods, the buyer may maintain an action against the seller for the difference between the contract price and the current market price of the goods. Damages are assessed at “the time or times when the goods ought to have been accepted, or, if no time is fixed for acceptance, then at the time of the refusal to accept.”

Limitations and Requirements. Damages in Canada are restricted by certain limitations and requirements, amongst them the typical requirements of proof of foreseeability, certainty and avoidability.

Causation/Foreseeability. Courts in Canada follow the principle from Hadley v. Baxendale that damages, in order to be recoverable, must have been reasonably foreseeable or in
the contemplation of the breaching party at the time of the making of the contract. In some cases, Canadian courts have gone even further and required not just that unforeseeable consequences were in the contemplation of the respondent, but that an agreement was made between the parties that, in case of breach, the claimant would be compensated for the unforeseeable consequences.

Foreseeable loss can include damages that the respondent knew would probably occur but was not absolutely certain would occur after a breach of contract. It can also include damages which occur that are of the same type of damage foreseen by the breaching party but not of the same magnitude. Canadian courts, however, are more hesitant to award damages in circumstances in which the respondent is not acting in its normal capacity, such as when an individual or company is either pressured into providing or agrees to provide goods in which it does not normally deal.

**Certainty.** In order for damages to be awarded, the claimant must prove that the breach of contract resulted in loss to the claimant. However, as long as damages are proven to have occurred, the amount of damages does not necessarily need to be specifically proven in order for the claimant to be awarded damages. Instead, a claimant has the burden of proving its damages “on a reasonable preponderance of credible evidence.”

In accordance with the seminal common law case of *Chaplin v. Hicks*, damages for loss of chance have also been awarded by Canadian courts, even in cases where the claimant’s chance was less than fifty percent.

**Avoidability.** A claimant may not recover loss that it could have avoided had it acted reasonably under the circumstances. Moreover, a claimant is not excused from mitigating its losses just because the expenditure of time or money is required in order to mitigate.
However, a claimant is not required to take drastic measures to mitigate its losses.\footnote{166} For example, a claimant is not required to ruin its reputation in order to mitigate its losses.\footnote{167} Moreover, a claimant is not forced to accept an offer from the respondent if, by accepting the offer, the claimant must give up some or all of its legal rights against the defendant.\footnote{168}

The Ontario Court’s decision in *Nova Tool & Mold Inc. v. London Industries Inc.*\footnote{169} illustrates the application of the foreseeability and avoidability requirements and the calculation of damages in a transnational contract dispute. In the case, Nova Tool, a Canadian company, and London Industries, an American company, entered into a contract in which Nova Tool agreed to construct molds for London Industries to use in manufacturing automobiles for Honda. Nova Tool, however, fell extremely behind schedule in its construction of the molds and continually led London Industries to believe that, despite its delays, the molds would be constructed in accordance with the parties contracted-upon time line. After almost a year of back and forth during which time the mold was not completed on schedule and numerous technical flaws in the molds were discovered, London Industries requested that the mold be moved to its facilities where it hired outside assistance to attempt to rectify the situation in order to fulfill its own contracts with Honda. After Nova Tool sued London Industries for supposed non-payments on the molds, London Industries countersued for damages including lost profits, repair costs and cost of completion. The Ontario Court ultimately held for London Industries, noting that the damages suffered by London Industries because of Nova Tool’s failure to prepare the mold on time and absent defects, were within the reasonable expectation of Nova Tool, even though the “quantum of [the] (buyer’s) damages . . . may be more than [the] seller anticipated.”\footnote{170} Additionally, the court held that even though the buyer was under a duty to mitigate its damages, the buyer in this case (London Industries) did not breach its duty to mitigate by failing to take its
business elsewhere after Nova Tool was repeatedly late in meeting deadlines, because its deadline with Honda was so close and the two parties had contracted for molds before during which Nova Tool had experienced problems during the manufacturing but had always supplied the molds on time and absent any defects.\textsuperscript{171}

2. United States

In the United States, as in common law countries generally, damages are the primary remedy for breach of contract.\textsuperscript{172} Damages are fundamentally regarded as compensatory and are only to place innocent parties in the position they would have been in had the contract been performed.\textsuperscript{173} In the United States, a claimant has the option of selecting the method for assessing damages. Thus, a claimant can decide against seeking damages that would protect its performance interest and instead seek damages that would protect its reliance or restitution interest. In fact, jurisdictions in the United States have allowed a combination of damages to be pursued, as long as the award of the damages does not result in double recovery.\textsuperscript{174}

Damages are classified in three separate categories: nominal, general, and special. Nominal damages are a trivial sum of money awarded when the claimant has not, or cannot, prove that it suffered any compensable damage. General damages, like general damages in England, are damages that flow naturally from a breach of contract. Special damages, synonymous with consequential damages, are damages that do not necessarily flow naturally from a breach of contract.\textsuperscript{175}

American contract law regards damages for breach of contract as primarily compensatory. Accordingly, courts typically do not typically award punitive damages in contract cases. However, punitive damages have been awarded when the breach of contract is
accompanied by fraudulent conduct or by an independent tort sufficiently outrageous to warrant such damages.\textsuperscript{176}

Damages for personal injuries are generally recoverable in a breach of contract action. Damages for mental suffering, however, are typically not recoverable.\textsuperscript{177} But there are exceptions to this general rule. Emotional distress damages for breach of contract have been awarded in cases involving “peculiarly sensitive subject matter, or noncommercial undertakings, or both.”\textsuperscript{178} For example, they have been allowed in cases where harassing collection techniques were used, a burial contract was breached, and a contract for the transportation of a dead body was breached.\textsuperscript{179} The Restatement (Second) of Contracts provides that recovery for mental suffering or emotional disturbance is allowed where the breach causes bodily harm or the nature of the contract is such that a breach of it is likely to result in serious emotional disturbance.\textsuperscript{180}

With respect to the calculation of damages, determining the sum of money varies, depending on the circumstances of the case, including whether the claimant terminated the contract and whether there was a complete or partial breach.\textsuperscript{181} The application of these principles can best be illustrated by looking at some common types of contracts. These include contracts for the sale of goods.

\textit{Sale of Goods}. In the United States, all states have adopted some form of the Uniform Commercial Code (UCC), a model law that governs a variety of commercial topics including the sale of goods under Article Two.\textsuperscript{182} All states except Louisiana have enacted Article Two of the UCC, some with minor (but insignificant) alterations.\textsuperscript{183} Both the 1951 and the revised version of Article Two of the UCC set forth different remedies for breach of a sales contract, including damages, depending on whether the claimant is a buyer or a seller and depending on the circumstances of the breach (e.g., non-delivery or repudiation).\textsuperscript{184}
Section 2-706, 2-708, 2-709 and 2-710 set forth an aggrieved seller’s pecuniary remedies. Section 2-706 provides that an aggrieved seller may resell the goods concerned and recover damages. It states: “Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.”

Section 2-708 allows an aggrieved seller to recover damages for non-acceptance. It states:

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

Section 2-709 provides that when a buyer fails to pay the price, the aggrieved seller may, in addition to any incidental damages, recover:
(a) the price of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and (b) the price of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.\(^{187}\)

Section 2-710 allows an aggrieved seller to recover incidental damages. It states: “Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.”\(^{188}\)

With respect to an aggrieved buyer’s pecuniary remedies, Section 2-711 provides that when a seller fails to make delivery or repudiates or the buyer rightly rejects or justifiably revokes acceptance, or when the breach goes to the whole contract, the buyer may cancel and (1) cover and claim damages, or (2) recover damages for non-delivery.\(^{189}\) With respect to damages for non-delivery, Section 2-713 states:

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.\(^{190}\)
Section 2-714 provides for the recovery of damages for breach in regard to accepted goods. It states:

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.\textsuperscript{191}

Section 2-715 sets forth an aggrieved buyer's incidental and consequential damages. It provides:

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
(b) injury to person or property proximately resulting from any breach of warranty.\textsuperscript{192}

\textit{Revised Version of U.C.C. Article Two.} In 2003, the National Conference of Commissioners on Uniform State Law and the American Law Institute promulgated a revised version of Article Two. To date, no states have adopted the revised version. The changes to Article Two, especially to the remedies section of Article Two, are relatively minor.

With respect to a seller’s remedies in the event a buyer breaches a contract for the sale of goods, Section 2-708 of the revised version of Article Two provides that, in addition to collecting incidental damages in a damage award, a seller may also recover consequential damages.\textsuperscript{193} Section 2-708 was also revised and now provides that a seller may recover damages under Section 2-708(2) not only if collecting damages under Section 2-708(1) is inadequate to put the seller in the position it would have been in had the contract been performed, but also if collecting damages under Section 2-706 is inadequate to put the seller in the position the seller would have been in had the contract been performed. In short, if a seller is a lost-volume seller who therefore is inadequately compensated under Section 2-708(1) or Section 2-706, the seller may recover the full amount for the goods in question (not just the difference between the market price and the contract price or the cover price and the contract price) under Section 2-708(2).

With respect to a buyer’s remedies in the event a seller breaches a contract for the sale of goods, Section 2-712 of the revised version of Article Two clarifies the circumstances in which a buyer is entitled to cover.\textsuperscript{194} Moreover, Section 2-713 clarifies the time at which the market price in a cover situation is to be measured. According to Section 2-713(1)(a), the market price in cases other than anticipatory repudiation is measured at the time for tender. Section 2-713(1)(b), on the other hand, provides that the market price in the case of anticipatory
repudiation is measured at the “expiration of a commercially reasonable time after the buyer learned of the repudiation.”195

**Limitations and Requirements.** The recovery of damages in the United States is subject to requirements and limitations similar to those found in common law England. These include: causation, foreseeability, certainty, and avoidability.

**Causation/Foreseeability.** In order for a claimant to recover damages from a respondent, it must prove that the respondent’s non-performance was the cause of the losses it suffered, or the gains it was prevented from acquiring. This question often boils down to whether, within the realm of common sense and experience, the respondent’s breach can be viewed as the cause of the claimant’s loss.196 This concept is generally discussed in conjunction with the ideas of remoteness and foreseeability. One commentator notes that “our only test of ‘causation’ . . . is foreseeability.”197

In the United States, the Restatement (Second) of Contracts has slightly narrowed the principles set forth in *Hadley v. Baxendale*.198 The Restatement provides: “Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.”199 A loss may be foreseeable if “it arises in the ordinary course of events, or . . . as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.”200 The ability of the breaching party to foresee damages is evaluated at the time the contract was made.201

Article Two of the UCC provides a similar formulation to the Restatement (Second) of Contracts.202 It states *inter alia* that a “buyer may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller’s breach as determined in any reasonable manner.”203 It also provides that “[c]onsequential damages resulting from the
seller’s breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.”

Certainty. Claimants cannot merely assert they have suffered a loss; they must prove it to a reasonable degree of certainty. This rule applies only to the existence of loss, not the extent of loss. Difficulty in assessing damages will not bar recovery. Furthermore, the certainty requirement does not, as a general rule, automatically bar the awarding of damages for loss of profits. In fact, in the United States, courts have been willing to award lost profits even in cases where the claimant is a new business. In addition, in the United States, while courts typically follow a no-fault rule with respect to damages, they have been “less demanding in applying the requirement [of certainty] if the breach was ‘wilful.’” American courts have also held that claims for the loss of “good will” need only be proved with “sufficient certainty.”

Avoidability. Once a claimant has been injured by a breach of contract, it must not unreasonably continue performance, and must desist and claim damages in which allowance will be made for expenses saved by not completing performance. This is different from the English rule, which does not require claimants to mitigate loss by accepting the respondent’s repudiation and suing for damages. The burden is placed on the respondent to show the claimant has failed in this respect. In mitigating, a claimant is not required to do anything that might injure the claimant’s commercial reputation.

The arbitral tribunal’s decision in Final Award in Case No. 8362 of 1995 illustrates the application of the certainty and foreseeability requirements and the calculation of damages in a transnational contract dispute. There, a United Kingdom distributor (the claimant) sought
from an American manufacturer (the respondent), who breached an exclusive distributorship agreement, expectation damages equal to lost net profits (i.e., estimated gross profits that it would have received over the duration of the distribution agreement but for the respondent’s breach less variable costs). To determine the amount of damages, the tribunal looked to the applicable law, New York law, which provided that the claimant must show “(i) that it has suffered harm; (ii) that such harm was caused with certainty by the breach, and (iii) that the amount of its damages is established with reasonable certainty.” With respect to the first two requirements, the tribunal determined that the claimant established with certainty that, as a direct result of the breach, the claimant lost its rights: (i) to purchase respondent’s product at a discount, and (ii) to the exclusive distribution of the respondent’s product in the United Kingdom and continental Europe. This resulted in a decline in the claimant’s sales in those regions. Furthermore, the tribunal found that “the right to resell at a profit was what was contemplated by the parties upon concluding the Distribution Agreement, so that the loss of profit suffered from the withdrawal of that right was clearly in the contemplation of the parties.” As a result, the claimant’s loss was an immediate and direct cause of the respondent’s breach. Turning to the calculation of damages, the tribunal noted that, under New York law, a consistently applied specific rule for calculating net profits did not exist. However, that did not preclude the award of damages. The tribunal explained that damages need not be calculated with precision. Instead, there only needs to be a sound basis for determining their amount. The tribunal calculated the lost net profit owed to the claimant as a percentage of the estimated lost sales equal to gross margin less avoided costs.

C. **Latin America**
Damages throughout Latin America reflect the civil law distinction between *damnum emergens* and *lucrum cessans*, both of which are recoverable upon a breach of contract. For example, the Civil Code of Brazil provides that if the respondent breaches the contract, the respondent will be liable for the actual loss suffered by the claimant in addition to what the claimant reasonably failed to gain. The amount that the claimant reasonably failed to gain is determined by the difference between the value of the claimant’s assets had the breach not occurred and the value of the claimant’s assets after the breach. This calculation includes lost profits. Therefore, damages are intended to award claimants their performance interest by placing claimants in the position they expected to be in had the contract been performed.

Damages in Argentina, meanwhile, are often categorized as either “positive” or “negative” damage. Negative damage is defined as the loss a party failed to gain. Positive damage, on the other hand, is defined as the actual loss a party incurred. In addition to these losses, damages in Argentina may include non-compensatory recovery, such as recovery for moral damages including the loss of business reputation. Recovery for these non-pecuniary losses is conditioned on a finding that the breach was wanton, outrageous or with malice. Moral damages are also recoverable in breach of contract actions in Paraguay.

*Causation/Foreseeability.* Losses are only compensable if they are directly caused by the respondent’s non-performance. This requirement of causation is the standard throughout civil law countries. For example, in Argentina, damages are restricted to those which are the immediate and direct result of the breach. One commentator notes that directness has been interpreted consistently with the concept of foreseeability in some cases, which would make Argentinean law consistent with the civil law tradition. Where the breach is the result of *dolo* (fraud), the respondent is liable for indirect consequences as well. In general, however, a
respondent in Latin America is only liable for direct damage that is foreseeable as a result of the breach of contract.232

*Certainty.* Generally, damages must be certain in their existence, but not in amount.233 According to the Guatemalan Civil Code, the victim of a breach of contract is only required to prove that it suffered damages.234 Although damages for non-pecuniary loss are difficult to prove with certainty, damages for sentimental feelings may be awarded in Mexico, but only if the claimant can prove the respondent breached its contract with the purpose of inflicting sentimental damage.235

*Fault.* Similar to some European civil codes, some Latin American countries require that in order to establish liability against the respondent for breach of contract, the claimant must prove the respondent was at fault in breaching the contract. The 2002 civil code of Brazil significantly narrows this principle, allowing excused non-performance only in the case of force majeure.236 In other Latin American countries, fault must be established but the respondent may avoid liability if it proves its non-performance was due to some event not attributable to its own actions.237 Meanwhile, in Argentina, in contracts where a specific result is contracted for, the respondent is presumed to have been at fault in the event of non-performance, in contrast to contracts for “certain means,” in which fault must be proven.238 In addition, respondents under Paraguayan law will only be held liable for a breach of contract if their non-performance occurred as a result of their own negligence.239

*Notice.* In civil law, a breach of contract does not always automatically entitle the claimant to damages. Consequently, the claimant in most Latin American countries, unless the contract calls for the performance to take place on a given date, typically has the formal duty of putting the breaching party in default by notifying the breaching party of its intent to sue.240
D. Middle East

Contract law in the Middle East is reflective of various influences, including civil law and Islamic law (Shari’a). For example, Egypt’s Civil Code of 1949 was originally based on the French Civil Code. Turkey’s civil code has been heavily influenced by the Swiss Code of Obligations. Before the Islamic Revolution in 1979, Iran was influenced by the French and German civil codes. Today, as a result of the Revolution, its legal system is a mix of civil and Islamic law, however all laws in Iran are required to follow Islamic law. Israel, meanwhile, has adopted a mixed system, which blends civil law, common law and, in areas reserved to religious jurisdiction, Jewish law. Notwithstanding the various sources of law, the goal of awarding damages for breach of contract in most Middle Eastern countries is to place the injured party in the position that it would have been in had the contract been performed. How that goal is achieved, however, varies greatly among the countries in the region.

In many Middle Eastern countries, the primary remedy is specific performance. However, when specific performance is impossible or too burdensome, monetary damages are awarded in order to compensate the injured party. In Kuwait and Egypt, for example, a distinction is made between damnum emergens and lucrum cessans. Both are recoverable. Meanwhile, in Jordan and the U.A.E., the recovery of lost profits is not allowed. Instead, damages are based on “the damages actually sustained at the time [the breach] occurred.” This reflects the dictates of the Shari’a which views lost profits, moral prejudice, and delay in performance as intangible elements that are not compensable.

Kuwaiti law is more generous toward injured parties in cases of breach of contract. For example, where defective goods have been delivered in contracts for the sale of goods, Kuwaiti law allows the buyer to rescind the sale, return the goods, and recover both the purchase price in
addition to damages, such as loss of profits. In contrast, in Jordan and the U.A.E., the buyer is only allowed to recover the actual purchase price of the goods, unless a separate tort was committed along with a breach of contract.

In Iran, damages are limited to losses which the injured party actually suffered. Damages for loss of profits are typically not awarded. However, aggrieved parties may recover the cost of obtaining substitute performance.

Meanwhile, in Israel, an injured party to a contract has three basic remedies: (1) enforcement of the contract; (2) rescission of the contract; and (3) recovery of damages, which may be recovered in addition to or independent of the first two remedies. As is the case in many civil law countries, specific performance, not damages, is the primary remedy in Israeli law.

The primary purpose of damages in Israel is to put claimants in the position they expected to be in once the contract was performed, giving them the “benefit of the bargain.” Thus, damages are compensatory. The Israeli Remedies law states that a claimant “is entitled to compensation for the damage caused to him . . . which the person in breach foresaw, or should have foreseen, at the time the contract was made.” Damages include lost profits. Furthermore, like many common law countries, damages are distinguished between a claimant’s performance interest and reliance interest, and claimants choose which measure of recovery to seek. Claimants may also seek a combination of remedies, such as restitution combined with lost profits. Finally, in a break from traditional English common law, non-pecuniary losses may be recovered under Israeli contract law.

Requirements and Limitations. Recovery of damages in Middle Eastern countries is limited by the same constraints as those found in European civil codes. First, damages must have been caused by the breach and must have been foreseeable. Moreover, in some countries,
there must also be fault on the part of the non-performing party and notice must be provided in order to put breaching parties in default of their obligations. Avoidability is also a limitation.

_Causation/Foreseeability._ In order to award damages for a claimant’s actual loss or loss of profits under Kuwaiti law, the claimant must prove that its damages were the natural consequences of the breach. Therefore, the respondent is typically only liable for the losses incurred by the claimant which were foreseeable or should have been foreseeable by the respondent at the time the contract was entered into. However, if the respondent is found guilty of “fraud or gross negligence,” a claimant may recover damages that were the direct consequence of the breach but may not have been foreseeable by the respondent at the time the contract was entered into.  

An illustration that damages must be both foreseeable and the direct result of the respondent’s breach in order to be compensable, is case no.1/1984, decided by an arbitration panel under Egyptian law. The claimant, a European company, entered into a contract with the respondent, the Minister of Agriculture for an African state, to dust crop fields using airplanes. As part of the parties’ agreement, the respondent agreed to maintain the safety of the runway for the claimant’s flight operations. The respondent, however, failed to uphold its contracted-for obligation and allowed a vehicle to enter the runway just as the claimant’s plane was taxiing down the runway. The claimant’s plane crashed and the claimant subsequently sought compensation from the respondent, for damages it suffered including the loss of profit from a contract with another African state for crop dusting, where the same plane was being used. In deciding this issue, the Tribunal looked to Article 221 of the Egyptian Civil Code, the civil code governing the dispute. That provision provides:
The judge will fix the amount of damages, if it has not been fixed in the contract or by the law. The amount of damages includes losses suffered by the creditor and profits of which he has been deprived, provided that the damages are the normal result of the failure to perform the obligation or of delay in performance. These losses shall be considered to be the normal result if the creditor is not able to avoid them by making a reasonable effort.

When, however, the obligation arises from contract, a debtor who has not been guilty of fraud or gross negligence will not be held liable for damages greater than those which could have normally been foreseen at the time of entering into the contract.265

Applying this article, the Tribunal held that the loss resulting from the separate contract was “an indirect prejudice for which the Respondent could not be held responsible.”266

In Israel, it is essential that a claimant, in order to ensure recovery, proves its loss was actually caused by the non-performing party’s breach of contract. In addition, the loss must have been foreseeable, or should have been foreseeable, to the breaching party at the time the contract was made.267

**Fault.** In many Middle Eastern countries, the failure to perform must be attributable to the fault of the respondent and the fault must be the material cause of the injury.268 For example, in Iran, the basic civil law principle of fault is explicitly required to exist in order for a claimant to recover damages from a respondent.269 However, in Egypt, the non-performance of the obligation is, in itself, sufficient to show fault, except in the case of force majeure or fault of the claimant.270 In Israel, meanwhile, proof of fault is not required. Therefore, the extent of damages awarded is not altered depending on the conduct of the breaching party. If a respondent
acts in “bad faith” damages are not extended, as they are, for example, in Kuwait, to encompass unforeseeable losses.  

*Notice.* In order for injured parties to recover damages or rescind a contract, the non-performing party must be put on notice in Egypt.  

In Iran, if no time is called for performance, parties must prove they demanded performance before they can be awarded damages. The party must have authorization in order to set a period for performance.  

There is no requirement of notice in Israel.

*Certainty.* According to one scholar, an important aspect of the *Shari’a* is that damages may only be awarded for losses to which an exact value can be assigned.  

Since the value of loss of profit, moral damages, and delay in performance cannot be quantified in exact numbers, *Shari’a* dictates that damages for these losses may not be awarded. Some Middle Eastern countries, however, do not follow this teaching. For example, according to Kuwait’s Civil Code, damages for “moral prejudice” may be granted to the victim of a breach of contract.

In Israel, pecuniary damages, including damages for lost profits, must be proven to a reasonable degree of certainty.  

Recovery for non-pecuniary damages is available; however, non-pecuniary damages, by their very nature are almost impossible to prove with certainty. Consequently, in awarding non-pecuniary damages, a court may use its discretion.

*Avoidability.* In many Middle Eastern countries, there is no express duty on the part of the claimant to take reasonable actions to mitigate its losses. However, Middle Eastern codes do provide that courts may take into consideration whether the claimant increased its losses after the breach of contract or had any part in causing the breaching party’s non-performance in the first place.  

This principle is illustrated by the decision of the Tribunal in case no. 12/1989, decided under Egyptian law.
In that case, the claimant, an international company, was seeking damages, including lost profits, from the respondent, an African agricultural bank after the bank cancelled the parties’ contract for the sale of grain. After the parties entered into a contract for the sale of grain, the respondent backed out of the agreement and the claimant was left with the rejected grain. Even though the price of grain had increased on the date the respondent backed out of the agreement, the claimant failed to attempt to resell the goods. Consequently, the Tribunal held that “the claimant had contributed to its own loss by failing to dispose of the cargo at a higher price and mitigating its own loss,” and refused to award the claimant damages for lost profits, but did award it damages for administrative and other expenses incurred in the transaction.280

The Israeli Remedies law also includes a codification of the common law requirement that claimants mitigate their losses. Section 14(a) states that breaching parties “shall not be liable . . . for damages which the injured party could have prevented or reduced by reasonable measures.”281

E. Asia

In Asia, some countries follow a common law tradition, others a civil law tradition, and a few, like the Philippines, have mixed systems.

1. Common Law Based Systems

India follows the common law tradition in which damages are the primary remedy for breach of contract.282 The goal of awarding damages for breach of contract is to compensate the claimant for loss and this entails putting the claimant in the position it would have been in had the contract been fulfilled.283

Damages are broken down into three categories: nominal, general and special damages.284 Nominal damages may be awarded where the actual amount of damages cannot be
judged or where the claimant has not been able to prove any actual loss. General damages are those which may not be proved beyond what a reasonable person can judge. Special damages on the other hand are precisely quantifiable. The only real difference between general and special damages is that special damages must be specially pleaded to be recoverable.

Damages are generally not awarded for mental anguish or for loss of reputation, however they may be recoverable when a contract’s purpose is to provide peace of mind.

Sale of Goods. In a contract for the sale of goods, damages typically are measured by the difference between the contract price and the market price at the time of the breach. Market price is to be determined at the place for delivery of the goods.

Requirements and Limitations. A respondent’s liability for losses to the claimant is limited in India by the typical requirements that the damage be caused by the respondent’s breach and that the damage was foreseeable. The claimant must prove, with reasonable certainty, the amount of damages it suffered. Finally, damages for loss that the claimant could have avoided through reasonable means are not recoverable.

Causation/Foreseeability. The measure of damages in India follows the rule from Hadley v. Baxendale. Damages are broken into two categories: 1) those which follow naturally from the consequences of the breach in question; and 2) those for which it must be shown the parties contemplated liability in the case of a breach. Mere notice to the respondent of special circumstances will not suffice to make the respondent liable for those circumstances in the case of a breach. The respondent must accept liability for special circumstances in the event it breaches the contract.

The application of the requirement that a respondent accept liability for special circumstances is illustrated in Dominion of India v. All India Reporter Ltd. In that case, the
claimant lost three volumes of a parcel of books making the entire set useless. The court found that the railway was not liable for the loss of the entire set, as they had no notice the loss of the three volumes would make the entire set useless.²⁹²

**Certainty.** In holding with the principle that damages are to be compensatory only, the claimant must not only prove that it suffered a loss, but it must also prove the extent of the loss it suffered. Damages need not be proven with absolute certainty. Instead, the level of certainty must be reasonable from the viewpoint of a prudent and impartial person.²⁹³

**Avoidability.** A claimant must not only show adequate causation and proof of loss, it must show that it could not have mitigated its loss by reasonable efforts.²⁹⁴ The claimant, however, has no obligation to “destroy his own property, or to injure himself or his commercial reputation, to reduce the damages payable by the defendant.”²⁹⁵

Final Award in Case No. 8445 of 1996 illustrates the awarding of damages in Indian law.²⁹⁶ In that case, the tribunal ruled that the respondent, a German manufacturer, breached a technology licensing agreement that it entered into with the claimant, an Indian manufacturer, by failing to provide the claimant with documents required under the contract. The tribunal applied the Indian Contract Act of 1872 which “provides that in order to recover for breach of contract, the aggrieved party must show that such damage arose naturally in the usual course of things from such breach, or was damage which the parties knew when they made the contract would be the likely result.”²⁹⁷ In the case, the court found that the loss of profit was the natural result of the respondent’s breach. The tribunal explained that “[t]he claimant unquestionably expected to make a profit from the local manufacture and the sale of products [resulting from the licensing agreement], and its inability to do so naturally led to a loss of profits, a result which both parties must have known at the time they entered into the agreement.”²⁹⁸
The tribunal also found that the claimant need not prove the amount of damages with absolute certainty, and noted “[all that] is required . . . is a reasonable estimate of loss based on such elements as are available.” The claimant met this test by providing detailed and reasoned estimates of the costs of production, the prices at which the products could be sold, their prospective market share and projected sales growth, and the ensuing profit that would have been made. As a result, the tribunal awarded the claimant lost profits for the duration of the agreement. However, the claimant’s request for damages due to loss or reputation was rejected on the grounds that proof of such loss, and especially the quantum of any such loss, is too speculative to serve as a basis for an award.

2. Civil Law Systems

China, Japan and South Korea follow the civil law tradition. In Japan and South Korea, a claimant’s first remedy upon the other party’s breach of contract is specific performance of the obligation. When specific performance is not possible or performance would be valueless, damages are the normal remedy. In China, claimants also have the option to request specific performance. However, damages are awarded when performance is impossible, specific performance is impractical or excessive, or when the claimant requests that performance occur in an unreasonable time frame.

Japan and South Korea classify damages into two categories: positive interest and the negative interest. The purpose of damages is to put the injured party in the position it would have been in had the contract been performed. Following a breach of a sales contract by delay in performance, the claimant can recover the difference between the contract price and the market price at the time of delivery. Profits that were lost because of the delay may also be recovered.
Damages are also divided into two other categories: ordinary and special damages. Ordinary damages are those which are likely to arise in the “normal course of events,” while special damages are those “resulting from special circumstance.” This division exists from the importation of the principles of Hadley v. Baxendale into Japan and South Korea.

China, on the other hand, recently made a large step towards a comprehensive law of contracts with the enactment of the Uniform Contract Law of China (UCL). Roughly modeled on both the Convention on the International Sale of Goods and the UNIDROIT Principles of contract, damages under the new law are designed to compensate a claimant for the loss which the respondent’s breach of contract caused. This places the claimant in the position in which it expected to be once the contract was performed. The UCL, unlike the Uniform Commercial Code in the United States, does not provide specific provisions on the calculation of damages.

In Japan, where the only obligation of the respondent consists of the payment of money, damages are specifically limited to the amount of interest owed on the money. The claimant does not have to prove damages. In addition, fault need not be proven when the only obligation is the payment of money. This situation may arise where a buyer refused to pay for goods received, and it is generally accepted that sellers may not recover damages beyond the delayed interest, even if proven.

Sale of Goods. There is no separate law in Japan governing contracts for the sale of goods. Damages typically equal the difference between the contract and market price, or where a resale has occurred, the difference between the contract price and resale price. In general, the buyer’s expected profits fall into the category of special damages.

In sale of goods cases in China, where a buyer has breached a contract, Article 109 of the UCL provides that the seller may demand the price. However, there does not appear to be a
requirement that the seller be unable to resell the goods. This would probably not create a problem of windfall to the seller because the duty to mitigate losses makes it nearly impossible for the seller to be able to sit on the goods and collect the goods’ price from the recalcitrant buyer. If the goods fail to meet the quality required under the contract, the buyer has the right to either demand that the seller bear the cost of curing the defect, or demand that the seller replace the goods. The buyer may also return the goods, and the buyer can ask for a reduction in price.

Limitations and Requirements. In order for a claimant to collect damages after a breach of contract, the claimant must be able to prove that the loss was caused by the respondent’s non-performance. Some countries also require that the claimant prove that the respondent’s non-performance is attributable to the fault of the respondent and that, to a reasonable degree of certainty, the claimant’s loss was not due to its own fault. A claimant must also mitigate its losses, and bear the cost if it fails to take reasonable efforts to prevent the aggravation of its losses.

Causation/Foreseeability. As to the scope of damages available, contract law in Japan and Korea were influenced by Germanic legal theory and consequently the extent of liability for breach of contract in these two countries is determined according to the concept of adequate causation. The civil codes of both Korea and Japan restrict damages to those which would ordinarily arise from the non-performance of the obligation. The respondent is responsible for “damages that have arisen through special circumstances, only if he had foreseen or could have foreseen such circumstances.”

This distinction between ordinary and extraordinary loss is not always easy to make and depends largely on the facts of each case. Normal loss has included such things as the cost of
finding alternative goods.\textsuperscript{327} It has also included the profit which a buyer intends to make on the resale of goods.\textsuperscript{328} In one case, however, the court found that a contract to resell goods at triple the purchase price was a special circumstance that could not have been foreseen by the seller.\textsuperscript{329}

In China, a country which modeled the recently promulgated UCL on the Convention on the International Sales of Goods, in order for a claimant to collect damages from a respondent, the damages must have been foreseeable at the time the parties entered into the contract.\textsuperscript{330}

\textit{Fault.} Fault is also an important consideration in a breaching party’s liability for damages in Korea and Japan. If, for example, an owner of a boat sells the boat and the boat is subsequently destroyed, the owner is not responsible for compensating the buyer if the owner of the boat was not at fault in the destruction.\textsuperscript{331} This principle, however, does not apply to a seller who was already in breach by delay when the subject matter of the sale was destroyed. Fault on the part of the respondent is also required in order for the respondent to be liable for damages for delay of performance or positive breach of contract.\textsuperscript{332} Fault, however, is not required when the only obligation is the payment of money.\textsuperscript{333}

\textit{Avoidability.} In Korea and Japan, “[i]f there has been any fault on the part of the obligee . . . the Court shall take it into account in determining the liability of the respondent and assessing the amount of damages.”\textsuperscript{334} The language of these provisions refers to the respondent’s fault in the non-performance of the obligation, but it also refers to the claimant’s fault in contributing to its losses.\textsuperscript{335} The requirement of fault puts a less rigorous burden on the claimant than the requirement in common law jurisdictions that the party use reasonable efforts to mitigate its loss.

In China, Article 114 of the UCL enunciates the rule of mitigation. It states that the party suffering any loss must take prompt measures to prevent further losses. If the party suffering the
loss does not take measures to prevent further losses, that party does not have the right to claim compensation for any additional loss.\textsuperscript{336}

F. \textit{Oceania}

New Zealand and Australia both follow the common law tradition and thus the rules regarding damages for breach of contract in New Zealand and Australia are similar to the Anglo-American and English common law rules regarding damages for breach of contract.\textsuperscript{337}

In Australia and New Zealand, damages are the primary and often the only remedy of an injured party to a contract.\textsuperscript{338} The point of damages for breach of contract in New Zealand and Australia is to put the claimant in the position it expected to be in had the contract been performed.\textsuperscript{339} Damages are often considered to fall into one of three types of interest following a breach of contract: restitution, reliance and performance interest.\textsuperscript{340} A combination of damages can be pursued, as long as double recovery does not result.\textsuperscript{341}

Like in England, a court in Australia and New Zealand can award general, special or nominal damages.\textsuperscript{342} Nominal damages are awarded when the claimant cannot show any loss but it is clear the other party committed a breach of contract.\textsuperscript{343}

Compensation for emotional harm and distress is generally considered inappropriate in breach of contract cases, particularly in commercial cases.\textsuperscript{344} However, if damages for mental distress were within the contemplation of the parties at the time the contract was entered into, they may be recoverable.\textsuperscript{345}

Putting the claimant in the position it expected to be in after the contract was performed requires compensation for two types of damages in Australian law: loss for the benefit promised under the contract; and consequential loss. To determine the first, the court must place a value on the performance which the claimant was wrongfully denied. This is not always easy and
different approaches are used in the various contractual settings. For instance, in a construction contract, a contractor who unjustifiably leaves a job is liable for the cost to complete the work. Consequential loss includes losses which would not have been suffered had the contract been performed, such as lost profits, expenses in performing obligations under the contract, and wasted expenditures. These losses often are the type of losses which are not compensable under the limitation on remote damage.346

Sale of Goods. Contracts for the sale of goods in New Zealand and Australia are governed by each country’s Sale of Goods Act.347 The remedies of the buyer and seller are separate, but the effect of the available remedies is to award the non-breaching party its performance interest.348

The seller has the right to damages only where the goods have not been accepted, or have been accepted late. However, a buyer has a right to damages upon non-delivery (including late delivery) and breach of warranty.349

In the case of a seller’s failure to deliver goods, damages are assessed as the difference between the contract price and the market price.350 If goods are delivered late, damages are assessed as the difference between the contract price and the market price at the time the goods were to be delivered.351

In Australia, the buyer may recover damages for breach of warranty, and failure to deliver.352 The buyer may also claim restitution for any money paid when the consideration for the payment failed, such as non-delivery.353

Requirements and Limitations. Australia and New Zealand both share the same limitations and requirements found in England and the United States with respect to the recovery of damages. The loss to the claimant must be caused by the respondent’s non-performance, the
loss must not be too remote, the claimant must be able to show the loss to a reasonable degree of certainty, and the claimant must have taken reasonable efforts to minimize its loss.

_Causation/Foreseeability._ A causal connection must exist between the respondent’s breach and the claimant’s loss.\textsuperscript{354} It is irrelevant that the claimant may have contributed to its own loss, unless the claimant’s contribution is so great that it breaks the causal chain between the respondent and the loss.\textsuperscript{355}

Both Australia and New Zealand restrict the recovery of damages according to the foreseeability principle enunciated in _Hadley v. Baxendale._ In New Zealand, however, _Hadley_ is only a starting point for the consideration of whether the claimant’s loss is too remote to be compensable. In the case of _McElroy Milne v. Commercial Electonics Ltd.,\textsuperscript{356} the court found that “reasonable foresight or contemplation, . . . are always . . . important consideration[s]. I doubt whether they are the only consideration[s].”\textsuperscript{357} The court went on to hold that other factors including the respondent’s culpability should be taken into consideration.\textsuperscript{358}

The two types of losses created by _Hadley_ are still applicable to questions of recoverable damage.\textsuperscript{359} In a case where delay in payment for scoured wool resulted in further loss in conversion to New Zealand dollars, the loss was found not to be too remote.\textsuperscript{360} In general, if the type of loss that was sustained was foreseeable, the respondent is liable regardless of the extent of the loss.\textsuperscript{361} The rule of _Hadley v. Baxendale_ is followed in Australia, however, it is only the kind of loss that must be foreseeable, not the extent of the loss.\textsuperscript{362}

_Certainty._ Damages must also be proven to a reasonable degree of certainty. The certainty rule applies only to the fact of damages, not to the amount of damages.\textsuperscript{363} In a recent decision, the New Zealand court of appeal awarded damages for lost profits from increased competition even though the claimant could not produce precise figures as to the amount of
business it lost as a result of the breach.\textsuperscript{364} The court found that it was clear the claimant had suffered a loss and awarded the amount which the court “was satisfied that the loss could not have been less than.”\textsuperscript{365} Thus, if the claimant provides sufficient evidence of loss or damage,\textsuperscript{366} the fact that the amount of damages are difficult to assess generally is no bar to recovery.\textsuperscript{367}

\textit{Avoidability.} In New Zealand and Australia a claimant must mitigate its losses upon a breach of contract.\textsuperscript{368} In other words, the failure to mitigate results in damages being calculated as if the claimant did not act reasonably to minimize its loss.\textsuperscript{369} If the claimant, in an attempt to mitigate its losses, increases its losses, the respondent may still be liable if the claimant’s attempt is deemed reasonable.\textsuperscript{370}

Australia, however, follows the same rule as England, that a claimant “need not mitigate loss, even after the [respondent’s] performance of the contract which he has repudiated falls due, by accepting the repudiation and suing for damages.”\textsuperscript{371}

\textbf{IV. DAMAGES UNDER THE UNITED NATIONS CONVENTION FOR THE INTERNATIONAL SALE OF GOODS}

The United Nations Convention on the International Sale of Goods (CISG) applies “to contracts of sale of goods between parties whose places of business are in different countries: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.”\textsuperscript{372} Under the CISG, if a party fails to perform its contractual obligations, the injured party, depending on whether the injured party is a buyer or seller, has various remedies, including damages.\textsuperscript{373} Specific performance is also more readily available to a buyer or seller than is available under common law.\textsuperscript{374}

Damages under the provisions of the CISG seek to give the injured party its performance interest.\textsuperscript{375} CISG Article 74 provides that a claimant may recover, for breach of contract, “a sum
equal to the loss, including loss of profit, suffered . . . as a consequence of the breach.”

The goal of this provision is to place the claimant in the same economic position it would have been in had the breach not occurred. In other words, it is designed to protect a claimant’s performance interest by giving it the benefit of the bargain.

Article 74 provides the basic principle for the recovery of damages under the CISG, although it does not provide specific guidelines for the calculation of damages. In particular, it does not contain a separate provision for the calculation of damages for breach of warranty. Instead, Article 74 grants a tribunal the authority to determine the claimant’s “loss . . . suffered . . . as a consequence of the breach” based on the circumstances of the particular case. It also explicitly provides that damages for breach of contract include lost profits. The Secretariat Commentary explains that the specific reference to loss of profit was included “because in some legal systems the concept of ‘loss’ standing alone does not include loss of profit.”

The Commentary provides the following illustrations of appropriate damages under article 74:

Example [A]: The contract provided for the sale for $50,000 FOB of 100 machine tools which were to be manufactured by the seller. Buyer repudiated the contract prior to the commencement of manufacture of the tools. If the contract had been performed, Seller would have had total costs of $45,000 of which $40,000 would have represented costs incurred only because of the existence of this contract (e.g., materials, energy, labour hired for the contract or paid by the unit of production) and $5,000 would have represented an allocation to this contract of the overhead of the firm (cost of borrowed capital, general administrative expense, depreciation of plant and equipment). Because Buyer repudiated [the]
contract, Seller did not expend the $40,000 in costs which would have been incurred by reason of the existence of this contract. However, the $5,000 of overhead which were allocated to this contract were for expenses of the business which were not dependent on the existence of the contract. Therefore, those expenses could not be reduced and, unless the Seller has made other contracts which have used his entire productive capacity during the period of time in question, as a result of Buyer's breach Seller has lost the allocation of $5,000 to overhead which he would have received if the contract had been performed. Thus, the loss for which Buyer is liable in this example is $10,000.

Contract price $50,000 [less] expenses of performance which could be saved $40,000 [equals] loss arising out of breach $10,000.

Example [B]: If, prior to Buyer's repudiation of the contract in Example [A], Seller had already incurred $15,000 in non-recoverable expenses in part performance of the contract, the total damages would equal $25,000.

Example [C]: If the product of the part performance in Example [B] could be sold as salvage to a third party for $5,000, Seller's loss would be reduced to $20,000.380

Articles 75 and 76 set forth guidelines on how damages are to be calculated in instances where the basic measure of damages set forth in Article 74 may not adequately compensate the injured party. Article 75 provides a method for calculating damages when the contract has been avoided and the “buyer has bought goods in replacement or the seller has resold the goods.”381 Here, the claimant “may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under Article 74.”382 However,
a claimant may use this method only if the resale or cover purchase was made “in a reasonable manner and within a reasonable time after avoidance.” The purpose of these requirements is to prevent the unfairness of having a party pay for loss which the other party caused through hasty or malicious conduct.

If the contract has been avoided but the injured party has not bought goods in replacement or resold the goods under Article 75, then Article 76 provides a different method for calculating damages. It provides that:

If . . . there is a current price for the goods, the party claiming damages may . . . recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under Article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

The price to be used in determining damages under this article is “the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.” This method of measuring damages is called the “market-price-rule.” It allows the claimant to calculate its damages independently from any cover transaction. If the contract does not fix a price and there is no current price within the meaning of Article 76, damages may be calculated under Article 74.

Unlike in some civil law countries, the CISG does not limit damages to those situations involving a negligent or willful breach. However, it excludes damages for death or personal injury caused by goods to any person.
Requirements and Limitations. Similar to the practice in many common law and civil law countries, the CISG imposes upon the claimant the burden of providing evidence of damage and of causation between the breach and the loss suffered.\textsuperscript{389} Unlike in civil law countries, liability for breach of contract is generally strict, and thus no fault has to be shown.\textsuperscript{390} In addition, like many common law and civil law countries, the CISG limits recovery of damages pursuant to the doctrines of foreseeability, avoidability and, perhaps certainty.

Certainty. It is unclear whether the CISG contains a certainty requirement. The CISG does not explicitly provide the level of proof needed for a claimant to recover damages.\textsuperscript{391} To date, there has been controversy over whether the issue of certainty is addressed by the Convention or whether it is a procedural matter that should be resolved by the domestic law of a country in which a dispute governed by the CISG is being decided. Some courts and tribunals have held that the issue is a procedural matter beyond the scope of the Convention and governed by the law of the forum,\textsuperscript{392} while others have held it is a matter governed by the CISG.\textsuperscript{393}

The standard of proof that has been employed by courts and tribunals deciding damages claims under the Convention has varied significantly. Some courts and tribunals have required a specific ascertainment of damages.\textsuperscript{394} Others have required that they be reasonably proved,\textsuperscript{395} and others have required sufficient proof of damages.\textsuperscript{396}

Causation/Forseeability. The CISG requires that a causal link exist between the breach of contract and the loss suffered.\textsuperscript{397} In addition, Article 74 limits damages for breach of contract to those that were “foreseeable.”\textsuperscript{398} The CISG employs both an objective and subjective test by stating that “damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of
The latter (the objective test) asks whether a reasonable party in the same situation could expect the loss from its non-performance.

The relevant time with respect to determining whether the loss was foreseeable is the time that the contract was entered into. That is, “[t]he facts and matters must have existed at the time of the conclusion of the contract and/or must be foreseeable at the conclusion of the contract, like seasonal market fluctuations, difficulties in transport caused by bad weather . . .”

It is also important to note that Article 74 “gauges foreseeability in terms of possible consequences.” Thus, a claimant need not show awareness that the loss was a “probable result” or a substantial probability, only that it was a possible result of the breach.

Avoidability. The CISG also embraces the concept of avoidability. Article 77 provides: “A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.”

The CISG thus provides that a party must undertake reasonable steps to minimize its loss. The mitigation requirement “applies to an anticipatory breach of contract . . . as well as to a breach in respect of an obligation the performance of which is currently due.” The Commentary explains, “[i]f it is clear that one party will commit a fundamental breach of the contract, the other party cannot await the contract date of performance before he declares the contract avoided and take measures to reduce the loss arising out of the breach by making a cover purchase, reselling the goods or otherwise.”
Like in common law and civil law countries, the failure of a party to mitigate its losses does not result in liability. Rather, the failure to mitigate results in the claimant’s damages being reduced by the amount which should have been mitigated.407

The following cases illustrate the awarding of damages under the CISG. In *ICC Arbitration Award in Case No. 8786 of January 1997*, an arbitrator relied on Article 74 of the CISG in awarding damages for breach of contract. 408 In the case, hours after being notified that the seller, a clothing manufacturer, would not be able to deliver certain seasonal goods to the buyer, a retail store, as provided for in the parties’ agreement, the buyer terminated the contract under CISG Article 72(1). That provision states, “[i]f prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.”409 The arbitrator determined that the seller’s actions amounted to a fundamental breach and that the buyer validly terminated the agreement. With respect to damages, the arbitrator noted that the CISG provided that “[d]amages for breach of contract by one party consist of a sum equal to the loss of profit suffered by the other party as a consequence of the breach.”410 Based on this provision, the arbitrator ruled that the buyer was entitled to lost profits, indirect loss of profits, as well as expenses incurred as a result of the breach (such as travel costs). The arbitrator then noted that these damages were foreseeable. The arbitrator explained that, with respect to lost profits, the seller “should have known that the goods were to be sold in the [buyer’s] retail store and also that the goods were seasonable in nature. Accordingly, late delivery would mean that the goods could only be sold for a reduced price once they were out of season and therefore profits would be lost.”411 The seller had argued that the buyer was not entitled to damages because it failed to take reasonable mitigation measures as required by Article 77. The arbitrator rejected that claim, noting that the seller bore the burden
of proof on the issue and it had failed to offer any evidence that the buyer did not take appropriate measures to mitigate its loss.412

In *Delchi Carriers v. Rotorex Corp.*, the United States Court of Appeals for the Second Circuit affirmed in part an award of damages against an Rotorex, American seller, who provided to Delchi Carriers, an Italian manufacturer of air conditioners, compressors that did not conform to the terms of the contract between the parties.413 There, the lower court had awarded Delchi Carriers lost profits and certain incidental damages.

The Second Circuit initially noted that the damages provisions of the CISG, which governed the contract, were “designed to place the aggrieved party in as good a position as if the other party had properly performed the contract.”414 That is, the provisions protected both the claimant’s performance and reliance interests.

Turning first to the issue of lost profits, the Second Circuit ruled that Delchi Carriers was entitled to lost profits resulting from diminished volume sales. It affirmed the trial court’s findings that Delchi Carriers lost sales as a direct result of Rotorex’s failure to provide conforming goods, and that lost profits were a foreseeable consequence of the breach. Interestingly, the Second Circuit also agreed with the trial court that Delchi Carriers was only entitled to those damages that it could prove with sufficient certainty, even though the CISG imposed no such requirement.415 Since the CISG did not address the issue, both the Second Circuit and the trial court concluded that the traditional common law damage limitation that the claimant must provide sufficient evidence to estimate damages with reasonable certainty should apply.416

With respect to the calculation of lost profits, the Second Circuit noted that the CISG was silent on the issue. As a result, it ruled that the trial court correctly applied the standard
formula in the United States for calculating lost profits which, applied to the case, equaled the
lost sales resulting from Rotorex’s breach multiplied by the average sales price less Delchi
Carriers’ variable costs. The Second Circuit ruled that fixed costs should not be deducted from
the sales revenue in calculating lost profits because such costs would have been encountered
whether or not the breach occurred.417

Turning to Delchi Carriers’ claims for incidental damages, the Second Circuit noted that
the trial court had awarded damages to Delchi Carriers to compensate it for costs incurred in: (1)
attempting to remedy the non-conformity of Rotorex’s compressors, (2) handling and storing the
rejected compressors, and (3) mitigating its damages by expediting the delivery of compressors
previously ordered from another supplier. The Second Circuit affirmed that portion of the award
based on the principle that an injured party is entitled to damages for the full loss incurred as a
result of the breach. The trial court had denied, however, Delchi Carriers damages for: (1)
shipping, customs and other charges incurred in rejecting and returning the nonconforming
compressors to Rotorex, (2) materials purchased for use only with Rotorex compressors, and (3)
the labor costs incurred when the production line was idle because of the lack of compressors to
install in air conditioning units. The trial court ruled that these costs were accounted for in
Delchi’s claims for lost profits. The Second Circuit disagreed. It noted that these costs were
reasonably foreseeable and legitimate incidental or consequential damages, and that the lost
profits award would not compensate Delchi Carriers for those expenses. It explained:

An award of lost profits will not compensate Delchi for the expenses in question.

Delchi’s lost profits are determined by calculating the hypothetical revenues
derived from unmade sales less hypothetical variable costs that would have been,
but were not incurred. This figure, however, does not compensate for costs
actually incurred that led to no sales. Thus, to award damages for costs actually incurred in no way creates double recovery and instead furthers the purpose of giving the injured party damages “equal to the loss.”

The court noted, however, that it was unclear whether labor costs were fixed or variable costs. As a result, it stated that Delchi Carriers would be entitled to be reimbursed for labor costs only if, on remand, the trial court was able to determine that its labor expenses were incurred only as a result of the breach.

V. THE AWARDING OF DAMAGES FOR BREACH OF CONTRACT UNDER GENERAL PRINCIPLES OF INTERNATIONAL LAW AND PRINCIPLES OF EQUITY

Some international tribunals have resolved claims for damages for breach of contract on general principles, such as those contained in the UNIDROIT Principles of International and Commercial Contracts, or on principles of equity. Those principles are typically based on rules found in national laws.

A. The UNIDROIT Principles

The UNIDROIT Principles of International and Commercial Contracts set forth general rules for international commercial contracts. They may be applied when the parties have agreed that the contract shall be governed by the Principles or when the contract is to be interpreted in accordance with general principles of law, including lex mercatoria. They also may be used to interpret or supplement existing international instruments, such as the CISG. Like the CISG, the UNIDROIT Principles provide that a party to a contract who has been aggrieved by the other party’s non-performance of its obligations has a right to compensation for
the full amount of the loss it suffered as a result of the breach. In other words, the goal of the damages provisions of the UNIDROIT Principles is to protect a claimant’s performance interest.

The scope of damages that a claimant may recover for breach of contract is broader under the UNIDROIT Principles than under the CISG. Like the CISG, the UNIDROIT Principles explicitly provide for the recovery of lost profits. But unlike the CISG, UNIDROIT Principles also explicitly provide for non-pecuniary loss such as physical suffering or emotional distress.

If, after the breach of contract, the claimant makes a replacement transaction, Article 7.4.5 of the UNIDROIT Principles measures the claimant’s damages as the difference between the contract price and the current price of the goods at the time the contract is terminated, as well as damages for any further harm. This provision is similar to CISG Article 75. Like in the CISG, Article 7.4.5 requires the replacement transaction to have been made within a reasonable time and in a reasonable manner.

If, after the breach of contract, the claimant terminates the contract but does not make a replacement transaction, the UNIDROIT Principles Article 7.4.6 provides that the claimant may recover the difference between the contract price and the current price of the goods at the time the contract is terminated, as well as damages for any further harm, provided that there exists such a current price. The “[c]urrent price is the price generally charged for goods or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.” The Comment to Article 7.4.6 states that the current price “will often, but not necessarily, be the price on an organized market.” In addition, “the place relevant for determining the current price is that where the contract should have been performed or, if there is no current price at that place, the place that appears
The remedy provided by Article 7.4.6 is similar to CISG Article 76.

The UNIDROIT Principles limit the right to damages in a variety of ways. Article 7.4.7, for example, limits the right to damages if the claimant has contributed to the harm. It states: “Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.”

The UNIDROIT Principles also limit damages through the familiar concepts of causation, foreseeability, certainty and avoidability.

Causation/Foreseeability. The UNIDROIT Principles provide that “[t]he non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.” Like the CISG, the UNIDROIT Principles contain both subjective and objective tests for foreseeability. However, in contrast to the CISG which requires that the foreseeable harm be a “possible” consequence of the non-performance of the contract, the UNIDROIT Principles state that such harm must be a “likely” result of the breach. Thus, the UNIDROIT Principles appear to take a slightly more restrictive view on foreseeability than the CISG.

The Comment to the UNIDROIT Principles explains that the concept of foreseeability relates to the nature or type of harm and not to its extent, unless the extent transforms the harm into one of a different kind. It also makes clear that the requirement of foreseeability goes hand-in-hand with the requirement of certainty. Thus, a claimant is required to show that “it must have been foreseeable that harm with certainty (is likely) to flow from such a breach.”
Furthermore, the Comment clarifies that, unlike some civil law systems, a respondent is not liable for unforeseeable harm even if the breach was willful. Finally, the Comment states:

What is foreseeable is to be determined by reference to the time of the conclusion of the contract and to the non-performing party itself (including its servants or agents), and the test is what a normally diligent person could have reasonably have foreseen as the consequence of non-performance in the ordinary course of things and the particular circumstances of the contract, such as the information supplied by the parties or their previous transactions.

*Certainty.* The UNIDROIT Principles provide that “[c]ompensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.” If the claimant cannot establish the amount of damages with sufficient certainty, the UNIDROIT Principles state that the tribunal would have the discretion to set the amount. The UNIDROIT Principles also allow recovery of damages for the loss of chance in proportion to the probability of its occurrence.

*Avoidability.* Article 7.4.8 of the UNIDROIT Principles precludes recovery for any harm that the claimant could have avoided by taking reasonable steps. The Comment explains that “[t]he purpose of this article is to avoid the aggrieved party passively sitting back and waiting to be compensated for harm which it could have avoided or reduced.”

Under the UNIDROIT Principles, the claimant need not undertake mitigation measures that are unduly time-consuming and costly. Rather, the claimant is required to undertake reasonable efforts to limit the extent of the harm or to avoid an increase in the initial harm.
If the claimant fails to undertake the required mitigation measures, its damages will be reduced proportionately. That is, its damages are reduced to the extent of the loss that could have been avoided by taking reasonable steps.\textsuperscript{445}

Article 7.4.8 also provides that “[t]he aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.”\textsuperscript{446}

The following cases illustrate the awarding of damages under the UNIDROIT Principles. In \textit{Arbitral Award No. A-1795/51}, an arbitral tribunal relied on the UNIDROIT Principles in awarding claimant damages for breach of an agency agreement.\textsuperscript{447} The tribunal noted that Articles 7.4.1 and 7.4.2 “affirm an aggrieved party’s right to full compensation for the harm it sustained as a result of the other party’s non-performance but exclude compensation for emotional suffering and distress, the aggrieved party being a corporate entity.”\textsuperscript{448} It also relied upon Articles 7.4.3 (certainty of harm) and 7.4.4 (foreseeability of harm) to exclude certain costs sought by the claimant, including the purchase of a house where the agency contract was to be performed.\textsuperscript{449}

In \textit{Arbitral Award No. 8502}, an ICC panel applied UNIDROIT Principles Article 7.4.6 to determine the amount owed to the claimant (a Dutch buyer) as the result of the respondent’s (a Vietnamese seller’s) breach of its contract for the sale of rice.\textsuperscript{450} The tribunal ruled that, under Article 7.4.6, the claimant was entitled to the difference between the contract price and the relevant market price. With respect to determining the relevant market price, the tribunal concluded that it should be the market price at the place where the delivery of goods should have been made, which was specified in the contract as being Ho Chi Minh City.\textsuperscript{451}
B. Principles of European Contract Law

The Principles of European Contract Law (PECL) were drafted and promulgated by the Commission on European Contract Law, a body of lawyers consisting of individuals from every member State of the European Union. The PECL were promulgated by the Commission in “response to a need for a Union-wide infrastructure of contract law to consolidate the rapidly expanding volume of Community law regulating specific types of contract.” They are analogous to model laws in the United States, in that they are not enforceable law, but rather are a model law that may be adopted as law by the European Union or even the member states (or future member states) of the European Union, much like the Uniform Commercial Code in the United States. Moreover, the PECL were also promulgated by the Commission so that parties from different States could expressly adopt them to govern international contracts. Finally, the Commission promulgated the PECL with the long-term goal of “harmonis[ing]” contract law throughout the Member States of the European Union. In drafting the Principles, the Commission members were influenced by the national laws of every Member State of the European Union. The drafters were also influenced by legal materials from within as well as outside Europe.

The goal of the damages provisions of the PECL, like the CISG and the UNIDROIT Principles, is protecting a claimant’s performance interest. Article 9:502 states: “[t]he general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed. Such damages cover the loss which the aggrieved party has suffered and the gain of which it has been deprived.”
In addition to providing recovery for actual loss and the loss of future profits, the PECL, like the UNIDROIT Principles, provide for recovery of non-pecuniary loss such as pain and suffering, inconvenience and mental distress. The PECL also allow recovery for damages for loss of chance and loss of goodwill. Although the PECL do not explicitly state that any loss suffered by the claimant after a breach of contract must be offset by any gain to the claimant caused by the breach of contract, the Comment to Article 9:502 does.

If the claimant makes a substitute transaction after the breach of contract, Article 9:506 of the PECL provides that the claimant may recover the difference between the original contract price and the price of the substitute transaction, as well as any further loss. Like the CISG and UNIDROIT Principles, the PECL require that the substitute transaction have been made in a reasonable manner and within a reasonable time after the breach.

If the claimant does not make a substitute transaction after a breach of contract, the PECL provide that the claimant may recover the difference between the contract price and the current price of the contracted-for goods or services as well as any further loss. The PECL measure the current price of the goods or services as the price at the time the contract was terminated. Although both the CISG and UNIDROIT state the location at which the current price of goods is to be determined, the PECL do not.

The PECL limit the right of the claimant to seek damages in a variety of ways. Article 9:504, like Article 7.4.7 of the UNIDROIT Principles, limits a claimant’s right to damages if the claimant contributed to the breach of contract. According to the Comment to Article 9:504, not only is a claimant precluded from collecting damages for non-performance to which it contributed, but a claimant is also precluded from collecting damages for additional loss after a
non-performance for which it was not responsible if it exacerbates the adverse effects of the non-
performance.469

Like the UNIDROIT Principles and the CISG, the PECL also limit damages through the
customary concepts of causation, certainty, foreseeability and avoidability.

_Causation/Foreseeability._ The PECL provide that “the aggrieved party may not recover
damages for loss not caused by the failure to perform.”470 If the respondent claims that an
intervening unforeseeable event occurred that should preclude it from being liable for non-
performance, the PECL provide that the question, “whether that event would have had an impact
on the contract if the failure in performance had not occurred,” must be answered in the
affirmative in order to deem an event something that breaks the chain of causation.471

_Certainty._ Unlike the UNIDROIT Principles which explicitly require that damages be
proven with a reasonable degree of certainty, the PECL discuss certainty only in a note, stating
that most systems “generally require a sufficient degree of ‘certainty’ of loss” in order to award
damages, but this is not to be taken literally.472

_Foreseeability._ Like the CISG and the UNIDROIT Principles, the PECL provide for the
use of both subjective and objective tests of foreseeability.473 The PECL, like the UNIDROIT
Principles, also appear to take a slightly more restrictive view on foreseeability than the CISG
stating that the harm caused by the breach of contract must have been the “likely” result of the
breach.474 In contrast to both the CISG and UNIDROIT, the PECL provide an exception to the
foreseeability requirement, allowing the claimant the right to recover unforeseeable damages in
the event that the nonperformance of the respondent was intentional or grossly negligent.475

The comment to the PECL supplies an illustration of an intentional breach where unforeseeable,
but nevertheless, recoverable damages occurred:
A contracts with B to construct and erect stands for a major exhibition at which leading electronic firms will display their equipment, hiring the stands from B. A week before the exhibition is due to open A demands a substantial increase in the contract sum. B refuses to pay, pointing out that A’s failure to complete the remaining stands will not only cost B revenue but expose it to heavy liability to an exhibitor C, which intended to use the exhibition to launch a major new product. A nevertheless withdraws its workforce, with the result that C’s stand is not ready in time and it claims substantial compensation from B. A’s breach being intentional and with knowledge of the likely consequences, the court has to award B an indemnity in respect of its liability to C, even though A could not reasonably have foreseen the magnitude of such liability at the time it made its contract with B. The same may be done even if A was not aware of the serious consequences for B of the intentional breach.  

Avoidability. According to Article 9:505, the respondent is not liable for losses suffered by the claimant if the claimant could have mitigated its losses. A claimant can fail to mitigate its losses in two ways: 1) if the claimant incurs unnecessary or unreasonable expenditure; or 2) if the claimant fails to take reasonable steps which would reduce its loss or offset its gains. The claimant, however, is not expected to go above and beyond the call of duty and is only expected to take reasonable steps to mitigate its losses. The claimant is also expected to refrain from taking steps that are unreasonable.  

Like under the UNIDROIT Principles and the CISG, the claimant may recover any expenses it incurred in mitigating its losses. Finally, even if the claimant takes steps beyond
what is reasonably expected and subsequently reduces its losses, the reduction in its losses will
still be accounted for in awarding damages.\textsuperscript{482}

C. \textit{Damages Decided Ex Aequo Et Bono}

Sometimes a tribunal will decline to select a particular law to be applied to a contractual
dispute, and instead base its decision on principles of fairness. This approach, however, is only
used when the tribunal has the power to decide ex aequo et bono. The arbitral tribunal’s decision
in \textit{Sapphire International Petroleum Ltd. v. National Iranian Oil Co.} illustrates this practice.\textsuperscript{483}

In \textit{Sapphire International Petroleum Ltd.}, the respondent, National Iranian Oil Company,
breached a concession agreement with the claimant after the claimant had begun exploring for oil
under the contract, but before the start of any drilling, exaction or sale. With respect to damages,
the arbitrator noted that it is well recognized by international tribunals that a wrongful breach of
contract entitles the injured party to the benefit of the bargain. In theory, this allows the claimant
to recover money for actual loss incurred as a result of the breach and any net gains prevented.
The arbitrator explained this principle as follows:

\begin{quote}
According to the generally held view, the object of damages is to place the party
to whom they are awarded in the same pecuniary position that they would have
been in if the contract had been performed in the manner provided for by the
parties at the time of its conclusion. . . . This rule is simply a direct deduction
from the principle of \textit{pacta sunt servanda}, since its only effect is to substitute a
pecuniary obligation for the obligation which was promised but not performed. It
is therefore natural that the creditor should thereby be given full compensation.
This compensation includes loss suffered (\textit{damnum emergens}), for example
expenses incurred in performing the contract, and the profit lost (\textit{lucrum cessans}),
\end{quote}
for example the net profit which the contract would have produced. The award of compensation for lost profit or the loss of a possible benefit has been frequently allowed by international tribunals.484

With respect to damnum emergens, the arbitrator ruled that the claimant was entitled to expenses incurred in performing the contract, such as the cost of exploration, certain registration fees the claimant had paid, and the amount of a letter of credit wrongfully cashed by the respondent. With respect to lucrum cessans, the arbitrator noted that, because the contract had been terminated at an early stage of exploration, both the commercial quantities and damages were uncertain. The claimant’s claim was thus akin to a loss of a chance to discover oil. The claimant’s expert opined that if the contract had not been breached, in the best case scenario, the claimant would have made US$46 million and in the worst case (i.e., if there were no commercial quantities of oil), it would have lost US$8 million. Fixing the quantity ex aequo et bono by considering all circumstances, including accounting for risks such as the possibility of wars and price recession, the arbitrator awarded claimant US$2 million in lost profits.

VI. TRIBUNAL AWARDS

Tribunals deciding transnational contract disputes typically do not have much difficulty in determining whether a claimant is entitled to damages once they have found that there has been a wrongful breach of contract. Rather, it is the calculation of damages and, in particular, the determination of lost profits, that has proved to be a complex process resulting in different approaches and seemingly arbitrary awards.

Today, it is well recognized by international tribunals that a wrongful breach of contract entitles the injured party to the benefit of the bargain.485 In theory, this allows the claimant to recover money for actual loss incurred as a result of the breach and any net gains prevented.486
In evaluating a claim for damages, a tribunal usually first looks to the applicable law to determine the requirements for awarding damages, such as foreseeability and avoidability. If these requirements are met, the tribunal then turns to calculating the damages.

The cases that are most troublesome for tribunals deciding disputes between transnational contracting parties typically involve damages claims for lost profits. Some tribunals view claims for lost profits as being speculative and have required a higher standard of proof with respect to such claims when applicable law is not explicit on the subject. For example, one panel deciding a claim for lost profit in an investment dispute stated that in order for such damages to be awarded the claimant must provide “detailed factual description of the circumstances of the claimed loss, damage or injury.”

Claims for lost profits in cases involving breaches of long term contracts may also raise special problems for tribunals. This is particularly true in those situations where the respondent’s breach has not just injured the claimant’s business, but destroyed it, and the tribunal must determine the value lost. Determining these damages in this situation can be particularly difficult because tribunals must calculate damages based on projected future earnings that may be greatly affected by ever-changing and often unpredictable economic circumstances, such as interest rates and energy prices. The most common approaches that tribunals have used to determine damages in this circumstance are the book value method, the replacement value method, and the discounted cash flow method (DCF).

The book value method calls for the tribunal to measure the going concern by reference to its costs. The book value method has been criticized as not accurately reflecting the value lost because it is based on historic and not actual costs, does not account for intangible assets, and fails to take into account the future profitability of the business.
The replacement value method requires a tribunal to set damages at the market value of similar properties or entities. The problem with this method is that that there may be no comparable businesses or opportunities to which a tribunal may look to in calculating damages.493

The DCF method determines the value of the business by projecting the net cash flow for a certain time period into the future and then discounting it back to present value as of the date of the breach. It uses a discount rate that may include an inflation component and a risk factor.494 Because the DCF method values the asset lost according to its income producing capabilities, in theory, it fully compensates the claimant by awarding an amount that reflects both the loss incurred and gain of which it was deprived.495 The report of an expert witness in Phillips Petroleum Co. v. Iran explained the DCF method as follows:

Standard economic theory holds that market value of an asset equals its expected future cash flows discounted to present value at the opportunity cost of capital . . . An assets’ market value stems from its expected ability to generate cash returns over time. Market value ultimately depends on the amount, timing, and risk of future cash flows. Prompt, safe cash flows are naturally more valuable than delayed, risky ones.

The relation of future cash flows to current market value is expressed in the discounted cash flow formula, in which forecasted cash flows are discounted to obtain present value. The appropriate discount rate is the opportunity cost of capital, that is, the expected rate of return from investing in other assets of equivalent risk . . . 496
The problem with the DCF method is that it is difficult to apply. Currently, there are no universal rules for determining the future cash flows of a business or setting an appropriate discount rate. The first task requires projecting the company’s earnings based on a wide variety of factors, including the company’s past earnings history, its projected outlook, and the industry outlook, all of which necessarily involve many assumptions, estimates and other subjective elements. The second task, setting the discount rate, requires an even more complex calculation that takes into account multiple variables, including the expected rate of inflation, the real rate of return, and the riskiness of the income stream. Accordingly, parties often employ experts to make a DCF valuation, and tribunals sometimes employ their own experts to assist in evaluating the parties’ claims concerning lost profits using the DCF method. Nevertheless, the lack of clear rules for determining the most important factors used in the DCF method has caused one commentator to remark that “[d]amages in complex businesses relying on calculation of future cash flows (quite speculative) discounted to present value by applying a specific discount rate (itself very uncertain as the risk factor added to the risk-free discount rate is inevitably highly subjective) can be reasonably and plausibly determined within a very wide range.” Others have called the DCF analysis as more of an art form than a science.

Not surprisingly, awards using the DCF methods sometimes seem arbitrary. In fact, in one case, the tribunal appeared to “split the baby,” setting damages exactly halfway between the claimant’s and respondent’s valuations. In other cases, tribunals have struggled with the DCF method, leading to inconsistent applications.

In ICC Case No. 5946, the tribunal determined that the duration of the income projection should last for the entire term of the contract, which was 40 months. By contrast, in Final
Award in Case No. 7006, the tribunal calculated lost profits based on an income stream for one year after the contract was breached because it felt that the claimant could have mitigated its losses after that time.506

A number of tribunals have refused to award damages consisting of lost profits where the business was not a going concern.507 These tribunals reason that because the business did not have a sufficient earning history, determining lost profits in such circumstances would be too speculative.

For example, in Levitt v. Islamic Republic of Iran, Chamber One of the Iran-U.S. Claims Tribunal ruled that Iran breached its contract for the construction of a housing project and awarded the claimant his expenses incurred as a result of the breach.508 Although the tribunal recognized that, in principle, lost profits may be awarded in the case of a breach of contract, it denied the claim for such profits. The tribunal reasoned:

[T]he basis for the [lost profits] claim . . . is highly speculative . . . By the time the Contract came to an end only initial stages of clearing and grading had been completed, and no construction work had begun on buildings. The project therefore reached only an early stage. . . . For these reasons, the Tribunal finds that the Claimant has not established with a sufficient degree of certainty that the project would have resulted in profit.509

By contrast, other tribunals have awarded lost profits even where the business that has been destroyed is not a going concern.510 For example, in the Sapphire arbitration, the arbitrator ruled that the claimant was entitled to lost profits for the breach of an oil concession even though the area that was the subject of the concession had not yet been prospected. The arbitrator explained:
It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence of the damage.\footnote{511}

The arbitrator relied on an expert’s report and testimony and ruled that the claimant met this burden of showing sufficient probability of success of the prospecting if the breach had not occurred. With respect to the amount of lost profits owed, the arbitrator noted that the claimant’s expert provided only a rough estimate of the loss. However, this was not fatal to the claimant’s claim. The arbitrator had been given the authority to decide \textit{ex aequo et bono} and thus concluded that he had wide discretion to fix the amount of lost profits, even though the extent and existence of the amount of lost profits were not certain. The arbitrator awarded US$2 million for lost profits, stating that that amount was both “reasonable and equitable.”\footnote{512}

Recently, tribunals have dealt with an emerging issue: the invocation of the abuse of rights doctrine to deny lost profits, even though the non-breaching party is entitled to such profits under the contract. This issue arose in the now controversial decision of \textit{Himpurna California Energy Ltd. v. P.T. (Persero) Perusahaan Listruik Negara}.\footnote{513} There, Himpurna California Energy Ltd. entered into a contract with the Indonesian state electricity corporation, PLN, to explore and develop geothermal resources in Indonesia, including building two power plants in the country and selling the power generated to PLN. When PLN failed to purchase the energy Himpurna generated, Himpurna submitted a request for arbitration, claiming that PLN breached the contract, thus causing US$2.3 billion in damages. An ad hoc arbitral tribunal agreed that PLN breached its contract with Himpurna.\footnote{514}
Turning to the issue of damages, the tribunal initially noted that under the Indonesian Civil Code, the applicable substantive law, damages may include “the loss which the creditor has suffered and the profit he has been made to forego.” In this case, Himpurna claimed both damnum emergens, which consisted of capital invested and expended plus interest, and lucrum cessans, which amounted to its expected future revenue stream, discounted to reflect the time value of money and the risk premium.

With respect to damnum emergens, the tribunal stated that Himpurna was entitled to reimbursement for monies that Himpurna could prove that it spent in reliance on the contract. As a result, the tribunal awarded Himpurna as damnum emergens US$273,757,306.

Regarding the claim for lucrum cessans, the tribunal looked to the applicable law, noting: Art. 1246 of the Indonesian Civil Code – echoing its precursor Art. 1149 of the French Code civil – provides for the recovery of lost profit. But the code goes on to set out limiting factors which, again, are quite familiar. Art. 1247 (congruent with Art. 1152 of the Code civil) restricts recovery to damages foreseeable at the time of contracting; and Art. 1248 (congruent with Art. 1284 of the Code civil) requires that damages be the “immediate and direct result of the breach.”

While the tribunal recognized that Himpurna was in principle entitled to lost profits, it ruled that the calculation of these profits should not be performed in a way that would impoverish the host state. To do so, the tribunal stated, would constitute an “abuse of right.” According to the tribunal, the abuse of rights doctrine is a general principle of international law that requires parties to observe good faith in the exercise of their rights. As a principle of international law, the tribunal stated, the doctrine overrides the right to the benefit of the bargain.
under substantive law. The tribunal explained “that this is a case where the doctrine of abuse of right must be applied in favour of PLN to prevent the claimant’s undoubtedly legitimate rights from being extended beyond tolerable norms, on the ground that it would be intolerable in the present case to uphold claims for lost profits from investment not yet incurred.”\(^{519}\) The tribunal thus refused to calculate lost profits “as though the claimant had an unfettered right to create ever-increasing losses for the State of Indonesia (and its people) by generating energy without regard to whether or not PLN had any use for it[,] [e]ven if such right may be said to have derive[d] from explicit contractual terms.”\(^{520}\) Accordingly, it awarded Himpurna US$117,244,000 in lost profits, which was less than 10% of the amount claimed. The tribunal settled on this amount by calculating Himpurna’s after-tax net cash flow projections, discounted to the present value applying a discount rate [19%] that took into account the perceived risks of the project, and by limiting the recoverable profits to 36% of the total claim for lost profits (so as to exclude lost profits on investments not yet made).\(^{521}\)

Similarly, in *Patuha Power Ltd. v. PT. Persero Perusahaan Listruik Negara*, an arbitral tribunal encountered another case arising from Indonesia’s breach of an agreement for the exploration and development of geothermal resources. The tribunal denied the claim for lost profits on the ground that it would be an abuse of rights to award millions in lost profits in light of the state of the economy in Indonesia.\(^{522}\)

By contrast, in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Das Gas Bumi Negara*, a third arbitration arising from failed power projects in Indonesia, the tribunal awarded the claimant lost profits.\(^{523}\) There, Karaha Bodas Co. (“KBC”) entered into a contract with Pertamina, the Indonesia state owned oil company, to finance, build and operate geothermal facilities in the Karaha area of Indonesia, and Pertamina agreed to buy energy generated by
KBC. Indonesia subsequently suspended the projects because of the country’s financial crisis. KBC filed for arbitration, seeking (1) a declaration that the contracts were terminated, (2) damages of US$96 million for expenditures already made on the projects, and (3) US$512 million for the present value of expected future profits over the life of the contract. The tribunal determined that Pertamina had breached its agreements with KBC and awarded KBC US$111.1 million for lost expenditures and US$150 million for lost profits.

Karaha Bodas subsequently filed actions to enforce the award in the United States, as well as in Hong Kong and Canada. The United States District Court for the Southern District of Texas ordered the enforcement of the award, and that order was affirmed by the United States Court of Appeals for the Fifth Circuit. In both courts, Pertamina claimed that enforcement should be denied because, inter alia, the damage award was contrary to public policy. Specifically, Pertamina argued that the “award of lost profits in this particular case, when KBC never finished the project and the Indonesian economy was in ruins, constitutes an abuse of rights in violation of public policy.” Both courts rejected that argument. The Fifth Circuit noted that the abuse of rights doctrine was not well established in American law. Furthermore, it stated that an action violates the abuse of rights doctrine only if one of the following three factors is present:

1. the predominant motive for the action is to cause harm; 2. the action is totally unreasonable given the lack of any legitimate interest in the exercise of the right and its exercise harms another; and 3. the right is exercised for the purpose other than that for which it exists.

It concluded that none of the factors were present in the instant case.
VII. CONCLUSIONS

In most countries, the primary purpose of damages for a breach of contract is to place the claimant in the position it would have been in had the contract been performed. Based upon this principle, the laws in most countries provide that a respondent that has unlawfully failed to perform its contractual obligations is liable for actual losses suffered by the claimant as a result of the breach, as well as any net gains prevented. Although countries lack a common language for identifying these concepts, the concepts are functionally the same from country to country.

All countries place limitations on damages for breach of contract, although they vary from jurisdiction to jurisdiction. The most common limitations are that a claimant may only recover losses that were directly caused by the respondent’s breach and that were foreseeable as a probable result of the breach. Many countries also preclude the claimant from recovering losses that it could have prevented through mitigation. Some jurisdictions also limit recovery to those damages which can be proven with reasonable certainty.

Many civil law countries also require as a prerequisite to the recovery of damages that the respondent be at fault in breaching the agreement. This typically means that the respondent’s breach must have been willful or negligent. In contrast, most common law countries do not impose such a requirement.

The study further finds that while most countries provide for the awarding of lost profits in the event of a breach of contract, the requirements for their recovery vary among countries. In general, lost profits are more difficult to obtain in civil law countries because many of these countries impose a high standard of proof for their recovery.

Like the laws of most countries, the CISG, the UNIDROIT Principles and the PECL provide that if the respondent fails to perform its contractual obligation, the claimant may
recover the full amount of the loss it suffered, including lost profits. One significant difference between the three is that the CISG does not allow the recovery of non-pecuniary loss, such as emotional distress, while the UNIDROIT Principles and the PECL do. Also, like many countries, the CISG, the UNIDROIT Principles and the PECL require that the claimant’s loss must have been foreseeable and preclude recovery of losses the claimant could have avoided by mitigation.

Some tribunals have awarded damages for breach of contract based on principles of equity. In such situations, they may award *damnum emergens*, *lucrum cessans*, or both.

In light of national laws, conventions, and general principles of international law and equity, there has been an almost universal consensus among tribunals deciding disputes between transnational contracting parties that the goal of damages for breach of contract is to place the injured party in the position that it would have been in had the contract been performed. Consequently, tribunals recognize that the aggrieved party is typically entitled to recover both losses incurred as well as gains of which it was deprived because of the breach.

However, the calculation of damages and, in particular lost profits, has proved more troublesome for courts and tribunals deciding international contract disputes. This result should not come as a surprise. The laws of most countries provide little or no guidance on how lost profits should be calculated. Indeed, most countries simply give the judge or jury broad discretion to fix damages, including lost profits. In addition, the assessment of lost profits is not an exact science. Moreover, some of the methods used to calculate lost profits are complicated. In particular, the DCF method is especially complex because it determines the value of the business by projecting the net cash flow for a certain time period into the future and then discounting it back to present value as of the date of the breach (taking into account *inter*
alia inflation and risk). Accordingly, awards of damages by tribunals deciding transnational contract disputes have varied greatly. However, this is not in-and-of-itself a cause for concern. As one tribunal explained:

There is no reason to apologise for the fact that [the approach used to calculate damages] involves approximations; they are inherent and inevitable. Nor can it be criticised as unrealistic or unbusinesslike; it is precisely how business executives must, and do, proceed when they evaluate a going concern. The fact that they use ranges and estimates does not imply abandonment of the discipline of economic analysis; nor, when adopted by arbitrators, does this method imply abandonment of the discipline of assessing the evidence before them.534

Finally, there are steps that the parties can undertake to assist tribunal in determining awards of damages. For example, parties can set forth in their contract how damages are to be calculated in the event of a wrongful breach of contract, provided it does not amount to a penalty that may not be enforced in some countries. Alternatively, parties may consider using final offer arbitration with respect to the amount of any award of damages. In this context, this approach calls for each party to propose to the tribunal the amount of damages that the claimant is entitled to; the tribunal would then choose between the two totals. (This procedure would only apply if the tribunal determined that the respondent was liable to the claimant for damages.) The advantage of this process is that it forces parties to be more reasonable in their positions (or more realistic in their assessment of their positions) and, in theory, should narrow the differences between the parties concerning the amount of damages owed. In fact, this procedure also may facilitate settlement of the dispute. As one commentator explains:
When the only dispute between parties is a numeric value [as in final offer arbitration], reasonable final offers provide a midpoint and a range of numbers on which to focus negotiations. Each side can assess the likelihood that the arbitrator will value the disputed item as worth more or less than the midpoint. This analysis helps the parties predict which offer the arbitrator will choose. . . . [T]his midpoint analysis promotes settlement. Close final offers usually settle because a compromise number is easy to reach. Final offers which are far apart often settle as well because each side fears that the arbitrator will choose the other’s offer.535

Tribunals also may consider a greater use of experts to assist in evaluating claims for damages.536 Employing experts may help the tribunal better understand the complexities involved in calculating damages and thus may lead to a more reasoned decision.537 The authors of one of the leading treatises on international arbitration explain:

In international commercial arbitration, the arbitration tribunal is usually composed of lawyers. Where matters of a specialist or technical nature arise, such an arbitral tribunal often needs expert assistance in reaching its conclusions, in order “to obtain any technical information that might guide it in the search for truth. . . .” For example, . . . [e]xpert help may be needed to investigate the quantification of a claim.538

Of course, the drawbacks are that employing experts may increase the cost of resolving the dispute and may slow the process. These potential drawbacks may be outweighed by the benefits, especially when substantial sums are involved.539

Tribunals also should be mindful that, where the claimant seeks both damnum emergens and the lucrum cessans, they need to be careful to avoid double counting so that they give the
claimant the benefit of the bargain and no more.\textsuperscript{540} The potential for double recovery is especially great when the applicable law provides for the recovery of \textit{damnum emergens} and the \textit{lucrum cessans}, and the tribunal employs the DCF method to calculate damages. As one tribunal explained:

\begin{quote}
[F]uture net cash flow generally includes all amortization of investment there will ever be. To ask for the full amount of the future revenue stream when also claiming recoupment of all investment is wanting your cake and eating it too. If the DCF method is applied in a contractual scenario to measure nothing but net cash flow (thus excluding the accrual accounting notion of ‘income’ which may cover non-cash items such as depreciation), there is no room for recovery of wasted costs. In other words, when the victim of the breach of contract seeks recovery of sunken costs, confident that it is entitled to its \textit{damnum}, it may go on to seek lost profits only with the proviso that its computations reduce future net cash flows by allowing a proper measure of amortization.\textsuperscript{541}
\end{quote}

Thus, in general, a claimant should not be able to receive as damages for breach of contract both the recovery of the value of its lost assets (as \textit{damnum emergens}) and lost profits measured by the discounted present value of future cash flows (as \textit{lucrum cessans}) because, in such case, “the expenses of making the contract . . . is an element included in the compensation for loss of profit.”\textsuperscript{542} Damages should, to the extent possible, place the aggrieved party in the same pecuniary position that it would have been in if the contract had not been breached; not a better position than if the contract had been performed.
1. See The Selda, [1999] 1 Lloyd’s Rep. 729; New Zealand Act, § 56; Civil Code § 398(1) (S. Korea); Civil Code art. 250 (Taiwan). If parties wish to abandon any remedies upon breach, however, express words must be used. See Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd. [1974] AC 689.


3. In recent years, there has been some debate over terminology for damages awarded in lieu of performance in the event of a breach of contract. In American law, such damages are often called expectation damages. One commentator has pointed out, however, that such terminology may be misleading, particularly outside of the United States. Accordingly, I will use the term “performance damages.” See D. Friedmann, “A Comment on Fuller and Perdue, the Reliance Interest in Contract Damages, Issues in Legal Scholarship, Symposium: Fuller and Perdue” (2001), available at http://www.bepress.com/ils/iss1/art3.


7. See Friedmann, op. cit.


10. See Dobbs, op. cit., § 4.1.(1).


14. See Robinson v. Harman (1848) 154 *E.R.* 363, 365. As an alternative to pursuing recovery of the performance interest, claimants can instead decide to seek damages that would protect their reliance or restitution interest. The reliance measure includes expenses reasonably incurred by claimants in reliance on respondents’ promises of performance. The object of an award for reliance is to put claimants in the position they would have been had the contract never been made. In some instances, courts are more willing to protect the reliance interest than the performance interest. See P. Atiyah, *An Introduction to the Law of Contract* 460-61 (5th ed. 1995). Courts may use the reliance measure of damages if something unusual has happened such as a serious case of mistake or frustration. See McRae v. Commonwealth Disposals Commission, [1950] 84 *C.L.R.* 377. Courts may also use the reliance measure of damages when dealing with contract claims that are not of a commercial nature. For example, the reliance measure of damages may be used in claims against consumers, members of a family, or in matrimonial disputes. Restitution is usually awarded in cases of unjust enrichment. See Rover Int’l v. Cannon Film Sales (No. 3), [1989] 1 *W.L.R.* 912.


19. *See* International Mineral & Chemical Corp., *op. cit.*, 103; *see also* McGregor, *op. cit.*, ¶ 263.


23. *See* Heywood v. Wellers, [1976] *Q.B.* 446; Jarvis v. Swans Tours, [1973] *Q.B.* 233, 239 (C.A.). In Knutt v. Bolton, the contract contained a provision that the architect’s design of a house would be pleasing to occupiers. Nevertheless, the court found that although the provision was ancillary to the contract, it was not the very object of the contract. Therefore, the claimant could not recover for distress and disappointment. *See* Knutt v. Bolton, *The Independent*, May 18, 1995, C.A.

*But see* President of India v. La Pintada Cia Navegacion SA, [1984] 2 All E.R. 773, HL (criticizing rule regarding interest).


27. See Sale of Goods Act 1979 § 49(1) & (2) (Eng.).

28. See *ibid.*, § 50(1).


30. See *ibid.*, § 50(3).

31. See *ibid.*, § 51(2).

32. See *ibid.*, § 51(3).

33. See *ibid.*, § 53(1)(b).

34. See *ibid.*, § 53(3). Section 53 of the Sale of Goods Act does not apply to Scotland. See *ibid.*, § 53(5). Section 53A applies to Scotland, which contains almost identical provisions on the measure of damages for breach of warranty, the only difference being omitted provisions allowing the buyer to bring an action for reduction or extinction of the price. See *ibid.*, §§ 53-53A.

35. A buyer is allowed those lost profits so far as they are not held to be too remote. See S. Waddams, *The Law of Damages* ¶¶ 123-34 (1983).

36. See *ibid.*, ¶¶ 191-92.
39. McGregor, op. cit., ¶ 1565; Weld-Blundell v. Stephens, [1920] A.C. 956, 986. However, sometimes a court will hold that the chain of causation is not broken. This may be the case if the respondent owes a contractual duty to the respondent to take care to ensure that an intervening and voluntary act of a third party does not occur. See London Joint Stock Bank Lytd. v. Macmillan, [1918] A.C. 777; De la Bere v. Pearson, [1908] 1 K.B. 280.
41. Hadley, op. cit., 145.
42. Ibid.

49. See Chitty on Contracts, op. cit., § 1562.


53. Chaplin, op. cit., 786.

54. Ibid.

55. See ibid. The beauty contestants were competing for twelve acting contracts--four contracts for three years in the amount of five pounds salary per week, four contracts for three years in the amount of four pounds salary per week, and four contracts for three years in the amount of three pounds salary per week. On average, a winner of the contest would have had a salary of U.K.£576. Twenty-five percent of U.K.£576 equals roughly U.K.£125. Factoring in the fact that the plaintiff may never have won the contest, the court held that the jury’s original award of U.K.£100 in damages was fair.


57. See Waddams, op. cit., ¶ 1194.


64. McGregor, op. cit., ¶ 218 (discussing cases).


68. See M. Glendon, et al., Comparative Legal Traditions (1994). The law of obligations covers all situations which can give rise to rights or claims and is customarily divided into three parts: the law of contracts, the law of delict (tort), and the law of unjust enrichment. Commercial codes typically apply to acts of merchants or transactions between merchants. See Commercial Code art. 110-3 (France); see also B. Nicolas, “Introduction to French Law of Contract,” in Harris & Tallon, op. cit., 15-16.

69. See, e.g., Codigo Civil [C.C.] art. 1124 (Spain); Allgemeines Burgerliches Gesetzbuch [ABGB] art. 918 (Austria); BGB 241 (Ger.); see also E. Bucher, “Law of Contracts,” in
For example, in the case of a contract for goods, the debtor may be ordered to deliver a specific item to the other party, or to pay the expenses of delivering a substitute good if suitable. See C.C. art. 1096 (Spain). In the case of a personal service contract, a party may be required to pay the expense of having someone else carry out the task. See ibid., art. 1098; see also K. Yelpaala, Drafting and Enforcing Contracts in Civil and Common Law Jurisdictions 135 (1986).

70. See Schuldrechtsmodernisierungsgesetz of 26 Nov. 2001, in force since 1 Jan. 2002 §§ 280-283 (Ger.).

71. See A. T. Von Mehren & J. R. Gordley, The Civil Law System 502 (1957);

72. See, e.g., C.C. art. 1106 (Spain); Code Civil [C. Civ.] art. 1149 (Fr.) (J. H. Crabb trans., 1995); Civil Code art. 1149 (Belg.); Burgerlijk Wetboek [BW] § 6:96 (Neth.); Codice Civile [C.c.] art. 1223 (Italy); Greek Civil Code art. 298; ABGB art. 1293 (Aus.); Swiss Code of Obligations (CO) arts. 195, 208.


75. See Tallon, op. cit., 274; Nicholas, op. cit., 226.


77. The most common form of recovery for breach of contract is positive interest. Negative interest is often awarded if the contract is void.

78. See B.W. art. 6:106 (Neth.); C.C. art. 299 (Greece); C.c. art. 2059 (Italy). For a comparative study of moral damages in Europe and Latin America, see Jorge A. Vargas, “Moral Damages
under the Civil Law of Mexico: Are These Damages Equivalent to U.S. Punitive Damages?,” 35


81. See Whincup _op. cit._, § 13.63.

82. Tallon, _op. cit._, 274.

83. See C. Civ. art. 1149 (Fr.); _see also_ C.C. art. 1106 (Spain);


85. For a discussion of French and German approaches to breach of contract, see Von Mehren, _op. cit._, 502.


87. See _ibid._ ¶ 317; _see also_ Treitel, _op. cit._, 75 n.1; Bucher, _op. cit._, 113.

88. C.c. art. 1455 (Italy).

89. See Nicholas, _op. cit._, 243.

90. See BGB § 323(5) (Ger.). Russia uses a “material violation” standard. See C.C.R.F. art. 450 (Russ.).

91. See C.O. art. 107(2) (Switz.); _see also_ BGB § 323 (Ger.). Additional time need not be given in certain cases, such as where there was a specific date for performance.

92. See C. Civ. art. 1153 (Fr.); C. C. art. 1108 (Spain); Civil Code art. 1153 (Belg.). Damages on top of interest may be recovered if the debtor’s delay was in bad faith and caused additional loss. _E.g._, C. Civ. art. 1153 (Fr.).

93. See, _e.g._, C. Civ. art. 1153 (Fr.).
94. Treitel, *op. cit.*, 102. The concrete method is often referred to in civil law as a form of substitute for specific performance, not as damages. However, in reality this makes no practical difference. *See* Nicholas, *op. cit.*, 217. The “concrete” method is analogous to the American concept of “cover” and “resale.” *See* Uniform Commercial Code, §§ 2-712, 2-716 [hereinafter U.C.C.].

95. *See* C.O. art. 191 (Switz.); C. Civ art. 1144 (Fr.); *see also* German Commercial Code [HGB] art. 376(3) (Ger.). This principle has been extended to contracts outside commercial contracts by the courts. *See* Treitel, *op. cit.*, § 102 (citations omitted).

96. Treitel, *op. cit.*, § 102; *see* B.W. arts. 7:36 & 7:37 (Neth.).

97. *See* Nicholas, *op. cit.*, 217.

98. *See* Treitel, *op. cit.*, § 100. Treitel claims that the right to price reduction in civil law is similar to the common law remedy allowing buyers to deduct from the price the damages due to the defect. *See* ibid; *see, e.g.* C. Civ. art 1644 (Fr.); *see also* Bucher, *op. cit.*, 121. In fact, in some countries, there is no right to damages for defective goods. *See* C.Civ. art. 1644 (Fr.); C.c. art 1492 (Italy); Nicholas, *op. cit.*, 82. Rescission, however, can be combined with damages in the case of defective goods. *See, e.g.*, C.Civ. arts. 1645 & 1646 (Fr.). In sale of goods cases, France has explicitly allowed the rescission of a contract where “the seller suffers from a breach of more than seven-twelfths of the price of realty . . . .” C. Civ. art. 1674. This is so even if the seller has contracted away the right to rescission. *See* ibid. Buyers, once the contract is rescinded, can choose to keep the goods and pay the “proper price and also one-tenth of the total price.” *Ibid.*, art. 1681.

99. BGB § 437 (Ger.).


103. For a list of countries that have adopted the CISG, see http://www.cisg.law.pace.edu/cisg/countries/countries.html.

104. See Bucher, op. cit., 114.

105. See C. Civ. art. 1150 (Fr.); C.C. art. 1107 (Spain); see also Cass. civ. 29 Dec. 1913, D. 1916. 1. 117; Cass. req. 24 Oct. 1932, D. 1932. 1. 176, in Von Mehren & Gordley, op. cit., 1114; Civil Code art. 1150 (Belg.); C.c. art. 1209 (Italy); Heikinheimo & Inkeroinen, op. cit., FIN-70.

In French law, the foreseeability requirement is treated in an autonomous manner as a limit to the principle of full compensation, whereas in English law it appears as an element relating to the directness or indirectness of the harm (remoteness of damage). See Contract Law Today, op. cit., 275; see also C.C. arts. 1104, 1107 (Spain); Civil Code art. 1150 (Belg.).


107. See C. Civ. art. 1151 (Fr.).

108. See C. Civ. art. 1150 (Fr.); see also C.C. art. 1225 (Italy); C.C. art. 1107 (Spain).

109. See C. Civ. art. 1151 (Fr.); C.C. art. 1107 (Spain). In France, damages for mental distress may be claimed, but awarding damages for mental distress is discretionary. See Barnard & Vlasto, “France,” Transnational Litigation FRA-106.
110. See BGB § 252 (Ger.); Von Mehren & Gordley, op. cit., 1115.

111. RG 15 Feb. 1913, RGZ 81, 359; see Mehren & Gordley, op. cit., 1115.

112. W. Hahnkamper, “Austria,” Transnational Litigation AUS-88. Under Belgian law, only the party directly injured by the breach of contract may bring a claim for damages. That is, parties indirectly damaged by the respondent’s breach of contract typically may not bring a claim for damages. See Simont, op. cit., BEL-64.


114. Under Italian law, if damages cannot be precisely determined, they are subject to “equitable liquidation” by the judge. C.c. art. 1226 (Italy).

115. See Simont, op. cit., BEL-64; B. Nicholas, op. cit., 228.

116. See C.c. art. 1226 (Italy).


118. See Hahnkamper, op. cit., AUS-88 (Austria); Simont, op. cit., BEL 63; M. Wirth, “Switzerland,” Transnational Litigation, SWI-76 (1997); BGB § 280 (Ger.); C.C. art. 1101 (Spain); B.W. art. 6:74 (Neth.); C. Civ. art. 1147 (Fr.).

119. See, e.g., C.C. art. 1101 (Spain); see Hahnkamper, op. cit., AUS-88; Simont, op. cit., BEL-63; Wirth, op. cit., SWI-76.

120. See BGB § 280(1) s.2 (Ger.); Hahnkamper, op. cit., AUS-89.

121. See C. Civ. art. 1147 (Fr.); Civil Code art. 1147 (Belg.); C.C. art. 1101 (Spain); C.c. art. 1218 (Italy).
122. See ABGB §§ 1323, 1324 (Aus.).

123. See EVHGB art. 8, no. 2, 4 (Commercial Code) (Aus.).

124. See J. Herbots, “Belgium,” International Encyclopaedia of Laws, 1 Contracts ¶ 405 (1998); see also Civil Code art. 1146 (Belg.); C. Civ. arts 1146 (Fr.); C.C. art. 1100 (Spain); C.O. art 102(1) (Switz.); ABGB § 1334 (Aus.); BGB § 281; C.c. art 1219 (Italy).


126. See Nicholas, op. cit., 237; see also C. Civ. art. 1139 (Fr.); Civil Code art. 1139 (Belg.).

127. See Nicholas, op. cit., 237; Herbots, op. cit., ¶ 405.

128. See C. Civ. art. 1146 (Fr.). This does not necessarily include cases which call for performance at a specified date. See Nicholas, op. cit., 238. Other counties, however, have allowed the passing of the date for performance to substitute for notice. See C.c. art. 1219 (Italy); C.O. art. 102 (Switz.); BGB § 286(2)(1) (Ger.).

129. See C. Civ. art. 1139 (France); C.C. art. 1100 (Spain);

130. See BGB § 281(1) (Ger.); C.O. art. 107 (Switz.). In certain cases this does not apply, such as where “the obligor seriously and definitely refuses to perform or if there are special circumstances which . . . justify the immediate assertion of a claim for compensation.” BGB § 281(2) (Ger.); see also C.O. art. 108 (Switz.).

131. See BGB § 323 (Ger.).

132. See C.c. art. 1123 (Italy); BGB § 254 (Ger.); see also Whincup, op. cit., 266-71.

133. C.O art 44 (Switz.); see also ABGB § 1304 (Aus.).

134. Tallon, op. cit., 293; see Nicholas, op. cit., 23.

136. See, e.g. B.W. art. 6:96 (Neth.).

137. See Treitel, op. cit., § 147.


139. Ibid., 161.

140. Ibid., 165.

141. Ibid., 166.

142. See ibid.

143. See Waddams, op. cit., ¶ 1.90.

144. See ibid. ¶ 10.10; see also Sykes v. Midland Bank Executor & Trustee Co., [1971] 1 Q.B. 113 (C.A.).


147. See Waddams, op. cit., ¶ 3.1320.

pecuniary damages against an airline after the airline caused the death of a family’s dog);


98


162. 100 Main Street East Ltd. v. W.B. Sullivan Construction Ltd., (1978) 88 D.L.R. (3d) 1, 22.

163. See Multi-Malls Inc. v. Tex-Mall Properties Ltd., (1980) 108 D.L.R. (3d), 399. In this case, the plaintiff was awarded damages for the defendant’s breach of contract which prevented the rezoning of the plaintiff’s property as a shopping mall. However, the chance of the re-zoning occurring was only twenty percent before the breach occurred and therefore the plaintiff only received twenty percent of the loss it claimed.

164. What is reasonable is a question of fact dependent upon the circumstances of a particular case. See Benjamin v. Mosher, [1953] 1 D.L.R. 826 (N.S.S.C.).


168. One commentator explains:

Suppose the defendant agrees to supply goods for $10, the market price at the time of due delivery is $12, and the defendant offers to supply the goods for $11 if the plaintiff will agree to a binding modification of the original contract. In
these circumstances, it is submitted, the plaintiff would be liable for damages of
$2. It is not reasonable to expect the plaintiff to abandon contractual rights, and a
defendant who demands such an abandonment cannot complain of the plaintiff’s refusal.


170. Ibid.

171. See ibid.

172. Specific performance is allowed to be granted by the court in cases where damages would
not adequately compensate the injured party. The seminal example is a contract for the sale of
land. See A. Corbin, 11 Corbin on Contracts § 993 (1993); Restatement (Second) of Contracts
§ 346.


175. See ibid., § 1001. Nominal damages are usually awarded as six cents or one dollar. See J.

176. See Calamari & Perillo, op. cit., § 14.3; see also U.C.C. § 1-106(1); Restatement (Second)

177. See U.C.C. §§ 2-715, 2-721; see generally Dobbs, op. cit., § 12.1 et. seq.


179. See ibid.

180. See Restatement (Second) of Contracts § 353.
181. The general measure of damages for a complete breach of contract has been expressed as follows:

\[
\text{Damages} = \text{loss in value} + \text{other loss} - \text{cost avoided} - \text{loss avoided}
\]

See Farnsworth, op. cit., 209. It should be noted that only the first two terms apply in the case of a claim for partial breach. The above formula is not the only method for calculating damages. One alternative method would give the claimant the sum of profit and other loss and the cost of reliance less the loss avoided. See ibid. A third method allows the claimant to recover “for work done, only such a proportion of the contract price as the fair cost of that work bore to the fair cost of the whole work required, and, in respect of the work not done, only such profit, if any, as he might have been made by doing it.” Kehoe v. Rutherford, 27 A. 912 (N.J. Sup. 1893).


184. See Article 2 (original) Sales § 2-101 et. seq.; Article 2 (revised) Sales § 2-201 et. seq. See also U.C.C. § 2-703 (setting forth seller’s remedies for breach); U.C.C. §§ 2-711, 2-714 (setting for buyer’s remedies for breach).
185. U.C.C. § 2-706.

186. U.C.C. § 2-708.

187. U.C.C. § 2-709. It further provides:

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

Ibid.

188. U.C.C. § 2-710.

189. U.C.C. § 2-711.

190. U.C.C. § 2-713.

191. U.C.C. § 2-714.

192. U.C.C. § 2-715.

193. Compare U.C.C. § 2-708(1) (original) Article Two (stating “the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710))”, with U.C.C. § 2-708(1)(a)&(b) (revised) Article Two (stating “the measure of damages for non-acceptance/repudiation by the buyer is the difference between
the contract price and the market price . . . . together with any incidental or consequential damages provided in this Article (§ 2-710”).

194. Compare U.C.C. § 2-712 (original) Article Two stating:

(1) After a breach within the preceding section the buyer may “cover” by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitute for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller’s breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

With U.C.C. § 2-712 (revised) Article Two stating:

(1) If the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects or justifiably revokes acceptance, the buyer may “cover” by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) A buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages under Section 2-715, but less expenses saved in consequence of the seller’s breach.

(3) Failure of the buyer to effect cover within this section does not bar the buyer from any other remedy.
195. Compare U.C.C. § 2-713(1)(b) (revised), with U.C.C. § 2-713(1) (original) Article Two stating: “(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price. . . .”

196. See, e.g., City of New Orleans v. Firemen’s Charitable Assn., 9 So. 486 (La. 1891).

197. Corbin, op. cit., § 1006.

198. See Farnsworth, op. cit., 256.

199. Restatement (Second) of Contracts § 351.

200. Ibid.


203. U.C.C. § 2-714(1).

204. U.C.C. § 2-715(2).


206. See Bagwell Coating v. Middle S. Energy, 797 F.2d 1298 (5th Cir. 1986); Locke v. United States, 283 F.2d 521 (Ct. Cl. 1960); Kozlowski v. Kozlowski, 403 A.2d 902 (N.J. 1979).
207. See UCC § 1-106, cmt. 1 (providing that damages need not “be calculable with mathematical accuracy”).

208. See Dunn, op. cit.


213. See Treitel, op. cit., 53; see also McGregor, op. cit., § 218 (discussing cases).


215. See Restatement (Second) of Contracts, § 350(1).


217. Ibid.

218. Ibid.

219. See ibid., 177.


221. *See* Civ. C. art. 402 (Braz.).


223. *See* Civil Code art. 1556 (Chile); *see also* Civ. C. art. 403 (Braz.).


225. *See ibid.*, ¶ 298 (citing to C. Civ. art. 522) (Arg.).

226. *See* C. Civ. art. 522 (Arg.).


228. *See* P. Neto, *Doing Business in Brazil*, § 8.166 (2005); Civ. C. art. 389 (Braz.).

229. *See* Civ. C. art. 520 (Arg.); *see also* Garro, *op. cit.*, ¶ 300.

230. *See* Garro, *op. cit.*, ¶ 301 (citing cases). Professor Garro also notes that the requirement of directness has been interpreted to include “those that are ‘natural’ or ‘ordinary,’ as opposed to ‘exceptional’ or ‘extraordinary.’” *Ibid.*

231. *See* Garro, *op. cit.*, ¶ 300. Cases of dolo involve purposeful breaches of contract such as where a respondent attempts to avoid its contractual obligations, or breaches a contract through fraud or deceit. *See ibid. ; see also* General Secretariat, *OAS (Organization of American States) A Statement of the Laws of El Salvador in Matters Affecting Business* 52 (1970).

232. *See* C. Civ. art. 1150. (Chile). Chile follows the typical civil law pattern of limiting damages to those which are foreseeable, except in cases of dolo. *See* Cruz, “Chile,” 1 *International Encyclopedia of Comparative Law* C-54-55 (1999).

234. See Civil Code arts. 1645, 1648 (Guat.).

235. See C. Civ. arts. 2116, 1916 (Mex.) (“Sentimental value shall not be considered in determining the value and deterioration of an asset, unless it is proven that the party responsible for its damage did so for the purpose of injuring the feelings of its owner.”).

236. See P. Neto, op. cit., § 8.162 (citing to Civ. C. art. 393 (Braz.)).

237. C. Civ. art. 2111 (Mex.); see also Cruz, op. cit., C-54; Dr. J. Gómez Padilla, A Statement of the Laws of Guatemala in Matters Affecting Business 75 (3d ed. 1975).

238. Garro, op. cit., ¶ 292. Meanwhile, Argentine legal scholars distinguish the burden of proof in breach of contract cases between contractual obligations calling for the obligor to achieve a specific result (obligaciones de resultado), in which the failure to perform raises a presumption that the respondent was at fault, in contrast to contracts where the contractual obligation involves a duty of best efforts (obligaciones de medio), in which fault must be proven.


240. See C. Civ. art. 2080 (Mex.); Civ. C. art. 509 (Arg.).


242. See A. F. Kassim, “Kuwait,” 1 Yearbook of Islamic and Middle Eastern Law 254, 255 (E. Cotran & C. Mallat eds., 1994). However, Article 2 of the Egyptian Constitution stipulates that Shari‘a is the main source of legislation. In addition to Egypt, Kuwait, Iran, Jordan, and the United Arab Emirates (U.A.E.) have enacted civil codes that have generally followed the French model. See Ibid.; R. Price, “United Arab Emirates,” 1 Yearbook of Islamic and Middle Eastern


244. See Const. Principle 4 (Iran).


249. Saleh, “Remedies for Breach of Contract Under Islamic and Arab Laws,” op. cit., 286 (citing JCC art. 363 (Jordan); ECCT 389 (U.A.E.)). In practice lost profits and moral damage may be recovered as the courts may appoint an outside expert to determine the damage without asking for a distinction between actual loss lost profits or moral prejudice. See Saleh, “Shari’a Influence on Middle Eastern Contract Law in the Next Twenty Years,” op. cit., 36-37.

251. See ibid., 275. The buyer can also seek to have the price reduced according to the diminished value of the goods.

252. See ibid. If buyers choose to keep the goods they do not have the remedy, as in Kuwait, of price reduction.

253. See Civil Code arts. 221, 222, 238 (Iran); see also M. A. Ansari-Pour, “Iran,” 8 Y.B. of Islamic and Middle Eastern Law 281 (E. Contran & M. Lau eds., 2001-2002). Whether this includes damages for delay is unclear. However, the Shari’a in general does not allow recovery of damages for delayed performance. See Saleh, “Remedies for Breach of Contract Under Islamic and Arab Laws,” op. cit., 280.


256. See Contracts Law (Remedies for Breach of Contract) 5731-1970, § 10 (Isr.) [“Remedies Law”].

257. See ibid., § 1(a).

258. See CA 1846/92 Levy v. Mabat Building Ltd., [1993] Isr. L.R 111, 5-6. In Israel, the claimant can only recover on the basis of either the expectation interest or the reliance interest. See Shalev, op. cit., ¶ 414. This is the case only if the party seeks compensation as the sole
remedy; if the party seeks enforcement of the contract, the party is limited to its positive damages. *See ibid.*


260. *See Remedies Law, op. cit., § 13,* which states: “[w]here the breach of contract has caused other than pecuniary damage, the court may award compensation for that damage at the rate it deems appropriate in the circumstances of the case.”

261. *See Saleh, “Remedies for Breach of Contract Under Islamic and Arab Laws,” op. cit., 285* (citing civil code art. 300.2 (Kuwait)); Civil code art. 300.2 (Kuwait) (defining a natural consequence as “damage the debtor could not have prevented by reasonable diligence”).

262. However, if the breaching party has committed serious fault or fraud it may be held liable for direct damages whether the damages were foreseeable or not. *See Saleh, “Remedies for Breach of Contract Under Islamic and Arab Laws,” op. cit., 285* (citing civil code art. 300.3 (Kuwait)).

263. *See Civ. C. art. 221 (Egypt).*

264. *See Award of 7 July 1985, case no. 1/1984, reprinted in Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration 3-6 (2000).*

265. Civ. C. art. 221 (Egypt).

266. Award of 7 July 1985, case no. 1/1984, *op. cit., 5.*

267. *See Remedies Law (Isr.), op. cit., § 10.*

268. *See Kassim, op. cit., 261.*

269. *See Civil Code art. 227 (Iran).*

271. See Friedmann, op. cit., 171.

272. See Civ C. art 157 (Egypt). The party must also be authorized to set a period for performance.

273. See Civil Code art. 226 (Iran).


275. See Civil Code art. 301 (Kuwait).


278. See Civ. C. art. 216 (Egypt).


280. Ibid., 9. The applicable law was from the Egyptian Civil Code articles 221 and 216, which states:

   The Judge will fix the amount of damages, if they have not been fixed in the contract or by law. The amount of damages includes losses suffered by the creditor and profits of which he has been deprived, provided that they are the normal result of the failure to perform the obligation or of delay in such performance. These losses shall be considered to be a normal result if the creditor is not able to avoid
them after attempting to do so. When however, the obligation arises from contract, a debtor who has not been guilty of fraud or gross negligence will not be held liable for damages greater than those which could have normally been foreseen at the time of contract. The Judge may reduce the amount of damages or may even refuse to allow damages if the creditor by his own fault, has contributed to the cause of loss or increased it.

The Tribunal did find, however, that the Claimant could recover administrative and other expenses paid out in reliance on the contract. See ibid., 9.

281. Remedies Law (Isr.), op. cit.
284. See Ramachandran, op. cit., 1588.
285. See ibid.; Halsbury’s Laws of India, op. cit., § 115.138. In contrast to English and American common law, the extent to which nominal damages are still awarded in India is based on the facts and circumstances of the case. Ibid. (citing Brahmedo Narain Singh v. Members of the Notified Area Committee A.I.R. 1965 Pat 179, ¶¶ 10, 11 (1965) B.L.J.R. 679; relying on Yarlagadda China Rattayya v. Donepudi Venkataramayya AIR 1959 A.P. 551; Rolin v. Steward,


287. The time for calculation of damages is the day of the breach. Although the seller cannot recover more if the market continues to drop, the buyer is also not barred from recovering an increase in damages if the market rises. A. Dutt, Dutt on Contract: the Indian Contract Act, § 73, at 555 (1990).

288. See Halsbury’s Laws of India, op. cit., § 115.154; Ramachandran, op. cit., §73, at 1589. If there is no market at the place for delivery, damages can be based on the nearest substitute, or the purchase value of the goods. Ibid.

289. See § 73 of the Indian Contract Act, 1872, which states:

[w]hen a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.


291. A.I.R. 1952 Nag 32, discussed in Ramachandran, op. cit., § 73, at 1576.

292. See ibid.

294. See Dutt, op. cit., 551.


297. Ibid., 175.

298. Ibid.


300. See Final Award in Case No. 8445 of 1996, op. cit., 175-76. The award of lost profits was adjusted to present value and interestingly discounted 15% to take into account the “uncertain nature of the calculations.” Ibid.

301. See ibid., 177.


303. See Civil Code art. 389 (1) (S. Korea); Minpō art. 414(1) (Civil Code of Japan).


308. Ibid.

309. See H. Oda, Japanese Law, 175 (2d ed. 1999); Doing Business in Japan, op. cit., § 1.15[e][i].

310. The new Contract Law of China (UCL) was enacted by the National Peoples’ Congress of the People’s Republic of China on March 15, 1999. It replaced the old division of contract law
in China which broke contract law into the Economic Contract Law, Foreign Economic Contract Law, and the Technology Contract Law, all of which were revoked on the same day the U.C.L. was passed.

311. *See* U.C.L. art. 113 (China). In a break from the traditional civil law, damages are the primary remedy, although specific performance is still an available remedy under certain conditions. *See* U.C.L. art. 112 (China). Punitive damages can also be recovered under U.C.L. art. 114 (China).


313. *See* Chen, *op. cit.*, 190; Wang, *op. cit.*

314. *See* Civil Code art. 419(2) (S. Korea); Minpō art. 397(2) (Japan).

315. *See* Civil Code art. 419(2) (S. Korea); Minpō art. 397(2) (Japan). For example, obligors cannot use force majeure to escape a monetary debt.


319. *See* *ibid.*. Price reduction is a common remedy throughout civil law countries, and is reflected in the Convention on the International Sale of Goods, article 50.

320. *See* Civil Code art. 416(2) (S. Korea); Minpō art. 393 (Japan); U.C.L. art. 113 (China).

321. *See, e.g.*, Civil Code art. 418 (S. Korea); *see also* Civil Code arts. 415-416 (S. Korea).

322. *See* U.C.L. art. 119 (China).
323. *See Doing Business in Japan, op. cit.*, § 1.15 [e][i]. The Japanese concept of adequate causation actually follows the English law rule laid out in *Hadley v. Baxendale*. While it draws on the distinction between natural damages and damages resulting from special circumstances, it has been interpreted to be similar to German law. *See ibid; see also* Oda, *op. cit.*, 175; *Doing Business in Japan, op. cit.*, 56-59.

324. *See* Civil Code art. 416 (S. Korea); Minpō art. 393 (Japan).

325. Civil Code art. 416(2) (S. Korea); *see also* Minpō art. 393(2) (Japan).


327. *See* Oda, *op. cit.*, 175 (citing Judgment of the Supreme Court, Apr. 28, 1961 (Minshū 15-4-1105)).

328. *See* Oda, *op. cit.*, 175 (citing Judgment of the Supreme Court, Dec. 18, 1953 (Minshū 7-12-1446)).

329. *See* Oda, *op. cit.*, 175 (citing Judgment of the Supreme Tribunal, Apr. 5, 1929 (Minshū 8-373)).

330. *See* U.C.L. art. 113 (China).

331. *See* Civil Code art. 415 (S. Korea).


333. *See* Civil Code art. 419 (S. Korea); Minpō art. 397 (Japan).

334. Civil Code art. 418 (S. Korea); *see also* Minpō art. 396 (Japan).


336. *See* UCL art. 114 (China).
Australian courts are not bound by English precedent, but English decisions are accorded great weight. See Zweigert & Kötz, *op. cit.*, 229. In some instances, such as the English Sale of Goods Act, 1893, Australia has adopted English legislation word for word. See *ibid.* at 230.

Specific performance may be granted when damages would not adequately compensate the injured party for their loss. See *ibid.*

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See Chetwin & Graw, *op. cit.*, § 15.2.4.

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See Chetwin & Graw, *op. cit.*, § 15.2.4.


See Carter, *op. cit.*, ¶ 211-214,

See Sale of Goods Act 1908 (N.Z.) § 50(1) (providing a seller an action for the price when the buyer received the goods); § 51(3) (damages are the difference between the contract price and market price); § 52(3) (same for the buyer). Contract Remedies are also regulated by the Contractual Remedies Act of 1979, which expressly states the Act does not affect the Sale of Goods Act. See ibid, § 15 (d).


See Sutton, Sales Law, op. cit., 441. If, however, the market price has risen the buyer may not be able to show any actual loss.


See Carter, op. cit., ¶ 218. There may also be other intervening factors which break the causal chain, however, these might also be foreseeable results of the breach and therefore would not sever liability. See Monarch SS Co Ltd. v. A/B Karlshamns Oliefabriker, [1949] A.C. 196.


Ibid., 43.

See ibid.

See Chetwin & Graw, op. cit., § 15.3.2.

See Isaac Naylor & Sons Ltd. v. NZ Co-op Wool Marketing Assn Ltd., [1981] 1 N.Z.L.R.


365. Ibid.

366. If claimants provide no evidence concerning their loss or damage, courts will often limit recovery to a nominal sum. See Carter & Harland, op. cit., ¶ 2117, at 775; McGregor, op. cit., § 260; Beck, op. cit., 96.


368. See Carter & Harland, op. cit., ¶ 2133, at 785.


373. *See* CISG arts. 45, 61. While articles 74 through 77 set forth the rules concerning damages, numerous other articles can affect the right to or calculation of damages. *See* CISG arts. 6, 7, 8, 9, 66, 80, 85, 86, 87, 88.


376. CISG art. 74.

377. *See* CISG art. 74.


381. CISG art. 75.


384. CISG art. 76(1).

385. CISG art. 76(2).


388. See CISG art. 5 (“This convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.”).


394. See Appellate Court Celle, 2 Sept. 1998 (Ger.), available at http://cisgw3.law.pace.edu/cases/980902g1.html (requiring exact calculation of damages); District Court München, 20 Feb. 2002 (Ger.), available at http://cisgw3.law.pace.edu/cases/020220g1.html (requiring specific ascertainment of damages).


397. See Enderlein & Maskow, op. cit., 300.

398. As noted above, the concept of foreseeability has its roots in common law countries, following the decision in Hadley v. Baxendale. See Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995) (stating “CISG requires that damages be limited by the familiar principle of foreseeability established in Hadley v. Baxendale”).

399. CISG art. 74.


401. Enderlein & Maskow, op. cit., 301.

403. *See* Restatement (Second) of Contracts, § 351.


407. The United States delegation to the Convention proposed that Article 77 read instead “If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated, or a corresponding modification or adjustment of any other remedy.” Official Records, 133. This proposal, which would have broadened the scope of the second sentence of article 77, was rejected. *See ibid.*, 398. For a discussion of the U.S. Proposal, see Honnold, *op. cit.*, 520-22. *See also* Final Award in Case No. 8817 of 1997, *reprinted* in 25 *Y.B. Com. Arb.* 355, 367 (2000).


409. CISG art. 72(1).

410. CISG art. 74.


412. *See ibid.*, 74-75.

413. *See* Delchi Carriers SpA v. Rotorex Corp, 171 *F.3d* 1024 (2d Cir. 1995).


415. *See Delchi Carriers, op. cit.*, 1031.

417. See Delchi Carriers, op. cit., 1030.

418. Ibid.

419. See ibid., 1031.


423. See UNIDROIT Principles art. 7.4.1 (“Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles.”); UNIDROIT Principles art. 7.4.2(1) (“The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance.”).
424. See UNIDROIT Principles art. 7.4.2(1) (stating that compensation for “harm includes both any loss which [the aggrieved party] suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm”).

425. Compare UNIDROIT Principles art. 7.4.2(2) (“Such [compensable] harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.”), with CISG art. 5 (“This Convention does not apply to the liability of the seller for death or personal injury caused by goods to any person.”).

426. See UNIDROIT Principles art. 7.4.5.

427. See UNIDROIT Principles art. 7.4.6(1).

428. UNIDROIT Principles art. 7.4.6(2).

429. UNIDROIT Principles art. 7.4.6 cmt 2.

430. Ibid.

431. UNIDROIT Principles art. 7.4.7. The Comment to that article provides:

   The contribution of the aggrieved party to the harm may consist either in its own conduct or in an event as to which it bears the risk. The conduct may take the form of an act (e.g. it gave a carrier a mistaken address) or an omission (e.g. it failed to give all the necessary instructions to the constructor of the defective machinery). Most frequently such acts or omissions will result in the aggrieved party failing to perform one or another of its own contractual obligations; they may however equally consist in tortious conduct or non-performance of another contract. The external events for which the aggrieved party bears the risk may, among others, be acts or omissions of persons for whom it is responsible such as its servants or agents.
The conduct of the aggrieved party or the external events as to which it bears the risk may have made it absolutely impossible for the non-performing party to perform. If the requirements of Art. 7.1.7 (force majeure) are satisfied, the non-performing party is totally exonerated from liability. Otherwise, the exoneration will be partial, depending on the extent to which the aggrieved party contributed to the harm. The determination of each party’s contribution to the harm may well prove to be difficult and will to a large degree depend upon the exercise of judicial discretion. In order to give some guidance to the court this article provides that the court shall have regard to the respective behavior of the parties. The more serious a party’s failing, the greater will be its contribution to the harm.

UNIDROIT Principles art. 7.4.7 cmts 2, 3.

432. UNIDROIT Principles art. 7.4.4.

433. A delegate to the Vienna Conference, which led to the CISG, explained the difference between a “likely result” and a “possible consequence” as follows: “[I]f one takes a well-shuffled pack of cards it is quite possible, though not likely, that the top card will prove to be the nine of diamonds even though the odds are 51 to 1 against.” J. Ziegel, op. cit., 479, in Kritzer, op. cit.

434. See UNIDROIT Principles art. 7.4.4 cmt.

435. See ibid.

437. See UNIDROIT Principles art. 7.4.4 cmt.

438. Ibid.

439. UNIDROIT Principles art. 7.4.3(1).

440. See UNIDROIT Principles art. 7.4.3(3).

441. See UNIDROIT Principles art. 7.4.3(2).

442. See UNIDROIT Principles art. 7.4.8(1) (“The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party’s taking reasonable steps.”).

443. UNIDROIT Principles art. 7.4.8 cmt 1.

444. See ibid.


446. UNIDROIT Principles art. 7.4.8(2).


448. Ibid., 410.

449. See ibid.

450. See ICC Arbitral Award No. 8502, reprinted in pertinent part in The UNIDROIT Principles and Practice, op. cit.

451. See ibid., 445-48; see also Arbitral Award No. 116 (International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation), summarized in The UNIDROIT Principles and Practice, op. cit., 481 (stating that tribunal applied UNIDROIT Principles Article 7.4.5 in awarding buyer difference between contract price and price of replacement transaction).
452. See The Principles of European Contract Law Parts I and II (O. Lando et al. eds., 2003) [“PECL”].

453. PECL, op. cit., Introduction (discussing need for uniform contract rules throughout the European Union).


455. See PECL, op. cit., 2(B).

456. See ibid., 2(A).

457. The Introduction to the Principles notes that “no single legal system has been made the starting point from which the Principles and the terminology which they employ are derived.” See PECL op. cit., Introduction.

458. The Introduction also points out that in drafting the Principles, the Commission drew on legal materials including the American Uniform Commercial Code and Restatements of contract. See ibid.

459. PECL art. 9:502.

460. See PECL art. 9:501(2)(b); see also PECL art. 9:501 cmt. F.

461. Compare PECL art. 9:501(2)(a), and PECL art. 9:501 cmt. E. (“Recoverable loss is not confined to pecuniary loss but may cover, for example, pain and suffering, inconvenience and mental distress resulting from the failure to perform.”), with UNIDROIT Principles art. 7.4.2(2) (“Such [compensable] harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.”).

462. See PECL art. 9:501(2)(b); see also PECL art. 9:501 cmt. F.
463. *See* PECL art. 9:501(2)(a) (“The loss for which damages are recoverable includes (a) non-pecuniary loss . . .”); PECL art. 9:501 cmt. 4 (stating “non-pecuniary loss may be . . . due to attacks on reputation or honour”).

464. *See* PECL art. 9:502 cmt. C (“The aggrieved party must bring into account in reduction of damages any compensating gains which offset its loss; only the balance, the net loss, is recoverable. Similarly, in computing gains of which the aggrieved party has been deprived, the cost it would have incurred in making those gains is a compensating saving which must be deducted to produce a net gain.”)

465. *See* PECL art. 9:506.

466. *See ibid.*, cmt. B (“The aggrieved party cannot recover the difference between the contract price and the price of an alternative transaction which is so different from the original contract in value or in kind as not to be a reasonable substitute.”).

467. *See* PECL art. 9:507; *see also* CISG art. 76; UNIDROIT art. 7.4.6.

468. *See* PECL art. 9:504; *see also* UNIDROIT art. 7.4.7.

469. *See* PECL art. 9:504 cmt. B (stating “[t]o the extent that the aggrieved party contributed to the non-performance by its own act or omission he cannot recover the resulting loss”); cmt. C (stating “[w]here the aggrieved party, though not in any way responsible for the non-performance exacerbates its adverse effects he cannot recover damages for the additional loss which results”).

470. PECL art. 9:501 cmt. D.


472. PECL art. 9:503.
473. See PECL art. 9:503 cmt. A (stating “[t]his Article sets out the principle adopted in many jurisdictions by which the non-performing party’s liability is limited to what it foresaw or ought to have foreseen at the time of the contract as the likely consequence of its failure to perform”).

474. Compare PECL art. 9:503 (stating “[t]he non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance”), with UNIDROIT Principles art. 7.4.3(1) (stating that “[t]he non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance”).

475. PECL art. 9:503 cmt. B.

476. Ibid.

477. See PECL art. 9:505(1).

478. See ibid., cmt. A.

479. See ibid. (stating “[t]he aggrieved party is only expected to take action which is reasonable . . . in the circumstances. Thus it need not act in any way that will damage its commercial reputation just to reduce the non-performing party’s liability”).

480. See ibid. (stating “[t]he aggrieved party is only expected . . . to refrain from action which is unreasonable . . . in the circumstances”).

481. See PECL art. 9:505(2); art. 9:505 cmt. C.

482. See PECL art 9:505 cmt. E (“Sometimes a party will take a step which reduces its loss and which goes beyond what it might reasonably have been expected to do. The reduction in loss will still be taken into account, as it is entitled only to damages for actual loss.”).

484. *Sapphire*, *op. cit.*, 185-86.


493. See ibid.


497. See Copeland et al., op. cit., 130.


503. See, e.g., Starrett Housing Corp., op. cit., 112, 339. Although the expert appointed by the tribunal itself had generated an award calculation of US$41 million based on the DCF method, the tribunal adjusted the amount to US$37 million without any calculation explaining its reduction. See also Ball, op. cit., 422; Phillips Petroleum Co. v. Iran, 21 Iran-U.S. Cl. Trib. Rep. 79 (1989). In this case, the tribunal adjusted the valuation provided by the claimant’s expert, substantially lowering the valuation. It based these adjustments not on its own DCF calculation, but rather on an underlying asset valuation not advocated by either party. Ibid., 158.


509. Ibid., 209-10.


512. Ibid., 189.


514. The Tribunal determined PLN breached the contract “by failing to provide Himpurna with assurances that it would honour its contractual obligations; by preventing Himpurna from completing the development of additional units; and by failing to pay invoices and issue standby letters of credit.” Himpurna, op. cit., 14.

515. Ibid., 70-71 (quoting Civil Code of Indonesia art. 1246).

516. This burden, the tribunal explained, does not mean that Himpurna had to establish damages with scientific certainty. Himpurna “need[ed] only to show that it has made expenditures; it [was] for PLN to show that they have no reasonable connection with the pursuit of contract objectives.” Himpurna, op. cit., 78-9. In addition, the fact that such expenditures may not have been judicious or providential was irrelevant at this stage. The tribunal determined that Himpurna provided sufficient documentation that it spent significant amounts to build the plants
and explore and drill wells, all of which were made pursuant to and in reliance on the contract and were thus foreseeable damages. See ibid., 73.

517. This amount consisted of US$254,502,586 in historical costs plus US$19,254,720 to reflect the present value. See ibid., 83.

518. Ibid., 84.

519. Ibid., 93.

520. Ibid., 90.

521. See ibid., 103.

522. See Patuha Power Ltd. v. PT. Persero Perusahaan Listruik Negara, summarized in pertinent part in M. Kantor, “Limits of Arbitration,” Transnational Dispute Management, vol. 1, issue 2 (May 2004), available at http://www.transnational-dispute-management.com/samples/welcome.html. It should be noted that Patuha and Himpurna, however, were not completely without lost profit compensation. Both had obtained equity political risk insurance that specifically covered the refusal to recognize an international arbitration award. See ibid.

523. The arbitral tribunal’s decision in Karaha Bodas arbitration is summarized in pertinent part in Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Das Gas Bumi Negara, 364 F.3d 274, 282-85 (5th Cir. 2004) [Karaha Bordas (C.A.)].


525. See ibid.

526. See Karaha Bodas (C.A.), op. cit., 281.

528. *Karaha Bodas (Dist. Ct.), op. cit.,* 955.


530. *See ibid.*

531. *See Gotanda, op. cit.,* 88-100 (discussing cases).


UNCITRAL Arbitration Rules art. 27; see also ICC Rules for Expertise (Jan. 1, 2003), reprinted in 13(2) ICC Bull. 15 (Fall 2002). See generally Arbitration and Expertise (Institute for International Law and Practice, Louise Barrington ed. 1994).


539. See Ibid., 326 (stating that while “it would be very expensive . . . for parties to produce evidence from independent experts, and then for the arbitral tribunal to appoint one or more experts of its own to assess the evidence[,] . . . where the technical issues involved are sufficiently complex, or where the amounts at stake are sufficiently large, this possibility cannot be ruled out”).


541. Himpurna, op. cit., 73. The arbitrator in the Sapphire case noted:

[The plaintiff should be] put . . . in the same pecuniary position as they would have been in if the contract had been performed. But the repayment of the expenses incurred in concluding the contract would tend to put them in the position they would be in if the contract had never been concluded (negative damages). . . . Undoubtedly, the plaintiff was justified in hoping to recover the expenses of making the contract out of the profit which they were expecting. But
this is an element included in the compensation for loss of profit. Adding positive and negative damages together is a contradiction, and cannot be allowed.

*Sapphire, op. cit.,* 186-87.