

Joseph M. Lookofsky

Associate Professor of Law
University of Copenhagen

Consequential Damages in Comparative Context

From Breach of Promise
to Monetary Remedy in the American,
Scandinavian and International Law
of Contracts and Sales

Jurist- og Økonomforbundets Forlag

Consequential Damages in Comparative Context

1. udgave, 1. oplag 1989

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Bogen er sat med Times hos Jur-Sats ApS, København

Omslaget er tilrettelagt af Morten Højmark

Tryk: Narayana Press, Gylling

Printed in Denmark 1989

ISBN 87-574-5510-4

Denne afhandling er af Det retsvidenskabelige
Fagråd ved Københavns Universitet antaget til
offentligt at forsvares for den juridiske doktorgrad.

Forsvaret finder sted fredag den 8. september 1989 kl. 14 præcis i
Annexauditorium A, Studiestræde 6, over gården.

København, den 31. maj 1989
Steen Rønsholdt, fagrådsformand

**Consequential Damages in
Comparative Context**

To Vibeke, Sarah, David & Daniel

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Foreword

*No legal system can be regarded as so advanced that it has little to gain from the study of foreign schools of thought.*¹

The comparative theme of this book reflects my own transnational legal background. Having completed my legal studies (J.D.) at New York University, I became a company lawyer practicing American commercial law. Later – as the combined forces of free will and fate would have it – I came to study Danish law (cand. jur.) at the University of Copenhagen and stayed on to become an academic lawyer, teaching Obligations and Comparative Law. This book presents the main results of my scholarly research during the past several years here in Denmark.

The book seeks to describe, compare, and evaluate the American, Scandinavian, and international solutions to a theoretically controversial and practically important legal problem. The problem – compensating “consequential”, commercial loss in a contractual setting – while seemingly specific, is deceptive in scope: even at the national level, the very subsumption of the subject matter as a single (contract/sales) issue is, in my view, problematical. So the study could not have been limited solely to those aspects of consequential damages usually discussed under the various, more standardized, national sub-headings. Moreover, I have attempted to assess consequential damages in terms of the ongoing, often heated, scholarly debate regarding the nature of contractual obligations and the propriety of conceptualization in the law of contract in general. The broader comparative study indicated by the subtitle has also been undertaken as an end in itself: to build a basic bridge between advanced contractual systems.

A central feature of the analysis is the use of contractual paradigms modeled on actual judicial decisions. The cases represent points on a continuum and are relevant not only as regards the past and present but also as regards the fu-

1. André Tunc, in Von Mehren and Gordley, *Civil Law System*.

ture: both how the law will be and how we would like to see it. I hope that the overall result strikes a reasonable balance between theoretical and practical considerations.

Because the subject matter of the book and its intended readership extend beyond national boundaries, I have chosen English – a principal language familiar to Scandinavians – as the most appropriate means of comparative communication. I have, however, provided translations of a number of key terms and have paid special attention to areas where problems of “translating” terminology are traceable to substantive problems of comparison.

Many fine lawyers have influenced my thinking since Charles Knapp first got me interested in Contracts some twenty years ago, and I cannot possibly express my thanks to them all. I would like to mention two talented young jurists who have made a special contribution to this project. In the early stages, Bjørn Ryberg was very helpful in collecting and organizing relevant Scandinavian precedents and scholarly articles. Towards the end, Sheila Foran provided valuable assistance with critical editing, cite-checking, and indexing. Thanks also to Pia Jerle for computer-help with the various tables, etc.

I am grateful to Axel H.’s Rejselegat for a grant which made possible a semester as Visiting Scholar at N.Y.U. in 1984 where I collected and studied American legal source materials. Using computer hardware and software purchased with grants from Gangstedfonden and Direktør Ib Henriksens Fond, I was able to organize my source material in data-bases set up for this particular purpose. With a grant from the Danish Council of Social Sciences, I was able to maintain continuing satellite-access to the American WEST-LAW database.

When jurists speak of “our law”, *vor ret*, they are usually referring to their own, national legal system. I feel I belong to two legal families and am used to speaking this way about both. In the pages which follow, I have tried to be evenhanded, seeking to afford my colleagues on both sides of the Atlantic – whose work provides the foundation for my own – that high measure of respect which they most certainly deserve.

Joseph Lookofsky
Copenhagen, August 1988

PART 1

Introduction

*Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances ...*¹

1.1. Thinking Comparatively – About Consequential Damages

Where shall we start? At what location in the legal labyrinth? Where shall we start if the question of consequential damages is “where shall we stop?”²

This is a comparative inquiry. Can we find the same starting point in Scandinavian and American systems of law?

The science of law, like other sciences, has its own language, its own terminology, even its own metaphors. Legal language facilitates communication among those who work within a given legal system. To these insiders, the lawyers of the system, a single legal label can serve to convey a mass of complex information. But to outsiders, the language of the system is often foreign, the legal lingo is “Greek”, a communication barrier.

For the jurist schooled in a Civilian system, the Common law “is not a legal system at all, but something queer, outlandish, and barbarous: anything that does not follow the grammar of the Civil Law tends to be for him hardly law at all.”³ If we speak the foreign language, we can learn the legal lingo, but comparative legal problems are not reducible to questions of linguistics. For although lawyers everywhere think like lawyers, the lawyers of different legal systems do not always think alike.

1. Lord Tennyson, A., *Aylmer's Field* (1793).

2. See Fuller & Perdue, *Reliance Interest* at 85. For full citations to this and other secondary sources referred to herein, see the Table of Authorities provided, *infra*.

3. Lawson, *A Common Lawyer* at 5. The term Common law is used herein to refer to systems whose roots are traceable to English law. See Williams, *Learning the Law* at 25. Common lawyers also use the term “common law” to denote judge-made law: see Posner, *Legal Formalism* at 179 and *infra*, part 1.5. Regarding other uses of the “Common” legal label, see Williams at *id*.

Part 1.1

Lawyers communicate best with non-lawyers in non-legal terms. Lawyers seeking to communicate across national boundaries can also employ non-legal means. We can agree upon a comparative starting point simply by describing the sort of facts which give rise to the problem at hand:

The Hadley Paradigm. The crankshaft in Miller's Gloucester mill breaks and must be sent to Greenwich to serve as a model for a new one. Carrier undertakes to ship the shaft but negligently delays delivery. As a result, the reopening of the mill is delayed. Miller suffers lost profits, for which he sues Carrier.

All Common lawyers and a great many others will recognize the English case from 1854 upon which this model is based, the famous leading case of *Hadley v. Baxendale*.⁴ We focus on this "fixed star in the jurisprudential firmament",⁵ not merely because it still serves as an important precedent, but also because *Hadley* has become a transnational symbol for a recurring legal problem, our primary focal point: the problem of consequential damages. The issue is whether a breaching promisor should have to pay for all the "consequences" of his act ... if not, "where shall we stop?"

The *Hadley* problem recurs in various forms – both in American and in Scandinavian law:

*Lost Wager.*⁶ Gambler predicts the outcome of the week's soccer games. He places a (legal) 5-crown bet by delivering a coupon to Dealer (a tobacco-shop owner) who, for a 10% commission, undertakes to pass it on to the central betting authority. The coupon is misplaced and the bet not registered. When Gambler's prediction proves correct, he sues Dealer for the 6,000 crowns he would have won.

Lawyers regularly handle facts like those in *Hadley* and *Lost Wager* in much the same way that biologists arrange and categorize individual specimens: lawyers subsume and pigeonhole, attach legal labels. If we compare the writings of American and Scandinavian scholars, we find that the systematical subsumptions for problems like these seem roughly analogous. The American problem of consequential damages, compensation for "conse-

4. *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

5. Gilmore, *Death of Contract* at 83.

6. Based on the decision of the Danish Supreme Court in UfR 1964.803 H.

Consequential Damages

quential loss,⁷ translates as the Scandinavian problem of *erstatning for følgeskader*, etc.⁸ In both systems, the *Hadley* issue – whether Carrier (/Dealer) is liable for Miller's (/Gambler's) consequential loss – is generally subsumed as part of the larger issue of the extent (/measure) of contractual liability (*erstatningens omfang/udmåling*).

The *Hadley*-problem belongs to both the general law of contract and to the various special branches thereof, *inter alia*, the most important law of sales:

*Oil Additive.*⁹ Miller's crankshaft needs oil. Seller recommends (and Miller buys) Brand X. The oil lacks a particular additive, Miller's engine grinds to a halt, and Miller suffers lost profits, for which he sues Seller.

“Neither in Michigan nor elsewhere does the term ‘consequential damages’ have a clearly established meaning”,¹⁰ but we lawyers see a unifying element in these various situations. In a contractual context, a promisor's failure to perform may, on the one hand, result in a reduction in the value of the promised performance itself: this reduced value constitutes what we call a “direct” loss. In addition, such a breach may also result in “other loss”, of a more far-reaching “indirect” (consequential) kind, like lost profits.¹¹ When we discuss consequential damages, we usually assume that the breaching promisor is liable – to *some* extent. The hard question is: “where do we stop?”

In some contractual situations, the contracting parties themselves make an express agreement regarding the extent of liability in the event of breach. If the parties contract, for example, to limit liability for “consequential” or “indirect” loss, and a dispute later develops, a court may be called upon to decide whether a given loss is covered by the clause in question.

On the other hand, contracts are often entered into with the minds of the parties set on performance (as opposed to breach and the remedial consequences thereof). Where the parties leave a remedial gap, the courts will often be called upon to fill it. In American courts, the supplementary rule regarding

7. See Corbin, *Contracts* § 1003 at 37 distinguishing injury (/“damage”) and damages (monetary compensation).

8. See generally Hellner, *Contractual Damages*. Regarding Danish law, see, e.g., Gomard, *Obligationsretten* 2. hæfte at 136 and 166. Regarding *konsekvenstap* in Norwegian law, see Krokeide, *Erstatningsberegning* at 170 and 217 (“tap som oppstår som følge av et mislighold”). Regarding *följdförlust* in Swedish law, see *SOU 1976.66* at 257.

9. Based on *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971).

10. *Applied Data Processing, Inc. v. Burroughs Corp.*, 394 F.Supp. 504, 508 (1975).

11. See generally *infra*, part 4.4.2.

Part 1.1

consequential loss is the principle first formulated in England by Lord Alderson in 1854: a breaching promisor is liable only for loss in the parties' "contemplation" at the time of contracting: *foreseeable* loss.¹² This is indeed an oversimplification, but it seems fair to say that foreseeability is traditionally seen not only as the key consequential liability limiter in American law, but also as the comparative key to consequential damages in Common systems in general.¹³

In Scandinavian law, the problem of consequential loss has traditionally been posed in terms of the general contract doctrine of "adequate loss" (*adækvat tab*), a concept also found in from German law.¹⁴ As we shall see, there are significant similarities between the American and Scandinavian rules, even the makings of a comparative "common core".

While the adequacy-criterion has been seen as a less restrictive liability-limiter, at least in its original (German) form,¹⁵ *Hadley*-like rules are clearly central to both American and Scandinavian law: foreseeability (*påregnelighed*) is a key factor in the Scandinavian concept of adequacy.¹⁶

Another significant similarity lies in the fact that in both Scandinavian and American law, foreseeability is not the only doctrinal tool serving to limit the extent of contractual liability. In both systems, an injured promisee is under a duty to mitigate his loss (*/tabsbegrænsningspligt*), and both systems limit recovery for *uncertain* loss.¹⁷

And yet, perhaps the most striking similarity is that both *Hadley* and *adækvans* seem to mean "all things to all men".¹⁸

1.2. Thinking Comparatively – About the Contractual Context

Although the problem of consequential damages is our primary focal point, we seek to paint a broader picture: to draw a comparative roadmap from

12. See generally *infra*, part 4.4.4.3.

13. *Id.*

14. See, e.g., Ussing, *Obligationsretten* at 144 and compare Treitel, *Remedies* at 66.

15. See generally Hellner, *Contractual Damages*.

16. See, e.g., Gomard *Obligationsretten* 2. hæfte at 174 (comparing UFR 1968.282 H with *Hadley*) and Gomard & Skovgaard, *Contract and the Pools* at 66 (translating *adækvans* as "reasonably foreseeable"). See generally *infra*, part 4.4.4.3.

17. See generally *infra*, part 4.4.4.2. and 4.4.4.4.

18. See Gilmore, *Death of Contract* at 50 and compare Andersen, *Skadeforvoldelse* at 63 ("be-grepenes mangfoldighet og elasticitet"). See generally *infra*, part 4.4.4.3.

Contractual Context

breach of promise to monetary relief. We seek this broader picture not only as a comparative end in itself. For the consequential question is tightly tied to other, even more fundamental contractual issues. Consider this variation of Blackstone's classic syllogism:¹⁹

Major premise: Against him who hath breached his contract with me,
I shall have damages.

Minor premise: But A hath breached his contract with me.

Conclusion: Wherefore I shall have damages against A.

The substantive rule of the major premise here (damages for breach) will come as no surprise to Common lawyers: this is indeed an accurate statement of their law. But such a seemingly strict basis (*grundlag*) of contractual liability is not the Scandinavian rule. So although we seek ultimately to compare the extent (*omfang*) of contractual liability in American and Scandinavian law (how much "I shall have"), we must first clear other hurdles elsewhere in the legal labyrinths: what are the bases of contract liability ... why indeed "shall I have" *anything*?

The delimitation of the true scope of a given legal problem or study is itself problematical, both at the national and at the international or comparative levels. The law of a given system, its legal labels notwithstanding, cannot be divided into a collection of neat little issues and rules ... "little sovereign states".²⁰ And *Hadley* is no sovereign state. We cannot neatly extract consequential damages from its larger contractual context, the seemingly seamless doctrinal web.²¹ We cannot properly isolate the problem of "where to stop" from the more fundamental problem of where to start. And it seems that the proper starting point, one tied to both the basis and the extent of contractual liability, is the concept of promise: the very basis of contract law itself.

*Basement Business.*²² Lessee is interested in renting Lessor's basement for the purpose of manufacturing radio parts. Lessor's agent orally advises Lessee that the premises have been approved for such commercial purposes, and a lease is signed. After Lessee moves in, at considerable expense, he learns that the basement is not – and cannot be – approved for commercial use.

19. Regarding Blackstone's procedural classic, see James & Hazard, *Civil Procedure* § 2.6.

20. Knapp, *Problems* at 99.

21. *Compare* (re. the CISG context) Nicholas, *Force Majeure* at 232.

22. Based on a Danish case: J.D. 1943.92.

Part 1.2

Before we ask whether Lessor is liable for Lessee's expenses, his consequential loss, we had better ask some other, more fundamental questions. Does the information provided by Lessor's agent regarding commercial use constitute a contractual commitment? Is the statement part of the contract, or would some of us apply the "parol evidence" rule and refuse to even consider the statement's existence? If we decide to admit the evidence, should we then label the statement a "warranty"? If instead, we classify the information given as a mere "misrepresentation", does Lessee have a remedy nonetheless? The consequential questions form a seamless web.

A comparative analysis in terms of promise involves, *inter alia*, problems of terminology. Only Common promissory doctrine is shrouded by mysterious concepts like parol evidence,²³ and "conditions".²⁴ Some important promissory information falls under the Common heading of warranty, but this term has many meanings and is by no means equivalent to a Scandinavian *garanti*.²⁵

In American law, the relationship between condition and warranty has been described as "somewhat tenuous".²⁶ "a warranty in a sales contract may operate as a condition or a promise or both."²⁷ There is not even a Common terminology: what Americans call "implied warranties", the English call "implied conditions".²⁸

It is sometimes difficult even to isolate a given issue at the comparative level. If the Common lawyer wants to talk about promise, he needs to talk (*inter alia*) about warranty. But since warranty conjures notions of liability, the Scandinavian jurist may feel that his Common colleague has changed the subject. In American law, the only binding promises are those supported by "consideration"; in Scandinavian law, all promises are binding.²⁹ In Scandinavian law, specific performance (*naturalopfyldelse*) is the primary remedy for breach of contract (*misligholdelsesbeføjelse*); in American law this remedial role is played by damages (*erstatning*).³⁰ Perhaps the most striking comparative distinction is the most elusive: American contract liability is no-fault, but in Scandinavian law, the rule is fault.³¹

23. See *infra*, part 2.3.

24. See *generally infra*, part 4.3.1.

25. See *generally infra*, part 2.3.

26. Calamari & Perillo, *Contracts* at 419.

27. See *id.*, n. 23

28. Compare, e.g., UCC §§ 2-313, 2-314 and 2-315 with SGA Sects. 13 and 14.

29. See *generally infra*, part 2.1.

30. See *generally infra*, part 4.2.

31. See *generally infra*, parts 1.3. and 4.4.

1.3. Contractual Obligations: the Direction of the Law

In some respects at least, the institution of law seems static and conservative, lagging behind a forward-moving society, looking backward to precedent for solutions to new problems. Comparative law often suffers from an even more serious case of jurisdic jet-lag. The problem is not just that comparative works appear later than the national sources upon which they are based. Equally significant is the fact that these national sources may not provide all the information we require, particularly if we have reason to seek a more dynamic and more critical picture: not just what the law is (*gældende ret*), but also the direction in which the law is – and ought to be – going.³²

There is often considerable disagreement as to what the law “is”. Just as accounts of current events vary from one newspaper to another, there is no single standard for the objective reporting of legal events. For those familiar with the widely-cited *Restatement* of contract law, much of the news reported in other respected sources of current American doctrine will seem surprising, perhaps even disturbing. Gilmore’s 1970 pronouncement that the classical version of American law of contract is “dead” can no longer be regarded as an isolated signal from the lunatic fringe.³³ When a recent leading article in the *Harvard Law Review* reports that the *entire institution* of American contract law is in a state of “conceptual disarray”,³⁴ we feel less secure with the *Restatement*’s neat, black-letter set of codified rules.

Who is right: the juridical doctors who delivered the new *Restatement* or those who pronounced it dead on arrival? *Hvem har ret*: the formalists who conceptualize³⁵ or the realists who atomize? ³⁶The participants resist the labels, and the labelling is suspect, both at the national and comparative

32. In both American and Scandinavian doctrine, the law (*gældende ret*) has been defined as a prediction of how courts would decide a given dispute (*prognose teori*): see Holmes, “The Path of Law” in *Collected Legal Papers* at 174-75 (1920) and Ross, *Om Ret og Retfærdighed* at 50 (1953).

Regarding the future direction of the law, compare Gomard, *Retspolitisk Program* at 57, note 29 and Knapp, *Promise of the Future* at 936.

33. See generally Gilmore, *Death of Contract* and compare von Mehren, *General View* 3-4.

34. See Eisenberg, *Bargain Principle* at 741.

35. See *id.* (“logical deduction from received axioms”).

36. See, e.g., Gomard & Skovgaard, *Contract and the Pools* at 56-57 (re. atomization contra generalization) and Gilmore, *Death of Contract* at 83 (re. Llewellyn’s atomization of American sales law).

Part 1.3

levels: outsiders label Scandinavian law as realistic and progressive,³⁷ but we can hardly equate the American avant-garde with the mainstream of Scandinavian legal thought.³⁸

“*Formalist* can mean narrow, conservative, hypocritical, resistant to change, casuistic, descriptively inaccurate (that is, “unrealistic” in the ordinary-language sense of the word), ivory-towered, fallacious, callow, authoritarian – but also rigorous, modest reasoned, faithful, self-denying, restrained”; formalism can also “mean the use of deductive logic to derive the outcome of a case from premises accepted as authoritative. ... *Realist* can mean cynical, reductionist, manipulative, hostile to law, political, left-wing, epistemologically naive – but also progressive, humane, candid, mature, clear-eyed”; realism at its best means “deciding a case so that its outcome best promotes public welfare in nonlegalistic terms; it is policy analysis.”³⁹

In America, classical doctrine was attacked first by Llewellyn and Corbin, later by “critical legal scholars”: the law’s new left. The most prominent scholars of the classical school were Holmes, Langdell and Williston; the “modern exemplar of formalism” is Law and Economics,⁴⁰ summoning us “back to the paths of righteousness, discipline, order, and well-articulated theory.”⁴¹

One key area of controversy relates to the classical conception of contract law as “private” law: agreements legally formed have the character of private legislation, *loi* made by and for the parties in privacy;⁴² this in contrast with the law of tort and its seemingly more “public” concern with community standards. This classical conception is under attack in both American and Scandinavian doctrine, but Scandinavian law seems a step ahead. In Scandinavian legal science, the law of contract has long been perceived as an integral part of a larger field, a hierarchically superior set of rules. This larger discipline – the law of obligations (*obligationsret*) – comprises the rules concerning the creation and enforcement of private law claims generally. Seen in terms of the ways in which such claims arise, the field of obligations comprises (1) the law of contract, (2) the law of torts, that is the rules regarding lia-

37. See, e.g., Schlesinger, *Comparative Law* 318 (4th ed. 1980).

38. Regarding the Scandinavian break with conceptual jurisprudence, see Gomard & Skovgaard, *Contract and the Pools*, 54-57.

39. Posner, *Legal Formalism* at 180 (emphasis added).

40. Posner, *id.* at 185. Compare Hellner, *Avtalsrett* at 11 (re. “law & economics”) and Gomard, *Kontraktret* at 84 (“Kontraktfriheden styrkes ... af bestræbelser i retning af ‘deregulation’...”).

41. Gilmore, *Death of Contract* at 103. For a critical appraisal of Judge (then Professor) Posner’s treatise, see Leff, A. “Economic Analysis of Law: Some Realism About Nominalism”, 60 *Virginia Law Review* 451 (1974) at 452 (“four hundred pages of tunnel vision”).

42. See Nicholas, *French Law of Contract* at 31 re. Code Civil, art. 1134.

bility for injurious acts of a delictual nature, and (3) the law of restitution, that is the rules regarding claims based on unjust enrichment.⁴³

This central feature of Scandinavian (and Civilian) doctrine has no direct counterpart within the mainstream of traditional Common legal analysis.⁴⁴ In American law the subjects known as contracts, torts and restitution are generally perceived as separate disciplines.⁴⁵ There is no higher, more “general” set of rules, no common starting point; there are *Restatements* of Contracts and Torts, but no “Restatement of Obligations”. The American legal establishment is hardly ready to merge Contracts and Torts into a single course in “Contorts”.⁴⁶

Why the seemingly peaceful coexistence of contract and tort only in Scandinavian (/Civil) law? Consider a Scandinavian paradigm:

*Weekend with Famous Actress: I.*⁴⁷ Famous Actress invites Careless to spend the weekend with her in the Oslo fjord. She tells him that she has just signed a million Crown contract for a new film and that since work starts in 2 weeks, she must be particularly careful to avoid injury. Shortly thereafter, Careless negligently knocks Actress over. She breaks her leg, loses the contract, and sues Careless for the 1 million.

Most Scandinavian and Common lawyers would conceive this case in delictual terms: a liability problem of negligent interference in a non-contractual setting.⁴⁸ But Common lawyers might make an observation of their own: not only is there no contract in the case, but there is no fault in the law of contract; unlike liability in tort, contract liability is no-fault liability.⁴⁹ Fault “plays no

43. See Gomard, *Obligationsret 1. del* at 15 and compare Gomard *Erstatningsregler* at 13 and 28 “[kontrakts/deliktsregler] fremstillet hver for sig ... ikke består nogen principiel forskel”).

44. See Gomard, *Introduktion* at 74 (comparing the English and German systems). Professor Atiyah’s holistic view of the English “law of obligations” (*Introduction* at 1) is atypical.

45. Compare (re. restitution) Farnsworth, *Contracts* § 12.19. Regarding the competition between contractual and delictual rules in Anglo-American law, see Gomard, *Erstatningsregler* at 67 ff.

46. This course was suggested by Gilmore in *Death of Contract* at 90. Professor Knapp has suggested the development of a “Restatement of Promissory Obligations”: see Knapp, *Promise of the Future* at 938-41 and Knapp & Crystal, *Problems* 1155-60. Re. Common “tort theorists”, see Fried, *Contract as Promise* 4-5.

47. Based on an imaginative hypothetical by Kristen Andersen in *Skadeforvoldelse* at 67.

48. See, e.g., Farber & Matheson, *Promissory Estoppel* at 906 (tort law as protection of right to be free of unreasonable interference).

49. See Farnsworth, *Contracts* at 1147.

Part 1.3

part in our thinking about contract’’:⁵⁰ the Common lawyer “who thinks negligence instinctively thinks tort’’:⁵¹ Holmes is long gone, but the breaching party’s intent still doesn’t make “a particle of difference’’:⁵² an idea quite compatible with a modern, “law-and-economics” approach, concerned only with the “efficiency” of the breach.⁵³

Scandinavian doctrine seems diametrically opposed. In Scandinavian (and Civil) law, there is a fundamental, unifying link between contractual and delictual liability, and one general rule applies to both: fault is the basis of liability in both contract and tort.⁵⁴

Now the experienced comparativist might expect these diverging points of departure to prove deceptive upon closer analysis. Both the Scandinavian and Common law rules are tempered by numerous exceptions.⁵⁵ And even for Civilian and comparative lawyers, fault may prove “a very slippery concept of uncertain outline.”⁵⁶

“La faute contractuelle n’est pas, pour autant, entièrement symétrique de la faute délictuelle.”⁵⁷

Consider a promissory variation:

Weekend with Famous Actress: II. Same facts as in *Weekend I*, except that just prior to the accident, Actress gets Careless to make an express commitment: “I promise to be careful.”

Should we deal with *Weekend I* as tort and *Weekend II* as contract?⁵⁸ Does the solution depend on the subsumption? Is the promise in *II* the linchpin, the operative fact which prompts us to choose a contractual textbook to solve the

50. Nicholas, *French Law of Contract* at 30.

51. Lawson, *Fault and Contract* at 301 with note 30, quoting Buckland & McNair.

52. Gilmore, *Death of Contract* at 52 (speaking of Holmes).

53. See Posner, *Economic Analysis* at 106-07.

54. See, e.g., Gomard, *Obligationsretten 2. hæfte* at 129 and Lookofsky, *Fault and No-Fault* at 111.

55. See generally *infra*, part 4.4.1.2 and 4.4.1.3.

56. Lawson, *Fault and Contract* at 297.

57. See *id.* at 309 with note 62 citing Carbonnier, *Droit Civil*.

58. See, e.g., Farber & Matheson, *Beyond Promissory Estoppel* at 906 (“still ... some sense in distinguishing between contract-based and tort-based theories of liability”).

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liability problem?⁵⁹ Or have we merely dressed a delictual problem up in a contractual suit of clothes?⁶⁰

Now, lest Common Classicists be tempted to question the binding nature of the promise in *Weekend II*, let's be considerate and add a fact:

Weekend with Famous Actress: III. Same facts as in *Weekend II*, except that in exchange for the promise, Actress pays Careless: 1 dollar, a horse and a robe.

Is *Weekend III* a different case? Should we now protect Actress's contractual "expectation": put her in a million-crown position? Only a Common lawyer can shift conceptual gears at the drop of a peppercorn.⁶¹ The problems with which we deal cannot all be analyzed in terms of the premises and conclusions of formal legal logic.⁶²

*Roof Fire.*⁶³ Supplier contracts with Recipient to renovate the latter's roof. As Supplier's employee is joining tarpaper sections with a blowtorch, the supporting structure catches fire and suffers extensive (consequential) damage.

Are all merchants equal in the eyes of the law, all covered by the same paradigm? Suppose this Supplier of services is a small, independent, and uninsured businessman: one who, if held liable for the consequences of his (servant's) negligent performance will be financially ruined. Suppose Recipient is so large that he is "self-insured". Are facts like these relevant? If so, should we water down liability with a consumer-like "safety valve"? How might this affect the economics of the market place: would you choose a light-weight merchant to repair your roof?⁶⁴

59. See *id.* at 914 ("Promise-making is the linchpin of liability under ... traditional contract doctrine").

60. Compare *Triangle Underwriters, Inc. v. Honeywell, Inc.* 604 F.2d 739, 747 (2d Cir. 1979) (allegations of false, precontractual representations held independent of contractual claim for purposes of statute of limitations).

61. Or, as Lord Coke put it in *Pinnel's* famous case (1602) (5 Co.Rep.117a) "the gift of a horse, or a robe". See also *Mountford v. Scott* [1975] CH. 258 (grant of an option entitling grantee to purchase house held binding in consideration of £1) and compare *Calamari & Perillo, Contracts* at 142 with note 62 (re. \$ 1 as consideration to buy land in American law).

62. Accord: Gomard, *Letters of Intent* at 281 ("syllogisme på grundlag af vage præmisser har kun ringe værdi").

63. Based on UfR 1984.23 H.D.

64. See generally *infra*, part 4.4.5.2 and 5.3.

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If we once moved from status to contract,⁶⁵ are we now in retreat?⁶⁶ If we protect the small-time suppliers in *Lost Wager* and *Roof Fire*, we may tend to “socialize” the law-merchant at the expense of “commercial certainty”.⁶⁷ Should we promote commercial justice or strive to maintain the English ideal?

“This ideal [of certainty] may never be fully attainable, but we shall certainly never even approximate to it unless we strive to follow clear and consistent principles and steadfastly refuse to be blown off course by the supposed merits of the individual case.”⁶⁸

We are blown off course by the winds of change. The law is in motion: a tentative set of working rules.⁶⁹ Since their inception in 1905-07, the original versions of the Uniform Scandinavian Sales Acts (KBL I)⁷⁰ were silent as to liability for “indirect” loss, thus leaving the problem of consequential damages to be resolved by general contractual principles. First eighty years later, Finland and Norway passed legislation (KBL II) incorporating a completely new rule,⁷¹ and Sweden and Denmark seemed prepared to follow suit.⁷² KBL II provides a *statutory definition* of “indirect” loss:

- 1) loss resulting from reduction or cessation of production or sales activity,
- 2) loss resulting from the goods being unusable for their intended purpose,
- 3) gains lost by reason of the termination or breach of contracts with third parties,
- 4) loss resulting from damage to a thing other than the goods themselves,
- 5) other loss which is similarly difficult to foresee.

The new statutes and drafts seek to define and thus isolate “indirect” loss, because different rules are now to govern compensation for this kind of injury.

65. Re. the famous 1861 dictum of Sir Henry Maine, see Farnsworth, *Contracts* at 20-21 and Friedman, *Impact* at 3.

66. See Farnsworth, *id.* at 295 (veering back to status).

67. (*Omsætningens sikkerhed*). See Comment, *Promissory Estoppel* at 576 (20th century “socialization” of contract). Accord: Ussing, *Køb* at 4 (“staternes stigende indgreb”). Compare Gomard & Skovgaard, *Contract and the Pools* (critical of UfR 1964.803 H).

68. The Chikuma [1981] 1 WLR 314.

69. See Corbin, *Contracts*, Preface.

70. In Sweden: “lag om köp och byte av lös egendom (1905); in Denmark, “lov om køb” (1906); in Norway, “lov om kjøp” (1907).

71. In Finland: lag om köp av lös egendom av 27 mars 1987; in Norway: Lov nr. 27 om kjøp af 13. mai 1988.

72. The various Scandinavian versions of the new rule are reprinted in *Ot prp nr 80* at 35.

According to the new Scandinavian solution, the key to liability for indirect (consequential) loss is not adequacy, not foreseeability, but *fault*.

As already indicated, fault is no parvenu to the Scandinavian contractual scene. Indeed, the new fault test may signal a return to old Civilian standards, a reaction to (possibly untoward) consequences of the severe KBL I standard traditionally applied to generic obligations.⁷³ In any event, one may well question whether the new standard represents a step forward for the law of sales. And what these sales changes may mean for general contract doctrine in Scandinavia is also an open question.

1.4. The New International Context: C.I.S.G.

Thus far, we have been working at the national level, introducing (and comparing) national rules and national problems. Traditionally, these national rules have also been used to settle disputes in the international commercial arena.

*Diesel Parts.*⁷⁴ With a view to overhauling 3 diesel engines aboard the M/V Frisky, Buyer B (the vessel's American owner) contracts with Seller S (the engines' Scandinavian manufacturer) for replacement engine parts. After a multi-million dollar overhaul, the ship sets sail, but because of latent defects in a few small replacement parts (some manufactured by S, some by third parties), the ship is confined to port for 2 months (the time it takes to locate and correct the problem). B sues S for profits (charter fees) lost during the resulting delay.⁷⁵

Once again we see the *Hadley* paradigm, the problem of consequential damages. But before we attempt to resolve the substantive issue in an international case like this, we must first determine the applicable substantive law. If the parties themselves do not agree on a set of national rules at the time of contracting, a choice will be made for them later by the court or arbitral tribunal asked to resolve the dispute: a choice likely to involve the selection

73. See generally *infra*, parts 4.4.1.2 and 4.4.5.2.

74. Inspired by *Maru Shipping Co., Inc. v. Burmeister & Wain American Corp. and Burmeister & Wain A/S*, 528 F.Supp 210 (1981).

75. *Maru (id.)* was a more complex case, involving the supply of both goods and services (by the American affiliate of a Scandinavian company; the Scandinavian party, named as co-defendant, went into receivership and defaulted in the action.) *Maru* also involved a purported disclaimer of liability - a point omitted here for the sake of simplicity.

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of rules seen as bearing “a significant” or “the most significant” relationship/*tilknytning* to the contract in question. In a case like *Diesel Parts*, the choice of substantive sales law might turn on the procedural niceties of forum-shopping.⁷⁶

Diesel Parts could be brought in a Scandinavian court by basing jurisdiction on the Seller’s Scandinavian domicile or the place of performance (delivery), *i.e.*, Scandinavia.⁷⁷ As regards the choice of law in a sale of goods, the Scandinavian court would then look to the seller’s place of business and choose the KBL.⁷⁸

An American court might also base its own jurisdiction on the place of performance, even where delivery takes place abroad (*eg.*) on the theory that “implied warranties” are to be “performed” in the buyer’s jurisdiction.⁷⁹ The American choice of law would likely be the UCC.⁸⁰

Fortunately, a less parochial system is now at hand. After 50-years of waiting, the international commercial community now has a truly international, substantive sales law: the United Nations Convention on Contracts for the International Sale of Goods (CISG). Not only can contracting parties now agree

76. Once jurisdiction is established, a Scandinavian court having no legitimate interest in a given dispute might even feel forced to “rule” on an unsettled point in *foreign law*: see Lookofsky, *Property-Based Jurisdiction* and Lookofsky in *UfR B* 1987 358-59.

77. See, *e.g.*, Schmidt, *International formueret*, kap. 2. If suit were brought in a Danish court, the national rules of civil procedure (*Retsplejeloven*) would apply; regarding the relationship between these national rules and the EC Convention on Jurisdiction and Judgments, see Lookofsky, *Property-Based Jurisdiction* at 66.

78. The Scandinavian countries have ratified the 1955 Hague Convention: regarding its proposed replacement, see Lando, “The 1985 Hague Convention on the Law Applicable to Sales” in 51 *Rebels Zeitschrift* 60 (1987).

79. See, *e.g.*, *Midland Forge, Inc. v. Letts Industries, Inc.*, 395 F.Supp. 506 17 UCC 50 (N.D. Iowa 1975). In *Midland Forge*, the extension of the German seller’s implied warranty was tied to a finding of long-arm jurisdiction *ex contractu*: “contracts to be performed in whole or in part in Iowa”. Regarding the American constitutional requirement of due process (minimum contacts) as applied in international trade, see Lowenfeld, *International Private Trade* § 4.12 and *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987). Regarding the absence of a minimum contacts requirement in Danish procedural law, see generally Lookofsky, *Property-Based Jurisdiction*.

80. See UCC § 1-105: “[Absent contrary agreement] this act applies to transactions bearing an appropriate relation to this state.” *Compare Restatement (Second), Conflict of Laws* § 188.

to adopt this newly codified *lex mercatoria* of international sales,⁸¹ but even absent such agreement, the Convention will be applied by courts and arbitrators as the new supplementary rule. So assuming the parties in *Diesel Parts* reside in C.I.S.G. Contracting States,⁸² there is no conflict of law: the heart of the Convention regulates the heart of this commercial liability dispute.

The United States was among the first 10 Contracting States to ratify the CISG,⁸³ and the Convention is already in effect as the supplementary American rule.⁸⁴ By mid-1988, Finland, Sweden and Norway had also ratified, and Denmark was preparing to do so as well.⁸⁵

We assume that the C.I.S.G. applies to *Diesel Parts*, and we ask whether Seller is liable for Buyer's lost profits. Article 74 addresses this controversial issue:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract ...

As in American and Scandinavian law, the Convention deals with lost profits in terms of the measure or extent of liability: the limit which damages may not

81. The primary sources of *lex mercatoria* are international conventions and customs: see Gormard, *Introduktion* at 15 with note 9, citing also rules prepared by the International Chamber of Commerce. Rules like the INCOTERMS, which may apply to an international contract of sale either by virtue of incorporation or by virtue of custom, may be considered as a separate source-category (*id.*).

Regarding *lex mercatoria* in historical and CISG context, see Sono, *Vienna Sales Convention* at 12.

82. See C.I.S.G. Article 1(1)(a). The Convention may also apply in an international sales context "when the rules of private international law lead to the application of the law of a Contracting State," cf. Article 1(1)(b). The United States has elected not to be bound by this principle by making a so-called Article 95-reservation.

83. Cf. Article 99.

84. See *SNACI v. Illinois Foundation Seeds, Inc.*, 5 UCC Rep. 2d 315, EDITORS' NOTE at 316-17.

85. The Convention provides a separate set of rules (Part II) regarding the *formation* of international sales contracts which the Scandinavian countries are not willing to ratify. See *infra*, part 6.2.1.

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exceed. And it appears to answer the question of “where to stop” solely in terms of foreseeability.⁸⁶ But as in national law, before we decide where to stop, we must know where to start, that is, whether there is liability at all. We must deal, *inter alia*, with Article 79 of the Convention which provides:

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences ...

Is a latent defect in goods manufactured by a third party an (unforeseeable and/or unavoidable) “impediment beyond [Seller’s] control”? Are the charter fees in *Diesel Parts* a “foreseeable” loss? Are American and Scandinavian judges likely to see eye to eye?

The Convention is a contract among nations.⁸⁷ “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application ...”⁸⁸

But national notions are not necessarily displaced. On the one hand, “it appears to be inevitable that, in both civil law and common law countries, interpretations will be influenced to a certain extent by national theory”.⁸⁹ And because the Convention’s liability-standards seem to resemble principles in American and Scandinavian law, we might expect national judges to harbor certain preconceived notions regarding the proper interpretation of the Convention. In this regard, an analysis of national rules and precedents should provide us with relevant data.

On the other hand, national judges and arbitrators are *bound* by the Convention to look beyond local modes of legal thought.⁹⁰ So a comparison of national rules and precedents becomes relevant not only to highlight divergencies but also to delineate the supranational “common core” upon which the Convention is based.

86. See, e.g., Honnold, *Uniform Law* at 410.

87. *Accord*: Société Nationale Industrielle Aerospatiale, v. U.S. Dist. Court for Southern Dist. of Iowa, 107 S.Ct. 2547 (1987); see Lookofsky in *UfR B* 1987 at 408 with note 26 (re. the interpretation of the international treaty in *Société*).

88. CISG Article 7 (emphasis mine).

89. Volken, *Vienna Convention* 40.

90. *Accord Sono*, *Vienna Sales* 7-8 (Article 7 permits judges to look beyond local precedent and examine foreign cases as well).

Not only is the CISG being advanced as a useful model in efforts aimed at unifying general European contract law,⁹¹ but key portions of the Convention performance/liability superstructure (eg: articles 35 and 79, but not article 74) have already been translated and adopted as part of the new Scandinavian national law of Sales (KBL II).

The comparative story presented in the following chapters is intended, *inter alia*, to serve as a link between national and international modes of legal thought: “when it comes to the application of internationally unified law, even the best legal education in a national system remains patchwork if it is not complimented by elaborate training in comparative law. A worldwide unification of the sales law cannot be realized by the mere drafting and entry into force of a multilateral Convention.”⁹²

1.5. Operative Facts, Scope and Plan of Study

The analytical approach of this comparative study accords with the “case-method”: not only a staple of the American legal curriculum since the days of Christopher Columbus Langdell,⁹³ but also a useful tool in modern doctrinal analysis.⁹⁴ The cases here serve as paradigms: concrete models, specific starting points which emphasize what Corbin called the “operative facts”.⁹⁵ Nearly all the case-paradigms in this study are based on (or inspired by) actual cases decided by American and Scandinavian courts, our primary source of law on the consequential question.

The American rules regarding liability for consequential loss – like the rules of contract law in general – have been formulated by the courts and not by the legislatures. The Uniform Commercial Code regulates the law of sales in 49 of the 50 states, but

91. See generally Lando, *Contract Law for Europe*.

92. Volken, *Vienna Convention* at 46.

93. See Gilmore, *Death of Contract* at 12-13.

94. See, e.g., the use of Illustrations in the *Restatement 2d*, by Farnsworth in *Remedies*, and Fried in *Contract as Promise*. Regarding the casuistic method of comparative study, see Lando, *Indføring* at 87 ff.

95. Regarding paradigms of larger proportions, see Kuhn, *Scientific Revolutions*, and Eisenberg, *Bargain Principle* at 751.

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the judge-made rules, restated and codified by contract scholars, still provide the key source of American law on the subject of consequential damages.⁹⁶

Until very recently, the Scandinavian Sales codifications contained no provisions regarding liability for indirect, consequential loss.⁹⁷ As in the general law of contract, so in the special law of sales: the rules regarding the extent of contractual liability were the uncodified principles developed in Scandinavian courts and universities: the judge-made law of “precedent” and the jurist-made law of doctrinal scholarship, often a combination of the two.

“Judge-made” law (hereunder the related concepts of precedent and *stare decisis*) is most often associated with Common law systems; Scandinavian courts are not formally “controlled” by precedent in the same sense as American courts. And yet, even in Scandinavia, “precedents have a strong persuasive effect ... apart from the attitude towards older decisions, no marked difference is discernable.”⁹⁸

In America, contract law is largely a matter of state law, and because the laws of the various American states often coincide, we may speak of general “American law”.⁹⁹ Without offending sovereign State law, it is also possible to speak of general Scandinavian law.¹⁰⁰ Broader generalizations, equating (*eg.*) American with Common or Scandinavian with Civil law, can only be made on a much more selective basis.¹⁰¹

Consequential damages is the primary focal point; the larger comparative context is the commercial law of contracts and sales.

Most of the fact-patterns considered involve contracts *between merchants*.¹⁰² The study deals mainly with *compensatory* damages for *commercial loss*: including both “purely economic” loss as well as physical damage to property, but not per-

96. UCC § 2-715 represents a codification of the *Hadley* rule: *see infra*, part 4.4.4.3.

The American *Restatement Second of Contracts* resembles a statute but is really an unofficial – albeit highly influential – codification of judge-made, “common” law. *See* Farnsworth, *Contracts* at 25 (quoting Clark: “what could be higher?”).

The American esteem for contract scholarship accords with Scandinavian tradition. In England, the House of Lords departed only recently from the rule that scholarly writings cannot be cited until the author is dead, the “Better Read when Dead” rule: *see* Wilson, W., “Knowing the Law and Other Things”, *Juridical Review* 259, 267 (1982).

97. Regarding new developments, *see infra*, part 4.4.5.2.

98. Gomard, *Civil Law* at 37. As indicated in the text, *infra*, and the Tables of Cases which follow, Scandinavian cases (Denmark: *UFR*; Norway: *NRT*; and Sweden: *NJA*) are cited by year and number (without naming the parties actually involved).

99. *See* Knapp, *Problems* at 10.

100. *See, e.g.*, Gomard, *Civil Law*.

101. *See, e.g.*, *supra*, note 96.

102. *Handlende*. Also included are a limited number of paradigms where a merchant supplies goods or services to a nonmerchant. Several key UCC rules emphasize the obligations of the merchant-seller (*see, e.g.*, § 2-314), but the UCC has no analog to the special KBL rules which regulate a “consumer-sale” (*forbrugerkøb*).

sonal injury, “non-economic” loss, or “punitive” damages.¹⁰³ As the focus is consequential, the emphasis is on the *supplier’s breach*.¹⁰⁴ The study does not extend to the rights and duties of parties not in contractual “privity”,¹⁰⁵ although it does consider the application of tort principles in certain contractual contexts.¹⁰⁶

The remainder of the book is organized as follows:

Part 2 deals with promissory obligation. First, comparative consideration is given to the concept of a binding, valid (*gyldig*) promise. Then, employing the conception of total obligation, and emphasizing the duty of timely and proper performance (supply of the right thing at the right time), the emphasis is on express and implied forms of contractual commitment, the relationship between breach of promise and misrepresentation, as well as the the role of contractual interpretation and commercial custom. Where possible, the analysis seeks to superimpose, even integrate national conceptions, emphasizing the supranational common core: superstructural barriers to comparative understanding (like parol evidence) are considered in a broader perspective.¹⁰⁷ Although the comparative focus in *Part 2* is on promise, it is argued that this aspect of contract ought not be isolated from the subject of (consequential) damages for breach; in succeeding sections, many of the promissory paradigms are reconsidered under remedial headings.

Part 3 deals with situations where a binding promise may cease to bind: not only supervening contingencies which qualify as impossibility (impracticability) of performance and *force majeure*, but also frustration of purpose, mistake, *bristede forudsætninger*, etc. Here as elsewhere, the doctrinal superstructures do not always accord: the American impossibility doctrine of *Part 3* is tightly connected to Scandinavian theories of liability considered in *Part 4*.

103. Re. the denial of damage recovery in American contract law for mental distress, punitive damages and attorneys fees, see generally Knapp & Crystal, *Problems*, 839-73. See also *infra*, part 4.4.1.3, text with note 269.

104. See Farnsworth, *Contracts* at 848.

105. Regarding significant developments in what the UCC refers to “third party beneficiaries”, See, e.g., White & Summers, *Uniform Commercial Code*, Ch. 11 and compare Gomard, *Introduktion*, 76-82. See also *infra*, part 6.2.2, text with notes 37-39.

106. Eg., “product liability” cases involving physical damage to an immediate buyer’s (commercial) property.

107. Compare Fuller & Perdue, *Reliance Interest* at 54 (re. the “superstructure” of interest-protection) and Gomard, *Kontraktsfrihed* at 556 (“trods forskellige systematik”).

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Part 4 plots a comparative, remedial “roadmap”¹⁰⁸ of American and Scandinavian remedies for breach in general, as well as monetary remedies (hereunder, damages for breach) in particular. The remedial matrix takes account of specific and substitutionary theories of relief, as well as the right to terminate, and considers the various degrees of protection available: the restitution, reliance (*/negativ kontrakts-*) and expectation (*/positiv opfyldelses-*) interests. The presentation accounts, *inter alia*, for the various bases of contractual liability and for the numerous principles which serve to limit monetary compensation. Special consideration is given both to the new supplementary rules of liability limitation as well as to liability disclaimers often found in the “bargain in fact”.

Part 5 is intended to provide a comparative synthesis, emphasizing liability for consequential (*/indirect*) loss. The most relevant national conceptions of the preceding sections are combined with significant precedents from both systems with a view to formulating a transnational approach to the problem of consequential damages: a normative model rooted in the reality of judge-made law.

Part 6 presents an initial attempt to apply the conclusions obtained with respect to American and Scandinavian national law to the United Nations Convention on Contracts for the International Sale of Goods (CISG).

Part 7 sums up the results of the study and highlights some of the main conclusions.

108. *Compare Peters, Roadmap.*

PART 2

Promissory Obligation

*In our time the legal consequences of agreements are seen as determined by legal rules, and these rules do not consist solely of a reference to the mutual will of the contracting parties ...*¹

2.1. Introduction: Binding Promise and Contractual Obligation

Suppose I make you a “binding” promise: I promise to sell you my book. I assume a duty, a contractual debt (*skyld*).² If I do my duty, we have no problem. If I break my promise, you have a remedy: by definition. Without a binding promise, the promisor (*løftegiver*) is under no contractual duty, so the promisee (*løftemodtager*) has no right to performance;³ without binding (enforceable, valid, *gyldig*) promise, there can be no breach, no remedy, no enforcement: by an award of damages or otherwise.⁴

According to traditional modes of analysis, both national and comparative, problems of validity lie at one end of the contractual spectrum, damages for breach at the other. In both American and Scandinavian law we usually distinguish among (1) the contracting process, (2) the contractual promise itself, and (3) remedies for breach. Read from one end to the other, this kind of doctrinal presentation tells the contractual story in chronological form: from contract formation, to breach of binding promise, to remedial relief.

1. Gomard, *Introduktion* at 30 (translation mine).

2. See Gomard, *Obligationsret* 1. del at 15.

3. Regarding rights and duties, see Farnsworth, *Contracts* at 109 and Gomard, *Obligationsret* 1. del at 17.

4. See Calamari & Perillo, *Contracts* at 18 (contract “enforceable” when promisee entitled to either money judgment or specific performance) and compare Gomard, *Obligationsret* 1. del at 45. Regarding the American distinctions between void, voidable and unenforceable contracts, see Calamari & Perillo at *id.* See also *infra*, part 3.2.1., text with note 22, and part 4.1. with notes 8-10.

Part 2.1

The *first* category deals with the legal framework which the law provides for the contractual *process*: not only (a) the process of making promises and entering agreements, but also (b) judicial interference in the bargaining process, the process by “which courts ‘police’ agreements against unfairness by placing limits on their enforceability”.⁵ The *second* category deals with the *content* of promise itself: the definition and interpretation of the obligation owed (*ydelsen*).⁶ The *third* category describes the *remedies* available in the event of breach. The contractual story is sometimes interrupted by the intervention of a *force majeure*-type impediment to performance: in American doctrine, this kind of situation is dealt with under headings related to promise, whereas Scandinavian law treats the problem as essentially remedial.⁷

In recent years, this classical description has come under attack. For one thing, considerable doubt has been cast upon the distinction between the contracting process and contractual content, the conception that judges act only as procedural referees disinterested in the substance of the agreement reached.⁸ Before we embark on the substantive road, we do well to remember the procedural side.

No legal system is so “reckless” as to enforce all promises,⁹ at least in the sense that no system will enforce a promise made at gunpoint. In other words, all systems recognize certain defenses (*indsigelse*) against claims that a binding promise has been made, and we find a substantial degree of similarity between American and Scandinavian law regarding the various defenses to contract enforcement. We find not only that the relevant legal labels – fraud, duress, undue influence, etc. – seem to correspond, but also that there seems to be a striking measure of agreement as to the underlying doctrinal concepts.

5. Farnsworth, *Contracts* at 212. Regarding these two aspects of the agreement process, see generally *id.* (chapters 3 to 6) and compare, *eg.*, Gomard, *Kontraksret* (kap. 3-5).

For purposes of the present validity discussion, we put aside such mechanics-of-consent issues usually subsumed under the heading of offer and acceptance. The “battle of forms” is discussed later in connection with standard agreements purporting to disclaim liability for indirect or consequential loss: see *infra*, part 4.4.6.

6. Compare, *eg.*, Farnsworth, *Contracts* (Ch. 7) and Gomard, *Obligationsret* 1. del, Afsn. II.

7. See generally *infra*, part 3.

8. For a critical assessment of the English distinction between “contractual” and “non-contractual” duties, see Atiyah, *Introduction* at 216.

9. See Farnsworth, *Contracts* at 12.

Legal systems are said to approach the problem of contractual validity from one of two extremes – starting either (1) with the assumption that promises are binding and then making exceptions (the Scandinavian approach) or (2) with the assumption that promises are generally unenforceable and then making exceptions (the American approach): see *id.*

Across a broad range of conceptual categories like status and behavior,¹⁰ we find much comparable legal thought – presumably because our societies share many cultural and moral values. None of us wants to reward the extortionist or swindler with the “benefit of the bargain” – or anything else. So, to this extent at least, our starting points as regards validity have much in common.

In one important respect at least, the defence-catalogues of Common law systems are unique: American and English law still start with the premise that promises are not binding unless “supported by” *consideration*. Lack of consideration is a defence to contract validity, contract enforcement. A promise to make a gift – to give something and get nothing in return – is not binding.

Civil systems know not of consideration, only tenuous analogues.¹¹ Perhaps the most far-reaching starting point is the Scandinavian: all promises are binding, period.¹² Scandinavian law enforces promises and agreements – whether “paid for” or not – whereas American law enforces only agreements: “bargains”.

From a Scandinavian vantage point, the American consideration rule (and its countless exceptions) make for an unwieldy state of legal affairs.¹³ And much of the traditional consideration doctrine is in fact outmoded.¹⁴ American texts are still forced to deal with the topic at considerable length – not so much because of its practical relevance, but because the classical rule is now riddled with complex exceptions – a sort of doctrinal Swiss cheese.¹⁵ As a result, American law seems to be moving towards the Scandinavian view: a promise of a gift will sometimes bind the promisor, but the courts are not

10. See Farnsworth, *Contracts* at 213 re. *status* (characteristics of the party involved) and *behavior* (how parties acted during the bargaining process: problems involving misrepresentation, duress, and the like). These days, the significance of the status-category extends far beyond such classical problems as the “capacity” of minors and the mentally incompetent: see, e.g., *infra*, part 4.4.5.1.

11. See Gomard, *Kontraktsfrihed* at 570 (critical of v. Mehren in *Harvard Law Review* vol. 72 (1959) 1009 ff).

12. See Gomard, *id.* at 538 re. the Danish and Norwegian Codes 5-1-1 and 5-1-2 (“den kontraktsretlige formfriheds højborg”). The promise must be freely made and suitable for creating a legal commitment (“egnet til at stifte forpligtelse af retlig karakter”): *id.*

13. See (re. the *Restatement 2d* §§ 82-90) Gomard, *Kontraktsfrihed* at 564 (“i høj grad uhenigtsmæssig”).

14. Though the Law & Economics school has provided a new cost-benefit rationale: see Farnsworth, *Contracts* at 48 with note 5.

15. *Accord* Knapp, *Problems* at 99. Regarding promissory estoppel, see *infra* part 4.4.3.

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bound to provide the promisee with the same measure of relief available for breach of a bilateral agreement.¹⁶

In the present comparative context, we can safely avoid much of the discussion which usually falls under the consideration-heading, because our main concern is bilateral contracts, like contracts of sale. And since a promise to deliver goods is usually made in exchange for a promise to pay, each promise is said to be made in consideration of the other: a bargain is struck, and both promises are binding.¹⁷

But even though our interest lies neither in promises of gift nor promises at gunpoint (duress, fraud, etc.), we cannot entirely ignore issues of validity. For one thing, consideration, its exceptions notwithstanding, is more than just an outmoded defense to contract enforcement. And even within a commercial context, not all promises are describable as bilateral bargains.

*Steel Supply.*¹⁸ Seller supplies steel to Buyer at a fixed price (X) pursuant to a long-term contract. When Seller's costs increase to the point where continued delivery would involve a loss, he notifies Buyer that unless Buyer agrees to a price increase (Y), Seller will stop deliveries. Buyer (who has his own commitments to meet) agrees.

The classical Common law view was (and in England still is) that Buyer's promise to modify the original contract is not "supported by consideration":¹⁹ Seller is already legally bound to deliver steel at fixed price X when Buyer promises to pay X + Y (for the same thing). Buyer makes a promise, but gets nothing in return. Y is a "gift".

Buyer's promise is not supported by consideration, but that is no longer relevant in American (sales) law, because – by statute – "[a]n agreement modifying a contract for the sale of goods needs no consideration to be binding."²⁰ And yet, dispensing with the consideration requirement does not dispense with the underlying problem in the case. Even Scandinavian lawyers may have reason to look this gift horse in the mouth: we all have to draw the

16. Compare *Restatement 2d* § 90 ("remedy granted for breach may be limited as justice requires") and Gomard, *Kontraktstret* at 34-35 ("ansvaret for opfyldelse af et gyldigt gaveløfte er mindre strengt ...").

17. Regarding the unconvincing doctrinal resolution of the mutual-promise conundrum see Fried, *Contract as Promise* at 29.

18. Inspired by the *Roth Steel* case (*infra* note 22). See also *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. (The Atlantic Baron)* [1979] Q.B. 705

19. *Id.*

20. UCC § 2-209(1).

line between threats and extortion (“economic duress”) on the one hand, and good faith: honest, acceptable business standards, on the other. “*Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.*”²¹

Under American (and English) law, Seller’s refusal to deliver without additional compensation constitutes a “threat” in violation of his implied obligation to deal in good faith.²² In Scandinavian doctrine, the query is whether the party submitting to the alleged threat might have stood fast and sought sufficient protection in supplementary remedial rules:²³ a theory which, in a case like *Steel Supply*, boils down to the extent to which the supplementary rules render Seller liable for Buyer’s *consequential loss* (eg., damages for which Buyer may be liable due to breach of third party commitments).

Consideration has been relieved of some doctrinal overload,²⁴ but we can hardly dispense with its fundamental idea. We are all concerned with the fairness of exchange and remedies for breach.²⁵ Equally important in our comparative context is the fact that American doctrine still speaks of consideration as the very basis of contractual liability.²⁶

Those who would liberalize emphasize the procedure, and those who would regulate look to the content,²⁷ but these days, neither force can claim a total victory. Consider these companion cases:

*Oil Agent.*²⁸ Company’s geological surveys point to Farmer’s land as a promising site on which to drill for oil. Company sends an undisclosed agent who says nothing about the surveys and secures Farmer’s promise to sell at the local market price for farmland.

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21. See *Restatement 2d* § 205 which is modeled after UCC § 1-203. See also Gomard, *Obligationsret* 1. del at 50 with note 43a (comparing these American provisions with corresponding, albeit uncodified, Scandinavian doctrine (“pligt til at vise hensyn og konduite”).
 22. See *North Ocean* (*supra* note 18) and *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 35 UCC Rep. 1435 (6th Cir. 1983). Regarding economic *force majeure*, see *infra*, part 3.2.3.
 23. See Gomard, *Kontraksret* at 114 with note 10 (referring to earlier Scandinavian literature and Farnsworth, *Contracts* § 4.17).
 24. See Fried, *Contract as Promise* at 36 and *infra*, part 4.4.3.
 25. See Atiyah, *Introduction* at 104-05 (rejecting traditional Common dogma that the “adequacy” of consideration is irrelevant).
 26. See *infra*, part 4.4.1.
 27. See Gomard, *Kontraksret* at 84.
 28. Based on an example in Fried, *Contract as Promise* at 79.

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*Agent in Overalls.*²⁹ Same facts as in *Oil Agent*, except that Company's agent comes "dressed in overalls and chewing a straw".

Should we distinguish on the basis of the Agent's attire? We "feel ambivalence about these duty-to-disclose cases",³⁰ because in modern American and Scandinavian law, we are interested not only in the classical conceptions of contractual consent, but also in such good faith duties as disclosure and fair dealing and – ultimately – in the issue of substantive fairness.³¹ We hesitate to draw a sharp line between the agreement process and substantive problems of contractual obligation and remedies for breach, between "contract law" and "the law of the contract".³²

In Scandinavia, a court may now set aside an agreement in whole or part simply because *it would be unreasonable or against good standards of dealing to enforce it*.³³ In making this determination, the courts are to consider not only (1) conditions at the time of contracting but also (2) subsequent developments and (3) the *content* of the contract.³⁴

In America, the modern standard of contractual morality has long been codified along similar lines. Also American courts have been granted the flexible authority to refuse to enforce contracts in whole or part *if the contract or term thereof is unconscionable ...*³⁵

To be sure, these national rules do not quite match in every respect.³⁶ But both rules test the content of the contract,³⁷ and the thresholds of unreasonableness and unconscionability are both meant to be reached in similar

29. Inspired by Fried's discussion of the example at *id.*

30. *Id.* at 82.

31. See Fried, *id.* with note 17 re. *Leitch Gold Mines, Ltd. v. Texas Gulf Sulphur*, 1 Ont. Rep. 469 (1969): "TGS got, for \$18,000, mining rights worth \$100,000."

32. Compare Farnsworth, *Contracts* at 445-46.

33. See § 36 of the (uniform, Scandinavian) Contracts Acts (translation mine).

34. *Id.*

35. See *Restatement 2d* § 208 which tracks the provisions of UCC 2-302 codified some twenty years earlier.

36. The Scandinavian test is surely the more open-ended of the two. *Prima facie*, "unconscionability" suggests a stricter test. And unlike § 36 of the Contracts Acts, the UCC and Restatement tests apply only to conditions at the time of contracting: compare Lyng Andersen, Madsen & Nørgaard, *Aftaler* at 224 ("§ 36 tænkes anvendt – først og fremmest vedrørende "senere indtrufne omstændigheder").

37. Although the *Restatement* test is to be applied as of the time of contracting (*id.*) the standard is subsumed not in Chapters 8 & 9 (concerning defenses like misrepresentation, duress, and public policy) but rather within the (substantive) promissory heading of Chapter 9: "The Scope of Contractual Obligations". Regarding the conceptual distinction between procedural and substantive unconscionability, see Farnsworth, *Contracts* at 314-15.

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circumstances: where “the sum total of [a contract’s] provisions drives too hard a bargain for a court of conscience to assist.”³⁸ And courts of conscience in both systems are concerned not only with the consumer, but also with the merchant: the requirements of fairness and good faith apply to both.³⁹ “Reasonableness is the primary consideration.”⁴⁰

The point is not that merchants should now fear these systems of law:⁴¹ an American or Scandinavian “court will be more likely to uphold the provisions of a contract made in a business transaction ...”⁴² But the commercial contract is no longer immune,⁴³ and the rules are now phrased in more flexible terms: “The more commercial the context ... the stronger the presumption of validity.”⁴⁴ The classical law of contract has been opened to an “insidious” attack.⁴⁵

UCC § 2-302 is applied in an ever-increasing number of commercial (non-consumer) cases, sometimes even to protect experienced merchants.⁴⁶ § 36 of the Scandinavian Contracts Act has also been applied, albeit sparingly, in commer-

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38. See *Restatement 2d*, Comment b to § 208, citing the equitable standard of *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 84 (3d Cir. 1948).
 39. See Farnsworth, *Contracts* at 213 (traditional reluctance of common law courts to police for substantive unfairness has declined) and at 307 re. UCC § 2-302 (invites courts to police bargains overtly for unfairness). See also Atiyah, *Obligations* at 209 (function of paternalism).
 40. *Gianni Sport Ltd. v. Gantos, Inc.*, 151 Mich.App. 598, 391 N.W.2d 760, 761, 1 UCC Rep. 2d 1433, 1435 (1986).
 41. *Accord*: Gomard, *Kontraksret* at 140 with 58 (disagreeing with Slater, *Journal of Business Law* 1982:173, 189).
 42. *Delhomme Industries, Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049 at 1059 (5th Cir. 1982).
 43. See *Maxon Corp. v. Tyler Pipe*, 497 N.E. 2d 570, 3 UCC Rep 2d 52, 62 (Ind. App. 1986) (§ 2-302 is “by no means limited to unsophisticated consumers”).
 44. *Id. Accord*, Speidel et al., *Commercial Law* at 1132 (disclaimer as against professional buyer *prima facie* valid).
 45. See Fried, *Contract as Promise* at 2.
 46. See, e.g., *Maxon*, *supra* note 43 (and *infra* part 4.4.6, text with notes 699-701: overt censorship of standard form agreement), *Gianni*, *supra* note 40 (cancellation clause held unconscionable, *inter alia*, because *unreasonable*) *A & M Produce Co. v. FMC Corp.*, 186 Cal.Rptr. 114 (App. 1982) (noted *infra* in part 5.2, text with notes 65-66), and compare *Phillips Petroleum Co. v. Bucyrus-Erie Co.*, 131 Wis. 2d 21, 388 N.W.2d 584 (both parties “giant corporations”; see *infra*, part 6.3.3, text with notes 102 and 129).

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cial contexts.⁴⁷ In a recent decision, the Supreme Court of Sweden applied § 36 to protect a relatively inexperienced merchant (local, independent distributor of pre-fabricated homes) against the consequences of an arbitration clause drafted by the party with superior bargaining power.⁴⁸

The consumer/merchant line is sometimes thin, but the import of these general clauses of Scandinavian and American law extends beyond those decisions which cite them openly to the numerous decisions which use covert means to achieve similar results. There is no clear line between those decisions which excise or temper clauses disclaiming liability in the name of incorporation or interpretation and those which reach the same result by outright censorship⁴⁹ ... no clear line between the contracting process and the contractual content.

Even an American who holds promise most dear can see the law moving toward “a more candid set of principles to determine which promises should be enforceable in terms of the *fairness* of each type.”⁵⁰ We might even hypothesize in more open-ended terms: perhaps contract *validity* is becoming a *question of degree*: even when a court holds a given promise to “bind”, in whole or part, it has a broad spectrum of remedial relief available to enforce the commitment. Expectation protection may be the general rule, but the exceptions to full enforcement are legion, and an open-ended conception of binding promise is fully compatible with such less extensive means of remedial relief.⁵¹

We follow tradition and start with promise, but not because promise is our sole concern. Contract law is no longer purely private. The comparative distinction sometimes drawn between Civilian rules and Common terms carries little weight in a modern, Scandinavian/American context.⁵² So we do well

47. See, e.g., UfR 1987.526 H and UfR 1987.531 H (setting aside contract clause obligating gas-station to return buried tanks to supplier upon termination: see Gomard, *Kontraktstret* at 136) and Stig Jørgensen, *Juristen* 1986 p. 118 (regarding the limited use of § 36 in the 10 years following its enactment in Denmark).

48. See NJA 1987.641 at 642: “i behov av samma skydd som en konsument ...” American courts have afforded similar protection to inexperienced merchant-recipients (eg.) by setting aside as unconscionable merchant-suppliers’ disclaimers of liability for consequential damage: see *infra*, part 4.4.6. But compare *Maxon*, *supra* note 43 (no disparity in bargaining positions). See also *supra*, note 46.

49. See *infra*, part 4.4.6.

50. Fried, *Contract as Promise* at 39 (emphasis added).

51. Accord: Knapp, *Promise of the Future*, 938-41 and Madsen, *Aftalefunktioner*, 3.3. See generally *infra*, part 4.

52. See discussion *infra*, part 2.5 re. contractual duties implied in law.

Express Promise

to employ an open-ended conceptual framework; we conceive of *contract* as the *total obligation* comprising a broad spectrum of duties both private and public: not just (1) those imposed by the willful agreement of the parties, the bargain in fact, but also (2) those imposed by the courts, by all sources of applicable law.

Thus, following the lead of the *UCC*, and in good harmony with the tenor of Scandinavian conceptions, we understand the *agreement* as “the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance ...”.⁵³

We understand *contract* as the broader conception, “the total legal obligation which results from the parties’ agreement as affected by [the *UCC* statute] and any other applicable rules of law.”⁵⁴

Using this conception, we see the private and public aspects of contract as related factors on a single spectrum, not as separate pigeonholes. For though we are dealing with 2 key elements of contract, the line between them, like the line between substance and procedure, is not at all clear.

We subsume custom here under “bargain in fact”. Others prefer to see custom as part of the “non-private” (albeit non-mandatory) part of the contract,⁵⁵ an “implied term”.⁵⁶

As the *UCC* conception of “total obligation” clearly demonstrates, the neat dichotomy between contractual & non-contractual duties no longer tenable.⁵⁷

To move across this integrated spectrum, from bargain in fact to contract in law, we start with the most classical element of contract: the express promise itself.

2.2. Express Promise (and Breach).

In a contractual context, the most obvious duty is the duty to perform. In a bilateral contract, the supplier’s main duty is to supply the right thing at the

53. *UCC* § 1-201(3).

54. *UCC* § 1-201(11). *Compare*: KBL § 1, subsec. 1 (“Denne lovs bestemmelser kommer kun til avendelse, for så vidt ikke andet er udtrykkelig aftalt, eller må anses for indeholdt i aftalen eller følger af handelsbrug eller anden sædvane.”)

55. See Atiyah, *Introduction* at 182.

56. To avoid this guise, Atiyah (*id.*) prefers the rule-of-law conception: a contractual duty *not* fixed by the parties. See *id.*, Chapter XI).

57. See Atiyah, *id.* at 216.

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right time and place. To determine what is right, we look first to the language of the agreement.⁵⁸

Reading Pipes.⁵⁹ Contractor agrees to build a residence for Owner for a stated price. The contractual specifications provide that “all wrought iron pipe must be ... of Reading manufacture.” These specifications notwithstanding, some of the pipe installed by Contractor is manufactured by Cohoes.

Here as elsewhere on the contractual map, the starting point is that the parties may exercise their contractual freedom to spell out the promise, specify the duty. And the language of private legislation in *Reading* is clear. Contractor promises to install Reading pipe. He does something else, fails to perform, breaches his promise. “The courts never say that one who makes a contract fill the measure of his duty by less than full performance.”⁶⁰

We concentrate on the supply-side of the contractual relation, but are of course mindful of the fact that similar considerations apply to performance and breach by the recipient: Owner’s promise in *Reading* to pay a given sum creates an obligation much like Contractor’s promise to perform.⁶¹ And the duties to perform and pay are mutually interdependent.⁶²

The breach is a legal wrong, and “[f]or every legal wrong there is a legal remedy.”⁶³ At this (promissory/*ydelsen*) stage of the contractual story, classical doctrine may say little about the nature or extent of the remedy, but we might think about the breadth of the remedial range: in a case like *Reading Pipes*, we may ultimately be talking about such things as specific performance, breach of condition, and or substitutionary relief (from big bucks to small change).⁶⁴

58. See UCC 1-201(3) and Gomard, *Obligationsret* at 125 (“Ordene ... er udgangspunktet for fortolkningen”).

59. Based on *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921).

60. *Id. Accord: Augdahl, Norsk Obligasjonsrett* at 171: “Mislighold vil overhodet alltid foreligge hvor man har *lovet* å levere noget med visse egenskaper, og ikke alle disse egenskaper er tilstede.”

61. See generally, Gomard, *Obligationsret* 1. del, kap. 3.

62. See *id.* at 17 and *infra*, part 4.3.1.

63. Calamari & Perillo, *Contracts* at 519.

64. See, e.g., *id.* at 519: “If the aggrieved party has suffered no damage he is entitled to a judgment for nominal damages, usually in the amount of six cents or one dollar, to symbolize vindication of the wrong done to him.” The remedial issue in *Reading Pipes* is discussed *infra* in part 4.3.1.

*Gas Convention.*⁶⁵ Manufacturer in Kansas City rents space in Atlantic City to exhibit its new stove at the forthcoming Gas Convention. Carrier promises to ship the stove “*express*”: arrival “not later than October 8th”. Carrier picks up the shipment, consisting of 21 marked and numbered packages, on time in Kansas City, but one package containing a key part is mistakenly sent to St. Louis and doesn’t get to Atlantic City until after the Convention.

As in *Reading Pipes*, the language of this supplier’s promise leaves no room for dispute. Carrier’s obligation is to deliver the whole stove at a particular time. By delivering part late, he breaches the contract, at least in part. And for breach of contract, there must be some remedy, by definition.

The breach may seem clear when the promise concerns results:

*Long Nose.*⁶⁶ Patient, a professional entertainer, has a straight – but long and prominent – nose. Doctor, a plastic surgeon in private practice, promises to reduce the nose’s prominence, shorten it, and make it more pleasing in appearance. Patient, looking forward to a brighter career, is more than willing to pay Doctor’s handsome fee. Unfortunately, Doctor bungles the job: the nose turns out crooked, more prominent than before, and Patient’s appearance is clearly worsened. Repeated attempts to effect a “cure” fail.

Doctors, however skillful, are generally reluctant to promise specific results. But *this* doctor, an enterprising entrepreneur,⁶⁷ promises a more pleasing nose, and he can only keep his promise by delivering the “goods”, the *ré-sultat*.⁶⁸ So, if Doctor’s promise is binding, he has surely breached it. And indeed, the promise *is* binding – at least for some judges, in some places.

In *Sullivan* (the real *Long Nose*), the plaintiff was awarded damages for breach of express contract.⁶⁹

65. Based on *Security Stove & Mfg. Co. v. American Ry. Express Co.*, 227 Mo.App. 175, 51 S.W.2d 572 (1932).

66. Based on *Sullivan v. O’Conner*, 363 Mass. 579, 296 N.E.2d 183 (1973).

67. Defined in *Webster’s New Concise Dictionary* (1982) as “one who organizes, manages, and assumes the risks of a business or enterprise”.

68. Re. the French (and comparative) labels *de résultat* and *de moyen*, see Lawson, *Fault and Contract* 300-01, Gomard, *Obligationsret* 1. del at 155 with note 36, and compare Gæbler, *Negligence* at 638 re. “warranty of result”. See also *infra*, part 2.5.

69. See *Sullivan*, *supra* note 66. Regarding the delictual side of *Long Nose*, see *infra*, part 2.5.

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In a recent English case,⁷⁰ a doctor expressly assured his vasectomy patient that no further contraceptive precautions were necessary. *Held*: the revival of patient's fertility gave rise to a claim for damages based on tort (failure to warn), but not for breach of contract. Recent German precedent is in accord with the contractual conception.⁷¹

Even a seemingly clear promise may need some measure of interpretation:

Lightning Bikes.⁷² On January 1, Retailer phones Middleman to order "10 Lightning-model bikes". Middleman promises delivery at his warehouse on Jan. 3. On Jan. 2 he sets 10 bikes aside, but later that day lightning strikes the warehouse, the bikes are destroyed, and Middleman does not deliver.

Scandinavians describe a promissory obligation like this as generic, in that the promise is to supply a given quantity of generically defined, unascertained goods:⁷³ "Lightning" bikes. The idea is that Middleman's express promise to deliver is understood to mean *any* 10 Lightning bikes and not (*eg.*) the 10 in his warehouse: this is simply the deal, the literal bargain in fact.⁷⁴ And while an American lawyer might not attach a special label to the promissory obligation in *Lightning*, he would provide us with a similar interpretation: the seller has undertaken "to deliver a stated quantity ... without regard to source".⁷⁵ So Middleman's failure to deliver is a breach. The "Act of God" at Middleman's warehouse is *his* problem, not Retailer's; Middleman has no "excuse".⁷⁶ It's a tough world out there, and the starting point remains: don't make a promise you can't keep. Because your recipient can count on you to keep your word, rely on your generic obligation.

70. *Thake v. Maurice*, 2 W.L.R. 337 [1986].

71. See judgment of June 19, 1984, Bundesgerichtshof, VI ZR 76/83 (Frankfurt), 1984 *Neue Juristische Wochenschrift* (N.J.W. 2625) briefed in 24 *Columbia Journal of Transnational Law* 200 (1985) (doctor liable for breach of contract to parents of an "unwanted" child when sterilization operation failed because of doctor's conduct).

72. Inspired by an example in Ussing, *Køb* at 73.

73. See KBL I § 3. *Accord*: Atiyah, *Sale of Goods* at 44. *Compare* UCC § 2-613.

74. See Ussing, *Køb* at 73 ("følger altså af selve aftalen"). The supplier's freedom to choose (*valgfrihed*) within the genus corresponds with his *obligation* to deliver if goods within the genus are available.

75. Farnsworth, *Contracts* at 675 (re crop-failure).

76. See Ussing, *Køb* at 73 ("uvedkommende"). *Accord*: *Restatement 2d* § 263, Illustration 1.

Express Promise

In a system where contractual liability is based on fault, it is significant that the generic promisor who fails to find and deliver available goods is guilty of culpable breach.⁷⁷

In Scandinavian theory, we often group cases like *Gas Convention* and *Lightning Bikes* together: both cases concern the same general kind of non-performance: the failure to deliver (on time).⁷⁸ *Reading Pipes* and *Long Nose* fall within a second major group of cases where the issue is whether the right thing is supplied, the right performance rendered. This is the defects category (non-conforming goods and services).⁷⁹ In both American and Scandinavian law, non-performance is catch-all term, including both delayed and defective performance.⁸⁰ And yet, each category presents a special set of comparative problems.⁸¹

We shall treat the (delay-related) impossibility- (/force majeure-) issue raised by cases like *Lightning Bikes* as a separate problem – one which, comparatively speaking, lies on the conceptual borderline between breach and remedy. As we shall see, the line between interpretation and rule-application is often unclear.⁸²

In our comparative context, the defect-cases often present the greatest conceptual difficulties. One problem is the overlap between contract and tort. “Much scorn has been poured on the [Common law] distinction [between nonfeasance and misfeasance], but it does draw a valid line between the complete non-performance which in the ordinary case is a breach of contract only, and a defective performance, which may also be a matter of tort.”⁸³ And Common lawyers have no patent on the problem.

Chickenfeed.⁸⁴ Chicken Farmer buys Seller’s “All-in-One” chicken-feed blend. Each sack contains a slip stating: “Vitamin E content appx.

77. See generally *infra*, parts 3.2 and 4.4.1.2.

78. Non-delivery (in *Lighting*) falls within the same conceptual category as late delivery (in *Gas*): “never” is very late indeed.

79. For a dissenting opinion, distinguishing between “nonconforming” and “defective” goods, see *Esquire Mobile Homes, Inc. v. Arrendale*, 182 Ga.App. 528, 356 S.E.2d 250, 3 UCC Rep. 2d 1798 (Ga.App. 1987).

80. See *Restatement 2d* § 235, Comment b and Ussing, *Obligationsretten* at 21: (“ikke ... rigtig opfyldelse”).

81. Compare Treitel, *Law of Contract* at 627 (where defect serious, no need to distinguish).

82. See generally *infra*, part 3.

83. Prosser & Keeton, *Torts* at 660.

84. Based on NRt 1972.1350.

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28 mg./kg. No supplement necessary'. Actually, the feed contains a lesser (and inadequate) amount of vitamin E, so Farmer's chickens become diseased, many die, and Farmer's production (and profits) decline.

Once again, we interpret the promise. We read the slip as part of the contractual description: "All-in-One".⁸⁵ And while there may be some room for disagreement regarding acceptable deviations ("appx."),⁸⁶ this Seller's promise has clearly been breached.⁸⁷

The simple, contractual logic of this conclusion is arguably independent of the nature of the consequences which flow from the breach: there is nothing inherently delictual about a batch of dead chickens. And yet, in American law, such misfeasance is also a case for the law of tort. And in Scandinavia, most would say that this consequential case is a case of pure tort (product liability).⁸⁸

In American sales law, the *Chickenfeed* promise would be subsumed as an *express warranty*.⁸⁹

In Scandinavian law, such a "warranty" would be classified as implied. In a recent Swedish Supreme Court case, Buyer, a rally enthusiast, filled his tank with gas marked "Premium". Because the fuel contained diesel oil, it ruined the engine, and Buyer sued the retailer for the consequential loss. *Held*: for the plaintiff: although the "premium" description did not qualify as an express warranty,⁹⁰ the statement, given the concrete circumstances,⁹¹ was given the same *effect* as if premium quality had been guaranteed.⁹²

So we cannot always separate the chapter on breach of promise from the subject of liability, remedial relief.

85. Regarding the line between representation and promise, *see infra*, part 2.3.

86. *Compare* KBL I § 66, subsec. 2 (defining *circa* as indicating a margin of 10 percent).

87. *See* NRt 1972 at 1353 ("mangelfullt i köpsrettslig forstand").

88. *See generally* Dahl, *Product Liability*. *See also* Jørgensen in *Juristen*, 1988 at 93 ("deliktsreglerne alene ... den herskende [opfattelse] i dag"), citing, *inter alia*, Dahl, *Produktansvar* and Dufwa, *Produktansvar*.

89. *See* UCC § 2-313 and *infra*, part 2.3.

90. *See* NJA 1985.641 at 644 ("sådan klar och uttrycklig garáanti är det ... inte fråga om").

91. In particular, the fact that the retailer, if held liable, could claim damages against his supplier for "pure economic loss" ("ren förmögenhetsskada") pursuant to KBL (I) § 43: *see id.* at 645. Regarding KBL I § 43, *see infra*, part 4.4.1.2.

92. *See id.* ("man i det aktuella fallet bör tillägga uppgiften på bensinpumpen samma virkan som om bolaget garanterat ...").

2.3. Representation, Warranty, and Parol Evidence: Let the Buyer (and the Lawyer) Beware

We continue to focus on the private agreement:

*Fake Fiddle.*⁹³ Innocent, an 86-year old collector of rare violins, shows his collection to Virtuoso, a prominent concert violinist who collects similar instruments. Virtuoso picks up a fiddle and asks: “How much would you take for this Stradivarius?” Innocent (who also thinks the fiddle is a Strad) prepares and signs the following “Bill of Sale”:

“This certifies that I have sold to Virtuoso one Stradivarius violin dated 1717 for the full price of \$10,000 on which has been paid \$1,000 the balance to be paid ...”

It later becomes apparent that the violin is an imitation worth only a fraction of the purchase price.

Both the subject matter of this transaction and the defect-problem posed lie clearly within the UCC and KBL statutes of sale.

UCC § 2-313 (1) (b) provides: Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

The Danish KBL (I) § 76, subsec. 1(1) defines as defective goods which do not correspond to the description (*betegnelse*) of sale.⁹⁴ Finland’s new Köplag (KBL II) § 18, subsec. 1 names “information” (*uppgifter*), not description, but the essence of the rule remains the same.

But when breach involves defect, the problems abound. For one thing, the American statute’s special term for this kind of promissory obligation is “express warranty”. Simply because Innocent does not deliver goods which conform to his express *description*, he seems in breach of an American express warranty.⁹⁵

93. Based on *Smith v. Zimbalist*, 2 Cal.App.2d 324, 38 P.2d 170 (1934).

94. The judge-made rule, applicable to sales generally, has been codified in the Danish rules expressly applicable to consumer sales. *Compare infra* this part re. incorrect information (*urigtige oplysninger*) in *Butcher Shop*.

95. *Compare*, re. English law, Atiyah, *Introduction* at 145 with note 1. In English and American sales of goods, an express warranty may also be created by supplying a *sample*. Re. UCC § 2-313(1)(c) *see, e.g.*, *Beck v. Plastic Products Co., Inc.*, 412 N.W.2d 315, 5 UCC Rep. 2d. 292 (Minn.App. 1987) (consequential damages for breach of express warranty to supply McDonald’s Restaurant with “Magic Crystal Balls” in accordance prototype samples).

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“*Guaranty* (/guarantee) and *warranty* are derived ... from the same word ... They are often used ... in commercial transactions as having the same signification, as where a piece of machinery ... is “guarantied” ...”⁹⁶

Scandinavians understand the concept of express description, but the shift to express warranty is a somewhat foreign idea.⁹⁷ Still, as regards the issue of performance and breach, there is an essential similarity. Indeed, the Official Comments to the American statute explain warranty in terms which correspond precisely with Scandinavian defect doctrine: “the whole purpose of the [American] law of warranty is to determine what it is that the seller has in essence agreed to sell ...”⁹⁸

But before we conclude that Innocent has breached, we must deal with the doctrine of *caveat emptor*. For what you see is sometimes all you are entitled to get, particularly in a specific sale like this one.⁹⁹ If Virtuoso beware, there is simply no breach, and no remedy therefor.

Caveat emptor involves a complex balancing of interests and risks, much more than a simple look in the horse’s mouth. On the one hand, we might well let Innocent’s positive assertion (/description) outweigh Virtuoso’s cursory inspection and failure to detect a latent defect.¹⁰⁰ Then again, it was Virtuoso who first called the fiddle a Strad, so why let him rely on an Innocent echo (if in fact he has relied at all)?

Indeed, to find for Innocent on the issue of breach, we need not even go outside the statutory strictures of KBL (I) § 76 and UCC 2-313, for each of these open-ended provisions contains a safety valve of its own: there is no breach under either rule unless the information provided can be deemed

96. *Black’s Law Dictionary*.

97. Compare Hellner, *Kontraktsträtt* at 314 re. NJA 1978.307 (“utfästelsefallen och därmed jämställda fall av positiva uppgifter”).

98. UCC § 2-313, Comment 4.

99. See Gomard, *Obligationsret* 1. del at 170 (*caveat emptor* “normal i handel med brugte ting og unika”).

100. See Gomard, *id.* at 147 (“Hovedvægten må...lægges på ... de oplysninger, som sælgeren faktisk har givet ...”) and 169-70 (“bestemte oplysninger om salgsgenstandens egenskaber, behøver køberen i almindelighed ikke kontrollere deres rigtighed ... mister ej heller uden videre sin virkning, dersom køberen ved en besigtigelse eller undersøgelse overser, at egenskaberne ikke er til stede ...). Accord: UCC § 2-316(3)(b) with Comment 8 (rejecting application of “caveat emptor” in all cases where buyer examines regardless of statements by seller) and Gomard, *id.* with note 54, comparing the harsher rule of KBL I § 47. KBL II § 20(2) is closer to the rule in CISG Art. 35(3).

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“significant”:¹⁰¹ unless it “affects the sale”,¹⁰² becomes part of “basis of the bargain”, *i.e.*, unless Virtuoso has *relied* on the sales-slip description.¹⁰³

Significant – or not? (Bargain) basis – or not? *Fake Fiddle* is a difficult case, most difficult perhaps for the Common law mind. For if an American concludes that the bargain is breached, his system responds by opening the remedial sea-cocks to the full extent of expectation protection. And since the American law of contract is, in its essential doctrinal design, a no-fault system,¹⁰⁴ the sea-cocks open automatically, without regard to Innocent’s innocence, and without regard to his (quasi-merchant) status.¹⁰⁵

We might also apply an alternative conception (from an earlier stage of the contractual story) and speak of a “misrepresentation” of material fact or a mutual mistake”: by virtue of such aberrations of the contracting process, Virtuoso may well be entitled to some kind of remedy, though not necessarily a remedy for contractual breach.¹⁰⁶

Can an American lawyer “consider the scope of recovery in deciding whether there was a warranty”,¹⁰⁷ a “misrepresentation” or “mistake” of a fact? Because these various theories of liability do not always provide the same kind or measure of remedial relief, we do well to reserve judgment in a case like this; we refuse to answer the performance problem in *Fake Fiddle* without reference to the remedial side of the coin ... on the grounds that any clear-cut answer might tend to incriminate us as members of the formalist school of jurisprudence. If we are to be quoted, we do not wish to be quoted out of the full contractual context.

In the real (pre-UCC) *Fake Fiddle*, Seller sued Buyer to recover the unpaid remainder of the agreed purchase price. In holding for the Buyer, the court character-

101. See the (Danish) KBL I, sec. 76 (“kan antages at have haft betydning for køberens bedømmelse af genstanden”).

102. See Finland’s Köplag (KBL II) sec. 18 (“kan antas ha inverkat på köpet”).

103. The UCC has not softened the (express) reliance-requirement of its predecessor, the Uniform Sales Act. See White & Summers, *Uniform Commercial Code* at 333 (“courts must employ the test of whether buyer relied ...”).

104. See Farnsworth, *Contracts* at 842.

105. Unlike the implied warranty of merchantability pursuant to UCC § 2-314, the express warranty provisions of UCC § 2-313 apply to merchants and non-merchants alike. See also *infra*, part 2.5, text with note 249.

106. See generally Farnsworth, *Contracts* §§ 4.10-4.15 and 9.2-9.3.

107. Honnold, *Sales* at 47.

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rized seller's description as a warranty,¹⁰⁸ but it also discussed the doctrine of mistake,¹⁰⁹ and, as indicated above, the case is further subsumable under the doctrine of (negligent or innocent) misrepresentation.¹¹⁰

In a Danish case decided in 1968 the High Court found no defect in an antique writing desk even though the seller had *advertised* the desk as having belonged to a famous author (Oehlenschläger). Because seller had expressed some uncertainty regarding origin during the subsequent negotiations, buyer was held to have accepted the risk that the description might not accord with actual fact.¹¹¹

So, we cannot always frame our promissory problem in simple terms. We face interrelated issues of terminology and substance:

*Butcher Shop.*¹¹² Seller offers her butcher shop (realty, good will & all) to Buyer for a stated price. Buyer insists that the contract memorialize the parties' discussions regarding turnover, so the following provision is added:

“Regarding turnover, Seller informs that the value of last year's meat purchases for resale was appx. 90,000 Crowns”.

After Buyer moves in, at considerable expense, he learns that the actual value of last year's purchases was in fact only 70,000 Crowns.

The subject matter of this sale is a going concern. Seller tells Buyer it's going at one rate; in fact, it is (/has been) going slower. Clearly, the information conveyed by Seller is incorrect. And though we do not attach legal significance to every such piece of factual information,¹¹³ the incorrect information conveyed here clearly has some significance for Buyer's evaluation of the subject matter of this sale. And so, we might well conclude that Seller's performance is defective: she is in breach. In Scandinavia at least, we could base our conclusion on the general rule, for the rule for the sale of moveable goods (*løsøre*) is the same as the rule for contracts in general.¹¹⁴ And although moveable goods are not the “predominant factor” in this particular

108. Pursuant to the then-applicable (pre-UCC) provisions of the Sale of Goods Act (SGA).

109. Regarding mistake as failure of a basic assumption (*forudsætning*), see *infra*, part 3.4.

110. See Prosser & Keeton, *Torts* at 761 with note 76. Regarding the overlap between misrepresentation and warranty, see *infra*, this part re. *Butcher Shop*.

111. See UfR 1968.194 Ø.

112. Based on UfR 1963.280 H.

113. See Gomard, *Obligationsret*, 1. del at 158.

114. See Gomard, *Obligationsret*, 1. del at 159 (“Ydelsen anses i tilfælde af misinformation som mangelfuld”).

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deal, both American and Scandinavian courts often use such “provisions as a basis for the application of similar rules in analogous cases.”¹¹⁵

UCC § 2-313(1) (a) provides: Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

The *Butcher Shop* Seller makes an “affirmation of fact ... which relates to the [shop]”. And because this affirmation becomes part of the writing at Buyer’s request, we have good reason to subsume it as “part of the basis of the bargain”.¹¹⁶ As with the UCC basis-of-bargain requirement, reliance seems central to the reasoning of the Danish Supreme Court in (the real) *Butcher Shop*.¹¹⁷

And yet, American lawyers may hesitate to try *Butcher Shop* as if it were a sale of goods. And applying the general rules, they are likely to make a formalistic conceptual distinction: whereas a *promise* to install pipe or to improve a nose concerns the *future*, a statement or *representation* about the volume of a business concerns only the *present or past*.¹¹⁸

The *Restatement Second* defines “contract” in terms of promise,¹¹⁹ and it has been asserted that the (American) law of contract is confined to promises – at least in the sense that contract law is concerned with exchanges that relate to the future and not with present exchanges.¹²⁰ But as regards the contract type of greatest

115. Farnsworth, *Contracts* at 33-34 (re. American law). See also UCC §§ 1-202 & 2-105 and, e.g., *Valley Farmers’ Elevator v. Lindsay Brothers Co. v. Martin Steel Corp.*, 398 N.W.2d 553, 2 UCC Rep. 2d 1495 (Minn. 1987) (hybrid sale/service contract, “predominant factor” test).

Re. KBL I, see Nørager-Nielsen & Theilgaard, *Købeloven* at 17 & 34-35. The CISG also adopts a predominant element test: see *infra*, part 6.2.1.

116. See UCC 2-313. *Accord* (re. Norwegian theory): Augdahl, *Obligasjonsret* at 173-74: “om uttalelsen forekommer i selve kontrakten [min fremhævelse] ... gjenstanden – medmindre forbehold er tatt – ikke ansees som *kontraktsmessig*...”

117. See UfR 1963.280 (“henses særlig til, at post 12 i skødet ... blev medtaget efter ønske fra appellantens side, efter at indstævnte havde udtalt, at hun ikke kunne svare for omsætningen ...”).

118. See Farnsworth, *Contracts* at 236 and Atiyah, *Introduction* at 145. Regarding the related Common distinction between promises and present transfers, see text *infra* with note 120.

119. See *Restatement 2d* § 1: “A contract a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty”. Compare *id.* § 2(1): “A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made”.

120. See Farnsworth, *Contracts* at 4 with note 6.

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practical importance, the contract for the sale of goods, American law “attaches implied obligations of a promissory character to exchanges involving only present transfers ...”¹²¹ And “it is a mistake to assume that a statement in the form of a representation cannot also be an implied promise ...”¹²²

Indeed, since the contract of sale is paradigmatic of general contract principles, we ought not distinguish key UCC warranty concepts from the general contract rules.¹²³ The law of warranty – what it is that supplier/seller has agreed to do/sell – seems destined to play an increasingly important role in general American contract law.¹²⁴

If we apply the UCC rule to *Butcher Shop*, we cannot be content with Scandinavian conceptions of defect and breach. For if we reason by analogy, we must conclude that this Seller expressly “warrants” that the shop “conform to the affirmation”: the UCC rule turns a mere affirmation into a liability-loaded express warranty. The corresponding Scandinavian statute does not force us to move directly from affirmation of fact to liability in damages: we need not make a conceptual leap from express promise to implied warranty (*stiltiende garanti*);¹²⁵ as in *Fake Fiddle*, we can choose to stop at the half-way house of defective performance.¹²⁶

121. *Id.* at note 6, citing UCC § 2-106. As regards goods, the more detailed the contractual specifications, the more likely that American lawyers will prefer the language of “non-conformity”: see Speidel, Summers & White, *Commercial and Consumer Law* at 1016.

122. Prosser & Keeton, *Torts* at 656. Compare (re. English law) Treitel, *Law of Contract* at 253 (re. “representations” which can become contractual *terms*).

123. Compare Farnsworth, *Contracts* at 4 with note 6 (distinction between exchanges that involve promises and those that involve only present transfers “not as sharp as might at first appear”, e.g., UCC seller’s implied warranties) and *id.* at 875 with note 8 (re. damages).

124. Accord: *Restatement 2d* § 333 (warranties of assignor) and Farnsworth, *Contracts* at 778 with note 9 (implied warranties of assignor for value “resemble those of a seller of goods”). See also Farnsworth, *Implied Warranties* and *infra*, part 2.5 regarding the implied warranty of “workmanlike service”, etc. Regarding the increasingly significant “implied warranty of habitability” see, e.g., *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987) and *Caceci v. Di Canio Construction Corp.*, 72 N.Y.2d 52, 526 N.E.2d 266 (1988) (both involving defective foundations).

125. Whether warranty (liability) will be implied will often turn on the concrete situation. See Dahl & Møgelvang-Hansen, *Garantier* at 17 (“afhænger af kontraktens indhold ...”) and Hagstrøm, *Selgerens ansvar* at 775 (“ikke samstemmighet om hva som skal til for at selgeren skal pålægges garantiansvar”). See also Hellner, *Kontraktsrett* at 314.

126. See, e.g., Augdahl, *Obligationsrett* at 401 with note 13 re. Retstid. 1905 s. 401 (contract stated property’s forest acreage as “appx. 2000”, in reality: 619; buyer held entitled to proportionate price reduction but not damages, in that seller had made no true “guarantee”).

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In the Common law system, to promise is to “warrant”, and vice-versa:¹²⁷ the very fact that a promise is broken unleashes the remedy of damages for breach.¹²⁸ Therefore, an American lawyer might prefer to attach a legal label which does not itself trigger promissory liability; he might choose to characterize the *Butchers Shop* Seller’s statement as a “mere misrepresentation”: simply an untrue statement of fact. His attention then turns from the content of the contract itself to the process by which it came to be. “In a system of contract law based on supposedly informed assent, it is in the interests of society as well as of the parties to discourage misleading conduct in the bargaining process.”¹²⁹ Scandinavian law does not make a formal distinction between representation and promise, but in both systems, the rules governing validity/*ugyldighed* and the rules of defective/*mangelfuld* performance overlap.¹³⁰ Buyer can either (1) challenge the validity of the agreement, or (2) allege breach.¹³¹

Although the recipient of the *Butcher Shop* business seems entitled to “satisfaction of some kind”,¹³² we ought not attempt to pigeonhole his supplier’s statement as (mis)representation or warranty without regard to the remedial *consequences* of a given subsumption.¹³³ Perhaps we should speak of a *hybrid* conception, a “warranty-representation”.¹³⁴ Given the question “warranty or not”, the realist in America or Scandinavia might quite rightly

127. See, e.g., *Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.* [1965] 1 W.L.R. 623 (mileage information held to be a warranty). Compare Speidel et al., *Commercial Law* at 1016 (the more detailed the contractual description, the less likely the warranty label).

128. See generally *infra*, part 4.4.1.1.

129. Farnsworth, *Contracts* at 232. Compare Gomard, *Obligationsret* 1. del at 126 (“Aftaler, som den ene part på utilbørlig måde har narret eller presset den anden ind i ...”).

130. See Gomard, *Obligationsret* 1. del at 127 and White & Summers, *Uniform Commercial Code* at 18-19 (re UCC 1-203: “probably the most important single provision in the Code”).

131. See Gomard, *Obligationsretten* 2. at 145 and compare Prosser & Keeton, *Torts* at 734-35. See also Knapp, *Problems* at 432 (re. contract/tort overlap for even innocent misrepresentation). Regarding validity and the bargaining process, see generally *supra*, part 2.1.

132. See Prosser & Keeton, *Torts* at 656.

133. Regarding the unconvincing English decisions which distinguish on the basis of the parties’ (supposed) *intentions*, see Atiyah, *Introduction* at 152-54.

134. See Prosser & Keeton, *Torts* at 656.

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reply: “why do you ask”? To get out of the deal,¹³⁵ to reimburse expenses lost, or to put the promisee in his expectation-position?¹³⁶

Under either (breach or misrepresentation) conception, and under either system, the fact that Seller’s affirmation, as evidenced by the express, written term, is clearly part of the deal should effectively remove the volume of the business from the *caveat emptor*-realm, so that Buyer can rely on what Seller says he’s getting. Another sales analogy: since “no reason exists for treating land sales differently from the sale of commercial goods insofar as application of the doctrine of caveat emptor is involved ... a purchaser of land may rely on material representations made by the seller and is not obligated to ascertain whether such representations are truthful”.¹³⁷

The fact that the conceptual pigeonholes at the promissory end of the contractual texts are tied to those at the remedial end gives us good cause to reconsider promise in non-classical terms: all contractual commitments need not be equal. Given the varying character of the statements and the contractual contexts we have seen thus far, we might start thinking about *degrees of commitment*. If we subsume as promise at this end of the text, but only reluctantly so (e.g., in *Fake Fiddle*, because the written contract is a sales slip and/or because the seller is an octagenarian), we might do well to recall our hesitation later when we re-open the case in remedial terms.

Query: does the seemingly weak promise in *Fake Fiddle* justify a damages claim for direct loss (understood as the contract/market differential) far in excess of a claim for “indirect” loss (moving expenses) in *Butcher Shop*? Substitutionary relief (monetary compensation) does not come packaged only under the conceptual label of damages (*erstatning*), and compensation for lost value is not always measured in contract/market terms.¹³⁸

135. See Farnsworth, *Contracts* at 233 and 242 (for this purpose, sufficient to show that the misrepresentation was *either* fraudulent *or* material and compare Ussing, *Aftaler* at 182: “Naar Adressaten *uden Uagtsomhed* har fremkaldt Løftet ved at give urigtige Oplysninger ... og han saa eller burde indse, at hans Oplysninger var bestemmende for Løftet, bør Løftegiveren vistnok som Hovedregel kunne Kræve sig løst fra Løftet ...”). See *generally infra*, part 4.3.1.

136. See *generally infra*, part 4.4. Re. UfR 1963.280, see *infra*, part 4.4.3, text with note 317.

137. See Farnsworth, *Contracts* at 247 with note 5, citing *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980) regarding the requirements for *avoidance* by reason of misrepresentation. See also *Spiess v. Brandt*, 41 N.W.2d 561, 230 Minn. 246 (1950) (seller of a summer resort made direct misrepresentations of expenses and profits to prospective purchasers).

138. Regarding the (Civilian/Scandinavian) proportionate reduction in price (*forholdsmæssigt afslag*), see *infra*, part 4.3.2.

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We may bifurcate the issues to clarify our exposition, but we cannot pigeon-hole our way to a just result.

*Fake Portrait.*¹³⁹ Merchant-Seller offers merchant-Buyer a portrait painted by Famous Artist. Buyer insists on a “guarantee”, and Seller endorses the bill of sale “*guaranteed genuine*”. Buyer later discovers that the portrait is a fake.

With or without an attached guarantee, the failure to supply goods as described is a breach of the duty to deliver goods which conform.¹⁴⁰ But the guarantee-label is not necessarily excess contractual baggage. It surely serves to elevate this merchant-Seller’s description beyond a “mere misrepresentation” and counter any *caveat emptor* suggestion. And more than nail down the promise itself, the guarantee may affect the degree of commitment as it relates to monetary relief. It may serve as the very basis of contractual liability. The recipient (/promisee) who gets a guarantee is somehow placed in a “better” position, especially in Scandinavia, where money damages are not automatically awarded as a substitute for the performance promised.¹⁴¹ At least within limits of statutory limitation, the guarantee may affect both the nature and degree of the contractual commitment.

Under the *Danish KBL* (I) § 54, all claims relating to defects are *time-barred* unless made within *one year* of the date of delivery unless seller has assumed a greater obligation. In UfR 1960.1048 H (the real *Fake Portrait*) the Supreme Court of Denmark held (5-2) that the buyer could not advance a claim against the guarantor-seller after the expiration of the statutory period.¹⁴² As in American law, a guarantee of authenticity is not a warranty which automatically extends to “future performance”.¹⁴³

139. Based on UfR 1960.1048 H.

140. See Gomard, *Obligationsretten* 1. del at 159-60 (“Såfremt oplysninger ... er urigtige, anses salgsgenstanden i almindelighed som mangelfuld, selv om oplysningerne ikke har karakter af en garanti, men alene er en faktisk meddelelse”. See also the *Danish KBL* (I) § 76. Accord Augdahl, *Obligationsretten* at 174 with note 13 (“Hvorvidt beskrivelsen er garanteret eller ikke, spiller altså forsåvidt ingen rolle”).

141. In Scandinavian doctrine, the term “guarantee” (*garanti*) is traditionally used to denote a promise, whereby the promisor assumes the economic risk of a contingency which would otherwise fall on the promisee. See Dahl & Møgelvang-Hansen, *Garantier* at 15 and 18. Accord: Hagstrøm, *Selgerens ansvar* at 776 (shifting the risk allocated by the supplementary sales rules).

142. See also Gomard, *Obligationsretten* 1. del at 164-65.

143. See *Wilson v. Hammer Holdings, Inc.*, 850 F.2d 3 (1st. Cir. 1988).

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The one-year KBL limitation has been the subject of considerable criticism and debate, but the suggestion that durable goods ought to survive the one-year period by *implication*¹⁴⁴ has not been accepted by the Danish courts.¹⁴⁵ In Sweden and Norway, the corresponding KBL (I & II) limitation period is two years. Only Finland's new *Köplag* provides no special limit as regards notice for defects.¹⁴⁶ Under the American UCC, the statute of limitations for contracts of sale is *four years*.¹⁴⁷

It is possible to subsume the *Fake Portrait* situation under a *validity* heading.¹⁴⁸ And, at least where plaintiff can establish conduct bordering on *scienter*, it may be possible to circumvent the time-limits of statutes of sale.¹⁴⁹

In sales of goods and contracts in general, the guarantee is evidence of the degree of commitment:

Missing Easement (I).¹⁵⁰ S contracts to sell Blackacre (real property) to B for Dkr. 200,000. The contract contains a clause whereby "S guaranties B that there is free and unimpeded vehicular access to the entire property without any limitation whatsoever". In fact, vehicular access is partly impeded (an easement is missing).

This failure to supply real property which conforms to the contract seems at least as clear as the *Butcher Shop* breach. Surely the guarantee provided here serves to take this Seller's commitment out the twilight zone of a mere misrepresentation. But a slight change of the facts may provoke other forms of formalism:

144. It is at least clear that an *express* guarantee-period (eg.) re. durability serves to displace the supplementary rule in KBL (I) § 54.

145. Re. guarantees of durability, etc. *see* Dahl, *UfR B* 1981 at 157-58 and *compare* Gomard, *Obligationsret*, 1. del at 164.

146. *See* Sevón, Wilhelmsson & Koskelo, *Huvudpunkter* at 111.

147. Regarding UCC § 2-725 as a bar to breach of warranty for defective or nonconforming goods, *see, e.g.*, *Navistar International Corp. v. Hagie Manufacturing Co.*, 662 F.Supp. 1207, 4 UCC Rep 2d. 1096 (N.D.Ill. 1987).

148. Regarding Swiss law, *see* Heiz, *Validity of Contracts* at 643-44 ("Self-portrait of Van Gogh" proved a copy; plaintiff could cancel on theory of material "error").

But compare *Firestone & Parson, Inc. v. Union League of Philadelphia*, 672 F.Supp. 819, 3 UCC Rep. 2d 499 (E.D.Pa. 1987), affirmed 833 F.2d 3 (3rd Cir. 1987) (action characterized as one for rescission based on "mutual mistake" barred by UCC § 2-725).

149. *See, e.g.*, (re. *Fake Furniture*) parts 2.5 and 4.3.1.

150. Based on UfR 1930.198 VL. For a fuller presentation of the facts, *see infra*, part 4.2, text with note 32.

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Missing Easement II. Same facts as *Easement I*, except that Seller's guarantee of access is not provided for in the written contract but made orally to Buyer (in the presence of witnesses) during the preliminary negotiations.

In *Easement II* the agreement is in writing, but the access-guarantee is not included therein. Is the easement part of the deal nonetheless? An American lawyer might suggest that before we interpret the "promise" in a case like *Easement II*, we ought to determine "the subject matter to be interpreted",¹⁵¹ and to make this determination, he would employ the (uniquely Common) rule of parol evidence: "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing ..."¹⁵²

"The function of the parol evidence rule, which may bar extrinsic evidence if there is a writing, should not be confused with that of the [Common law's] *statute of frauds*, which may make a contract unenforceable if there is no writing."¹⁵³ A contract for the sale of an interest in land – like that in *Missing Easement (I & II)* – remains "within" current American and English versions of the Statute.¹⁵⁴ There is no Scandinavian analog to the statute of frauds, but recording requirements make written agreements for the sale of realty a practical necessity.

This is hardly the place to re-probe all the "subtle difficulties" of parol evidence.¹⁵⁵ Some points require our attention, however, and the first is that those who *would not* admit the easement evidence in *Easement II* are simply saying that, as a matter of substantive law, the written contract is a complete memorial of the parties' agreement, so evidence (about preliminary negotia-

151. See Farnsworth, *Contracts* § 7.2.

152. Corbin, *Contracts* § 573.

153. Farnsworth, *Contracts* at 447, note 1.

154. See Farnsworth, *Contracts* at 397. In 1954, England narrowed its Statute of Frauds to cover only (1) land contracts and (2) suretyship agreements: see Treitel, *Law of Contract* at 136. The American Statutes remain applicable, *inter alia*, to agreements "not to be performed within one year" (see Farnsworth, *id.* § 6.4) and contracts for the sale of goods for a price of \$500 or more: see UCC § 2-201.

155. See Calamari & Perillo, *Contracts* at 99 and Farnsworth, *Contracts* at 448 – both quoting Thayer, *A Preliminary Treatise on Evidence at Common Law* 390 (1898).

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tions, etc.) which lies outside its “4 corners” is simply irrelevant:¹⁵⁶ according to this view, there is no easement in the Blackacre contract, nothing to “interpret”, no duty, no breach.¹⁵⁷ Those who *would* admit the parol evidence in *Easement II* would argue either (a) that the contract of sale is not a “complete integration”, and that the evidence of the prior negotiations does not contradict but merely supplements the contract,¹⁵⁸ or (b) that there is a binding, “collateral agreement” with respect to the easement.

Easement II is much like *Mitchill v. Lath*,¹⁵⁹ the “leading collateral agreement case.”¹⁶⁰ In *Mitchill*, the buyer of a farm pursuant to a written contract secured seller’s oral promise to remove an unsightly ice house across the road. Because the written integration was held complete, it could not be supplemented by the alleged collateral (oral) agreement. In this kind of case, the collateral agreement approach may obscure the real issue: partial contra complete integration.¹⁶¹ If there is no “integration”, the parol evidence rule does not apply.¹⁶²

In a more recent Swedish case,¹⁶³ Buyer sued to rescind a signed contract for the sale of land which expressly provided that Buyer was obligated to familiarize herself with applicable zoning regulations.¹⁶⁴ Prior to signing, however, Seller had assured Buyer that the area was not zoned as a “green area” (with the attendant risk of eminent domain) – information which proved incorrect. *Held*: for the Buyer; the prior oral negotiations rendered the written contract provision ineffective.¹⁶⁵

If we give the *Easement II* Buyer the benefit of the doubt and admit the evidence tending to prove the existence of the access-guarantee, we follow Corbin’s realistic advice. And this would surely sit well with Scandinavian observers whose law is not burdened with technical rules as to the admissibility of evidence. Perhaps we would all feel relieved. But before we heap more criti-

156. See Atiyah, *Introduction* at 162.

157. See Farnsworth, *Contracts* at 450-51.

158. See *id.* at 455.

159. 247 N.Y. 377, 160 N.E. 646 (Ct. App. 1928).

160. Farnsworth, *Contracts* at 459.

161. See *id.* with note 43 at 459, indicating that not even the authors of the UCC understood this problem. See also *infra*, text with note 169.

162. See, e.g., the unintegrated statement in NJA 1952.184 H (“*Waterproof*”), discussed *infra* in parts 4.4.4.1 and 5.2.

163. NJA 1980 s. 398.

164. *Id.* (“Det ankommer på köparen att själv göra sig underrättad om innehållet i gällande planbestämmelser.”)

165. *Id.* at 406 (“vad som förekommit vid de muntliga överläggningarna ... anses ha medfört att [bestämmelsen] satts ur spel”).

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cism on a rule already in bad repute,¹⁶⁶ we might look at the problem in alternative terms.

Missing Easement III. Same facts as *Easement II*, except that the contract provides:

“This contract expresses all the terms and conditions of the agreement. No verbal understanding will be recognized by either party hereto.”¹⁶⁷

By adding a merger clause to their private agreement, the parties simply spell out that which the rule of parol implies by law: “the rule simply affirms the primacy of a subsequent agreement over prior negotiations and even prior agreements ...”¹⁶⁸ Either Buyer is bound by his written promise (merger clause and all), or the contract isn’t worth the paper on which it’s written ... unless, that is, there’s a collateral agreement.¹⁶⁹

“There is scarcely any subject more perplexed than in what cases and to what extent parol evidence shall be admitted.”¹⁷⁰ These cases pose real problems, but the American experience seems to indicate that the solutions do not lie in the mechanical application of formal rules (*begrebsjurisprudence*), not even in those seemingly rare instances where the proper application of the rule seems clear.

California is one jurisdiction which has dropped the old rule; in this state, since 1968,¹⁷¹ “it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parol evidence.”¹⁷² The recent *Trident* decision¹⁷³ provides a striking example: to finance construction of an office building complex, plaintiff loaned \$56,500,000 from defendant at 12.5% interest. The promissory note provided: “[m]aker shall not

166. See Farnsworth, *Contracts* at 451.

167. *Compare, eg.*, UfR 1985.334 H (“Foranstående indeholder hele aftalen vedrørende levering og service mellem kunden og A/S. Ingen tidligere aftaler desangående, herunder evt. betingelser i ordrer indsendt af kunden, forpligter A/S”).

168. Farnsworth, *Contracts* at 451.

169. See *id.* at 459-60 (collateral agreement rule applicable only where there is a binding express merger clause). *Compare supra*, text with note 161.

170. *Id.* at 452, quoting the court’s lament in *Thompson v. M’Clenachan*, 17 Serg. & Rawl. 110, 113 (Pa. 1827).

171. The year the California Supreme Court decided *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 442 P.2d 641, 69 Cal.Rptr. 561 (1968).

172. *Trident Center v. Connecticut General Life Insurance Co.*, 847 F.2d 564, 569 (9th Cir. 1988).

173. *Id.*

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have the right to prepay the principal amount hereof in whole or part” for the first 12 years (of the 15 year term). When interest rates began to drop, plaintiff sought to refinance the loan. Although the detailed contract documents signed by these 2 “highly sophisticated business people ... squarely address the precise issue”, plaintiff was held “entitled to introduce extrinsic evidence that the contract means something other than what it says.”¹⁷⁴

“The [English] Law Commission has examined the “parol evidence rule” and concluded that insofar as any such rule can be said to have an independent existence, it does not have the effect of excluding evidence which, in the interests of justice between the parties, ought to be admitted ... such authorities as appear to support the existence of a rule excluding evidence which ought otherwise to have been admitted would be distinguished by a court today and not followed.”¹⁷⁵

Getting rid of the rule may be a step in the right direction,¹⁷⁶ but this does not rid us of the underlying problem:

Basement Business (Revisited).¹⁷⁷ Lessee is interested in renting Lessor’s basement for the purpose of manufacturing radio parts. Lessor’s agent orally advises Lessee that the premises have been approved for such commercial purposes, and a lease is signed. After Lessee moves in, at substantial expense, he learns that the basement is not – and cannot be – approved for commercial use.

During pre-contractual negotiations, the parties to a contract often exchange information about the subject matter of the proposed agreement – information which is not incorporated among the terms and conditions of the subsequent written “memorial” of the deal.¹⁷⁸ As we have seen, American law uses the parol evidence rule to brand at least some such information “irrelevant”: if the lease in *Basement Business* is seen as a complete integration, the agent’s “statement” (to use a neutral term) is not part of the deal; so, even assuming that the agent made the statement – which he (incontrovertibly) did – why waste time listening to the irrelevant?

174. *Id.* at 565.

175. *Halsbury’s Monthly Review*, March 1986 at 12-13, quoting *The Parol Evidence Rule*, Cmnd 9700, Law Commission 154.

176. *But see Trident*, *supra* note 172, at 569: “Pacific Gas [*supra* note 171] casts a long shadow of uncertainty over all transactions negotiated and executed under the law of California.”

177. *See supra*, part 1.2 re. J.D. 1943.92.

178. *See Gomard, Obligationsret* 1. del at 158.

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There is a delicate conceptual relationship between parol evidence and the warranty-representation hybrid: “the parol evidence rule does not exclude evidence to show mistake, misrepresentation, or duress as a ground for avoidance,”¹⁷⁹ but “the qualification admitting evidence of fraud does not extend to evidence of express warranty, and presumably it does not extend to other nonfraudulent misrepresentations.”¹⁸⁰ “The question frequently arises, whether the action for misrepresentation can be maintained when the promise itself cannot be enforced.”¹⁸¹ American “courts are far from unanimous on the resolution of these problems.”¹⁸²

In Scandinavia, all relevant evidence is admissible,¹⁸³ but, as in Corbin’s realistic version of parol evidence, we must often examine a given piece of evidence to determine its relevance. Not every pre-contractual statement will be held to survive a subsequent written memorial,¹⁸⁴ and the problem of whether incorrect information is a breach is also a Scandinavian problem. As a starting point at least, we might even draft a Scandinavian version of the rule: parol evidence is *prima facie* irrelevant:¹⁸⁵ *i.e.*, presumably irrelevant, yet freely admissible.¹⁸⁶ We prefer the uncertainty of a flexible approach to the embarrassment inherent in overly rigid rules.¹⁸⁷

179. Farnsworth, *Contracts* at 465. Regarding the warranty-representation hybrid, *see supra*, text with notes 133-34.

180. *Id.* at 466.

181. Prosser & Keeton, *Torts* at 763-64.

182. Calamari & Perillo, *Contracts* at 287. *Compare* Prosser & Keeton at *id.* (“tendency is clearly to treat the misrepresentation action as a separate matter from the contract”).

183. *See* (re. Danish law) Gomard, *Civilprocessen* at 321.

184. *Accord*: Gomard, *Obligationsret* 1. del at 158 (“En del af sådanne oplysninger er uden retlig betydning, men en del tillægges betydning”).

185. *Accord*: Ussing, *Aftaler* at 428 (“naar skriftlig Kontrakt er oprettet ... Formodning for at foreløbige Vedtagelser ... falder bort ...”) and Gomard, *Kontraktret* at 52 (“fortolkningsregel”).

186. *See* Ussing at *id.* (“det staar hver af Parterne frit for at oplyse, at der under Forhandlingerne er givet ham Tilsagn om en anden Retsstilling en den, der er angivet i den skriftlige Kontrakt ...”) and Gomard at *id.* with note 5 regarding the questionable validity of some merger clauses in Scandinavian law.

187. *Accord* Honnold, *Uniform Law* at 143 (parol as “an embarrassment for the administration of modern transactions”). Regarding American precedent *see* Corbin, *Contracts* § 585 at 483-85: “In a majority of these [cases in which the promisee is assured of the present existence of some quality or condition of a subject matter] the testimony was held not admissible; but in a somewhat larger minority it was held otherwise. These decisions are not necessarily in conflict ...”

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So we Scandinavians admit the evidence. What does it tell us? Lessor describes one thing but delivers another. If there were a “Restatement” of general contract law in Scandinavia, it would restate the principle of the law of sales: the leasehold may be deemed defective because the agent has supplied incorrect information,¹⁸⁸ provided the statement can be deemed significant for lessee’s evaluation.¹⁸⁹

As in *Fake Fiddle*, we must pay heed to *caveat emptor*. A recipient cannot always close a deal in reliance on the supplier’s information.¹⁹⁰ Buyers, lessees, and other recipients must still “beware” in certain situations: in *Basement Business*, Lessee, instead of relying on the (incorrect) information supplied by Lessor’s agent, could have ascertained the true state of facts on his own. If so, perhaps the agent/supplier’s statement ought not be seen as part of the “deal”.

“Significant” ... or not? (Bargain) “basis” ... or not? Even in Scandinavia, we hesitate to complete the subsumption. For one thing, we may feel more confident about the kinds of statements in *Missing Easement (II & III)* and *Butcher Shop*. In *Easement*, the supplier gives his recipient an especially good reason to believe that the access-statement is part of the bargain: because that supplier guarantees his statement of fact, we have a clear manifestation that a contractual commitment has been made.¹⁹¹ In *Butcher Shop*, the supplier’s performance-obligation, though not expressly guaranteed, is spelled out within the “4 corners” of the contract. In *Basement Business*, however, we are asked to supplement the written memorial with a naked statement, non-guaranteed parol evidence. Under the classical view, we must come up with a yes-or-no answer. Defective performance or *caveat emptor*.¹⁹² Others might

188. See Gomard, *Obligationsret* 1. del, 159-60.

189. See text *supra* with notes 94 and 101-03 re. the Danish KBL (I) § 76, subsec. 1(1): a provision which, though applying directly only to consumer sales, is seen as codifying principles applicable to sales contracts generally.

190. See Gomard, *Obligationsret* 1. del at 168 and compare Atiyah, *Introduction* at 162 (parol test is whether reasonable man would rely).

191. Remedially speaking, we might describe the guarantee of (present) access as “a manifestation of intention to act in the future”: a sort of “promise” or express *commitment* to perform (or pay damages for breach if the statement proves incorrect). Compare *supra*, this part, text with note 119, re. *Restatement 2d* § 2(1).

192. Compare Gomard, *Obligationsret* 1. del 168-69 with note 52.

be willing to split the remedial baby,¹⁹³ to achieve substantial justice, arbitration-style.

Basement Business is not a one- or two-issue case, not just about parol and the promissory “subject matter to be interpreted”. Lessee has *relied* on Lessor’s statement, first (“directly”) by signing the lease and paying a month’s rent, and then (“collaterally”) by making expenditures in preparation for the new business to be conducted on the premises. And since these are fundamentally different kinds of reliance, leading to both *direct* and *indirect* (/consequential) kinds of loss, perhaps no single promissory standard or standard measure of remedial relief will do the job which justice requires.¹⁹⁴

If we find no promise, there can be no breach, no contractual remedies: no right to cancel (*hæve*) and/or claim damages for breach. But, according to both Scandinavian and American law, the rights of the recipient in *Basement Business* are not solely dependant on a binding promise, and (eg. under American law) mere misrepresentation could still entitle the recipient to a non-contractual remedy like rescission¹⁹⁵ and/or damages in tort.¹⁹⁶

Rules and conceptualizations like parol evidence, caveat emptor, and express warranty may help our articulation of the issues, but they do not provide us with solutions to concrete cases like *Basement Business*. Before we draw the line – promise or not – we look to the consequences of a sharp subsumption. For if there are degrees of promissory commitment and degrees of justifiable reliance, why not then degrees of remedial relief?¹⁹⁷

193. See Vinding Kruse, *Ejendomsøk* at 148. Accord: Augdahl, *Obligasjonsrett* at 170, providing a restitutionary remedy in an example much like *Mitchell*, *supra* note 159 (“A selger en byggetomt av sin eiendom til B. Under salgsforhandlingene uttaler A at han ikke kommer til å bebygge tomten foran. Og B legger for dagen at det nettop er for utsiktens skyld han kjøper. Noget *tilsagn* om at der ikke skal bygges blir imidlertid hverken forlangt eller avgitt ... Om nå A allikevel bygger på tomten foran ... må B kreve et avslag i kjøpesummen ... vil ikke bruke ordet *mislighold* ...” [dele fremhævet her]). Compare *id.* at 173 (“i selve kontrakten ... ikke *kontraktsmessig*”). Regarding proportionate price reduction, see *infra*, part 4.3.2.

194. Regarding reliance, see generally *infra*, part 4.4.3. The consequential loss in *Basement Business* is discussed *infra* in part 5.4.

195. Re. rescission for even non-fraudulent, material misrepresentation, see Farnsworth, *Contracts* at 243 and (re. termination) *infra*, part 4.3.

196. See Farnsworth, *id.* at 242 with note 1.

197. See *supra*, part 2.1. (text with note 51) and compare (e.g.) part 5.3 (ad *Used Generator*) and 5.4 (ad *Basement Business*).

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2.4. Supplementing Express Promise: Custom and Usage

The agreement itself, the bargain of the parties in fact, is found not only in their express language but also by implication, from other relevant circumstances.

*Half-Inch Staves.*¹⁹⁸ Seller and Buyer (both merchants) enter a written contract for the delivery of wooden staves, “1/2 inch by 28 inches”. The thickness of the staves delivered exceeds ½ inch.

Prima facie, this looks like another *Reading Pipes*, another easy case of promise and breach. Seller promises to deliver “1/2-inch staves”. If we follow the golden rule of literal interpretation, we assume that half an inch means just what it says. And though “there may be microscopic deviations which business men and therefore lawyers will ignore”,¹⁹⁹ if some staves delivered measure between 9/16 and 5/8 of an inch, Seller seems to have breached his contractual word. And yet, we cannot always abide by the golden rule.

An American court has compared the belief in “the immutable meaning of words” with “the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a page torn out of the psalter and put in dough ...”²⁰⁰

For “by recognized trade usage, particular figures may be given a different meaning, as in a baker’s dozen ...”²⁰¹ So, if I promise a dozen doughnuts and deliver but twelve, I may well be in breach. The custom of the trade is part and parcel of the parties’ private legislation, an implied part of the private agreement, in both American and Scandinavian law.²⁰² Thus even where the supplier promises specific results, we may have to venture outside the “4 corners” of the contract to determine its content.²⁰³ And so we sometimes reject the golden rule. The “bargain in fact” is more complex.

198. Based on *Arcos Ltd v. Ronaasen & Son* [1933] AC 470.

199. *Id.* at 479, *per* Lord Atkin.

200. *Trident Center v. Connecticut General Life Insurance Co.*, 847 F. 2d 564, 569 (9th Cir. 1988), citing *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*: *See supra*, part 2.3, text with note 171.

201. *Ibid.*

202. *See supra*, part 2.1, text with notes 53-54. The parties can, however, “contract out” of custom by express agreement: *see* Atiyah, *Introduction* at 182.

203. Regarding the result in *Arcos*, *see infra*, part 4.3.1, text with notes 126-127.

*Fertilizer Purchase.*²⁰⁴ Buyer signs a 3-year contract with Seller promising to buy: “no less than 31,000 tons of fertilizer per year”. (The contract also states the dollar-price per ton and includes an escalation clause.) When fertilizer prices drop sharply, buyer fails to order the contract-minimum.

To be sure, Buyer’s failure to order the literal contract-minimum looks like a failure to perform his contractual obligation. But just as we cannot isolate the express terms of the contract from the terms implied by the general custom of the trade, we cannot ignore the particular custom of these parties, their own “course of dealing”,²⁰⁵ So if the pattern of prior business dealings between Seller and Buyer is one of “repeated and substantial deviation from the stated amount or price ...” of fertilizer, then the language of the parties is one thing, the “bargain in fact” quite another. If so, the failure to order the contract-minimum is not a breach.²⁰⁶

Under the UCC, even “parol” evidence is admissible as to usage of trade, course of dealing, etc.²⁰⁷

In a recent Danish case,²⁰⁸ Canadian Seller S and Danish Buyer B entered a 3-year contract (expressly made subject to “Canadian law”) whereby S was obligated to sell and B to buy 3000 tons of paper pulp annually (at a price to be fixed).²⁰⁹ During the first year of the contract, B (in the face of falling demand for its paper products) accepted only 751 tons of pulp. When S sued for breach, B claimed that long-term, international agreements for the supply of paper pulp are customarily regarded as mere “reservation contracts”, with buyers free to take lesser amounts

204. Based on *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 9 UCC Rep 977 (4th Cir. 1971).

205. See UCC § 1-205(1): A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

A course of dealing is given greater weight than a “usage of trade”. See, e.g., *Schulze & Burch Biscuit Co. V. Tree Top, Inc.*, 831 F.2d 709, 4 UCC Rep 2d. 641 (7th Cir. 1987) (arbitration clause, contained in seller’s 9 previous confirmation forms, not material alteration pursuant to UCC § 2-207: discussed *infra*, part 4.4.6).

206. See *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 9 UCC Rep 977 (4th Cir. 1971) (reversed and remanded for failure to admit evidence of course of dealing and usage of trade).

207. Regarding UCC § 2-202, parol evidence, and trade usage, see White & Summers, *Uniform Commercial Code* § 2-10.

208. UFR 1983.280 S.H.D.

209. The contract in UFR 1983.280 S.H.D. contained a provision for fixing the price. (*id.* at 281: “Seller’s announced price and terms ... then in effect ...”).

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than agreed in accordance with reduced needs. B succeeded in convincing the Maritime and Merchant Court to accept its allegations regarding a branch custom permitting reduction of expressly agreed quantities.²¹⁰ S's own written reply to an EC Commission competition law inquiry seemingly conceded buyer's version of its obligation.²¹¹

Trade custom and usage are often decisive not only as regards performance and breach but also as regards the nature and scope of remedial relief.

*Contagious Abortion.*²¹² Seller sells her cow to Buyer, with an express "guarantee: free from Contagious Bovine Abortion".²¹³ Buyer then gives Farmer a similar guarantee and places the cow in Farmer's stable. The cow proves Contagious and infects Farmer's herd. When Farmer sues Buyer and recovers the value of the herd, Buyer sues Seller for an equivalent amount.

Seller has made a promise of good health, but this is no simple promissory obligation. For one thing, because the case involves injury to property, we've crossed the conceptual boundary-line between contract and tort (/product liability).²¹⁴ But we may still have one foot on the contractual side of the line, in particular because the guarantee indicates a particularly strong degree of contractual commitment. Many would say that Buyer ought somehow to be better off with the guarantee than without it, that Buyer need not beware, and that his actions in reliance²¹⁵ are justified by the express guarantee.

But in a comparative context we cannot assume that we all have the same interpretation of a given guarantee or that we are all "better off" to the same degree.²¹⁶ For if the local custom of this particular trade is no compensation

210. *See id.* at 286 ("lagt til grund, at der inden for branchen er kutyme for nedsættelse af de aftalte mængder"). The Court found B liable for breach, but it reduced the amount of damages via reference to the custom.

211. *Id.* at 285 ("as a practical matter, feel free to take less than ...").

212. Based on UfR 1941.61 H.

213. *Compare id.* at 62-63 ("garanteret ... fri for smitsom Kastning").

214. *See Dahl, Produktansvar* at 172 (re. Carstens commentary to UfR 1941.61 H in TFR 1941.228).

215. (Making the purchase without independent veterinary advice and letting the cow mingle with a healthy herd).

216. *Compare Dahl & Møgelvang-Hansen, Garantier* at 66 ("guarantee" ought to improve consumer's legal position) and Fried, *Contract as Promise* at 23 with note * (defining warranty as a promise to be responsible).

for “indirect loss”, then the guarantee does not justify reliance, and the Buyer in this locale relies at his peril.²¹⁷

Moreover, when we ask whether a guarantee makes a promisee “better off”, that question cannot be answered without reference to the supplementary rules which apply absent agreement.²¹⁸

2.5. Contractual Duty “Implied in Law”.

To determine the scope of contractual obligation, we always start with the “bargain in fact”. At some point, however, we may sense that the agreement itself begins to “give out”.²¹⁹ When this happens, we need to read the contract in a larger kind of context: the total legal obligation.

*Horseshoe Lost.*²²⁰ Rider is on his way to marry Heiress when his horse loses a shoe. Rider asks Blacksmith to replace it, and Blacksmith goes to work. Blacksmith does a bad job, the horse becomes lame, and Rider loses a fortune.

Like *Reading Pipes*, *Horseshoe Lost* is a case about a contract, and the same set of general contract rules covers the installation of everything from pipes to horseshoes. Yet lawyers are likely to distinguish cases like these. Compared with *Reading*, the contractual bones in *Horseshoe* seem bare. To supply the flesh, we fill in the gaps. First, we call Rider’s request an offer. We say Blacksmith accepts just by going to work.²²¹ Of course, blacksmiths don’t generally give something for nothing (nor should riders expect them to), so we fill in this gap with a reasonable price.²²² Last but not least, we determine the nature of Blacksmith’s duty: we say that he must do what one would expect a professional to do in exchange for a reasonable price: a good, professional, reasonable job.

217. Re. UfR 1941.61 H, see *infra*, part 5.3 (*Contagious Abortion*).

218. *Accord*: Hagstrøm, *Selgerens ansvar* at 776 (“Garanti betyr at selgeren har påtatt seg en risiko som ville ha ligget på kjøperen etter deklarasjonsregler”).

219. See generally Fried, *Contract as Promise* (re. the failure of the will theory).

220. Versions of this classic hypothetical are discussed, *inter alia*, in *British Columbia Sawmill Co. v. Nettleship*, L.R. 3 C.P. 499 (1868) (see Corbin, *Contracts* § 1000 at 26-27) and in *Wartzman v. Hightower Productions, Ltd.*, 456 A.2d 82 at 85 (Md.App. 1983).

221. In American law, this was traditionally referred to as a “unilateral” contract: see Farnsworth, *Contracts* at 110.

222. See, e.g., Corbin, *Contracts* § 566 and compare KBL (I) § 5.

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In both American and Scandinavian law, we make a contract out of nearly nothing at all. Without express promise, representation or usage of trade. But do we use the same means? Is the distinction between the Common law's "implied term" and the Civil law's *droit supplétif* as important here as it is said to be elsewhere?²²³

Resorting to implied terms "is in line with the tendency of English Courts to refer all the consequences of a contract to the will of those who made it."²²⁴ But even for the modern English observer, this seems no more than a formalistic fiction: "if you asked the parties what they intended, they would say that they never gave it a thought ..."²²⁵ And though the implied term is still used in American law, we no longer pretend that the judge's role is pure interpretation.²²⁶ Nowadays, in a case like *Horseshoe*, Americans might well agree with the Scandinavian view: it is the rule of law, not the law of the parties, which serves to fill the contractual gap. Where the agreement "gives out", judicial construction takes over.²²⁷ And for both the American and Scandinavian judge, the gap-filling standard is reasonable care.²²⁸ And under both systems the failure to provide reasonable care will be labeled negligence. Thus, if we look at *Horseshoe* in terms of monetary relief, we see that, in both systems, liability in damages must presuppose negligent breach (*cul-pøs misligholdelse*).²²⁹

This seems to conflict with the conventional wisdom, that Common contractual liability is strict, no-fault liability, whereas only Civilian systems base such liability on fault or negligence.²³⁰ For the Common observer, the idea

223. See generally Nicholas, *Rules and Terms* and compare Lawson, *Fault and Contract* at 303 with note 41 (citing David, *Les contrats en droit anglais*: "beware of distinguishing sharply").

224. Lord Radcliff in *Davis Contractors v. Fareham Urban Dist. Council*, [1956] A.C. 696, 728.

225. Lord Denning, M.R. in *Greaves & Co. v. Gaynham Meikle* [1975] 1 W.L.R. 1095.

226. See Farnsworth, *Contracts* 520-21: "Terms supplied by courts for such cases are called "implied" or occasionally "constructive" terms."

227. See *id.* 524 (justice should guide, not "hypothetical expectations or fictitious intentions ..."). Accord, Atiyah, *Introduction* at 19: "It is not the actual agreement or intention of the parties which matters, but what they are deemed, as reasonable men, to have agreed or intended ..."

228. See Farnsworth, *id.* 529 with note 15 ("to make such efforts as are reasonable ..."). Accord: Gomard, *Obligationsret* 1. del at 155.

229. See *infra*, part 4.4.4.3 regarding fault, foreseeability and the extent of liability in *Horseshoe Lost*.

230. For definitions of these terms, see Lawson, *Fault and Contract* at 300.

of a contract law based on fault sounds suitable for “a nation of peasant proprietors”, but not for contracts between “substantial businessmen or corporations, who ... should be left to take care of themselves”.²³¹

But the conventional Common wisdom surely overstates the case. For one thing, “[c]ontractual fault can ... be understood in ways that lead to a blurring of the distinction between fault and no-fault liability.”²³² And in neither American nor Scandinavian law do we find a clear line between contract and tort. Blacksmith’s duty to do his best coincides with the French obligation of means (*de moyen*), and the Common law insistence on no-fault in contract may only reflect a preoccupation with situations like *Reading Pipes*: those involving an obligation to produce a result (*de résultat*).²³³ American contract law is not really no-fault: the contract texts play down, but by no means ignore, the fault factor; and the texts on tort, which are full of fault, also cover contractual problems like *Horseshoe Lost*.²³⁴

American law does pay great attention to obligations *de résultat*: the paradigm transaction is the contract of sale. But just as an obligation to provide a service (eg., shorten a nose) can be a promise to deliver concrete results, it seems that the converse may also hold true: even the *de résultat* law of sales seems to abound with *de moyen*-type problems.

Rotten Boat.²³⁵ Buyer B is a landlocked welder with seafaring ambitions. He contacts Seller S, a recently retired fisherman, who would like to sell his 73 year-old wooden boat, “Headache”, which he rebuilt for fishing some 30 years ago. S describes the vessel as “a good boat” and invites B to inspect. B sticks a penknife in the hull, finds the asking price (100,000 Dkr.) reasonable, and signs a standard deed of sale (“as is”

231. See Lawson, *id.* at 305 (contrasting French and English attitudes to liability and fault).

But see Treitel, *Law of Contract* at 631-34 (presenting an un-Common, doctrinal picture, distinguishing among various “standards of [contractual] duty” (strict, fault, etc.) and subsuming these “bases” of liability under the heading of “what amounts to breach”: *id.* at 626). Compare Gomard, *Obligationsretten* 2 at 131 (“Overlappingen [af delikts- og kontraktserstatningsrettens ansvarsgrundlagsregler] er en følge af, at de to regelsystemers grundbegreber, misligholdelse og delikt, delvis overlapper hinanden”).

232. Bergsten & Miller, *Proportionate Reduction* at 257.

233. See Lawson, *Fault and Contract* at 301 (citing Buckland and McNair) and compare Farnsworth, *Contracts* at 529 with footnote 15. But see Atiyah, *Introduction* at 188 (distinguishing between contract types).

234. See Prosser & Keeton, *Torts* at 658 with note 8, citing the 1372 “borderland” case of the smith who lamed the horse while shoeing it: Y.B 46 Edw. II, f. 19, pl. 19.

235. Based on UfR 1982.609 H.

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clause and all). B later discovers that, due to extensive dry-rot, the boat is worth far less than the price paid.

We have seen that an express promise to install *Reading Pipe* means just what it says. And if a “Stradivarius” is promised, not even an immaculate Guaranius will do. But in *Rotten Boat*, Seller delivers just the “Headache” he promised. Surely the “good boat” puff is no promise of good quality or the absence of dry rot.²³⁶ On the contrary, the boat is sold “as is”, codifying by contract the traditional rule of, *caveat emptor*: what you see is what you get.²³⁷

But we must also consider the more modern trend: *caveat venditor*. In Scandinavia, a supplier’s performance is defective not only when it does not conform to the express language of the agreement, but also when it does not conform with the recipient’s justifiable expectations.²³⁸ These days, Buyers are generally entitled to expect an ordinary degree of usefulness and value – ordinary goods.²³⁹ And we need not resort to the fiction of the “implied term”,²⁴⁰ for we have a better, more objective expectation-index: the price paid. Reasonable goods command a reasonable price, and vice-versa. Providing bad goods for (good) money is out of the ordinary, a breach of the duty imposed by law.²⁴¹ And at least where the price-quality gap is deemed “substantial”, not even an express, “as is” disclaimer will displace this Scandinavian rule of law.

According to the letter of the rule in KBL I § 48, gap-filling assumptions about “reasonable goods” are effectively disclaimed in sales at auction, and the principle was once extended (by analogy) to other “as is” contracts.²⁴² But

236. Neither American nor Scandinavian jurists would be likely to attach significance to “good boat”-puff. See White & Summers, *Uniform Commercial Code* at 329 and Gomard, *Obligationsret* 1. del at 158.

237. The Latin label belies the rule’s English origin: see Nørgaard-Nielsen & Theilgaard, *Købeloven* at 830; compare Ussing, *Køb* at 142 (“tradition, der går tilbage til romersk ret”).

238. See Gomard, *Obligationsret* 1. del at 141 (“forventninger (forudsætninger), som realkreditor efter kontraktssituationen med føje har til ydelsen ...”).

239. See Ussing, *Køb* at 123 (“den brugelighed og værdi, som er den almindelige ...”).

240. Compare *id.* at 124 (“om to fornuftige og retsindige parter ville have betinget en vis egenkab i kontrakten, hvis de skulle have taget stilling til spørgsmålet ...”).

241. Accord: Gomard, *Obligationsret* 1. del at 140 (ad “krav om betaling af fuld pris for en sekunda vare ...”).

242. Except in extreme cases of fraud, etc.

even before the advent of KBL II § 19, the courts had taken a more pro-buyer position.²⁴³

Because American courts have been reluctant to police agreements against substantive unfairness,²⁴⁴ such Scandinavian thinking might seem extreme at first blush. But Common courts do sometimes “police” substance,²⁴⁵ their alleged distaste for paternalistic laws notwithstanding. At least where the seller has the status of “merchant”, some UCC standards look quite Scandinavian: a UCC merchant is held to impliedly warrant that his goods are merchantable (*inter alia*) ‘of fair average quality ... fit for ordinary purposes ...’²⁴⁶ And, as in Scandinavia, when there is “doubt as to what quality is intended, the price ... is an excellent index of the nature and scope of his obligation ...’²⁴⁷

But let the *Rotten Boat Buyer* beware: “some citadels of *caveat emptor* remain”.²⁴⁸ Some Americans might be reluctant to subsume this boat’s Seller as a warranting merchant²⁴⁹ and unwilling to ignore the express clause: “as is”.²⁵⁰ And even in Scandinavia, we must ask: ought Buyer’s casual inspection “in the circumstances .. have revealed” the dry rot?²⁵¹ Ought the inspection

243. *Accord*: Gomard, *Obligationsret* 1. del at 146 (“forbehold som [disse] har ofte kun ringe eller ingen selvstændig betydning ved siden af Købelovens § 47 ...”). UCC 2-316(3) (a) is also sometimes read as an elastic clause, particularly as regards a merchant’s disclaimer directed against a consumer-buyer: see White & Summers, *Uniform Commercial Code* at 448.

244. See Farnsworth, *Contracts* at 212.

245. *Id.* at 213.

246. § 2-314.

247. See UCC § 2-314, Official Comment 7. American courts may be hesitant to apply the “implied warranty” label to used goods, but even in these cases, the price paid seems an “excellent index”.

248. Calamari & Perillo, *Contracts* at 290 (regarding sales of real property in Massachusetts). *But compare*, e.g., the recent *Tusch* and *Caceci* decisions cited *supra*, part 2.3 in note 124.

By the mid-1980’s the Danish law in this area had become so pro-buyer as to prompt a counter-revolution, perhaps signaling a partial return to *caveat emptor*.

249. UCC § 2-104(1) defines *merchant* as a person who deals in goods of the kind or otherwise holds himself out as having knowledge or skill peculiar to the practices or goods involved (...). The Scandinavian Sales Acts (KBL) define and provide special, protectively mandatory rules for sales by a merchant to a consumer: “consumer sales”.

250. *But compare* *Alpert v. Thomas*, 643 F.Supp. 1046, 2 UCC Rep. 2d. 99 (D.Vt. 1986) (“as is” clause overridden by oral assurances that colt was “breeding sound”).

251. See UCC § 2-316(3)(b) and *compare* KBL (I) § 47: “burde være opdagede”. The new rule in KBL II § 20 is more in line with the UCC rule.

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- or perhaps even the common knowledge that old boats are sometimes rotten
- outweigh the seeming imbalance of the exchange?

Who should win cases like *Rotten Boat*? Or should we make the move back from contract to status and ask who should win *this case*: the marginal merchant²⁵² making his very last deal or the sprightly young seaman who can live and learn? Which of these innocent parties should bear the risk?

In UfR 1982.609 H (the real *Rotten Boat*), the Danish Supreme Court, in a split (3-2) decision, found for the Seller: no breach, no remedy. The majority emphasized: that, taking the ship's age into account, Buyer must have recognized the possibility of rot; and that Buyer had made (only) a cursory inspection of the ship but had not demanded a guarantee from Seller. The dissenting justices would have granted Buyer a reduction in price.²⁵³ The *ratio* contains no mention of the contractual 'as is' clause.²⁵⁴

We cannot coldly interpret the bargain in fact. The obligation "to give" is not just *de resultat*.²⁵⁵

Fake (Renaissance) Furniture.²⁵⁶ Norwegian Buyer sees a Renaissance-style furniture set in Dealer's Copenhagen shop and agrees to pay the asking price (with nothing being said about the quality or origin of the goods). When the goods arrive in Norway, Buyer is disappointed to discover that the set is Renaissance in style only: a cheap imitation, camouflaged to look like the real thing.

In the Scandinavian law of contract, goods are deemed defective, *inter alia*, when a seller *neglects* to provide information which he ought to have and which is relevant for buyer's evaluation of the goods;²⁵⁷ in a UCC context,

252. Compare White & Summers, *Uniform Commercial Code* at 345 ("considerably broader class than the man on the street might think").

253. See *infra*, part 4.3.2. Compare *Smith v. Stewart*, 233 Kan. 904, 677 P.2d 358, 36 UCC Rep. 1141 (Kan. 1983) (practicing dentist sold buyer used pleasure boat for \$50,000; no liability for extensive dry rot on basis of UCC § 2-314).

254. Compare the facts stated in UfR 1982 at 609 ("Skibet solgtes ifølge skødet, 'således som det nu er og forefindes'").

255. Regarding the distinction between contracts "to do" and contracts "to give" (*eg.*, sell) in Roman and French law, see generally Dawson, *Specific Performance*.

256. Based on UfR 1923.518 H.

257. Compare the consumer-sales codification of this general rule in KBL (1) § 76(1)(3).

“in most cases the question of non-disclosure is of no relevance ...”²⁵⁸ Then again, there is only a thin conceptual line between a merchant-seller’s “implied warranty” and the inference of fault when a merchant neglects to tell what he should know, *i.e.*, that buyer is entering a bad bargain.²⁵⁹

And indeed, American law is riddled with notions of fault. Here we can shift to a procedural mode: if we see Seller’s non-disclosure as a misrepresentation,²⁶⁰ Buyer should be allowed to “undo the transaction”.²⁶¹ Once again, our conceptions of validity/*ugyldighed* and the rules of defective/*mangelfuld* performance seem to overlap²⁶² ... as do our conceptions of fault and no-fault.

*Architect’s Advice.*²⁶³ Acting on Owner’s instructions to cut costs during a factory construction project, Architect selects roof tiles of corrugated aluminum. Because such tiles are unsuitable for a project like this (the roof slopes only 5 degrees), the roof leaks and the tiles must be replaced.

Faced with the issue of whether Architect is in breach, we recall the general, gap-filling rule: Architect’s performance is defective, *inter alia*, when it does not conform to Owner’s justifiable expectations. But, since what is justified depends on the particular contractual situation,²⁶⁴ the general guideline seems of devoid of content.²⁶⁵ So we look to the law regarding contracts of

258. Calamari & Perillo, *Contracts* at 290. See also *id.* with note 88 regarding *consequential damages* for breach of warranty (undisclosed defect equated with foreseeability of consequential loss). Compare (re. sale of real property) *id.* at 290 (in the Massachusetts citadel of *caveat emptor* a seller need not disclose that a house infested with termites, but the modern trend is towards implied warranty of habitability).

259. Compare Hagstrøm, *Selgerens ansvar* 803-04 and see *infra*, part 4.4.3 regarding protection of the *Fake Furniture Buyer’s* negative (reliance) interest.

260. See Calamari & Perillo, *Contracts* at 290 (whether nondisclosure constitutes misrepresentation significant primarily where warranties effectively disclaimed).

261. See *supra*, part 2.3, text with notes 106 and 195. Regarding termination and avoidance, see *infra*, part 4.3.1.

262. Accord: Gomard, *Kontraksret* kap. 4.5 (“Løftgivers valgret”).

For an argument that negligent (though not fraudulent) misrepresentations ought to be subsumed solely under sales headings of breach (*misligholdelse*) as opposed to invalidity (*ugyldighed*), see Gomard, *Obligationsret* 1. del at 127 and Gomard *Erstatningsregler* at 71 (“afskærer ... fra at erklære købet ugyldigt”).

263. Based on UfR 1973.675 H.

264. See Gomard, *Obligationsret* at 141.

265. *Id.* at 152 (speaking of the corresponding formulation in the Danish KBL § 76, subsec. 1(4)).

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service, and the term that American courts are likely to supply is also the rule in Scandinavian law: the recipient of a service is entitled to expect at least good, reasonable efforts: the specialist's professional best.²⁶⁶

Does this mean that the law equates the proverbial "nice try" with full (*be-hørig*) performance?²⁶⁷ Before we answer, we should ask about the remedial motive for posing the question. Consider first the fundamental axiom that "payment and delivery are constructive conditions concurrent":²⁶⁸ Architect's roof-recommendation has no value, and we might not force Owner to pay for it, because "requiring the payment of something for nothing is repugnant to our notions of justice."²⁶⁹ On the other hand, if the bargain-in-fact in *Architect's Advice* is that Owner has purchased a "nice try", then he should be made to pay for even bad results.²⁷⁰

In Danish doctrine, a distinction has been drawn between "result" and "means" type obligations (*resultat/omsorgs-forpligtelser*) with a view toward the obligee's duty to pay for the obligor's performance.²⁷¹ This contrasts with the French *de resultat/moyen* distinction, traditionally drawn with a view towards liability.²⁷²

If our remedial motive for asking about Architect's performance is not Owner's obligation to pay (*/vederlag*), but rather the question of Architect's possible liability for Owner's indirect (consequential) loss, it is not at all clear that our conception of Architect's obligation will (or should) be the same.²⁷³ If Architect's effort is sub-standard, negligent and thus unreasonable, he is in breach, and he may well be liable in damages for the very same

266. See Farnsworth, *Contracts* at 529 ("reasonable" depends, *inter alia* on "the other party's justifiable expectations") and compare Gomard, *Obligationsret* 1. del at 155 ("aftaler med ... specialister om en konsultation forpligter denne til at udøve en god faglig indsats ...").

267. Compare Gomard, *Obligationsret* 1. del at 155 ("Præsteres en god faglig indsats, er aftalen behørigt opfyldt, selv om behandlingen fejler ...") and Farnsworth, *Contracts* at 529 (duty of best efforts clearly more onerous than duty of *good faith*, citing an *express* best efforts clause).

268. In Danish law: "vederlagsforudsætningen" (see *infra*, part 4.3.1).

269. Corbin, *Contracts* § 1337 at 389.

270. Compare, as regards an architect, Gomard, *Obligationsret* 1. del at 156 ("Også den gode, men mislykkede indsats skal honoreres"). But a building contractor's right to payment is conditioned on his presenting a successful "result": see *id.* at 155.

271. See *id.* at 19 & 155-56.

272. See *id.* at 20 with note 5 and 155 with note 36.

273. The real *Architect's Advice* (UfR 1973.675 H, cited *id.* at 155) has nothing to do with *resultatforpligtelser* in the (just stated) Danish sense (*vederlagsspørgsmålet*).

Duty Implied in Law

reason. But just as reasonableness is not the exclusive test of performance, fault need not be the only basis of liability.²⁷⁴

The standards of reasonableness and best efforts are general rules which apply absent agreement. And although *Architect's Advice* is no *Long Nose*, there being no express agreement about the quality of Architect's work, we have yet to consider the sometimes related conception of "implied" (*stiltiende*) agreement. We seek guidance by analogy, in the paradigmatic transaction, the contract of sale:

*Oil Additive (Revisted).*²⁷⁵ Miller's engine needs oil. Seller recommends Brand X. Because the oil lacks a given additive, Miller's engine (and business) grind to a halt.

Supplier knows the particular purpose for which the system is required, and that his Recipient is relying on his skill and judgment to furnish suitable goods. In this situation, Buyer is entitled to expect suitable goods; an implied commitment of goods "fit for such purpose" is part of the deal.²⁷⁶ Under both Scandinavian and American law, the delivery of unfit goods is – at the minimum – breach of implied, promissory obligation.²⁷⁷

UCC § 2-315 provides: Where the Seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded ... an implied warranty that the goods shall be fit for such purpose.

Until recently, the Scandinavian Sales Acts contained no comparable rule, but the advent of the CISG has served as a vehicle to carry this Common law concept to Scandinavian sales. The new rule in KBL II § 17, subsec. 2(2) is, for all intents and purposes, identical with that in CISG Art. 35(2)(b): Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: ... are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract except where ... it was unreasonable for [the buyer] to rely on the seller's skill and judgment ...

274. *Accord*: Gæbler, *Negligence* at 630-31 (distinguishing tort and contract theories of manufacturer's liability).

275. Based on *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971). *See supra*, part 1.1, text with note 9.

276. Regarding the remedial consequences in *Oil Additive*, *see infra*, part 5.4.

277. *Compare* Hellner, *Kontraktsträtt* at 315 ("[*kärnegenskaper*] anses utfäst").

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Now, however paradigmatic be the law of sales, the UCC and KBL rules about defective (non-conforming) performance cannot be transplanted, just like that, to other contract types.²⁷⁸ Only where similar considerations apply should we transplant ideas, by analogy.

In American law, a supplier's implied obligations to provide a *habitable* home and *workmanlike service* are seen as comparable to the implied obligation to provide suitable goods,²⁷⁹ and a building contractor has been said to warrant not only "the skill and care with which he performs his work [but also] the soundness of the materials used therein".²⁸⁰ In Scandinavia, such a contractor is also likely to be "strictly" liable for defective materials.²⁸¹

In American law the implied sales warranties of merchantability and fitness are also readily extended to *product liability* contexts.²⁸² As already indicated, Scandinavian writers tend to keep these cases in a separate (delictual) category.²⁸³ In a leading Danish case,²⁸⁴ Retailer sold Rancher sirup for his cattle. The syrup proved poisonous, leading to the death of all cattle fed with it. In a 6-5 decision, the Supreme Court held Retailer liable without proof of fault on his part. The dissenting judges would have found for the Retailer: they saw no proof that the syrup delivered did not "conform to the contract".²⁸⁵

What are we entitled to expect from the architect: does the law imply fit-for-purpose results absent agreement, absent "something like" a promise.²⁸⁶ Is Architect's recipient entitled to expect a *merchantable design*, which keeps out rain, or just "best efforts"? In *Architect's Advice* we are not asked to

278. See Gomard, *Obligationsret* at 154.

279. See 719 F.2d at 75 (comparing admiralty & sales warranties). Re. the implied warranty of habitability, see citations *supra*, this part, notes 248 and 258.

280. See Farnsworth, *Contracts* at 529, note 15, citing *Gavbis v. Palm*, 201 Md. 78, 93 A.2d 269 (1952) and compare Gæbler, *Negligence* at 633 (regarding liability for negligent failure to perform services in a "workmanlike manner").

281. See Grathe, *UfR B* 1983 at 213. *But see* Hørlyck in *UfR B* 1986 at 115 ("stadig gælder en særlig regel om entreprenørens ansvar for mangler ved materialer, og culpereglen i AB § 22, stk. 1 er således kun gældende for mangler ved udførelsen"). Compare Krüger Andersen, m.fl., *Dansk Privatret* at 486 ("overfortolkning ... at nå frem til et domsstolsskabt krav om culpa ... [f.s.v.a.] materialefejl (dårlige eller uhensigtsmæssige materialer), som entreprenøren har købt hos tredjemand i god tro ...").

282. See generally Prosser & Keeton, *Torts* Ch. 17.

283. Regarding express sales commitments and product liability, compare *supra*, part 2.1 (re *Chickenfeed*, etc.).

284. *UfR* 1939.16 H.

285. See *id.* ("ikke ... bevis for, at Melassen ved Leveringen var i ukontraktsmæssig Stand ...") and *infra* part 5.2., text with note 67.

286. Compare Trolle, *UfR B* 1973 at 323: "Der må nok kræves noget i retning af, at der er lovet at materialet er brugbart, - at der er givet en tilsikring ... [fremhævet her]").

decide the difficult question of whether an architect is liable for hidden defects in carefully chosen materials: indeed, there is nothing wrong with the material chosen in *Architect's Advice*, except that it unfit for the purpose chosen by Architect. As the average tile-layman is surely aware, a nearly flat roof is likely to leak, so this Architect's effort is culpable breach. He is liable under a fault or no-fault theory.

In UfR 1973.675 H (the real *Architect's Advice*) the defendant (architect/engineer) was held liable in damages (including Owner's "indirect" loss: cost of replacement, inconvenience, etc.) The Supreme Court of Denmark affirmed the High Court's finding that defendant recommended the covering without reservation even though he "must" (*måtte*) have been aware of the slope's significance.²⁸⁷ Negligence thus established, there was no need for the Court to say anything about (possible) strict liability, so it did not.

Where an architect in England "commits an error, not of supervision, but of design: [t]here is considerable support for the view that in such case he gives an "absolute warranty" that the resulting structure will be reasonably fit for the owners purpose."²⁸⁸ In *Greaves*, Lord Denning asked: "What then is the position when an architect or an engineer is employed to design a house or a bridge? Is he under an implied warranty that ... it will be reasonably fit for the purpose? Or is he only under a duty to use reasonable care and skill? ... in the present case I do not think we need answer it." The architects were held liable for the defective construction on the basis of a contractual term *implied in fact*.²⁸⁹ There seems only short step from the warranty implied "in fact" by Lord Denning to the kind we often imply "in law".²⁹⁰

Reconsider *Long Nose*:²⁹¹ doctor failed to deliver the promised *result* (a less prominent, more pleasing nose). But some courts are "skeptical about the contract theory [because] doctors can seldom in good faith promise specific results."²⁹² But though the promise to "effect a cure or to bring about a given

287. A formulation covering both actual knowledge and what "ought" to have been known; see UfR 1973.675 at 686.

288. Treitel, *Law of Contract* at 634 (my emphasis), citing *Greaves & Co. Ltd. v. Baynam Meikle & Partners* (1975) 1 W.L.R. 1095, 1101.

289. Under cross-examination, the defendants conceded that it was their "job ... to produce a building which was going to be fit ... Q. That was what you were being engaged to do and that is what you were being paid your fee for? A. Correct." *Id.* at 1100.

290. See *Greaves* at 1099.

291. See *supra*, part 2.2 re. *Sullivan v. O'Conner*.

292. *Sullivan*, 296 N.E.2d at 186.

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result” may be set aside,²⁹³ there remains the delictual theory: liability based on negligence.²⁹⁴

In *Sullivan* (the real *Long Nose*), the court adopted what it called the “middle of the road position”: allowing an action based on alleged contract, but insisting on clear proof.²⁹⁵ Passing this test, plaintiff was held entitled to recover on a reliance theory for out-of-pocket expenditures, worsening of condition, and pain and suffering. In the *Restatement 2d of Contracts* the *Long Nose* paradigm is used to illustrate the new *Hadley*-adjunct of § 351(3) whereby a court may limit (*e.g.* expectation) damages for foreseeable loss in order to avoid disproportionate compensation.²⁹⁶

We jurists cannot talk about everything at once.²⁹⁷ But when we consider the scope and content of promissory obligation, we ought not lose sight of our ultimate objective. “The answer to the question of *Hadley v. Baxendale* ... where shall we stop ... must inevitably be as complex as the answer to the question ... where shall we begin? ...”²⁹⁸

293. *Id.* at 185.

294. *Compare* (regarding liability in Danish tort law for an unsuccessful sterilisation operation) A. Vinding Kruse, *Erstatningsret* at 357.

295. *See Sullivan* at *id.*

296. *See Restatement Second*, Illustration 19 to § 351. The provision is discussed *infra*, part 4.4.5.1.

297. Gomard, *Civilprocessen* at 24 (“ikke muligt at tale om alting på én gang”).

298. Fuller & Perdue, *Reliance Interest* at 85.

PART 3

Excuse

*All the king's horses and all the king's men
cannot put Humpty Dumpty together again ...¹*

3.1. Introduction.

We look to the agreement and we look to the law. And, depending on the mix of operative facts, we often conclude that the promise does bind, that I am under a duty to perform.

But suppose the unexpected occurs: suppose a supervening contingency prevents performance as promised (in whole or part). Suppose I simply cannot keep my contractual commitment. Does my promise continue to bind – *pacta sunt servanda*² – or do I have a valid “excuse” (*undskyldningsgrund*)?³

Faced with this kind of situation, American law, using a distinct conceptual category, asks whether the contingency operates to discharge⁴ the contractual obligation (*/fordringens ophør*). In Scandinavian doctrine, the corresponding question is traditionally posed in terms more narrow than total discharge: Scandinavians ask whether the contingency works as an exemption from liability (*/ansvarsfritagelse*).⁵ Common systems treat impossibility and *force majeure* as affecting the entire obligation; Scandinavian and Civilian systems see these issues as an aspect of monetary remedy: the *basis* of liability for consequential and other loss.⁶

This comparative gap might seem difficult to bridge, but seemingly sharp conceptual distinctions often prove deceptive upon closer analysis. Consider first this set of operative facts:

1. Corbin, *Contracts* § 1326 at 339.

2. See Farnsworth, *Contracts* at 647.

3. See (using this term) Gomard, *Erstatningsregler* at 211. Re. *clausula rebus sic stantibus*, see Hellner, *Kontraktsrätt* at 237 and Augdahl, *Obligasjonsrett* at 142.

4. Or, in the case of a temporary impediment, suspend.

5. See generally *infra*, part 3.2.

6. Accord: Nicholas, *Force Majeure* at 234.

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*Jawboning.*⁷ In 1965 American Manufacturer contracts to build 99 jet planes for Airline for half a billion dollars, delivery to be made during the period 1966-1969. During this period, the war in Vietnam escalates, and the government institutes a policy of “jawboning”: exerting pressure on its suppliers (hereunder Manufacturer) to accord military orders priority over civilian projects. Manufacturer accords such priority, and 90 of Airline’s planes are delivered late. Sued by Airline for consequential damages, Manufacturer cites the following clause in the 1965 contract:

“Seller shall not be responsible nor deemed to be in default on account of delays in performance ... due to causes beyond its control and not occasioned by its fault or negligence, including but not limited to ... any act of government, governmental priorities, allocation regulations or orders ...”

Contractual freedom is the starting point – not only as regards our definition of performance, but also as regards the consequences of non-performance.⁸ And since these parties have passed a (presumptively valid) piece of private legislation on point – a so-called *force majeure* clause – our primary job is simple, “statutory” interpretation.

Whatever our legal education, we read this particular clause to cover the contingency in question: the governmental “jawboning”. And as regards the legal consequences (*retsvirkninger*) of such a contingency, the clause lays down a dualistic approach: (1) Manufacturer is not “in default” of his obligation (to deliver on time), i.e. not in breach, and (2) Manufacturer is not “responsible”, i.e. not liable in damages.

Jawboning involves that species of non-performance known as delay which, as we have seen, is a Scandinavian sub-category of nondelivery.⁹ In this situation, the consequences of the contingency are (1) a *temporary* excuse, a suspension (as opposed to discharge) of the duty to perform, and (2) a temporary exemption (*midlertidig fritagelse*) from liability.

If we choose to emphasize the Common side of the coin, we focus on Manufacturer’s promise, his contractual obligation. We focus on the fact that the obligation is not absolute. Rather, the promise to perform is expressly

7. Based on *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976).

8. Hereunder late and defective performance.

9. See Ussing, *Køb* at 60 and compare UCC § 2-615(a).

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conditioned:¹⁰ “I, Seller, will deliver on time if (and only if) the government does not impose priorities”. If the government intervenes, and I deliver late, I am not in breach.

If we stress the Scandinavian approach, we look not to the promise, but to the liability. Even if late delivery is labelled “breach”, there will be no liability, because liability is disclaimed. We enforce the parties’ remedial agreement by refusing to award Airline damages.

In *Jawboning* both approaches are right; both are covered by the express agreement. In American and Scandinavian law as well, private agreement takes precedence over the supplementary rules of national law. There is no duty and (of course, *ex tuto*) no liability.

The liability part of the contractual clause is subsidiary: *det mindre i det mere*. According to both systems’ legal logic, the issue of whether a promise is expressly conditioned (*betinget*) precedes the problem of remedial relief.

In our interpretation of the *Jawboning* contract, we bypass, for the present, two related issues. The first is whether Manufacturer should be excused even if the war-escalation and resulting jawboning were “foreseeable” at the time of contracting. The second issue relates to the relationship between the private legislation of the parties and the gap-fillers of private (contract) law. Although there is no mandatory American or Scandinavian legislation which precludes the enforcement of a clause like this, some courts in both systems have shown an inclination to interpret similar private legislation in a manner tending to elevate non-mandatory, contractual rules to near-mandatory status.¹¹ Both these issues were raised in the real “Jawboning” case, and both were resolved in the manufacturer’s favor.¹²

Private agreement is one thing; the supplementary rules of law are something else again. And the gap-filling theories seem far apart. The American emphasis is *lex specialis*: the impossibility-problem is dealt with separately because it concerns only a narrow range of operative facts, a special class of supervening events: “Acts of God”, *force majeure*, *vis major*, and the like; and an American might argue that the problem of legal excuse (obligation-discharge or liability-exemption) is distinct from the question of why we impose liability (eg. for consequential loss). A Scandinavian might retort that the failure to see the connection is a conceptual weakness of Common legal thinking.

10. Compare Farnsworth, *Contracts* at 543-48 (nonoccurrence of a condition of an obligor’s duty as discharge).

11. Compare Gomard, *Obligationsretten* 2. hæfte at 161 (“Retspraksis fastholder ... med rette ansvaret ... hvor ikke andet klart fremgår af aftalen ... En vedtagelse om ansvarsfrihed for force majeure opfattes ikke som en fravigelse ...”)

12. See 532 F.2d 957.

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We need not make a definitive choice.¹³ For just as the concepts of discharge from obligation and exemption from liability can stand comfortably side by side in a contractual clause, we can identify key elements of a common, comparative core which unite the diverging conceptions of the supplementary rules.

The structure of the following analysis is inspired by Henry Ussing's emphasis of *impossibility* and *foreseeability* as the key conceptual features of KBL I § 24.¹⁴

3.2. Unforeseeable Impossibility (& Related Impediments).

3.2.1. Impossibility.

Impossibility of performance is a natural place to start, and impossibility is often the key to the case. Consider a classic situation:

*Music Hall.*¹⁵ On May 27th Taylor rents Caldwell's Music Hall at £100 per day for the purpose of giving a series of four grand concerts, starting on June 17th. Taylor invests in advertising, promotion, etc., but on June 11th the Hall is destroyed by an accidental fire, so there can be no concert on June 17th. Seeking compensation for his consequential loss, Taylor sues Caldwell.

Confronted with the catastrophe of June 11th, Caldwell cannot perform. It's physically impossible (*umuligt*).

Here, as elsewhere, we find terminological complications. We need to consider not only what is physically impossible, but also what the law *deems* impossible.¹⁶ Even if the King himself could somehow get all his men to rebuild Caldwell's Hall by June 17th – i.e., even if performance were physically “possible” – it would still be deemed impossible for all practical and legal purposes: some might say “impracticable”. In *American* law, *impracticability* is used not only this way (i.e., as “economic force

13. In somewhat continental fashion, Professor Treitel subsumes the impossibility(/frustration)-issue under a variety of discharge and liability (sub)headings: see *Law of Contract* at 628-634 and Chapter 20.

14. See generally, Ussing, *Køb* § 10.II.A (upåregnelighedsbetingelsen) and § 10.II.B (umulighedsbetingelsen) and Lookofsky, *Fault and No-Fault*.

15. Based on the classic English case of *Taylor v. Caldwell* (1863) 3 B. & S. 826.

16. See KBL (I) § 24 (“muligheden af at opfylde aftalen *må anses* for udelukket ...”).

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majeure’, a sub-heading under the rubric of impossibility),¹⁷ but also as a larger term of art comprising: (a) objective impossibility, (b) economic *force majeure*, and (c) “frustration of purpose”, what Scandinavians would call a “right of withdrawal” (*afbestillingsret*).¹⁸

The American terminology should not be confused with that of *English* law, where *frustration* is the major term of art, comprising (a) objective impossibility,¹⁹ (b) “impracticability”, in the narrow (economic *force majeure*) sense,²⁰ and (c) “frustration of purpose”.²¹

Performance is impossible in *Music Hall*, but there is no relevant contractual clause, no private legislation covering this catastrophe, no agreement like that in the *Jawboning* case which expressly precludes enforcement of the supplier’s promise. So the court must fill the contractual gap. Does the promise still bind?

In Scandinavia, a binding (*gyldig*) obligation is often defined in terms of primary and secondary remedial relief: specific performance (*naturalopfyldelse*) and substitutionary relief in money, damages (*erstatning*).²² To determine whether an obligation is discharged – ceases to bind – we ask whether these (primary and secondary) forms of remedial relief remain available even in the face of a supervening contingency which renders performance impossible. As is natural, Scandinavian (like Civilian) systems look first to their primary remedy: specific performance.

Now although specific performance is the Scandinavian rule, the list of exceptions is long indeed, and one exception deals with those deeds which cannot be done.²³ In Scandinavia at least, we do not insist on impossible performance in a effort to maintain doctrinal purity.²⁴ Impossibility is an exception to the general rule.

So the conceptual hurdle is easy to leap, but Americans need not even make the attempt. Because in American law (and Common systems generally) spe-

17. Compare *Black’s Law Dictionary* at 680: “*Impossibility of performance* ... means not only strict impossibility, but impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved.”

18. See UCC § 2-615, *Restatement 2d* Chapter 11, and *infra*, part 3.4.

19. See Treitel, *Law of Contract* at 648 and 652.

20. *Id.* at 662 (comparing American terminology).

21. *Id.* at 665.

22. See *supra*, part 2.1 (text with n. 4) and Gomard *Obligationsret* 1. del at 45-46 (“debitor forpligtet til opfylde såfremt kreditor har krav på naturalopfyldelse eller positiv opfyldelsesinteresse”).

23. Regarding the rule and its exceptions, see generally *infra*, part 4.2.

24. Compare (re. CISG) Nicholas, *Impracticability* at 5-19 (implying that some Civilian systems take a different view).

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cific performance is an exceptional remedy in the first place.²⁵ And indeed, it would seem that no reasonable court would engage in the futile exercise of trying to make Caldwell perform, make him do the impossible. So we dismiss summarily the proposition that Taylor might be entitled to specific (*/in natura*) relief.²⁶ But we need not therefore discount the idea of monetary relief: the payment of damages is never (legally) impossible, and since Caldwell's promise to rent is unqualified, absolute on its face, we must ask whether Taylor is entitled to substitutionary, remedial relief.²⁷

The clear answer in both American and Scandinavian law is that he is not, because no American or Scandinavian court would read Caldwell's seemingly absolute (unconditional) promise to perform (provide the Hall) as containing any "implied warranty" (*/stiltiende garanti*) regarding the possibility of performance.²⁸ Even in America, where damages for breach is the primary remedy, a legal rule which implied such a warranty, holding Caldwell liable in damages, would run counter to a just "allocation of the risks involved ... the practices and custom of [reasonable] men ..."²⁹ The short lived doctrine of "absolute contracts" has been dead for centuries.

The 1647 English case of *Paradine v. Jane*,³⁰ is generally associated with the doctrine of absolute contracts.³¹ In *Paradine*, a tenant, dispossessed by act of the King's enemies, was nonetheless held liable for rent unpaid. In the course of its decision, the court offered the following *dictum*: "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good ... because he might have provided against it by his contract." But since the tenant's performance of his generic obligation – the payment of rent – remained *possible*, "the decision is *not a precedent* for cases in which a promised performance has become impossible..."³² And in the light of *Taylor v. Caldwell (Music Hall)* decided just 16

25. See generally *infra*, part 4.2.

26. We would not, for example, impose on Caldwell a duty to re-erect the Hall.

27. See Lawson, *Fault and Contract* at 302, indicating the continued influence of the "hard line" in modern English law: "since the only remedy for breach of contract at common law is an award of damages, which can indeed be claimed in any case ... we cannot say that a contract is *automatically* discharged if performance becomes impossible."

28. See Gomard, *Obligationsretten* 2. hæfte at 139 ("almindelig stiltiende garanti for sin evne eller mulighed for at opfylde indgåede aftaler kan ikke pådømmes enhver debitor").

29. See Corbin, *Contracts* § 1325 at 338.

30. Aley 26, 82 Eng. Rep. 897 (K.B. 1647).

31. See Treitel, *Law of Contract* at 648.

32. 6 Corbin on *Contracts* § 1322 at 331 (my emphasis). As Corbin (*id.* at 330-31) points out, *Paradine* is rightly seen as a *frustration of purpose* case: see *infra*, part 3.4.

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years later, the famous *Paradine* dictum “must ... be regarded as merely an inaccurate generalization.”³³

So, doctrinal subtleties aside, we can describe the legal effect of the Hall’s accidental destruction in a unitary set of comparative terms: the Taylor/Caldwell contract is deemed discharged: the private obligations created by the parties come to an end (*fordringerne ophører*).³⁴ Taylor’s promissory duty to rent the Hall ceases to bind³⁵ because of the material change in circumstances, the failure of a basic assumption (*bristet forudsætning*).³⁶ And Caldwell is no longer bound to pay the agreed rent, simply “because requiring the payment of something for nothing is repugnant to our notions of justice.”³⁷ Impossibility is a valid (legal) excuse for non-performance: the whole deal is off. Caldwell’s promise no longer binds, so non-performance is not breach. And so, although the liability side of the *force majeure* problem dominates doctrine outside the Common law realm, the concept of discharge by reason of impossibility is hardly at odds with the Scandinavian theory of contractual obligations.

The Scandinavian concept of performance-risk (*ydelsesrisiko*) addresses only the problem of specific performance,³⁸ but relief from the duty to perform specifically and relief from liability (in damages) are often measured by similar standards.³⁹

In Common law language, Caldwell is not in breach, simply because breach

33. Compare Gomard, *Erstatningsregler* 31-32 and (re. *Taylor*) *id.* at 36-37.

34. *Accord*: Ussing, *Obligationsretten* § 44.III.A.

35. Compare (re. specific sales) Gomard, *Obligationsret* 1. del at 40 (“Forpligtelsen falder bort, jfr. Købelovens § 23”).

36. See *Restatement 2d* § 263 (cited *infra*, this part) and compare Gomard, *id.* at 40 (comparing *bristede forudsætninger* & “frustration”). See also Augdahl, *Obligationsrett* at 144 with note 1 (referring to the German/Scandinavian doctrine’s founding fathers: Windscheid, Möller, Ussing, etc.) and at 154 (“Virkningen av den relevante bristende forutsetning ... er oftest at løftegiveren er helt fri”). Regarding the related problems of “right of withdrawal” (*frustration of purpose*, *afbestillingsret*) and “mistake”, see *infra*, part 3.4 and (re. termination) part 4.3.

37. Corbin, *Contracts* § 1337 at 389. Compare Skal 1 at 64 (“En ydelse, der ikke præsteres, kan ikke kræves betalt ...”).

38. See Gomard, *Obligationsret* 1. del at 46 (“spørgsmålet, om en kontrahents forpligtelse til at præstere sin ydelse vedbliver at bestå eller om den *ophører* ... [fremhævet her]”).

39. *Accord*: Augdahl at 158 (“de to spørgsmål i større eller mindre utstrekning besvares efter samme retningslinjer”) and Gomard, *Obligationsretten* 1. hæfte at 41-42.

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is defined as the failure to perform *without legal excuse*.⁴⁰ Even if we characterize Caldwell's non-performance as a "breach" of his contractual obligation,⁴¹ the result is the same, for both parties: Caldwell need not perform or pay damages, and Taylor will not be forced to pay something for nothing.⁴² The Common law method of reaching the undisputed result here bears the advantage of maintaining parity between the juridic and everyday conceptions of "breach" of promise (*kontraktsbrud*).⁴³

§ 261 of the *Restatement 2d of Contracts* provides:

"Where ... a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged ..."⁴⁴ And § 263 of the *Restatement* defines the *Music Hall*-type of basic assumption: "If the existence of a specific thing is necessary for the performance of a duty, its ... destruction ... is an event the non-occurrence of which was a basic assumption on which the contract was made."

In Scandinavian law, we find no codified analogs to these general rules of contract, but KBL I § 23 provides a clear sales analogy: a seller who incurs a specific obligation is liable for delay or non-delivery unless he can establish that he is not guilty of culpable breach. The American analogue of § 23 is UCC § 2-613 which provides: "Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party ... if the loss is total the contract is avoided ..."⁴⁵

It is important to note that we are dealing with the accidental destruction of the necessary thing: for if the Hall had burned because Caldwell (or Taylor,

40. See Knapp, *Problems* at 865, Treitel, *Law of Contract* at 628, and Lookofsky, *Kontraktsansvarsgrundlag*: note 38.

41. See Gomard, *Obligationsret* 1. del at 30 ("kontraktsbrud eller misligholdelse"), entitling the recipient to a "bilateral remedy" (*gensidighedsbeføjelse*: see *infra*, part 4.1), notwithstanding the fact that the contract is usually deemed cancelled (*hævet*) – and the contract thus brought to an end (*ophør*) – automatically. See *id.* at 62 (noting that a buyer of insured goods may have an interest in not cancelling the contract pursuant to § 54 of the Danish Insurance Contracts Act).

42. Under American law, he will be entitled to recover any part payment made under restitutionary principles: see *generally infra*, part 4.3.2.

43. *Accord*: Gomard, *id.* at 30 ("almindelig sprogbrug").

44. Compare the German BGB § 275: "debtor is relieved from his obligation to perform if the performance becomes impossible because of a circumstance for which he is not responsible and which occurred after the creation of the obligation ..." (translated in von Mehren, *Civil Law* at 1193).

45. See *also infra*, this part, re. KBL (I) § 24 and UCC § 2-615.

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for that matter) had put a match to it, we would have a different situation and subsumption entirely.⁴⁶

In *Taylor v. Caldwell*, the fire was “[a]pparently caused by a careless plumber, who had left an unattended flame in the roof...”⁴⁷ (Whether such a *plumber* would be liable for breach of *his* contract is, of course, quite another (consequential) question).⁴⁸

Music Hall is a classic case. But the accidental destruction of a specific thing is not what such cases most often concern.

Lightning Bikes (Revisited).⁴⁹ On January 1, Retailer phones Middleman to order “10 Lightning-model bikes”. Middleman promises delivery at his warehouse on Jan. 3. On Jan. 2 he sets 10 bikes aside, but later that day lightning strikes the warehouse, the bikes are destroyed, and Middleman does not deliver.

Middleman makes an express promise. We characterize his obligation as generic, because we *interpret* it to mean – not the 10 bikes he set aside but – any 10 bikes of the Lightning kind. So, Middleman’s excuse does not even qualify as a case of “subjective impossibility”. There is no legal excuse, because performance as agreed, delivery of 10 “Lightning” bikes – which we assume are available somewhere – is still clearly possible.⁵⁰ If we subsume *Lightning Bikes* in the codified rules of national sales we say: (in Scandinavia) that the “possibility” of Middleman’s performance is not “precluded”; (in America) that performance as agreed has not been made “impracticable”. There is no excuse. But the sales statutes tell us much more than this:

KBL I § 24 provides that, in generic sales, the seller is *liable in damages* for delay or non-delivery, even absent fault attributable to him, unless he has disclaimed liability or the possibility of performing the contract must be deemed precluded by circumstances not of such a nature that

46. See *Restatement 2d*, Comment d to § 261 (event caused by obligee amounts to breach; if event due to fault of obligor, § 261 does not apply).

47. Treitel, *Law of Contract* at 648, note 7.

48. See, e.g., *infra*, part 5.3 (*Roof Fire*).

49. See *supra*, part 2.2.

50. See Ussing, *Køb* at 73. *Accord*: Corbin, *Contracts* § 1327 at 342 (no discharge though contractor expected to perform in particular manner or place).

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that the seller should have taken them into account at the time of the conclusion of the contract, such as the accidental destruction of all goods of the kind or lot concerned, war, prohibition of import, or the like.⁵¹

UCC § 2-615 provides, *inter alia*: “Except so far as a seller may have assumed a greater obligation ... (a) Delay in delivery or non-delivery in whole or in part by a seller ... is *not a breach* of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable ... governmental regulation ...”

A conceptual distinction returns to the fore. The UCC rule tells us that when (as in *Lightning*) performance is still possible (“practicable”), non-performance is breach: a fact which itself says nothing about substitutionary relief. But according to the KBL rule, the fact that performance is still possible (“not precluded”) leads us straight toward remedial relief: liability in damages.

The same result would surely be reached pursuant to KBL II which deals with the “exemption”-issue using concepts borrowed directly from the CISG. Under this new Scandinavian rule, the Seller in *Lightning* would not be relieved of liability simply because non-performance can *reasonably be avoided*.⁵²

But we may again be looking at a distinction without a difference, because according to American law, damages is the primary remedy, the one automatically available for *every breach*.⁵³ In both systems, the possibility of performance as promised is tied to the protection of what Scandinavians describe as the “positive interest” (expectation liability). And there is another important part of the common core: under either system, impossibility of performance, without more, will not always suffice as a legal excuse.

51. My translation here of the Danish version of the Uniform Act is similar to the Unidroit translation of the corresponding Swedish provision in *Unification of Law Yearbook 1961* (Rome 1962) at 203. Emphasis added here and in the corresponding UCC rule below for purposes of comparison.

52. Regarding the new KBL II rule of “control liability”, *see infra*, part 3.3.

53. *See generally infra*, part 4.4.1.1.

3.2.2. Foreseeability.

Factory Fire.⁵⁴ Buyer places an order with Factory for 21,000 kilos of prime cotton yarn. A fire at Factory destroys the German machines necessary for production, and the outbreak of war prevents their replacement. When Factory does not deliver, Buyer covers, securing an alternative supply at a higher price, and sues Factory for the difference.

Should we compare the supplier's obligation here with the generic one in *Lightning Bikes* or with the specific one in *Music Hall*? The evidence may point in opposite directions. On the one hand, Factory's obligation is indeed generic – at least in the technical sense that the obligor has the freedom to choose which bundles of cotton to deliver; the goods are not “identified” to the contract.⁵⁵ On the other hand, the deal involves the delivery of the product of a specific factory.

Quite apart from the nature of the obligation concerned, *Factory Fire* seems closer to the *Music Hall* situation. Unlike *Lightning Bikes*, the destruction of this supplier's means of production makes performance as agreed impossible.⁵⁶ And we do not require the supplier in *Factory Fire* to assume the role of the Middleman in *Lightning Bikes*: Factory is not a middleman, did not contract like one, and need not – indeed must not – procure substitute goods from an alternative source.⁵⁷

But impossibility of performance is not always enough, particularly if we think in terms of substitutionary relief: the payment of damages is always a possibility. Obviously, we would not want to let a supplier off the damages hook when impossibility of performance is no fault but his own. Nor would we excuse one who incurs a contractual obligation with the knowledge that he will not be able to perform. But these clear-cut cases are not the only exceptions to the impossibility-rule. For there is no sharp line between what we, especially the merchants among us, know and what we ought to know, no sharp line between fault and risk.

So the American rule which applies in *Factory Fire* excuses only if “performance as agreed has been made “impracticable” by the occurrence of a

54. Based on UfR 1915.218 S.H.D. The case is cited in note 1 of the High Court's decision in UfR 1928.796 (*Birdsong*: see *infra*, this part), presumably as a relevant “precedent”.

55. Compare *supra*, part 3.2.1 at note 45 re. UCC § 2-613.

56. See UfR 1915 at 219: “umuliggjort”.

57. See *id.* (“kan ... ikke ... paahvile Sælgeren ... at stille en lignende Vare til Dispositon”).

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contingency (/fire) the non-occurrence of which was a basic assumption (/forudsætning) on which the contract was made ...”⁵⁸ And although the basic assumptions-test is an open-ended one which defies mechanical subsumption, we can apply the *Music Hall*-rule,⁵⁹ because, in American law, the continued existence of a specific thing necessary for performance is ordinarily a basic assumption.⁶⁰ So we handle *Factory Fire* like *Music Hall*: we discharge the contract. In so doing, we equate one supplier’s specific obligation (to provide a particular hall) with another generic one (to provide a given quantity of non-ascertained goods). We assume that these suppliers did not assume these risks.

Factory Fire can also be solved by applying UCC § 2-613 by analogy, in that this case and the destruction of “goods identified” represent clearly analogous situations.⁶¹ The *Restatement Second* is the general rule, and § 263 is directly on point.⁶²

When American courts classify the non-occurrence of a supervening contingency as a “basic assumption”, they indicate that – as in Scandinavia – contracting parties are not deemed to assume unforeseeable (/upåregnelige) risks. But in rephrasing the American standard of basic assumptions in terms of foreseeability, we are speaking figuratively about what a contracting party “ought to take into account”, speaking realistically about the reasonable allocation of contractual risks: “the issue becomes one as to the fairness and justice of excusing performance in the light of the circumstances affecting the parties at the time they made their contract.”⁶³

Only KBL § 24 employs terminology traditionally associated with foreseeability,⁶⁴ but the UCC basic assumptions-test is an essentially similar standard: if the

58. See *supra*, part 3.2.1 (text following note 51) re. UCC § 2-615 and compare *Restatement 2d* § 261 (at *id.* with note 44).

59. See *Restatement 2d* § 263 at *id.*

60. Comment b to *Restatement 2d* § 261 (emphasis added). Compare von Eyben & A. Vinding Kruse, *Formueretten* at 88 (“forudsætninger, som normalt eller typisk knytter sig til de enkelte kontraktsarter ...”).

61. See Corbin, *Contracts* § 1339 at 396 (destruction of a factory compared to destruction of a crop).

62. The facts of Illustration 2 to *Restatement 2d* § 263 are essentially similar to those of UfR 1915.218 (*Factory Fire*). Compare: UCC § 2-615, Comments re. failure of source of supply.

63. *L.N. Jackson & Co. v. Royal Norwegian Government*, 177 F.2d 694, 697 (2d Cir. 1949). Accord: Corbin, *Contracts* § 1331 at 358 (risks allocated by the court in accordance with requirements of justice).

64. See translation *supra*, part 3.2.1 at note 51 (“should have taken into account”).

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occurrence of a contingency is foreseeable, its non-occurrence cannot be a “basic assumption”;⁶⁵ so “it and its consequences are taken outside the scope of UCC 2-615, because the party disadvantaged by fruition of the contingency might have protected himself in his contract.”⁶⁶ § 261 the *Restatement Second* carries the 2-615 standard, hereunder the basic assumptions test, to the general law of contract: “The fact that the event was unforeseeable is significant as suggesting that its non-occurrence was a basic assumption.”⁶⁷

Whereas the American doctrine provides a single, generally applicable (basic assumptions) test for cases like *Factory Fire*, KBL I operates with two distinct standards: one for specific obligations (as in sales of used goods), and another for generic cases like *Factory Fire*. And when the obligation is generic, only “qualified, extraordinary contingencies” are defined (by statute) as lying within the range of the unforeseeable. Absent contrary agreement, all other risks are deemed assumed by the supplier.

It often takes a “qualified, extraordinary” contingency to render the performance of a generic obligation impossible – even “impracticable”. If I promise to sell you “grade A wheat”, without further qualification, the possibility of my performance can – as a practical matter – only be “precluded” by world-class contingencies: “war, prohibition of import, or the like.” Although *Factory Fire* involves a specific source, Factory’s obligation is generic. And although the destruction of Factory’s specific source makes performance totally impossible, the same (qualified) statutory standard of “foreseeability” applies, and “fire” is not on the KBL I list of extraordinary contingencies. But even so, the *Factory* obligation is deemed discharged.⁶⁸ Impossibility by fire is an unforeseeable contingency as the statute is interpreted by the Scandinavian judge.⁶⁹

On this point, KBL reform narrows the comparative gap: the new KBL II standard, following the lead of the CISG, not only dispenses with the formal specific/generic distinction; it contains no list of “qualified extraordinary contingencies.”⁷⁰

65. Duesenberg, “Contract Impracticability: Courts Begin to Shape § 2-615”, 32 *The Business Lawyer* at 1096 (1977).

66. *Eastern Airlines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 441 (S.D.Fla. 1975). See also Lookofsky, *Fault and No-Fault* at 124-25.

67. Introductory Note to Ch. 11 of the *Restatement 2d*. “However, the fact that it was foreseeable, or even foreseen, does not, of itself, argue for a contrary conclusion, since the parties may not have thought it sufficiently important a risk to have made it a subject of their bargaining.” (*Id.*)

68. This was the result in UfR 1915.218. See also Ussing, *Køb* at 76, and Nørager-Nielsen & Theilgaard, *Købeloven* at 331.

69. Regarding NJA 1906.124 (ND 1906.53) (cargo destroyed in dockside fire: temporary impossibility), see Gomard, *Obligationsret* 1. del at 40-41 with note 36. Regarding temporary and partial impossibility pursuant to the UCC and KBL, see Lookofsky, *Fault and No-Fault* at 118-19.

70. See *infra*, part 3.3.

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There is no perfect parity, but a common core nonetheless. Consistent with both American and Scandinavian law, we describe the excuse standard as a two-pronged test: unforeseeable impossibility.⁷¹

*Norwegian Mine.*⁷² Seller, the Norwegian branch office of an English mining company, contracts to supply Danish Buyer with 10,000 tons of iron pyrites from its Norwegian mine; in so doing, the branch ignores a request received earlier the same day from its English sales agent to suspend sales in Scandinavia. Seller subsequently refuses to deliver, referring to a prohibition imposed by the English government.

Because (physical) impossibility is still often the key, the best general solution,⁷³ we ask first whether Seller “can” perform. On this set of facts, the answer is no. The generic nature of his obligation notwithstanding, the source of supply is a particular mine, and delivery therefrom would contravene a governmental order. The order renders delivery illegal and thus objectively impossible. Because we retain the means (the foreseeability prong) to enforce even “impossible” promises,⁷⁴ we need not bend the natural meaning of everyday language and call this “subjective impossibility,” just because what is impossible for this obligor may not be impossible for another. The fact that this supplier cannot deliver from the agreed source makes the lawful performance of this contract impossible.

This reasoning assumes, of course, that the order “applies”: covers the contract in question.⁷⁵

Earlier American and Scandinavian doctrine operated with the classical distinction between “subjective” impossibility where the consideration (*/ydelsen*) can, in and of itself, be presented, but where it is impossible for the obligor to do so:⁷⁶ the difference between “the thing cannot be done” and “I cannot do it.”⁷⁷ “The primary application of this distinction is in cases where performance is impossible

71. Regarding KBL § 24, see Ussing, *Køb* at 75-76 (“upåregnelighedsbetingelsen”) and at 77-84 (“umulighedsbetingelsen”).

72. Based on NRt 1922.31 H.

73. See Augdahl, *Obligasjonsrett* at 233 (“den bedste generelle løsning ... umulighet som ansvarsbefriende ...”).

74. By substitutionary relief.

75. This is clearly the case in *Norwegian Mine*. In NRt 1922.31 H (the real case), a minority of the Norwegian Supreme court expressed some doubt as to whether the seller had carried his burden of proof on this point.

76. See Ussing, *Obligationsretten* at 53.

77. *Restatement 2d* § 261, Comment e.

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because of inability to pay money or render any other performance as a result of insolvency or other financial problems. Such inability is personal to the obligor and does not excuse performance.”⁷⁸ Many have abandoned the traditional label,⁷⁹ but – at least as regards financial inability – the reality remains: “a party generally *assumes the risk* of his own inability to perform his duty”.⁸⁰ Subjective impossibility is impossibility, but – in the eyes of the law – there is no legal excuse.⁸¹

According to the *minority* view in NRt 1922.31 H, the impossibility in *Norwegian Mine* is “subjective” in nature, because another (non-English) supplier could have performed.⁸² Such a description is inappropriate: even the minority acknowledged that it is not legally “possible” to ignore a governmental order.⁸³

The doctrine of subjective impossibility has been criticized as adding unneeded complexity to an already complicated subject.⁸⁴ The new KBL II concept of *control-liability* hardly resolves the issue.⁸⁵

In *Norwegian Mine*, though Seller has not himself imposed the contingency rendering performance impossible, the request to suspend sales in Scandinavia has put him – or at least ought to have put him – on notice of the impending impediment. Performance as agreed has become impossible, but Seller ought to have foreseen the impediment and taken it into account before the

78. Calamari & Perillo, *Contracts* at 498.

79. See, e.g., *Restatement 2d* § 261, Comment e and Nørager-Nielsen & Theilgaard, *Købeloven* at 358.

80. *Restatement 2d* § 261, Comment e (emphasis added). Accord: Treitel, *Law of Contract* at 632 and Gomard, *Obligationsretten* 2. hæfte at 161 (“selvom hans økonomiske vanskeligheder skyldes begivenheder af ganske upåregnelig karakter ...”).

81. Corbin, *Contracts* § 1332 at 361 followed the lead of the first *Restatement* (§ 455) in distinguishing between personal (subjective) *inability* and objective *impossibility*.

For a comparison of earlier Scandinavian and German doctrine with that of the first American *Restatement of Contracts* § 455 see Gomard, *Erstatningsregler* at 210-11 with note 62 (citing Corbin, *Contracts* § 1332). Nearly all the cases cited by Corbin in § 1332 are of the “I-cannot-pay” variety. In *Montgomery Ward & Co. v. Northern Pacific Terminal Co.* (cited by Corbin at *id.*, note 64) “the defendant had not made reasonable efforts, that might have been successful, to induce its workmen to make delivery.”

82. See NRt 1922.31 H (“Hindringen ... har sit ophav i den forpligtedes personlige forhold og vilde ikke ha mødt en indehaver af gruberne i almindelighed som maatte ha været forpligtet til at opfylde kjøpet”).

83. See *id.* (“engelsk selskab ... var nødt til at bøie sig for sin regerings vilje [min fremhævelse]”). But see Ussing, *Køb*, at 81, classifying subjective impossibility (“ansvar for rent individuelle forhold”) as a sub-heading under the rubric of impossibility (*id.* at 77).

84. See Nørager-Nielsen & Theilgaard, *Købeloven* at 360, distinguishing the minority view in NRt 1922.31 and UfR 1951.995 H (a decision based, *inter alia*, on evidence of supplier’s fault). Compare Gomard, *Obligationsretten* 2. hæfte at 159-60.

85. See *infra*, part 3.3.

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promise was made. So he cannot later lay claim to a legal excuse. Thus, where either the performance is possible – or the impossibility thereof at least foreseeable – the promise still binds.

When we talk about what a seller knew or should have known, we are talking not only about foreseeability but also about contractual fault. And because notions like impossibility, foreseeability and fault are inseparably tied not only to our conceptions of discharge, but also to remedial doctrines of specific performance and liability, we find no single set of pigeonholes for cases like these, least of all in a comparative context.

In NRt 1922.31 H, the Supreme Court of Norway held the seller liable in damages. A majority (4) of the Court based their conclusion on foreseeability (fault).⁸⁶ As already noted, the minority (3) saw this as a case of subjective impossibility.

NRt 1970.1059 illustrates a problem related to the fault issue. With a view toward the spring fishing season, Norwegian Fisherman placed an October order with Netco for the weaving of a net suitable for Fisherman's special needs. Netco confirmed the March 1st delivery date in writing. During the winter, however, delivery of a component – Italian line to be secured through the government monopoly-importer – was delayed. Fisherman was first advised of the problem when the net was delivered late, on March 27, and he sued for profits lost in the interim. Because the Italian line could only be secured through the sole government importer, performance (making and delivering the net) was *impossible*.⁸⁷ Yet, even assuming this to be an "extraordinary" excusing contingency, failure to notify constituted contractual *fault*.⁸⁸

Questions of frustration (/impossibility) and remoteness of damage may overlap, with foreseeability as a common theme.⁸⁹ In an English case, defendant-ship-owners were held liable for delay causing plaintiff cargo-owner consequential loss, in that defendants ought to have foreseen both the outbreak of war and the possibility that the ship might be requisitioned by England and the cargo shipped to Sweden at plaintiff's expense.⁹⁰

Where Seller is at fault, impossibility of performance is no excuse. Where no fault is to be found, we are likely to have a different situation:

86. *See id.* (Assessor Feragen: "ved kjøpets avslutning burde ha tatt hindringen i beregning").

87. *See* NRt 1970.1059 ("erstatningsansvar etter kjøpslovens regler for forsinkelse ikke vil foreligge selv om forholdet bedømmes etter den strengere bestemmelse – § 24"). The sale was generic although the goods were made-to-order (*bestillingskøb*).

88. *See id.* and compare the corresponding rule re. the consequences of failure to notify in UCC § 2-615(c).

Regarding the mitigation aspect of NRt 1970.1059, *see infra*, part 5.2 (*Norwegian Mine*).

89. *See* Atiyah, *Introduction* at 213.

90. *Monarch SS. Co. v. A/B Karlshamns Oliefabriker* [1949] A.C. 196. Regarding remoteness, *see infra*, part 4.4.4.3.

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*Norwegian in America.*⁹¹ Norwegian citizen N contracts to sell the output of his American mill to Buyer B. War breaks out, and N's government orders him to sell the output of his mill to it instead. N complies with the order in good faith and fails to deliver to B.

Whether N is "willing to break the law and risk the consequences ..." should make no difference.⁹² We deem performance legally impossible, and unforeseeable as well. "Such is the allocation of risk that is made by our social and business mores, as well as by the law of contract that is based upon them."⁹³ Unlike the seller in *Norwegian Mine*, this seller N had no reason to know.⁹⁴ And although the "dangers of the mechanistic use of a foreseeability test have been noted on several occasions ...",⁹⁵ a promisor ought not be held to "foresee" this kind of supervening event.

§ 264 of the *Restatement 2d* provides:

"If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the nonoccurrence of which was a basic assumption on which the contract was made." § 264 represents a conceptual improvement on this aspect of UCC 2-615, in that in § 264 governmental regulation is framed as an *example* of a (discharging) "basic assumption". Where the supplier is at fault (as in *Norwegian Mine*) there is no excuse.⁹⁶ The same result would surely obtain under § 2-615, where government orders are in a separate class.

The two-pronged test of unforeseeable impossibility is an open-ended standard. Sensibly applied, it helps guide us to justice in the concrete case.

*Bird Song.*⁹⁷ On July 1, Middleman, seeking to fill an export order for 20 tons of grass seed, telephones Farmer, (his regular supplier) who

91. Based on Illustration 6 to § 264 of *Restatement 2d* and *L.N. Jackson & Co. v. Royal Norwegian Government*, 177 F.2d 694 (2d Cir. 1949), cert. denied, 339 U.S. 914 (1950).

92. See Comment a to *Restatement 2d* § 264.

93. Corbin, *Contracts* § 1332 at 362 (regarding "mere personal inability and misfortune").

94. The outbreak of war is sometimes a foreseeable event, but there is no such suggestion in our paradigm-facts.

95. Comment c to *Restatement 2d*, § 261.

96. See *Restatement Second* § 261.

97. Based on UfR 1928.796 ØL.

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owns the farm known as “Bird Song”. The resulting bargain, as memorialized in Middleman’s written confirmation, is for “15 tons Cock’s Foot seed from your own Bird Song harvest”. Owing to a sudden change in the weather, crops fail nationwide, and Farmer can harvest and deliver only half the promised quantity. As regards the remainder, Middleman sues Farmer for damages (the contract/market differential).

It is often hard to discern the content of private agreement. Thus, “[w]hether or not a contract for the sale of produce ... contemplates that it shall be grown on a particular tract of land ... is often a close question of construction of the particular contract.”⁹⁸ But the *Bird Song* agreement, as memorialized in Middleman’s confirmation, seems straightforward: Farmer is to supply “15 tons Cock’s Foot seed from [his] own harvest”. And we know that this particular source of supply, like the agreed means of performance in *Music Hall* and *Factory Fire*, has been destroyed. So, without leaving the four corners of the contract, we conclude that performance as promised is objectively impossible.⁹⁹ On the other hand, the contract contains no express provision as to the legal effect of supervening impossibility, and since the payment of damages is never objectively impossible, we cannot say that a contract is automatically discharged whenever performance becomes impossible. Should this contract, like the ones in *Music Hall* and *Factory Fire*, be discharged? Or should we distinguish this case? Sometimes the court must supply the omitted term: not by “implication”, but by *construction*.

“Because the language of the promise in question is absolute and admits of no excuse, it is perhaps difficult to see that anything has been omitted. For this reason, courts have often rationalized excuse on grounds of impossibility by saying that it is an “implied condition” of the duty that performance remain possible.”¹⁰⁰ But “the court must find a solution, even in the cases where interpretation produces none.”¹⁰¹ So “constructive conditions are created by the courts to do justice.”¹⁰²

An American court would be likely to follow the *Music Hall* precedent: not because such an old English precedent “controls”, but rather because similar

98. *Pearce-Young-Angel Co. Inc. v. Charles R. Allen, Inc.*, 213 South Carolina 578, 586, 50 S.E. 2d 698 (1948).

99. *Accord: Jørgensen, Kontraktstret II* at 159.

100. Farnsworth, *Contracts* at 676.

101. Corbin, *Contracts* § 1337 at 388.

102. Calamari & Perillo, *Contracts* at 405. *Accord: Farnsworth, Contracts* at 676.

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factors point in similar, reasonable directions. “In the absence of some expression of contrary intention the risk of destruction of a necessary specific thing, there being no fault, is borne by both parties ... Both parties alike bear the risk of not getting the expected benefits of their bargain.”¹⁰³

The law should let the Bird Song-supplier off the hook, for to do otherwise is to introduce an imbalanced – and thus unreasonable – element in the parties’ transaction. Farmer contracts to sell his own grass seed because his business is to create – and sell – his own source of supply. Farmer is in a risky business: if his crop fails, he has nothing to sell. His buyer, Middleman, does not, of course, assume the risk of crop failure: he need not pay for what he doesn’t get. Absent clear evidence of an agreement to the contrary, we ought not impose additional risks on the parties. In particular, we ought not make Farmer protect Middleman against price fluctuations which result because he must now go elsewhere to find the grass seed he needs. In this case, *impossibilium nulla obligatio* makes good business sense.¹⁰⁴ “Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs.”¹⁰⁵ We do not hold a farmer to take this kind of contingency (widespread crop-failure) into account. The imposition of a more “absolute” basis of liability would be unreasonable. If a middleman wants to insure against the risk he assumes as against his buyer, he should secure an alternative source of supply.

In UfR 1928.796 (the real *Bird Song*) Farmer was held liable for Middleman’s loss.¹⁰⁶ Other Scandinavian decisions and the views of academic writers support the view taken here.¹⁰⁷

In an analogous American case,¹⁰⁸ the defendant, a Texas dealer, contracted to sell 800 bags of “Texas No. 1 blackeye peas” to the plaintiff for delivery on June 30. Heavy rain destroyed the entire pea crop in the area of Dilley, Texas; the dealer failed to deliver and was sued for damages. The evidence presented showed that the buyer, prior to accepting the peas offer, had inquired how the dealer could be sure the peas would be “No. 1”; the dealer answered by referring to the unusually dry, current

103. Corbin, *Contracts* § 1337 at 388-89.

104. Regarding § 306 of the German BGB, see Zweigert & Kötz, *Introduction* II at 160.

105. The Kronprinzessin Cecile, 244 U.S. 12, 24, cited in *Jackson*, 177 F.2d 694 at 699.

106. See *infra*, part 4.4.1.2.

107. See, e.g., *supra* re. *Factory Fire* and UfR 1923.343 H (UfR 1921.935 S.L.) (delivery of “potash” possible, but no liability when seller’s German stock confiscated). *But see* Nørager-Nielsen & Theilgaard, *Købeloven* at 325-26 (classifying UfR 1923.343 H as generic impossibility: *artsumulighed*).

108. *Pearce-Young-Angel Co. Inc. v. Charles R. Allen, Inc.*, 213 South Carolina 578, 50 S.E. 2d 698.

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crop of Dilley, Texas, hereunder his existing contracts for the purchase of 7000 bags thereof. The court found on these facts that a specific source of supply was *contemplated* by both parties and therefore held that the defendant was discharged from his duty to perform. Numerous other Common law precedents accord.¹⁰⁹

3.2.3. Economic Force Majeure.

Impossibility is a promisor's best excuse – the one both American and Scandinavian courts are most likely to classify as a legal excuse, a contingency the non-occurrence of which was a “basic assumption” of the contract, thus effecting the discharge of obligation.

Steel Supply II.¹¹⁰ S supplies steel to B at a fixed price pursuant to a long-term contract. When S's costs increase to the point where continued delivery would involve a loss, he stops delivery.

When a seller's costs increase beyond what they were at the time of contracting, the equilibrium of the original agreement may be disturbed. But performance as agreed is not physically impossible: a contractor's inability to make a profit on a particular contract does not, in and of itself, serve as a legal excuse discharging that contractual obligation. And the overwhelming general rule – in both American and Scandinavian law – is that an increase in price is *seller's* problem, because those who sell long-term are in the business of assuming this kind of risk. In a market economy, those who are driven out of business by market forces like fluctuating prices should be driven out and not “bailed out” - by the courts or anyone else.

In this kind of situation, there is thus no legal excuse: not merely because delivery is “possible”, at least in the short run, but because a reasonable businessman ought to foresee increased costs. So such a contingency should be dealt with by the parties, in their contract. Conversely, the absence of a contractual price-index clause permits the inference that the seller's obliga-

109. See Lookofsky, *Fault and No-Fault* at 122 and 18 Williston, *Contracts* § 1946.

See also *Alimenta (USA), Inc. v. Gibbs, Nathaniel (Canada) Ltd*, 802 F.2d 1362, 2 UCC Rep 2d 490 (11th Cir. 1986) (serious drought in portions of U.S.; seller not liable for late or non delivery of “U.S. runner split peanuts”).

Regarding English law, compare *Howell v. Coupland* (1876) 1 Q.B. 258: a case much like *Birdsong*. *Howell* is cited in Farnsworth, *Contracts* at 675 and discussed in Treitel, *Law of Contract* at 629 and 657.

110. A variation on the paradigm considered *supra*, part 2.1.

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tion is absolute to this extent. So, interpreting the plain meaning of a contractually fixed price, the courts keep hands off and let this kind of loss lie where it falls. They usually refuse relief on grounds of “economic *force majeure*”.¹¹¹

The rules of excuse are, in principle, available to seller and buyer alike.¹¹² Still, not even extreme financial difficulty will excuse a buyer or other recipient. Financial inability (*pengemangel*), once described as “subjective impossibility”, is now best described as a “foreseeable” risk.¹¹³

Pacta sunt servanda is the general rule, but, as always, there are exceptions to be found. Neither the Scandinavian nor the American rules demand complete impossibility in the classical sense. Given the right set of operative facts, a court may deem that performance is precluded, “impracticable”.¹¹⁴

Water Supply.¹¹⁵ In 1929 Supplier contracts to supply Hospital with water at a fixed rate “at all times hereafter”. Some 50 years later, Supplier’s costs have increased twentyfold, and he refuses to make further deliveries.

If we apply the golden rule of interpretation, we might be tempted to hold the seller to the plain meaning of the original contract: the price fixed “in perpetuity”. But in Common as in Scandinavian courts, “questions of construction and interpretation are liable to be approached ... with a strong bias in favour of the idea that a contract should ensure some substantial reciprocity in exchange.”¹¹⁶ And to ensure that some transactional balance be maintained, the courts may choose among various tools.

Some Common courts still “interpret” their way around the plain meaning of words, but we all can see through such “transparent fiction”.¹¹⁷ In *Water*

111. See, e.g., Hellner, *Kontraktsträtt* 248-49.

112. The absence of an express, statutory provision in the UCC does not justify an *e contrario* conclusion. See Crandall, “Frustration as an Agricultural Buyer’s Excuse under U.C.C. Section 2-615”, 11 *Univ. Cal. (Davis) L.R.* (1978). Compare *International Minerals & Chemical Corp. v. Llano, Inc.* 770 F.2d 8, 41 UCC Rep. 347 (10th Cir. 1985) (*contractual* provision regarding buyer’s inability interpreted as synonymous with UCC § 2-615).

113. See, e.g., *Lawrance v. Elmore Bean Warehouse, Inc.*, 108 Idaho 892, 702 P.2d 930, 41 UCC Rep. 358 (1985) (allegation that performance after market collapse would result in buyer’s bankruptcy).

114. Impracticability is used here in the narrow sense: see *supra*, part 3.2.1 with note 17.

115. Based on *Staffordshire Area Health Authority v. S. Staffs Waterworks* [1978] 1 W.L.R. 1387.

116. Atiyah, *Introduction* at 107.

117. See Atiyah, *id.* at 10 (re. the “intention” of the parties in English law generally) and (re. frustration) *id.* at 17-22.

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Supply, as in many cases of true impossibility, the contract “gives out”.¹¹⁸ At some point, in some cases, performance as agreed has become so burdensome that we *deem* it to be the functional equivalent of impossibility:¹¹⁹ we pass what Scandinavian theorists call the sacrifice threshold (*offergrænsen*).

In Scandinavian law this threshold is seen with two sets of tools: the liability-line of KBL (I) § 24, overlaps with the validity-rule in § 36 of the Contracts Act,¹²⁰ because the broad letter of the general clause § 36 covers *inter alia*, cases where subsequent circumstances make enforcement as originally agreed unreasonable.¹²¹ Once again, the question is one of kind and degree: the more commercial the case, the more we stick to our guns.¹²² But even in a commercial case, justice is sometimes best served by compromise: a “half-measure” of remedial relief.¹²³

In the real *Water Supply* the English Court of Appeal, unable or unwilling to find a § 36-analogue, intervened with a covert half-measure of remedial relief, thinly disguised as interpretation the parties’ will: “the water company could [not] have determined the agreement immediately after it was made. That cannot have been intended by the parties. No rule of construction could sensibly permit such a result. But, in the past 50 years, the whole situation has changed so radically that one can say with confidence: ‘Rather than force such unequal terms on the parties, the court should hold that the agreement could be and was properly determined in 1975 by the reasonable notice of six months’...”¹²⁴ Nowhere in its extensive discussion of

118. See generally Fried, *Contract as Promise* Ch. 5 and compare Hellner, *Kontraktsträtt* at 242-43 (re. adjustment pursuant to the Contracts Act: “jämkning enligt 36 § avtalslagen”) and Gomard, *Introduktion* at 55 (re. the relative insignificance of hardship clauses in charter-party agreements).

119. See *Restatement Second* § 261 Comment d (discharge even though performance possible) and compare KBL (I) § 24, *supra* at note 51: *deemed* precluded (“medmindre ... muligheden af at opfylde aftalen må anses for udelukket”).

120. See *supra*, part 2.1, at note 33.

121. Regarding the overlapping doctrines of KBL § 24, *forudsætningslæren*, and § 36 of the Scandinavian Contracts Act, see Gomard, *Introduktion* at 55.

The overlap of substantive and validity conceptions may be significant as regards the interface of the CISG and Scandinavian (national) sales law: see *infra*, part 6.

122. *Accord*: Gomard, *Erstatningsregler* at 211 (“Jo stærkere aftalens kommercielle præger, jo færre undskyldningsgrunde ...”).

123. A term borrowed from Young, “Half Measures”, 81 *Colum. L.R.* 19 (1981).

124. [1978] 3 All E.R. 769 (*per* Lord Denning). Lord Denning goes on to commend a specific “solution [price increase] to [the] two public authorities in the hope that it will settle their difficulties without troubling the courts further ...” *Compare* (re. equitable adjustment) *Westinghouse* discussed below.

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the case does the court make any reference to the rules regarding frustration or impracticability, but the underlying disturbance of (English) doctrinal purity has not gone unnoticed.¹²⁵

A recent American decision has upheld the contractual rights of 207,000 consumers who were promised “lifetime” fixed-fee termite protection. Ten to twenty years of inflation notwithstanding, the U.S. Court of Appeals relied on the “plain language” of the agreements: “The yearly premium for this lifetime protection is very modest and never increases.”¹²⁶

In a recent Danish case,¹²⁷ a vacation property was leased for a period of 49 years at a yearly rental of Dkr. 49. Thirty years later, the market value had risen twentyfold. *Held*: no modification was authorized by virtue of § 36 of the Contracts Act.

A 1923 Swedish case involved a contract for delivery of a minimum of 100 tons of cardboard per year for 5 years. In 1916 the quantity was amended to 200 tons at 41,300 (and later: 66,000) Swedish Crowns per ton. When the market price went to 104,000 Crowns, the seller refused further delivery. The price rise was held to have had such a character that it was deemed to have lain entirely outside the parties assumptions.¹²⁸

One often-cited American exception to *pacta sunt servanda* is *Mineral Park*.¹²⁹ A newer exception to the hard-nosed rule is *Aluminum Co. of America v. Essex Group*¹³⁰ where “the nonoccurrence of an extreme deviation of the [escalator] and ALCOA’s non-labor production costs was [held to be] a basic assumption on which the contract was made [so that the] increase in its cost of performance was severe enough to warrant relief”.¹³¹

Faced with cost increases related to the Arab oil embargo in 1975, the Westinghouse Electric Corporation refused to deliver pursuant to a number of uranium supply contracts that it held with various public utilities. In the resulting litigation,¹³² Westinghouse attempted to invoke UCC § 2-615, alleging commercial

125. See Cheshire & Fifoot, *Law of Contract* at 512 and Lookofsky, *Kontraktansvarsgrundlag* at 281 with note 47 (“fritagelse pga. uforudsete prisstigninger”).

126. See *Orkin Exterminating Co. Inc. v. Federal Trade Commission*, 849 F.2d 1354, 1357 (11th Cir. 1988).

127. UfR 1987.711 V.L.D.

128. See NJA 1923.20 and Lookofsky, *Fault and No-Fault* at 123.

129. *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916) is the model for Illustration 5 to *Restatement 2d Contracts* § 266.

130. 499 F.Supp. 53 (W.D. Pa. 1980).

131. *Id.* at 72. See Farnsworth, *Contracts* at 680 with note 18 (re. *Alcoa v. Essex*) and *id.* at 651-52 (re. a contract “gone awry”). *But see* Matter of Westinghouse Elec. Corp. Uranium Contracts litigation, 517 F.Supp. 440 (E.D.VA. 1981) (declining, *id.* at 458, to follow *Alcoa*: “Westinghouse was wagering that the stone would turn out to be a diamond. That it misjudged the odds does not release it from its bargain.”)

132. In re Westinghouse Elec. Corp. Uranium Contracts Litigation, MDL Docket No. 235 (E.D. Virginia, Oct. 27, 1978).

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impracticability by reason of a 600% increase in the price of uranium and a potential loss of 2.5 billion dollars.¹³³ The U.S. District Court judge ruled that “Westinghouse did not meet its burden of establishing that it [was] entitled to excuse ...”¹³⁴ The majority of plaintiffs later settled with Westinghouse out of court: a fact related to the possibility of an equitable adjustment of the contract price pursuant to UCC § 2-615.¹³⁵ Of course, the parties themselves sometimes anticipate the possibility of such contingencies and draft a so-called “hardship clause”.¹³⁶

§ 272(2) of the *Restatement 2d* provides that to “avoid injustice” which might otherwise result from the application of the general rules regarding discharge in cases of impossibility and impracticability, “the court may grant relief on such terms as justice requires ...”¹³⁷

The more difficult the case, the more we need to remind ourselves that our starting points are mere generalizations, and “that all generalizations should be regarded as tentative working rules ...”¹³⁸ The convenience of our two-pronged test notwithstanding, “reasonableness”, “good faith”, and “justice” are likely to determine ultimate allocation (or sharing) of the contractual risk.¹³⁹

3.3. KBL II: Control Liability.

In 1961, just as American lawyers were getting their first look at the new Uniform Commercial Code, their Scandinavian colleagues began to study the same legislation with an eye to reform of their own (uniform) Sales Acts. And the KBL rules regarding liability in damages were singled out as a major target

133. See Maughmer, “In re Westinghouse: Commercial Impracticability as a Contractual Defense”, 47 *UMKC L. Rev.* 650-661 (1979).

134. See Eagan, “The Westinghouse Uranium Contracts: Commercial Impracticability and Related Matters”, 18 *American Bus. L. J.* 300 (1980). This important preliminary ruling notwithstanding, the litigation did not produce a definitive reported opinion: see Farnsworth, *Contracts* at 680, note 18.

135. See *Official Comment* 6 to the UCC section; Eagan at *id.*; Huffmeyer, “Section 2-615 and Corporate Accountability”, 13 *U.C.C.L.J.* 263 (1981); and Lookofsky, *Fault and No-Fault* at 124.

Regarding Norwegian law and arbitration practice, see Lund, “Inflasjon og Konjunktursvikt som Problem for Skipsfartens Langtids-Kontrakter”, 14 *Arkiv for Sjørett* 339 (1977).

136. See generally Lando, *Révision Conventionnelle*.

137. See Hudec, *Reliance Interest* 713-18.

138. Corbin, *Contracts* § 1331 at 358.

139. *Accord: id.*

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for revision. For one thing, the basis of seller's liability in KBL (I) § 24 had been criticized as too strict, too influenced by German doctrine.¹⁴⁰

To bitter the pill, the doctrine of *adækvans*, though more restrictive than its German analog, was seen as an inadequate limitation on the *extent* of this no-fault liability, the degree of protection of buyer's expectation interest.¹⁴¹

So during the course of KBL reform, numerous proposals were made to revise § 24. Initial KBL II drafts dealt with the problem by providing a longer list of "qualified, extraordinary" circumstances which serve to relieve seller's liability for delay or non-delivery. Later, however, liability reform took a different, more open-ended tack, one directly inspired by the new standard formulated for international sales in the 1980 Vienna Convention, CISG.

The starting point for seller's liability for non-performance, delay and/or defect, pursuant to KBL II is the newly formulated rule in § 27(1):¹⁴²

The buyer is entitled to damages suffered as a result of seller's delay or non-performance unless seller proves that the delay was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the conclusion of the contract or to have avoided or overcome it or its consequences.

This new, national sales standard, which Scandinavian writers refer to as "control-liability", is *virtually identical* to that of the new rule drafted for international sales, CISG Article 79.¹⁴³ The buyer is entitled to damages unless

140. See generally SOU 1976:66 21-29 (summary in English); *id.* at 138 (citing Hellner in *Ius privatum gentium* (Festschrift für Max Rheinstein), 1969 at 713 ff); and *id.* at 161 (ad UCC "förbilden"). See also *NU 1984:5* at 183 ("det på den s.k. omöjlighetsläran grundade skadeståndsansvaret vid genusköp är alltför strängt").

141. See generally *infra*, part 4.4.5.2.

142. As of this writing, KBL II is the law in Finland and Norway: see *supra*, part 1.3 with note 71. The standard formulated in § 27(1) for delay is also the starting point for defects: § 40(1) incorporates the rule in 27(1) by reference.

As regards *buyer's breach* a separate, more strict, basis of liability is laid down in § 57(1). The single standard here does not distinguish between "direct" and "indirect" loss: see *infra*, part 4.4.4.2, text with note 380.

143. A technical distinction lies in the fact that the Scandinavian provision provides both the rule (imposing strict liability) and the exceptions thereto; the CISG exemptions provision must be read together with Articles 45 and 61: see generally *infra*, part 6. Unlike CISG Article 79, which covers impediments to performance by either party, control-liability pursuant to KBL applies only to seller's *direct* loss: see *infra*, part 4.4.5.2.

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seller proves¹⁴⁴ that all of the following four conditions are fulfilled:¹⁴⁵

1. Non-performance must be due to an *impediment (hindring)*.¹⁴⁶ All types of impediments are within the potential scope of the rule.¹⁴⁷ As applied to delay (and non-delivery), objective impossibility is not required, in that the new rule is also meant to comprise “economic” *force majeure*.¹⁴⁸ An impediment can also lead to defective performance (nonconforming delivery): if rarely in practice, at least in theory.¹⁴⁹

2. If the seller is to be relieved from liability, the impediment must lie beyond his *control*, thus the shorthand expression: “control-liability”. *Inter alia*, a seller is deemed to have control not only over the running of his business but also his financial circumstances in general.¹⁵⁰

Scandinavians have not attached the “control-liability” label for convenience only. The legislative history of KBL II indicates that this (CISG-inspired) Scandinavian “control” standard is to be read: “sphere of control”, and the legislative intent is to carry on the near-strict standard of KBL I. Only extraordinary “impediments” similar to those known under the earlier rule will serve to relieve a seller from liability under this new no-fault liability rule.¹⁵¹

In the case of generic sales pursuant to KBL I, a seller’s liability for defects has been virtually strict, and the drafters of the new KBL rule tell us that it will be extremely difficult for a seller to establish that a defect is due to an impediment “beyond his control”, particularly in the common case where the non-conformity can be traced back to “internal” conditions in the production process (seller’s, his supplier’s or that of an earlier link).¹⁵²

144. The reversed burden of proof corresponds to that in KBL (I) § 24 and UCC § 2-615.

145. The conditions for a liability exemption pursuant to KBL II § 27 presented in *Ot prp nr 80* at 37 accord with Honnold’s analysis of the corresponding CISG Art. 79: see Honnold, *Uniform Law* at 427.

146. The new CISG term impediment (*empêchement*) has been the subject of considerable attention: see, e.g., Nicholas, *Force Majeure* at 240. The corresponding Scandinavian concept of (*opfyldelses*) *hindring* has long been central to KBL liability theory.

147. See *Ot prp nr 80* at 37.

148. See *id.* and compare *supra*, part 3.2.3.

149. See *infra*, text immediately following, ad point 2. The same is true as regards defects due to impediments (*hindringer*) pursuant to KBL (I) § 43: see Nørager-Nielsen & Theilgaard, *Købeloven* 811-12.

150. See *Ot prp nr 80* at 37. “I cannot do/afford it” (subjective impossibility) is still no excuse: see *supra*, part 3.2.

151. Accord: Sevón, Wilhelmsson & Koskelo, *Huvudpunkter* at 79 ff (“Produktionsstörningar som beror på utifrån kommande orsaker ... allmänt import- eller försäljningsförbud ...”).

152. See *id.* at 124.

KBL II. Control Liability

KBL II drops the KBL I “specific/generic” distinction: § 27 of the new statute contains but one liability standard irrespective of a seller’s “freedom of choice”.¹⁵³ In some situations, the old distinction should retain significance, because when delivery (of conforming specific goods) is impossible, the consequences of the impediment are surely also unavoidable.¹⁵⁴ Seller’s misstatements regarding the quality of goods are of course within his “control”, but we need not reach the issue pursuant to § 27: there is hardly in such case an “impediment” to performance (*opfyldelseshindring*).¹⁵⁵

3. Only an impediment *unforeseeable* at the time of contracting can relieve a seller of liability. This limitation provides Scandinavian courts with the authority to impose liability even where seller proves an unavoidable impediment beyond his control. The control-liability label should not divert attention from this key condition in the traditional KBL allocation of risk: *upåregnelighedsbetingelsen*, what seller ought to take into account, the (unchanged) foreseeability requirement of KBL (I) § 24.¹⁵⁶

4. Only an *unavoidable* impediment will relieve a seller of control-liability. When the seller’s obligation is generic, as it most often is, he can usually avoid breach by securing an alternative source of supply.¹⁵⁷ If performance is practicable, there is a basis of liability for breach.¹⁵⁸

The cumulative effect of these four elements, and thus the severity of this new, national basis of liability is essentially similar to that of its predecessor, KBL (I) § 24.¹⁵⁹ “Control-liability”, the new rule of KBL II § 27, is *no-fault liability*.

153. Regarding the specific-generic distinction, *see supra* part 2.2 at note 74.

As regards defective delivery, the letter of new control-liability standard may arguably be stretched so as to keep the old idea alive: *see id.* at 124-25. Some quasi-merchant sellers may be subject to a milder standard: *see id.* at 124 (re. “enskilda husdjur”). Regarding professional suppliers of specific goods: *see, e.g., infra*, part 5.3 (*Used Generator*).

154. *See* text immediately below ad 4. This principle applies as regards *specific* obligations like the supply of a given quantity of potatoes from a particular plot or identified lot: *see supra*, part 3.2 (*Bird Song*) and *compare* Sevón et. al. at *id.*

155. *Compare id.*

156. *See* Ussing, *Køb* at 75 ff and *supra*, part 3.2.2.

157. *See Ot prp nr 80* at 37-38. Regarding delays due to such “third parties” as seller’s suppliers, subcontractors, etc., *see* KBL II § 27(2) (which corresponds to CISG Art. 79(2)) and Lookofsky, *Fault and No-Fault* at 135.

158. Practicability is determined by reference to the “sacrifice threshold” (economic *force majeure*).

159. The new rule is, however, a more flexible one: more like UCC § 2-615. *See supra*, part 3.2.

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Unlike the rule of KBL I, however, the new KBL II control-rule does not serve to provide a general basis of contractual liability, but only liability for what the statute defines as “direct” loss, hereunder loss in value: the contract/market differential.¹⁶⁰

3.4. Other Basic Assumptions: Frustration and Mistake.

The doctrines of impossibility, impracticability, and *force majeure* are exceptions to the rule that (bargain) promises are binding. But these are not the only exceptions:

Veterans' Banquet.¹⁶¹ On April 20th, the Danish Association of War Veterans makes a reservation at Jensen's Hotel for a 300-person banquet to be held on July 6th. On June 24th the Danish government proclaims that a parliamentary election be held on July 6th. Knowing that its members would not attend a banquet on election day, the Association withdraws its reservation. Jensen sues for profits lost.

There has been an unexpected turn of events, but this recipient's performance – the payment of money – remains possible. We cannot even say that performance has been rendered “impractical” by an “impediment”.¹⁶² What we might say, using the jargon of the Common law, is that the Veterans' contractual purpose, the reason or motive for entering the agreement, has been “frustrated”. In Scandinavian law, the doctrine of “failed assumptions” (*/bristede forudsætninger*) serves as the corresponding category for this and similar problems.¹⁶³

The situation in *Veterans' Banquet* seems quite comparable to the classical (English) frustration paradigm of *Krell v. Henry*¹⁶⁴ where the lessee sought to avoid paying for a hotel view of the coronation of Edward VII because the King-to-be took ill and the procession was cancelled.

160. See generally *infra*, part 4.4.5.2.

161. Based on UfR 1920.848.

162. See Comment a to *Restatement 2d* § 265.

163. Compare Lando, *Law of Contracts* at 152-54 (translating the Scandinavian doctrine as “implied conditions”) and *infra*, part 4.3.1. (re. implied conditions in the termination context). See also Hellner, *Kontraktsträtt* 237-41.

164. 2 K.B. 740 (1903)

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There is no “impediment” to performance of the Veterans’ (bargain) promise as such, but the deal has become essentially one-sided, at least from the Veteran’s subjective point of view: “a change in circumstances makes one party’s performance virtually worthless to the other, frustrating his purpose in making the contract.”¹⁶⁵ In Civilian systems, “the validity of a contract may depend on the relationship between what the parties respectively undertake.”¹⁶⁶ In a case like this, a Scandinavian court may act to restore the transactional balance.

In UfR 1920.848 ØLD the Danish High Court denied the promisee-hotel’s claim for damages, emphasizing (1) that the reservation was cancelled upon 14 days notice, (2) that the reservation was cancelled for good reason,¹⁶⁷ and (3) that the promisor-association offered to hold the banquet at the same hotel at a later date.

In American law there is a clear, modern trend toward a doctrinal unification comprising impossibility, impracticability, frustration and mistake.¹⁶⁸ The promisor is bound by his word ... unless and until the law grants an excuse. When the transaction becomes imbalanced, our urge to protect the promisee may falter in the face of our desire to prevent injustice, the payment of something for nothing.

*Russian Agent.*¹⁶⁹ Soviet purchasing Agent contracts to purchase machines from New York Seller for the purpose (known to Seller) of exporting them to Russia. Prior to the date of delivery, regulations are enacted which bar export absent a license. Agent is denied a license and seeks to call off the deal.

165. Comment a to *Restatement 2d* § 265 (Discharge by Supervening Frustration). See Calamari & Perillo, *Contracts* at 302 re. Wood v. Boyton, 64 Wis. 265, 25 N.W. 42 (1885) and compare Gomard, *Obligationsretten* 1. hæfte at 42 (*afbestillingsret*: “hvornødigheden på grund af ændrede forhold har mistet interessen for realkreditor (bestilleren)”).

166. Zweigert & Kötz, *Introduction* at 58. See, e.g., *id.* at 59 re. § 934 of the Austrian Code (parties to any contract entitled to rescind if performance of one is worth more than twice the other’s).

167. See UfR 1920 at 849 (“plausibel Grund for Aflysningen”).

168. See, e.g., Honnold, *Sales* at 47, Fried, *Contract as Promise* (“single problem”) and Farnsworth, *Contracts* § 9: “Failure of a Basic Assumption”.

169. Based on Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co., 206 F.2d 103 (2d Cir. 1953). Compare Ill. 5 to *Restatement 2d* § 265.

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Once again, the recipient's principal purpose is substantially frustrated¹⁷⁰ through no fault of his own. Is there a distinction between these cases, a (non-political) reason why we might let the Veterans off the hook but keep the Russian Agent to its promise? Perhaps, but we cannot hope to find guidance in a single rule of law applicable to such unsimilar contract types as these.¹⁷¹ We can formulate a "rule" (an exception to the rule about binding promises) which indicates that a promisor whose purpose becomes frustrated will sometimes, depending on the concrete circumstances, be excused, and we can package and label the numerous relevant factors as a question of whether a "basic assumption" has failed. But to do so is only to ask who, in the opinion of the court, should bear the risk in a given case.¹⁷²

In *Amtorg*, the real *Russian Agent*, the court denied the frustration claim: "there is no impossibility of performance where delivery to the buyer is to occur in this country [America]".¹⁷³

In a more recent Norwegian case,¹⁷⁴ Buyer ordered a computer with accompanying programs (to be adapted by Seller to Buyer's special needs) for fall delivery. On June 1, Buyer's factory burned to the ground, obviating (*inter alia*) the need for computer technology. *Held*: Buyer could not cancel the contract with reference to the doctrine of failed assumptions, and Seller could recover lost profits (contract/cover differential).¹⁷⁵

In Scandinavian doctrine, the following factors have been listed as significant as regards the "right of withdrawal": whether the recipient can use the goods or services in another way than that originally planned;¹⁷⁶ whether the supplier can

170. *But see the Restatement at id.* which would deny that recipient's principal purpose is frustrated if it "can reasonably make other disposition of the machine, even though at some loss ..." The *Amtorg* decision makes no mention of such a factor, although the fact that the value of the machines exceeded the contract price is relevant for another aspect of the decision (restitution of prepayment). The possibility of an alternative use is perhaps better viewed as a relevant factor in deciding whether the frustration of the *principal* purpose is a "basic assumption".

171. See Gomard, *Obligationsretten* 1. hæfte at 42.

172. See Comment a to *Restatement 2d* § 264 referring to the same basic assumption test as applies to impracticability; see also Comment b to § 261 re. "factors that bear on a just allocation of risk".

173. 206 F.2d 103. Regarding the applicability of UCC § 2-615 to buyer's frustration of purpose, see *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 1 UCC Rep. 2d 1505 (7th Cir. 1986) (utility company contracted to buy coal at fixed price was later bound by state agency not to raise rates: buyer's risk).

174. Gulating lagsmansrett, judgment of August 27, 1976: see Nørager-Nielsen in *EDB Kontrakter* at 275-76.

175. See Nørager-Nielsen at *id.*

176. Compare Ill. 5 to *Restatement* 264.

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cover; whether the calculation of damages would create serious difficulty; and whether supplier has received reasonable notice.¹⁷⁷

In *Russian Agent* the deal turns sour when frustration supervenes. Sometimes a deal has been sour all along.

Fake Fiddle (Revisited).¹⁷⁸ Innocent, an 86-year old collector of rare violins, shows his collection to Virtuoso, a prominent concert violinist who collects similar instruments. Virtuoso picks up a fiddle and asks: “How much would you take for this Stradivarius?” Innocent (who also thinks the fiddle is a Strad) prepares and signs the following “Bill of Sale”:

“This certifies that I have sold to Virtuoso one Stradivarius violin dated 1717 for the full price of \$10,000 on which has been paid \$1,000 the balance to be paid ...”

It later becomes apparent that the violin is an imitation worth only a fraction of the purchase price.

The fiddle is defective: it does not conform to the contractual description; some would say a warranty has been breached. Others might prefer to challenge the validity of Virtuoso’s promise by focusing on the seller’s (innocent) misrepresentation.¹⁷⁹ But these possibilities notwithstanding, we might also approach *Fake Fiddle* using the doctrine of (mutual) mistake: we proceed – as with misrepresentation – by challenging the validity of the promise, thus seeking to avoid the transaction.¹⁸⁰ But the analogy with impossibility, impracticability and frustration is also quite clear: we seek to excuse Virtuoso from his promise to buy because of the failure of a basic assumption (*/forudsætning*): not one relating to broken (*/bristede*) dreams about the future, but about an erroneous (*/urigtig*) belief as to facts existing at the time of contracting.¹⁸¹

In American law the real *Fake Fiddle* has been conceived, *inter alia*, as a “mistake”-case.¹⁸² Danish law does not generally distinguish between delivery of de-

177. Gomard, *Obligationsretten* 1. hæfte at 42.

178. See *supra*, part 2.3.

179. See *id.*

180. See Farnsworth, *Contracts* at 662.

181. Compare Gomard, *Kontraktret* at 162 (“Forudsætningstilfældene ligger ugyldighed nærmere end kontraktbrud”).

182. See Honnold, *Law of Sales* at 46 re. *Smith v. Zimbalist*.

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factive goods and delivery of a wholly different type of good (*aliud*), thus limiting the overlap of rules of “validity” and rules of nonconformity.¹⁸³ Yet competing conceptions like these remain relevant in national and international sales.¹⁸⁴

Under the Scandinavian doctrine of failed assumptions (*forudsætningslæren*), we ask: (1) whether a given assumption is *material*, (2) whether the promisee ought to have *known* of this fact at the time of contracting, and (3) who should bear the *risk*?¹⁸⁵

In American doctrine, “Where both parties share a common assumption about a vital fact upon which they based their bargain and that assumption is false, the transaction may be avoided ... unless the risk is otherwise allocated by agreement, custom or law.”¹⁸⁶ Considerations similar to those enumerated in the Scandinavian test are codified in the 3-pronged analysis in § 152 of the *Restatement Second*,¹⁸⁷ but it seems unclear why the first of these (“basic assumption”) should signify materiality:¹⁸⁸ on the one hand, the second prong is also about materiality; on the other, “basic assumptions” is distinguished from the risk factor (prong 3), but according to § 261, basic assumptions itself “involves a judgment as to which party assumed the risk ...”¹⁸⁹

As the recent decision in *Aluminum Co. of America v. Essex Group*¹⁹⁰ confirms, the line between assumptions about the present (subsumed in American law as “mistake”) and future (“impracticability”) is often thin indeed: in doctrine and in precedent.¹⁹¹

183. See Gomard, *Obligationsret* 1. del at 124 with note 2.

184. Re. mistake and restitution in Danish law, see *infra*, part 4.3.2. Re. validity problems and the *CISG*, see *infra*, parts 6.2.1 and 6.3.1 and compare Gomard, *Obligationsret* 1. del at 124, note 2 (“Den int. Kbl udelukker anfægtelse af køb på grund af vildfarelse om salgsgensstandens egenskaber”, citing *v. Caemmerer* i 178 AcP (1978) 127).

185. See generally Krokeide, *Forudsætningslæren*, Lando, *Law of Contracts* 152-54, Gomard, *Kontraktret* Kap. 6, and Lyng Andersen, Madsen & Nørgaard, *Aftaler* Kap. 2.9.

186. Calamari & Perillo, *Contracts* at 300.

187. See Farnsworth, *Contracts* at 654: “(1) the (mutual) mistake goes to a basic assumption on which the contract was made; (2) the mistake has a material effect on the agreed exchange of performances; and (3) the mistake is not one of which he (the party adversely affected) bears the risk”.

188. See Farnsworth, *Contracts* at 654: “apparently intended to exclude mistakes relating to ... collateral or peripheral matters ...”

189. Introductory Note to § 261 at 311. Despite this apparent inconsistency, the *Restatement* proclaims that “basic assumption” means the same thing in both instances: see Comment b to § 152; accord Farnsworth, *Contracts* at 654.

190. 499 F.Supp. 53 (W.D. Pa. 1980). See *supra*, part 3.2.3 with note 130.

191. See Farnsworth, *Contracts* at 650 (“difficult to draw line”). Compare *id.* at 651 (discussing *ALCOA V. Essex* in terms of mistake) and *id.* at 680, note 18 (same case as impracticability).

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In both Scandinavian and American theory, the risk-factor leaves the doctrine of mistake open-ended. Indeed, as we unravel these systems' seamless webs, we see that courts are not likely to enforce an obligation when to do so would be unreasonable. Nor are they likely to decide whether a given promisor continues to be bound, in whole or part, without regard to the remedies available when non-performance is breach.

PART 4

Breach and Remedy

*The law of remedies has probably always involved a greater degree of uncertainty than has the system of rules by which the rights and duties of men are determined.*¹

4.1. Introduction: the Remedial Matrix

I make you a binding promise and break it: I fail to perform, and I have no legal “excuse”. I am in breach, and you have a remedy, by definition. *What* remedy? What means are available to right the wrong?

Even a piece of freely enacted private legislation which sets the standard for performance is likely to be “an imperfect statute which provides no penalties, and which leaves it to the courts to find a way to effectuate its purposes.”² Such private law “usually says nothing at all about what shall be done when it is violated”,³ and much of the litigation about remedies involves contracts which are in this respect imperfect statutes. We must look to the law to fill in the remedial gaps.

But the gaps are not always easy to fill ... and a comparative analysis not easy to make: the national superstructures may not even match. We need a remedial matrix which suits our comparative needs. And we find, *inter alia*, a well-established comparative classification in terms of the three basic courses of action which legal systems make available, depending upon the circumstances, to the aggrieved party:⁴

1. *Specific relief*: make the promisor do just what he promised; enforcement of the promise *in natura*.

1. Corbin, *Contracts* § 995 at 10.
2. See Fuller & Perdue, *Reliance Interest* at 58.
3. *Id.*
4. See Treitel, *Remedies* at 3.

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2. *Substitutionary* relief: make the breaching promisor pay some amount of money to compensate the loss suffered by the promisee (*erstatning*).
3. The right to *terminate*: cancel (*hæve*); put an end to the contractual relationship.

While the second heading is clearly our main (consequential) concern, it cannot be isolated from its remedial adjuncts. Specific and substitutionary relief need not be placed at opposite poles of the remedial spectrum. The right to demand specific performance is at odds with the right to terminate, but an injured promisee need not always choose between the right to demand specific performance and the right to demand damages for breach.⁵

Substitutionary relief is seen primarily as alternative to specific performance: a monetary substitute for the real (promised) thing.⁶ The substitutionary label is less appropriate when reliance damages are awarded not as a “substitute” for the broken promise, but rather as a means to help return the promisee to his pre-promise position.⁷

In Scandinavian doctrine, binding promise is sometimes defined as giving rise to a claim for either specific performance or performance (“expectation”) damages.⁸ But it has been noted that the converse is not necessarily true: an agreement cannot be classified as invalid (*ugyldig*) because the promisor can neither be held to specific performance nor to pay expectation damages.⁹ It seems better to speak of binding promise in more flexible terms: specific performance or monetary relief.¹⁰

In Scandinavian theory, specific and substitutionary relief have been united in a single conception: performance remedies (*opfyldelsesbeføjelser*), aimed at enforcement of the contract according to its “principal or subsidiary content”, and comprising both a claim to specific performance and a monetary claim based on protecting the “performance interest”.¹¹ American doctrine operates with an analog-

5. For example, where a court not only orders a tardy defendant-obligor to perform but also awards his obligee money damages to compensate for loss due to delay.

6. See Treitel, *Remedies* at 3 (“compensation for ... the promised performance”).

7. See *infra*, part 4.4.3.

8. See Gomard, *Obligationsretten* 1. hæfte at 40. Regarding the “performance (/expectation) interest”, see *infra*, this part.

9. See Krüger Andersen m.fl., *Dansk Privatret* 47-48.

10. *Accord*: Calamari & Perillo, *Contracts*, 2d at 18 (promise binding or enforceable when the “promisee is entitled to either a money judgment or specific performance because of a breach ...”). Compare *Restatement 2d* § 345(f) (enforcement of arbitration award is remedy).

11. See Gomard, *Obligationsretten* 1. hæfte at 64-5 and *Erstatningsregler* at 177-78.

ous concept: both specific and substitutional relief serve to protect the expectation interest by “attempting to put [the promisee] in as good a position as he would have been in had the contract been performed ...”¹²

The right to terminate also involves complicated conceptions. In American theory, termination is classified a “response to non-performance”, not a “remedy” as such.¹³ In Scandinavian law, termination is a “bilateral remedy” (*gensidighedsbeføjelse*): one which terminates (*ophæver*) the breaching promisor’s claim to consideration from the promisee.¹⁴

This tripartite framework is a useful one, but it cannot account for all factors relevant in our comparative context. Therefore, we distinguish three main “interests” which are protectable by contract enforcement: three principle purposes for awarding contract damages.¹⁵ Starting with the “lowest” level of interest- protection, this aspect of the remedial matrix may be summarized as follows:

1. Where a plaintiff P in reliance on a D’s promise confers some value on D, and D fails to perform, forcing D to disgorge the value protects P’s *restitution interest*.¹⁶

Corbin, in his own tripartite remedial scheme (restitution, damages and specific performance), distinguished the purpose of restitution: “the restoration of the injured party to as good a position as was occupied by him before the contract was made, without attempting to compensate him for *consequential* harms; the means to this end is a judgment for the equivalent in money of any performance rendered by the plaintiff and received by the defendant ...”¹⁷

The Scandinavian law of restitution comprises the restoration of gains constituting unjust enrichment. Although the restitution label is perhaps most often applied in non-contractual situations, it may also be applied in a variety of promissory contexts.¹⁸

12. Farnsworth, *Contracts* at 812. *Accord*: Knapp, *Problems* at 882-83.

13. *See* Farnsworth, *Contracts* at 606 and *infra*, part 4.3.

14. *See* Ussing, *Obligationsretten* at 78.

15. *See generally* Treitel, *Remedies* 27-30. The term “interest” refers to *economic* interest: *see* Gomard, *Kontraksret* at 93, note 15.

The *Restatement 2d* § 344 codifies these levels of interest protection under the heading: “Purposes of Remedies”. Hudec (*Reliance Interest* at 707) describes this section as “a most curious black letter law proposition. It states no rule.”

16. *See* Fuller & Perdue, *Reliance Interest* 53-54.

17. Corbin, *Contracts* § 1102 at 548 (my emphasis).

18. *See generally* A. Vinding Kruse, *Restitutioner* Kap. 10 and Krokeide, *Restitusjon*. *See also* Gomard, *Obligationsretten* 1. hæfte at 66.

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2. Where P in reliance on D's promise suffers harm, an award of damages which undoes the harm by putting P in the position he was in before the promise was made protects his *reliance interest*.¹⁹

Scandinavian doctrine also speaks in terms of compensation for loss which a party suffers by having "relied" on (*stolet på*) a contractual promise.²⁰ Relief designed to return the injured party to his pre-contractual position is usually referred to as "negative (contract) interest" (*negativ kontraktsinteresse*) protection.²¹

The conceptual similarity with American law is no coincidence: both the reliance and the negative interest doctrines are traceable to German (Civil) law origins.²²

3. Where D fails to keep his promise to P, awarding P the value of the expectancy created by the promise (i.e. putting him in the same position as he would have occupied had D performed) protects his *expectation interest*. Such protection (which, in contrast with 1 and 2 above, is not predicated on proof of P's reliance) may be achieved either by an order compelling performance or by an award of damages.²³

In Scandinavian law the positive performance interest *positiv opfyldelsesinteresse* is defined as compensation which places an injured promisee in the position he would have occupied had the breaching promisor (properly) performed.²⁴ Performance remedies (*opfyldelsesbeføjelser*) are the *means* available to protect the expectation interest.

Of course, the fact that both American and Scandinavian theory identify similar contractual interests, sometimes worthy of protection, does not necessarily mean that these systems' courts in fact protect these interests in the

19. See Fuller & Perdue, *Reliance Interest* at 54.

20. See Gomard, *Obligationsretten i en nøddeskal* 135 (2. hæfte 1978).

21. See Gomard, *Obligationsret* 1. del at 154 ("tillidsinteressen eller den negative interesse").

22. See Augdahl, *Obligasjonsrett* 247-48 (re. Ihering, *Jahrbücher für Die Dogmatik des Privatrechts*, Bind 4, 1861) and Fuller & Perdue, *Reliance Interest* at 55 with note 4 (citing the annotation to § 122 of the German Civil Code in Busch, *Das Bürgerliche Gesetzbuch* (1929)). See also Treitel, *Remedies* at 28 (re. *Vertrauensinteresse*).

23. See Fuller & Perdue, *id.* at 54. The reliance/expectation distinction is related to (but hardly the equivalent of) the doctrinal distinction sometimes drawn between "losses caused" (*damnum emergens*) and "gains prevented" (*lucrum cessans*): see *id.* and Treitel, *Remedies* at 29. Compare Farnsworth, *Remedies* at 1162 with note 67.

24. See *eg.*, Augdahl, *Obligasjonsrett* at 141 and (for a critical comparison of the positive and negative interests) Krokeide, *Erstatningsberegningen* 132 ff.

same situations or to the same degree. And indeed, though each system identifies similar interests, the national pigeonholes diverge at a number of significant points. Still, this scheme helps establish a conceptual point of departure, a transnational scale of criteria, a suitable tool for comparative analysis, both positive and normative.

Our primary concern is monetary relief. We seek not only to assess varying degrees of monetary relief but also to describe why a breaching promisor should pay damages at all: the basis of liability in a contractual context.²⁵ As we shall see, the basis and extent of contractual liability go hand in hand, the encyclopedic pigeonholes notwithstanding.²⁶

For present purposes, it seems appropriate to start with the broader conceptions of our initial, tripartite remedial classification, hereunder the relationship between monetary and non-monetary forms of relief. We begin at the Scandinavian (and Civilian) point of departure, by looking at the primary remedy for breach of promise, the most natural kind of performance-interest protection, the non-monetary kind: performance *in natura*, specific performance.

4.2. Specific Relief.

The relationship between specific and substitutionary relief has been described in terms of a choice between fundamental options available to a legal system: a choice between (1) “secur[ing] for the promisee the very benefit that he was promised ...” and (2) “provid[ing] him with something in substitution for that benefit ...”²⁷

“[S]ince a contract is first of all a promise, the contract must be kept because a promise must be kept”.²⁸ If a promise is legally binding, it *must* be kept, moral considerations aside, because the law will enforce it. And surely the most straightforward means of relief for breach is the specific kind. It is therefore quite natural that Scandinavian law, in accordance with Civil systems generally, has chosen specific performance (*naturalopfyldelse*) as its

25. Because the protection of the reliance interest is a *tort-like* form of relief, an analysis in terms of interest-protection helps shed light on the sometimes complex relationship between contractual and delictual relief. See *infra*, part 4.4.3.

26. Compare Treitel, *Remedies* Ch. 16 at 56: “Our concern is rather with the *extent* of liability than with the basic *availability* of a remedy for contractual default. However ... in CIVIL LAW systems ... the ‘fault’ required as a condition of contractual liability sometimes appears to determine not only the existence of liability but also its extent”.

27. Farnsworth, *Remedies* at 1145.

28. Fried, *Contract as Promise* at 17.

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as its remedial starting point: if you break your promise to me, a Scandinavian court will give me a judgment obligating you do what you promised.²⁹

In American law, as in Common systems generally, the starting point seems to lie at the other end of the remedial spectrum: if you break your promise to me, an American court will give me a substitute for the performance promised: damages (*erstatning*) is the “primary remedy” for breach of contract;³⁰ monetary relief is the norm, specific relief the deviation.³¹

Consider this expanded version of a case considered previously:

*Missing Easement (Revisited).*³² S contracts to sell Blackacre (real property) to B for Dkr. 200,000. The contract contains a clause whereby “S guarantees B that there is free and unimpeded vehicular access to the entire property without any limitation whatsoever”. In fact, full access to Blackacre (as guaranteed by S) is impeded because *W*, the owner of *Whiteacre*, an adjoining property, only need tolerate pedestrian traffic. B sues S to enforce the contract: execute a deed which conforms to the deal. S can secure B full vehicular access to Blackacre only via the outright purchase of *Whiteacre*, which *W* is willing to “let go” for Dkr. 100,000 (twice its market value).³³

Buyer has been wronged: in a legal sense. He was promised one thing and got something else (of lesser value). “For every legal wrong there is a legal remedy.”³⁴

The most natural means available to right the wrong would seem to be *in natura* relief: make Seller make good on his guarantee, provide unimpeded access. But in American law specific performance is an exceptional remedy, and the most significant limitation governing its discretionary use is that specific

29. See KBL (I) § 21, subsec. 1 and § 28, subsec. 1. See also Gomard, *Obligationsretten* 1. hæfte at 40.

30. Regarding the historical development of specific relief in the common law courts, see Farnsworth, *Contracts* at 819. “Of course if the promise was simply to pay a sum of money, the effect of such a judgment was to give the plaintiff specific relief.” (*Id.*).

31. See Farnsworth, *Remedies* at 1154.

32. See *supra*, part 2.3 (*Missing Easement I*). This paradigm is based on a fuller presentation of the facts in UfR 1930.198 VL.

33. In UfR 1930.198 VL, plaintiff’s primary claim (*påstand*) was that defendant be ordered to execute a deed with a guarantee corresponding to that in the contract of sale (*Slutseddel*).

Regarding the doctrine of “merger” in American law, see Katz, “Breach of Real Estate Contracts” in *Commercial Damages* § 32.04 (7-8) (C. Knapp Ed. 1987).

34. Calamari & Perillo, *Contracts* at 519.

relief will not be granted if an award of damages is “adequate”.³⁵ Whether damages are an adequate remedy depends in large part on whether money can buy a substitute,³⁶ and since Common law courts still view each parcel of land as unique,³⁷ damages for breach of a promise to convey an interest in land remains an inadequate remedy.³⁸

If S had simply refused to convey Blackacre to B, even an American court would order S to do it. But this is not the problem in *Missing Easement*. B wants not only Blackacre (which S has) but also the easement (which is missing).³⁹ So we ask whether an American or Scandinavian court would (also) make S buy Whiteacre, and thus secure the easement. We predict that neither an American nor a Scandinavian court would so order, but not necessarily for the same reason. An American lawyer, traditionally predisposed against specific relief, might proceed to argue: (1) since S does not own Whiteacre or the rights to it, performance as agreed (the transfer of access to Blackacre via Whiteacre) is impossible, at least as things stand now;⁴⁰ and (2) since S has made no promise to buy Whiteacre, a court should not make him do so: there is nothing to “specifically” perform.⁴¹ S has breached a promise which guarantees an easement, but the breach gives rise only to monetary relief.

These arguments would not seem wholly out of place in a Scandinavian court, for even in this system where performance *in natura* is the primary remedy, a court will not order the impossible.⁴² Specific relief is designed to enforce a given promissory obligation to “do something”,⁴³ and because S has made no express promise to buy Whiteacre, we should be reluctant to “imply” one.⁴⁴ Still, Scandinavians might well be more inclined to interpret S’s

35. See *Restatement 2d*, Introductory Note to § 357 and § 359.

36. See Farnsworth, *Contracts* at 828.

37. *Id.* at 829.

38. See Calamari & Perillo, *Contracts* at 582.

39. See UfR 1930.198 VL (“paastaaet Sagsøgte kendt pligtig ... at udstede Skøde ... principalt overensstemmende med ... Skødeudkast ...”).

40. Compare Comment c to *Restatement 2d* § 358 re. a “seller of land who cannot perform as agreed because of ... a defect in title ...” (emphasis added).

41. § 357 of the *Restatement 2d* speaks of “specific performance of a contractual duty”.

42. See *infra*, this part.

43. Injunctive relief (*forbud*) involves the enforcement of a promise “not to do” (*undladelsesforpligtelse*): see Gomard, *Fogedretten* at 353. Regarding the French distinction between the enforcement of promises to “do”, etc., see generally Dawson, *Specific Performance*.

44. Compare the reasoning of the Danish High Court in UfR 1930.198 VL (“et saadant Køb ... har ligget ganske udenfor *Forudsætningerne* ved *Handlens Indgaelse* ... [fremhævet her]”).

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promise in a manner consistent with some form of specific relief, and there is at least some authority supporting the view that a conveyor of land may be compelled to cure (*/afhjælpe*) a (partial) defect in title such as the one in *Missing Easement*.⁴⁵

The starting point in Scandinavian doctrine is that the recipient (*kreditor/obligee*) of defective goods or services can demand “proper performance” (*/rigtig ydelse*): *inter alia*, that the supplier redeliver or cure.⁴⁶ But even in Scandinavia, specific performance is only a “starting point”, a general rule with a list of (substantive and procedural) exceptions as long as the arm of the law.

The *substantive* starting point is that the obligee/promisee can obtain a judgment (*dom*) which decrees that the defaulting obligor perform *in natura*.⁴⁷

Perhaps the most significant, substantive exceptions involve “impossibility”, “impracticability”, and related doctrines. As already indicated, many Scandinavian writers prefer to deal with the problem of *force majeure* solely in terms of *liability* (as opposed to discharge of obligation).⁴⁸ This approach necessitates construction of a separate (but essentially equal) set of excuses as regards specific performance, lest a promisor excused from liability remain bound to do the impossible, etc. The “performance-risk” (*ydelsesrisiko*) issue deals with the question of whether an obligor’s duty to perform *in natura* continues or terminates where performance unexpectedly becomes “impracticable”:⁴⁹ the issue is likely to be resolved by a reference to the rules which govern excuse from liability in damages.⁵⁰ As in American law, self-imposed impossibility of (specific) performance does not relieve the obligor of his “secondary duty” to pay damages.⁵¹ The “right of withdrawal” (*/afbestillingsret*) is sometimes classified as an exception to specific performance,⁵² but the doctrine seems best described within a unitary, discharge (frustration of purpose) context.⁵³

45. See Ussing, *Obligationsretten* at 71 (“som det bl.a. er forudsat i ... U 1930.198”). See also Gomard, *Obligationsretten* 1. hæfte at 49.

46. See Gomard, *id.* at 48-49.

47. See Gomard, *id.* at 40.

48. See generally *supra*, part 3.

49. See Gomard, *Obligationsret* 1. del at 45 (“hvornopfyldelsen uventet ... blevet usædvanlig byrdefuld eller umulig”).

50. Re. KBL (I) § 24, see Gomard at *id.*

51. See Gomard, *id.* at 45 with note 41 and 46 (“aftalens subsidiære indhold”).

52. See, e.g., Gomard, *Obligationsretten* 1. hæfte at 42.

53. See *supra*, part 3.4 and compare Gomard, *Obligationsretten* 1. hæfte at 42 (“En realkreditor ... kan undertiden erklære kontrakten for ophørt uden herved at ifalde [erstatnings] pligt ... [fremhævet her]”).

Specific Relief

As in America, Scandinavian courts will not specifically enforce contracts for personal services (“involuntary servitude”).⁵⁴ Another substantive limitation relates to the duty to mitigate (*tabsbegrænsningspligten*).⁵⁵

Beyond this, there are important, “procedural” exceptions. The general rule regarding enforcement of judgments is that a non-money judgment is enforced by the sheriff as if it were a monetary claim (*pengekrav*).⁵⁶ An important exception to this principle involves judgments requiring the obligor to deliver “moveable things”, hereunder goods (*løsøre*).⁵⁷ This corresponds to the system in Germany.⁵⁸

And the list of exceptions is longer still. Where specific performance would place a *far greater burden* on the obligor than would the payment of monetary compensation, Scandinavian doctrine limits the range of remedies. And if, in *Missing Easement*, the inflated price required to purchase Whiteacre far exceeds the value of the easement to B, a Scandinavian court will let B make do with some smaller measure of monetary relief.⁵⁹

In UfR 1930.198 VL the Danish High Court made a discretionary estimate of B’s loss and reduced the price of the purchased property by that amount.⁶⁰ The decision has been seen as one preventing “economic waste”,⁶¹ but its seemingly “subjective” rationale also seems quite compatible with contractual interpretation, American style.⁶²

54. See Gomard, *Obligationsretten* 1. hæfte at 47. Regarding injunctions (*forbud*), see *id.* and Gomard, *Fogedret* Kap. 11; compare Farnsworth, *Contracts* § 12.5.

55. See Gomard, *id.* at 43 and *infra*, part 4.4.4.1 (“*Wet Straw*”).

56. See Gomard, *Fogedret* at 22.

57. See (re. Danish Code of Civil Procedure (*Restplejeloven*) § 531) Gomard, *id.*, 224-25.

58. See Dawson, *Specific Performance* at 526 (“problem of procedure”).

59. *Accord*: Gomard, *Obligationsretten* 1. hæfte at 46 (“Hvor ... naturalopfyldelsen [er] langt mere byrdefuld ... har retspraksis ... begrænset debitors forpligtelse til at erstatte kreditors opfyldelsesinteresse, jfr. UfR 1930.198 VL”). See also KBL II § 23(1).

60. UfR 1930.198 VL (“passende ... ansættes til 2000 Kr.”).

61. See Ussing, *Obligationsretten* at 68-69. *Accord*: Augdahl, *Obligationsrett* at 159 with note 5 (citing Ussings example of a motorboat which sinks before delivery). Compare Farnsworth, *Contracts* at 871 (re. damages based on cost to remedy a defect: pejorative term “economic waste” sometimes misleading).

62. See UfR 1930.198 VL (“et saadant Køb, der vilde forudsætte [urimelige] økonomiske Opofrelser ... har ligget ganske udenfor Forudsætningerne ved Handlens Indgaaelse ...”). *Accord*: Gomard, *Obligationsretten* 1. hæfte at 7 (“opfyldelsespligten [vedbliver] vistnok at bestå, medmindre opfyldelsen kræver væsentlig større opofrelser ... end påregnet ved aftalen”).

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According to the *Restatement Second*, “the seller of land who cannot perform as agreed because of a ... defect in title may be ordered to transfer all that he can, with *compensation* for the resulting claim for partial breach”.⁶³ More specifically, the buyer is entitled to an *abatement*⁶⁴ – what Scandinavians (and Civilians) would call a proportionate reduction in price.⁶⁵

From a comparative point of view, we seem to be approaching full circle:⁶⁶ American law rejects specific performance where damages are an adequate remedy whereas Scandinavian law rejects specific performance where damages is the only adequate, reasonable remedy.

To be discharged from a primary obligation to perform, the obligor need not even reach the “sacrifice-threshold” applicable to substitutionary relief.⁶⁷ And if there is a comparative gap,⁶⁸ modern American developments are helping to close it.⁶⁹

Damages is the primary remedy, in both systems: if not in theory, at least in practice; and not only for the reasons already stated, but also because we can’t turn back the clock.⁷⁰ Even in those limited situations where we grant specific performance because damages are inadequate, we must often compensate for the inadequacy of specific relief. Since, for example, “specific relief seldom results in performance within the time the contract requires, damages for the delay will usually be appropriate.”⁷¹ And where “time is of the essence”, specific performance is itself an “inadequate remedy”. Fortunately, it is not the only one available.

63. Comment c to § 358 (emphasis mine).

64. See Illustration 3 to *Restatement 2d* § 358; accord Calamari & Perillo, *Contracts* at 582.

65. The *restitutionary* nature of this remedy is discussed *infra*, part 4.3.2.

66. Accord: Gomard, *Naturalopfyldelse* at 14 (“nærmer sig stærkt det anglo-amerikanske”) and Sevón et.al., *Huvudpunkter* at 63.

67. See Sevón et.al., *Huvudpunkter* at 66 (“uppoffringar som inte är rimliga”).

68. Compare David, *English Law* at 127 (doubting that English law is less liberal than the French).

69. See Farnsworth, *Remedies* at 1156 (trend clearly extension of specific relief). Re. the expansion of UCC § 2-716, see, e.g., *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F.Supp. 429, 19 UCC Rep. 721 (S.D.Fla. 1975) and generally White & Summers, *Uniform Commercial Code* § 6-6.

70. See Farnsworth, *Contracts* at 825.

71. Comment C to *Restatement Second* § 358.

4.3. Termination and Restitution

4.3.1. Termination: Putting an End to the Contract

If we provide a contracting party with the right to *terminate*, we let him “put an end to the contract”. In the law of sales, we speak of the right to cancel (*hæve*).⁷² Other terms describe similar notions.⁷³

There is no consensus as to terminology. The termination label, often-used in a general contractual context, seems broader than the UCC notion of cancellation.⁷⁴ Termination is preferable to *rescission*, since this suggests *avoidance*.⁷⁵ To cap off the confusion, the CISG uses the term *avoidance* as the international label for cancellation (*hævebeføjelsen*).⁷⁶

In American general contract theory, the right to put an end to the contract is a “response to breach by non-performance”,⁷⁷ a problem closely aligned with the “mysterious” topic of conditions.⁷⁸

Reading Pipes (Revisited).⁷⁹ Contractor agrees to build a residence for Owner for a stated price. The contractual specifications provide that “all wrought iron pipe must be ... of Reading manufacture.” These specifications notwithstanding, some of the pipe installed by Contractor is manufactured by Cohoes, and – although Cohoes pipe is “just as good” as Reading – Owner refuses to pay.

By supplying pipe which does not conform to the contract, Contractor breaches his binding (valid) promise. So, Owner is entitled to remedial relief. The question here is whether this recipient, in response to his supplier’s breach, can refuse to comply with his own promise to pay.⁸⁰ To answer this,

72. See, e.g., UCC § 2-106(3)-(4).

73. See Ussing, *Køb* at 61-62 (comparing Scandinavian, Continental and Common terms).

74. See Farnsworth, *Contracts* at 606 with note 2.

75. *Id.* Regarding “avoidance” by reason of mistake, see *Restatement 2d* § 152. Regarding the “ambiguous” concept of rescission, see White & Summers, *Uniform Commercial Code* at 295.

76. See, e.g., CISG Articles 49 and 81. Compare Ussing, *Køb* at 62 (re. U.L.I.S.).

77. See Farnsworth, *Contracts* at 606 and compare *id.* Ch 12 (ad “remedies”: specific performance, damages, and restitution).

78. See Fried, *Contract as Promise* at 120.

79. See *supra*, part 2.2.

80. Compare Ussing, *Obligationsretten* at 82 (“ophører at være forpligtet til at erlægge sin ydelse ...”).

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Common lawyers are likely to ask whether Contractor not only has breached a promise, but also a *condition*, that is, “an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.”⁸¹ Lest some Scandinavians fail to see the connection, we add another illustration:

*Corinthian Columns.*⁸² Contractor C promises Owner O to construct an extravagant, classically inspired car port on O’s vacation property. O advises C of his wife’s fanatical insistence on Greek simplicity and requires that the contract specify: “CONDITION: BEARING COLUMNS DORIC STYLE”. Arriving at the site upon completion, O discovers that, due to C’s oversight, the port is supported by Corinthian columns. Sued by C for the contract price, O refuses to pay.

In *Corinthian* we see an express condition. And conventional Common legal wisdom would demand strict compliance with the condition, however harsh:⁸³ no Doric columns, no contractual duty to pay. “In exercising their freedom of contract the parties are not fettered by any test of materiality or reasonableness. If they agree, they can make even an apparently insignificant event a condition.”⁸⁴

Even according to the conventional Common wisdom, we should not rush to the judgment that the Owner in *Corinthian* can keep the defective port without paying for it.⁸⁵

Now a Scandinavian lawyer might well ask what all this has to do with *Reading Pipes*. For clearly, the *Reading* contract contains no clause which conditions Owner’s duty to pay upon the installation of Reading pipe.⁸⁶ So if the Owner in *Reading* claims he “may keep the [unreturnable] house without paying for it”, we might brand the suggestion “absurd”, *a fortiori*, because

81. *Restatement 2d* § 224.

82. Inspired by McLaughlin’s eloquent dissent in *Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921) (the real *Reading Pipes* case).

83. See Farnsworth, *Contracts* at 544.

84. *Id.* at 538.

85. Re. a restitutionary theory of recovery, see Fried, *Contract as Promise* 123-25 and *infra* note 87. Regarding unconscionability, see *infra*, this part.

86. *But see* Fried, *id.* at 123, example IV – “specifications ... expressly denominated conditions ...” – an example allegedly “based” on *Jacob & Youngs*, the real “*Reading Pipes*” case: *id.*, note 18.

we are not dealing with an express condition.⁸⁷ So we draw a distinction between *Corinthian Columns* and *Reading Pipes*: in *Reading*, we can deal with Owner's claim without any direct assault on the citadel of contractual freedom.

Cardozo's eloquence notwithstanding, it seems peculiar that *Jacob & Youngs* (the real *Reading Pipes* case) has become the American "conditions" paradigm, because the owner in that case did not even *claim* that his performance was "conditional". Plaintiff-contractor built defendant's residence "at a cost upwards of \$77,000" and sued defendant-owner only "to recover a balance of \$3,483.46, remaining unpaid." "No realist would think that the defendant's argument would have been treated nearly so respectfully if he had refused to pay any part of the price."⁸⁸

True, the *Reading* contract does contain what Common doctrine labels an "implied", *constructive* condition.⁸⁹ And as in Scandinavia, payment and delivery are "constructive conditions concurrent" (*vederlagsforudsætningen*).⁹⁰ But this "condition" is a court-constructed gap-filler, designed to express the important, yet simple idea that you only have to pay for what you get. In a case like *Reading*, Owner need not pay anything if Contractor builds nothing. In fact, he builds something, but something other than what Owner ordered. So we ask: is Contractor's performance "substantial" (or) is his breach "material"? And only if the breach is material will the Owner be relieved of his obligation to pay the purchase price.⁹¹ Materiality is a question of fact and of degree,⁹² and Cohoes pipe is in fact "just as good" as

87. Compare Fried, *id.* at 123: "absurd" because of the possibility of restitutionary recovery. Even the clause in *Corinthian*, while certainly more explicit than the one in *Reading*, does not expressly provide that O can keep the house without paying for it.

Re. the contract price as a ceiling on restitutionary relief, see Fried, *id.* 114-15 and 126 and compare Gomard, *Obligationsretten* 1. hæfte 77-78.

88. Atiyah, 95 *Harvard Law Review* 509, 522 (1981) (book review of Fried's *Contract as Promise*).

89. Accord: Farnsworth, *Contracts* at 591 (discussing *Jacob & Youngs* in the context of "substantial performance": a doctrine not applicable to express conditions).

90. See *infra*, part 4.3.2.

91. Compare Farnsworth, *Contracts* at 590: "only 'substantial' performance is required of the first party before he can recover *under the contract*" (emphasis added) and *id.*, note 2 (distinguishing recovery of "progress payments").

92. See Calamari & Perillo, *Contracts* at 409 and Farnsworth, *Contracts* at 591 (quoting Cardozo in *Jacob & Youngs*).

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Reading; the defect does not affect the value of Contractor's performance.⁹³ Neither American nor Scandinavian courts would construct an absurd condition which would relieve Owner of his duty to pay.

*Used Generator.*⁹⁴ Seller offers Buyer (electric utility) a "rebuilt" (40-year old, war surplus) generator for 50,000 kr. In its acceptance, Buyer agrees to pay the price, describing the machine as "rebuilt and fully reliable". Neither party tests the generator prior to installation. Once installed, the generator proves unreliable due to a serious, latent defect, and Buyer seeks (a) to cancel the contract and (b) to recover damages for installation costs, lost profits, etc.

By describing the machine as "fully reliable", Buyer communicates his expectations as to quality: what he expects in return for his money. And though we are hardly dealing with an "express condition", the communication serves a dual purpose: not only does it tend to negate any *caveat emptor* inference; it also helps determine the materiality of breach.

In NRt 1960.1055 the Supreme Court of Norway held Buyer utility entitled to cancel the contract of sale. In this connection, the court emphasized the "fully reliable" clause.⁹⁵

In UFR 1942.252 H contractor C agreed to dig a well on owner O's property. C, who was to receive a fixed hourly wage, estimated the job would cost about 2,000 Dkr. After several months' work, the bill was up to at 24,000 Dkr. and the job still unfinished. In relieving O of the obligation to pay (for next-to-nothing) the Danish Supreme Court reasoned along the lines of "implied conditions".⁹⁶

So, at least where there is no express agreement as to termination, we can formulate the general rule in both American and Scandinavian law: the injured

93. In this situation (*ikke-værdi-forringende mangel*), there cannot even be a restitutionary reduction in price: *see infra*, part 4.3.2.

94. Based on NRt 1960.1055.

95. *See* NRt 1960 at 1058 ("Hevningsretten ikke ... gått tapt ... betydelig vekt på ... den forpliktelse til å levere generatoren "fullt driftssikker" ..."). Regarding the Court's decision as to the *extent* of monetary relief, *see infra*, part 5.3.

See also UFR 1986.831 Ø (realtor was aware that seller attached decisive significance to a specified minimum price: "kontante provenu").

96. *See* UFR 1942. 252 ("Forudsætning, at Appellanten var i Stand til at opfylde sine kontraktmæssige Forpligtelser ... bristede ...").

party can put an end to the deal only where the breach is deemed to be material.⁹⁷

By terminating, he treats the breach as “total”.⁹⁸ In both systems, the party terminating may, in addition, assert a claim for damages. Damages, if awarded, will be “calculated on the assumption that neither party will render any further performance.”⁹⁹

In American doctrine, substantial performance is regarded as the “antithesis of material breach”.¹⁰⁰ The first question is whether the breach is significant enough to amount to the nonoccurrence of a “constructive condition of exchange”; if so, and assuming the breach is not cured (*afhjulpet*), the injured party is entitled to terminate.¹⁰¹ The Uniform Commercial Code deals with termination/cancellation in Scandinavian fashion: as a *remedy* for breach.¹⁰²

The right terminate (a “bilateral remedy”) is often exercisable without judicial intervention.¹⁰³

Comparative analysis can dispel some of the mystery surrounding Common law conditions. But disparities remain which can hardly be passed off as merely superstructural. For one thing, what Common lawyers sometimes see as a clear condition,¹⁰⁴ may only be a “warranty” in Scandinavian eyes.

97. As with specific performance, the remedial starting point here is *no-fault*. See *Obligationsretten* 1. hæfte at 73 and compare *Restatement 2d* § 241, Comment f (adherence to Subsection (e) not conclusive as regards materiality).

98. See Corbin, § 946 and compare Ussing, *Obligationsretten* at 82 (“han træder helt tilbage fra kontrakten”).

99. Farnsworth, *Contracts* at 608. Accord: Ussing, *id.* at 82 and Gomard, *Obligationsretten* 1. hæfte at 110 (“Pligten til at præstere fremtidige ydelser falder bort ...”).

100. Calamari and Perillo, *Contracts* at 410.

101. See Farnsworth, *Contracts* at 611-15.

102. See UCC § 2-703, listing the remedies available to a seller upon buyer’s breach and compare White & Summers, *Uniform Commercial Code* at 305 (re. revocation of acceptance): “The common law concept of “material breach” is at least a first cousin to the concept of “substantial nonconformity””.

103. See Gomard, *Obligationsretten* 1. hæfte at 65 and compare Farnsworth, *Contracts* at 815 re. “judicial” remedies.

A buyer who (*eg.*) seeks to “revoke acceptance” and receive a restitutionary repayment will often need court assistance. Whether a party is *entitled* to a non-“judicial” remedy is, in the final analysis, a question for the court.

104. Regarding the interpretation of conditions in American law, see Farnsworth, *Contracts* § 8.4.

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In a recent English case,¹⁰⁵ an FOB contract for sale of sugar required S to specify a loading port “at latest” by November 14th. Despite a reminder, S did not specify until November 15th. *Held* (notwithstanding the arbitrator’s finding of custom to the contrary): “no words in English more final”. In allowing the buyer to terminate the sale, the court emphasized the need for certainty in mercantile transactions.

The Scandinavian version of *rigor commercialis* seems somewhat less rigorous,¹⁰⁶ as confirmed by another recent English decision applying Norwegian law.¹⁰⁷

Even where the language of condition is clear, a Scandinavian court would surely resist enforcement of private legislation which purports to “make even an apparently insignificant event a[n express] condition.”¹⁰⁸ In Scandinavia, “freedom of contract” is clearly fettered by a reasonableness-test.¹⁰⁹ In Scandinavia, an unreasonable express condition *does not bind* the promisee.¹¹⁰

Inman v. Clyde Hall Drilling Co. illustrates the classical American doctrine of strict compliance with express conditions.¹¹¹ Within 30 days of being discharged, Inman sued his employer for termination without justification. His contract required that he give his employer 30 days prior notice of any claim and that he could not bring suit earlier than 6 months after giving such notice. Summary judgment for the employer was affirmed, because Inman had not given prior notice as required by the contract and performance of this *condition* was now impossible.

Inman notwithstanding, there are important exceptions to the strict compliance rule.¹¹² Even in America, the parties’ contractual freedom is at least fettered by “the doctrine of unconscionability and a few other constraints ...”¹¹³ § 229 of the *Restatement 2d* provides for the excuse of a condition to avoid a “disproportionate

105. Gill & Duffus S.A. v. Société pour L’exportation des Sucres S.A. [1985] 1 Lloyd’s Rep 621.

106. See Hellner, *Kommersiell Avtalsrätt* at 19 (“kan behövas en säkerhetsventil även vid ‘rigor commercialis’”).

107. See *Forsikrings Vesta v. Butcher* [1988] 2 All E.R. 43 (Owners of Norwegian fish farm failed to comply with 24-hour watch condition in insurance and reinsurance policies; under Norwegian - as opposed to English - law, breach of this condition did not provide London underwriters with a valid defence to claim by Norwegian insurance company).

108. Farnsworth, *Contracts* at 538 (re. American law). Compare Hellner at *id.*

109. See, e.g., UfR 1986.104 H (letter of credit). Compare Farnsworth, at *id.* (expressing the contrary, American view).

110. See § 36 of the Contracts Act, *supra* part 2.1 and compare *Forsikrings Vesta*, *supra* note 107.

111. 369 P.2d 498 (Alaska 1962), discussed by Farnsworth, *Contracts* at 545-46.

112. See Farnsworth at 545 (rule of strict compliance traditionally applies) and *id.* at 546 with note 13 (re. grounds to avoid this rule, “particularly true where the liability of an insurer is involved”). Compare UfR 1984.811: under the circumstances, *held unfair* (“stridende mod billighed”) to relieve insurer when commercial insured in arrears.

113. See Farnsworth, *id.* at 538-39.

Termination

forfeiture”, and because the disproportionate failure concept deals with *supervening* events,¹¹⁴ it works to supplement the doctrine of unconscionability (which deals overtly only with unfairness existing at the time of contracting).¹¹⁵ If safety valves like these are “flexible one[s], to be used by a court in its sound discretion as a last resort,”¹¹⁶ then the *Inman* court appears to have abused its discretion.¹¹⁷

We need not look to private legislation to find rules which, purporting to advance “commercial certainty” (*omsætningens sikkerhed*), tend to make even an apparently insignificant event a condition: even in Scandinavia, KBL I provides that, as between merchants, “every delay is significant”: *i.e.*, a material breach giving the “injured” party a right to cancel (*hæve*).¹¹⁸ But while such Scandinavian formalism is all but legal history,¹¹⁹ *rigor commercialis* lives on in the Common law world.

Although defective title to a single slave did not “substantially” deprive the Common buyer of a plantation in 1779,¹²⁰ let the modern UCC seller who delivers all but a spare tire beware!¹²¹ The UCC § 2-601 rule of perfect tender¹²² is subject to a

114. See *Restatement Second* § 229, Comment a and Farnsworth, *Contracts* at 571.

115. See UCC § 2-302 and *Restatement 2d* § 208. In Scandinavia, § 36 of the Contracts Act deals with both existing and supervening unfairness: see *supra*, part 2.1.

116. Farnsworth, *Contracts* at 571 (speaking of disproportionate forfeiture and unconscionability).

117. See Knapp, *Problems* at 824, citing Childres, “Conditions in the Law of Contracts”, 45 *N.Y.U.L.R.* 33 (*Inman* is “lonely outpost” measured against current judicial standards).

118. Regarding KBL § 21(3), still in effect in Denmark and Sweden as of this writing, see Ussing, *Køb* at 65 (“De nordiske loves regel kan synes streng i enkelte tilfælde, men ... forøger den almindelige sikkerhed i handelen”). Regarding the corresponding rule for buyer’s breach in § 28, see *id.* at 89.

119. The new KBL II test (§ 25) is material breach, supplemented by a *Nachfrist* rule which accords with the principle in CISG Article 49: see Sevón et.al., *Huvudpunkter* at 69.

120. *Boone v. Eyre* (1779) 1 Hy.Bl. 273n; 2 W.Bl. 1312, discussed in Treitel, *Law of Contract* at 577.

121. See *Colonial Dodge, Inc. v. Miller*, 420 Mich. 452, 362 N.W.2d 704, 40 UCC Rep. 1 (1984) (under the circumstances – *inter alia*, the dangers attendant upon a stranded motorist on a Detroit freeway – failure to include the spare tire entitled buyer to revoke his acceptance of automobile pursuant to UCC § 2-608).

122. Roughly translated: “enhver forsinkelse og enhver mangel er væsentlig”.

Part 4.3.1

number of significant exceptions,¹²³ but the net result is surely more “pro-condition” than Scandinavian law.¹²⁴

In modern English Sales law, the perfect tender concept is expressed in terms of *implied conditions*.¹²⁵ In *Arcos v. Ronaasen* (the real *Half-Inch Staves*)¹²⁶ Seller contracted to deliver wooden staves, “1/2 inch by 28 inches”. Although the thickness of the staves delivered slightly exceeded 1/2 inch, they were both merchantable and fit for the buyer’s intended purpose (making barrels). *Held*: Buyer could rightly *reject* (in the falling market) because the goods failed to conform with the implied condition that they correspond with the *description*.¹²⁷ This formalistic *Sale of Goods Act* approach tends “to shut out from consideration as irrelevant the actual consequences of a breach of contract.”¹²⁸ The American UCC § 2-313 treats conformity with description under the rubric of implied *warranty*,¹²⁹ but the perfect-tender rule of § 2-601 could be applied to such a breach.

Cancellation (*/hævebeføjelsen*) is a remedy for breach: one, but not the only, doctrinal path leading to termination, the “end” of the contract.

Fake (Renaissance) Furniture (Revisited).¹³⁰ Norwegian Buyer sees a Renaissance-style furniture set in Dealer’s Copenhagen shop and agrees to pay the asking price (with nothing being said about the quality or origin of the goods). When the goods arrive in Norway, Buyer is disappointed to discover that the set is Renaissance in style only: a cheap imitation, camouflaged to look like the real thing. Buyer seeks (*inter alia*) to terminate the contract.

123. See White & Summers, *Uniform Commercial Code* at 305 re. installment contracts (§ 2-612) and revocation of acceptance (§ 2-504): “basic test in both ... is that the goods be “substantially” nonconforming.” Regarding the relationship between “cure” (*afhjælpning*) and perfect tender, see, e.g., *T.W. Oil, Inc. v. Consolidated Edison Co. of New York, Inc.*, 57 N.Y.2d 574, 443 N.E.2d 932, 35 UCC Rep. 12 (1982). In other situations, the perfect tender rule of UCC § 2-601 may well bow to trade usage, etc.: see White & Summers, *id.* at 304.

124. See, e.g., White & Summers, *id.* at 305 (late delivery hypothetical).

125. See S.G.A. secs. 11-15.

126. See *supra*, part 2.4.

127. See now: S.G.A. § 13.

128. Atiyah, *Sale of Goods* (6th) at 42. Atiyah (*id.* at 83, note 8) regards *Arcos* as suspect in light of subsequent English practice, but the cases cited (*id.* at 43) seem easily distinguishable, and Atiyah himself suggests not only that certainty in commercial sales may be “all important” (*id.* at 91 with note 18), but also that S.G.A. “Sect. 13 needs revision, if not outright repeal” (*id.* at 92).

129. See *supra*, part 2.3.

130. See *supra*, part 2.5.

Termination

The contractual solution should already be clear. The merchant-Dealer is *deemed* to promise (Renaissance) value for Renaissance money; he delivers less: a contractual breach.¹³¹ And the seriousness of the breach (value-gap) helps determine the appropriate remedy. Because the value expected is “substantially impaired”, the breach is material. We “construct” a condition: we let Buyer put an end to the contract by allowing him to cancel/*hæve*.

In UfR 1923.518 H the Supreme Court of Denmark held buyer entitled to cancel the contract of sale by virtue of the material breach.¹³²

Assuming the goods do not conform to Dealer’s obligation under the contract,¹³³ the situation would seem to fit within UCC § 2-608: the “revocation-of-acceptance” exception to § 2-601’s perfect tender rule which employs a “substantial-impairment-of value” test.

But rather than put an end to the parties’ contractual duties to perform, we might simply “undo” the transaction itself, *ab initio*.

The validity-approach would focus on the “abuse of the bargaining process”.¹³⁴ In American law, fraud (*scienter*) is the starting point, and as in Scandinavia, fraud comprises both willful and “reckless” conduct.¹³⁵ But where the misrepresentation is *material*, “courts allow avoidance for nonfraudulent as well as fraudulent misrepresentation ...”¹³⁶ A special problem is whether a mere “omission” (“simple nondisclosure” as opposed to “positive” statement/misrepresentation) will suffice. As regards “simple nondisclosure ... [American] courts have had great difficulty ...”¹³⁷ What “amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing”?¹³⁸

131. *Caveat emptor* does not apply here. Compare UfR 1923.518 H (“de i [ekspert] Skønnet specielt paapegede Mangler for en stor Del er af den Beskaffenhed, at de ikke kunde ventes konstateret ved sædvanlig Undersøgelse”).

132. See UfR 1923.518 H (“Møblerne ... ogsaa under Hensyn til Købesummens Størrelse – maa anses at have været behæftede med væsenlige Mangler ... [Østre Landsrettens præmisser, der tiltrådtes af Højesteret]”). Regarding damages and the negative interest, see *infra*, part 4.4.3 (re. *Fake Furniture*).

133. See UCC § 2-106 (defining “conformity” as “accordance with the obligations under the contract) and *supra*, part 2.1 (re. contract as total obligation).

134. See *supra*, part 2.1.

135. See Farnsworth, *Contracts* at 242.

136. *Id.* at 233.

137. See *id.* at 238, distinguishing “candor” from “honesty” and describing the classic case of *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817).

138. See *id.* at 241 and *Restatement 2d* § 161(b). See also Calamari & Perillo, *Contracts* § 9-20 (re. *Laidlaw v. Organ*) and *supra*, part 2.1 (re. *Oil Agent*).

Part 4.3.1

In UfR 1978.48 H Seller offered to sell his restaurant, advertising it in July, 1972 as a business with a “million-crown turnover”. Buyer accepted and a contract was drawn up which (correctly) placed the 1971- turnover at “minimum: 1,000,000”. The contract did not mention – nor did Seller disclose – the fact that business during the first half of 1972 was down 30%. The Danish Supreme Court held that the buyer could cancel the contract.¹³⁹

In both systems, the rules governing validity/*ugyldighed* and the rules of defective/*mangelfuld* performance overlap.¹⁴⁰ Similar themes dominate both the contractual and the delictual analysis: the UCC “basis-of-bargain” (/reliance) and *caveat emptor* balancing tests are also to be found in the texts on tort.¹⁴¹ The processes involved here tend to confirm the affinity between contractual and delictual theories of remedial relief.

In America, tort law has assumed co-responsibility for “policing” misrepresentation: each field has its own set of remedies for the problem,¹⁴² and in situations like this the representee “may have the possibility of no less than eight different [contractual and delictual] remedies based upon some form of misrepresentation.”¹⁴³

The starting point in Danish doctrine is that innocent misrepresentations by a seller of goods are governed exclusively by the provisions of the Scandinavian Sales Act.¹⁴⁴

The competition among rule-sets at the national level reappears at the international level, and the problem is neither dealt with by the CISG itself nor easily dismissed.¹⁴⁵

139. See UfR 1978.48 H (“berettiget til at hæve handelen efter grundsætningen i købelovens § 42, stk. 1 ... [landsrettens præmisser]”).

140. See Jørgensen, *Kontraktret* I at 120 (citing Bramsjö, *Om Avtals Återgång*: “i alt væsentligt sammenfaldende”) and 121 (“Funktionelt er der ... ingen forskel”), Nørgaard, *Ugyldighed* at 277, and Gomard, *Obligationsret* 1. del at 127 and *supra*, part 2.5 (re. *Fake Furniture*).

141. See Prosser & Keeton, *Torts* at 761 re. “justifiable reliance” and “disparity of knowledge”, citing, *inter alia* at note 76, *Smith v. Zimbalist (a/k/a Fake Fiddle)*: sale by “violin expert to experienced violinist”.

142. See Farnsworth, *Contracts* at 232.

143. Prosser & Keeton, *Torts* at 734.

144. See Gomard, *Obligationsret* 1. del at 127 (only buyer who is “taken in”/*ved næsen* can choose between validity and breach) and at 128 (“[Kun] den besvegne eller udnyttede part kan i almindelighed vælge ...”).

145. See *generally infra*, part 6.

4.3.2. Restitution.

Specific performance and termination are the principal forms of non-monetary relief available for breach of promise. Restitution, a principal form of monetary relief, is closely tied to the concept of termination as a remedy for total breach.

*Retail Store I.*¹⁴⁶ Buyer and Seller enter into a written agreement regarding the sale of Retail Store to B for \$100,000 dollars. After B makes a down payment of \$20,000, S refuses to go through with his part of the deal.

We assume that B wants to “put an end” to the contract. Of course, S has already indicated his intention to terminate his own obligation. And there is no doubt B has the right to demand an eye for an eye. Just as B’s total performance (payment in full) is said to be impliedly conditioned on total performance by S, we may also describe B’s part-performance as impliedly conditioned on (at least) partial performance by S. When B performs in part, and the condition fails, S should repay. If S resists a demand for repayment, B needs relief in terms of the most fundamental degree of interest-protection. To prevent unjust enrichment, both Scandinavian and American courts would protect B’s restitution interest by compelling S to repay. The alternative of allowing S to keep part of the price under these and similar circumstances – and thus get something for nothing – is simply “repugnant to our notions of justice”.¹⁴⁷ In the everyday contractual language of lawyers, merchants, and laymen: “The [whole] deal is off,” and B gets his money back.

“Such a ‘rescission’ is merely an assertion by the injured party that the other has committed a vital breach, that he himself has been discharged from the duty of further performance, and that he asks for a restitutionary remedy.”¹⁴⁸

The Scandinavian restitutionary maxim “no performance without adequate consideration” (*ingen ydelse uden adækvat vederlag*) equates with the Common law maxim that payment and delivery are constructive (implied in law) conditions concurrent.¹⁴⁹

146. Inspired by Illustration 1 to § 373 of the *Restatement 2d*.

147. 6 Corbin, *Contracts* § 1337 at 389.

148. *Id.* § 1104 at 558.

149. See A. Vinding Kruse, *Restitutioner* at 315 (*forudsætningssynspunktet*) and compare Calamari § Perillo, *Contracts* at 383 ff.

Part 4.3.2

Some may be reluctant to label such repayment as “damages” – not only because the damages-label is often used to describe a much broader form of monetary relief,¹⁵⁰ but also (in Scandinavian law) because damages (*/erstatning*) are awarded only where there is a basis of liability (*/ansvarsgrundlag*). But as regards restitutionary protection, even Scandinavian liability is strict, for defendant’s breach of contract is itself a sufficient reason for this degree of monetary relief. Because B is deemed to have paid subject to the implied condition that S perform, the only condition posed for requiring S to repay is that he has breached his promise.

In a case like *Retail Store I* B pays the price to S in reliance upon the latter’s own promise of performance. Another way of saying this is that “the restitution interest is merely a special case of the reliance interest ...”¹⁵¹ Scandinavian theory also subsumes a contractual, restitutionary repayment within the category of negative interest protection.¹⁵²

We subordinate S’s motive, reason, or excuse (if any) for non-performance, in that the same restitutionary considerations would apply if S was willing but truly *unable* to perform, for example if delivery were “impossible” because the property (after contracting but before delivery) was destroyed by earthquake.¹⁵³ The breaching promisor’s culpability may, however, have some relevance in certain situations.¹⁵⁴

The fundamental character of restitution seems emphasized by the fact that alternative conceptions provide a similar solution:

*Custom Software.*¹⁵⁵ Clothing manufacturer B contacts computer supplier S, because B wants to replace his existing data system with one which can perform more effectively operations done by his existing equipment. After some negotiation between the parties, S accepts B’s offer which provides, *inter alia*:

150. In modern American doctrine, restitution (for “total breach”) is described as an alternative to damages (expectation protection). See Farnsworth, *Contracts* at 908 (unless expectation measure presents lesser problems of measurement) and compare Calamari and Perillo, *id.* at 572 (“the right to damages or restitution are both remedial rights based on the contract ...”) and at 579 (“in an award for damages, the plaintiff’s restitutionary interest is usually protected”).

151. Fuller & Perdue, *Reliance Interest* at 55.

152. See Gomard, *Obligationsretten* 1. hæfte at 87.

153. See *Restatement 2d* § 272.

154. See A. Vinding Kruse, *Restitutioner* at 342.

155. Based on UFR 1985.334 H.

“Hardware: Dkr. 540,000; Standard Software Dkr. 50,000 – 80,000 ... Our assessment is that nearly all required operations can be performed by our standard system ... However, the final extent and cost of necessary programming will first be determined after detailed planning.”

First after delivery of the hardware and upon closer investigation, it becomes clear to both parties that the new system, in order to perform the same operations as B’s former system, will require customized programs costing far more than standard software. B advises S that the deal is off.

The system delivered is defective: not only because it does not conform to seller’s express “description” (/assessment) of the goods,¹⁵⁶ but also because “seller at the time of contracting has reason to know [the] particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to ... furnish suitable goods.¹⁵⁷ And when goods delivered are not fit for their intended purpose, Seller is guilty of a material breach: one which should entitle Buyer to cancel the sale, and return both parties to their pre-contractual positions.

Following another, more procedural line, we might categorize Seller’s assessment as a misrepresentation: an assertion not in accordance with the facts.¹⁵⁸ To avoid (“rescind”) the contract for this reason, it is sufficient to show that S’s misrepresentation is material and that Buyer’s promise was induced thereby.¹⁵⁹ A third approach, one closely connected with the validity line,¹⁶⁰ would be to describe the transaction as one founded on a “mutual mistake” (*urigtig/bristet forudsætning*):¹⁶¹ (1) a material assumption for B is that the new equipment can perform the same functions as the old, (2) S knows or ought to know same, and (3) it seems reasonable for the seller to bear the risk when the assumption proves incorrect.¹⁶²

156. *I.e.*, standard software cannot do the job.

157. See UCC § 2-315 and *supra*, part 2.5.

158. See Black’s Law Dictionary.

159. See Farnsworth, *Contracts* §§ 4.12-13 and *Restatement 2d* § 164.

Compare Ussing, *Aftaler*, 178-79 og Lyng Andersen, Madsen & Nørgaard, *Aftaler* at 205 (*fremkaldt vildfarelse*).

160. See Gomard, *Kontraktret* at 186 (“Forudsætningstilfældene ligger ugyldighed nærmere end kontraksbrud”). *Accord*: Lyng Andersen, Madsen & Nørgaard, *id.* at 205 (“løfte ... ikke bindende, hvis A har fremkaldt løftet ved en urigtig oplysning ...”).

161. See Lyng Andersen, Madsen & Nørgaard, *id.* at 204 (“ikke altid muligt at drage en skarp sondring”).

162. See *supra*, part 3.4.

Part 4.3.2

Where, as in *Custom Software*, the recipient seeks only to call off the deal, thus “avoiding” the transaction, the choice between these 3 theories may have little practical significance: each theory serves to protect Buyer’s restitutionary interest.¹⁶³ Each seems fundamentally tied to the fact that Buyer received equipment worth far less than that which he was entitled to expect as the subject matter of the sale. When Seller does not deliver value for money, the whole deal is off.

In UfR 1985.334 H buyer successfully argued that he was entitled to cancel by virtue of “failed assumptions”.¹⁶⁴ Following the claims and allegations formulated by the parties, the court did not need to consider alternative conceptions.¹⁶⁵

The protection of a recipient’s restitutionary interest ought not result in an unjust double recovery.¹⁶⁶ In UfR 1968.828, an antique dealer sold a porcelain platter described on the sales slip as a “Kang Hsi”. Actually, the platter was a “Kien Lung” – a fact which the buyer discovered when the platter fell off its display. Buyer’s right to cancel the contract by virtue of the incorrect description was denied, in that the Kien Lung could not be returned in its purchased condition.¹⁶⁷

In a case like *Custom Programs*, the remedy of restitution for “total breach” involves the return of payment in full. But the restitutionary concept has a wider field of contractual application. In Scandinavia, where we retain the Roman remedy of a proportionate price reduction (*forholdsmæssigt afslag*), we can provide a restitutionary measure of monetary relief even where the injured party is not entitled to cancel.¹⁶⁸

163. If the disappointed recipient seeks protection of either his reliance or expectation interests, the choice among applicable theories of relief is likely to be significant.

164. See UfR 1985.334 H (“anført, at sagsøgte ... var berettiget til at hæve købet af maskinletet på grund af bristede forudsætninger ...”).

165. See generally, Gomard, *Civilprocessen* Kap. 21 (“Forhandlingsmaksimen”).

166. See § 384 of the *Restatement 2d*.

167. See KBL § 58 and compare UCC § 2-608(2). See also Gomard, *Obligationsret* 1. del at 164-65 (criticizing the distinction made in UfR 1968.828 between cancellation and proportionate reduction).

168. See generally Ussing, *Køb* at 129-30 re. *actio quanti minoris*. The reduction is proportional to the reduced value due to the defect. “X” in the following equation designates the price (after reduction) which buyer is to pay:

$$\frac{X}{\text{contract price}} = \frac{\text{value w/ defect}}{\text{value w/o defect}}$$

Restitution

The proportionate price reduction, a remedial gap-filler largely unknown in Common systems,¹⁶⁹ has been compared to unjust enrichment pursuant to the Common law.¹⁷⁰ It is a bilateral remedy (*gensidighedsbeføjelse*):¹⁷¹ the promisee is partially relieved of the payment obligation, a kind of partial cancellation, corresponding to the degree of nonperformance represented by the defect.

Like full restitution (in the case of cancellation for “total breach”), the proportionate reduction provides a kind of limited “strict liability” measured by the quality-gap and capped by the restitution interest. And while it is true that an award of damages does serve (*inter alia*) a restitutionary purpose,¹⁷² the proportionate price-reduction is often a less drastic, and perhaps more appropriate, remedial reaction. The difference in interest protection is a difference in degree: by framing a plaintiff’s award in terms of a proportionate reduction, the court provides a “formal” justification for denying compensation for consequential loss (without denying monetary compensation altogether).¹⁷³

169. See Bergsten & Miller, *Reduction in Price* and Ziegel, *Remedial Provisions* at 9-36. But compare Rodhe, *Quantum of Damages* at 162 (re. “due allowance” pursuant to UCC 2-613), Farnsworth, *Contracts* at 614 with note 8, citing *Continental Forest Prods. v. White Lumber Sales*, 256 Or. 446, 474 P.2d 1 (1970) (“by adopting trade standards, the parties also bargained for a *reduction in price* as a method of cure [emphasis added]”), and *supra*, part 4.2, text with note 64 (re. abatement).

170. See Ziegel, “Seller’s Liability”, 2 *McGill.L.J.* 183 (1966). Compare Treitel, *Remedies* at 34 re. the *restitutionary* nature of this Civilian remedy.

In American law, in the case of partial breach, there can be no restitution of price except as regards installments: see Corbin, *Contracts* § 1119 at 637 (re. breach of warranty).

171. See *supra*, part 4.1.

172. Compare Atiyah, *Introduction* at 106 re. damages for unmerchantable goods (buyer gets “some of the money back”).

Where the market price exceeds the contract price, damages calculated by a UCC § 2-714(2) type formula compensate (1) for the “non-perfect” part of the tendered performance (*den manglende del af rigtig opfyldelse*) and (2) for the market-price differential corresponding to the said part; i.e. damages exceed the proportionate reduction only where the market price is higher. See Dahl, *Produktansvar* at 118-19.

173. See Gomard, *Obligationsretten* 2. hæfte at 165 w/ note *) (“formel begrundelse”), citing UfR 1969.909 V.L.D. (good faith seller not liable for “inconvenience” caused buyer of defective home; buyer granted proportionate reduction). Compare *infra*, part 4.4.4.4 re. the doctrine of certainty as a covert justification for denying compensation for consequential loss.

See also UfR 1982.915 Ø (mason-builder not liable in damages; proportionate reduction) and Hørlyck in UfR 1986 B 113.

Re. other distinctions between damages and proportionate reduction (time of delivery v. the time of contracting; absolute sum v. proportionate difference), see Bergsten & Miller, *Reduction in Price* at 259.

Part 4.3.2.

The proportionate reduction is a remedy well-suited to international sales and is available pursuant to the CISG.¹⁷⁴

4.4. Damages for Breach.

4.4.1. The Basis of Expectation Liability.

4.4.1.1. Classical Points of Departure.

Damages is not only the primary remedy in American law; even in Scandinavian commercial practice, performance *in natura* takes a secondary seat. Consider a situation like this:

*Cancelled Exhibition I.*¹⁷⁵ Promoter P needs a large convention hall for 3 industrial exhibitions: by subleasing to exhibitors, he expects to clear a net profit of Dkr. 1 million. Owner A agrees to lease its convention hall to P but then repudiates. P then contracts with Owner B to lease the latter's similar, but more expensive hall, and the exhibitions are otherwise held as planned. After reaping a net profit of Dkr. 900,000, promoter sues Owner A for damages: compensation for the difference between the cost of the first and second lease (Dkr. 100,000).

In order to analyze a claim for contract damages, Scandinavian lawyers subdivide the problem into two fundamental components and ask: (1) whether there is a basis (*grundlag*) of liability and (2) what is the extent (*omfang*) or measure (*beregning*) thereof.¹⁷⁶ The first question asks whether the breaching supplier is liable at all.¹⁷⁷ If the answer is yes, we must answer plaintiff's second question: "How much can I get?".¹⁷⁸

Contracting parties sometimes have the foresight to draft terms about the consequences of breach: such private legislation may cover, *inter alia*, both the basis and the extent of liability. But contracting parties often have their minds fixed on performance, and they often neglect (or avoid) express clauses

174. See *infra*, part 6.2.4.3 and Bergsten & Miller, *Reduction in Price*, 274-75 (buyers may keep goods which they might otherwise reject, "a policy greatly to be favored [since] the goods ... will be in a country other than that of the seller").

175. Inspired by UFR 1976.776 Ø.L. "*Cancelled Exhibition II*", *infra*, part 4.4.2, is closer to the facts of the actual case.

176. See Gomard, *Obligationsretten*, 2. hæfte at 129-30.

177. See Gomard at *id.* ("hvorvidt grundlag for at pålægge ansvar overhovedet foreligger ...").

178. Compare O'Connell, *Remedies in a Nutshell* (New York 1977) IX.

on the subject of breach.¹⁷⁹ And so we reformulate our initial (Scandinavian) question: *absent agreement*, is there a basis for contractual liability in *Cancelled Exhibition*?

And classical Scandinavian doctrine provides us with a comparatively interesting answer. The general basis of contractual (and delictual) liability is fault. In Scandinavian as in German law, *culpa* and liability go hand in hand.¹⁸⁰

“It is that which fastens on the person charged the responsibility of the transaction; and consequently the phrases are often convertible, and *in culpa est*, he is in fault, has the same meaning as *ei imputatur*, he is responsible.”¹⁸¹

In a case like *Cancelled Exhibition*, this general rule provides a clear basis for Owner’s contractual liability. This supplier’s repudiation (*leveringsnægtelse*) is an intentional refusal to perform the obligation owed to his recipient:¹⁸² contractual fault “in the first degree”.¹⁸³

Owner is liable, but liable for what? What is the extent or measure of liability in Scandinavian law? Monetary relief reaches across a broad spectrum. In *Cancelled Exhibition*, Promoter asks the court to place him in a hypothetical “expectation” economic position.¹⁸⁴ Is Owner liable to this extent?

Actually, the answer to this second (extent) question is tied to the first (basis). The rules which determine whether a breaching promisor is liable are, to some degree at least, dependent on the nature of compensation sought in the particular case.¹⁸⁵ But *Cancelled Exhibition* is a simple case: there is a basis

179. The problems involved in negotiating a potential “dealbreaker” may lead negotiators to fiddle with the issue.

180. See Bauer, *Consequential Damages* 699-70, quoting Sedgwick, *Damages* 117 n. * (3d ed. 1858) and Hasse, *Die Culpa des Romischen Rechts* (1838).

181. Bauer, *id.* at 700.

182. Compare UfR 1976.776 Ø.L., note 1 re. UfR 1974.654 H (“uberrettiget annulation”).

183. Even if Supplier’s failure to provide the hall was attributable to “mere” negligence (*eg.* a negligent oversight, leased to another) he would still be at fault. “The possible varieties [of fault] are infinite ...”: see Lookofsky, *Fault and No-Fault* at 114.

184. Compensation in terms of the expectation (positive performance) interest (*positiv opfyldelsesinteresse*): see *supra*, part 4.1.

185. See Gomard, *Obligationsret* 1. hæfte at 129: (“grundlag ... i et vist omfang ... afhængige af, hvilke skader der søges erstatning for”) and compare Farnsworth, *Contracts* at 39-40: (“question of whether a promisor is liable is often bound up with the question of the extent of that liability”).

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for performance-interest damages in Scandinavian law, *a fortiori*, because fault always serves as a basis of contractual liability, regardless of the extent of the protection sought.

In a specific sale, the KBL I liability standard for delay and non-delivery is fault with a “reversed” burden of proof: § 23.¹⁸⁶ As regards liability for defects, KBL I § 42 provides that in a specific sale the seller in breach is liable in damages if he (a) has been guilty of *fraud* or (b) has given a *guarantee*, express or implied. Doctrine has supplemented these codified classical criteria with (c) the general base of contractual *fault*.¹⁸⁷ Of these 3 possibilities, fault and guarantee are the most significant, and both leave courts with a good deal of discretion. In a Danish case, the merchant-seller of a used automobile was held to have impliedly warranted that the car had “nice tires” and that its general condition conformed to a car driven 58,000 km.¹⁸⁸ It has recently been suggested that Scandinavian courts imply a (*stiltiende*) guarantee in cases involving “key-qualities” (*kjerneegenskaber*).¹⁸⁹

Thumbing through an American contractual text, we are hard-pressed to locate any material corresponding to the Scandinavian basis-of-liability idea. Indeed: “Virtually any breach gives the injured party a claim for damages”!¹⁹⁰ Small wonder that the chapters on damages seem concerned almost exclusively with the extent or measure of liability.¹⁹¹

But there must be a basis, an American reason for imposing liability in a case like *Cancelled Exhibition*. Why does (virtually) any breach give the injured party a claim to damages?

We can start to explain in a Scandinavian way. Owner has made a promise, and “since a contract is first of all a promise, the contract must be kept because a promise must be kept ...”.¹⁹² As we have seen, this promise principle is also the cornerstone of contractual enforcement in Scandinavia.

So far so good. But Owner/Supplier, in an exercise of contractual freedom, has promised only to supply a hall. He has not promised to pay damages for

186. The rule is made even more severe by the fact that the seller is liable for his employee’s negligence, the doctrine of *casus mixus cum culpa*, etc. See Ussing, *Køb* 87-88.

187. See Gomard, *Obligationsretten* 2. hæfte 156-57.

188. See UfR 1964.87 H.

189. See generally Hagstrøm, *Selgerens Ansvar*.

190. Farnsworth, *Contracts* at 838. See also *Restatement 2d* § 346.

191. See, e.g., Farnsworth, *Contracts* §§ 12.8 - 12.18 and Calamari, *Contracts* Ch. 14.

192. Fried, *Contract as Promise* at 17.

The contract in *Cancelled Exhibition* is bilateral, and Owner has made a “bargain promise”. As indicated previously (*supra*, part 2.1), the Common law does not maintain that all (hereunder “non-bargain”) promises *must* be kept (/are legally “binding”). Compare Gomard, *Erstatningsregler* at 295 ff (“vederlagets betydning for aftalens retsvirkninger”).

breach. Promoter/Recipient may have good reason to expect to receive the use of the hall, but “great expectations” on the part of the promisee do not themselves provide a general basis of contractual liability.¹⁹³

Then again, contract is much more than express promise: both in American and in Scandinavian law. Contract is best understood as the total legal obligation. If I promise you a “boat”, the *law* may require that you get a “merchantable” one: one which lives up to your “justifiable expectations”. The issue of whether or not the boat conforms to the contract can hardly be decided solely on the basis of express promise.¹⁹⁴

By the same token, we cannot decide the liability-issue solely on the basis of express promise. According to American law, the recipient in a case like *Cancelled Exhibition*, has a “primary” right, by virtue of his supplier’s express promise, to receive the use of the hall. But when Supplier fails to perform his primary obligation, the *law* grants Recipient a *secondary right* in substitution: a right to receive damages.¹⁹⁵

In Common legal systems, the secondary right is the *primary remedy*. “The only universal consequence of a binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.”¹⁹⁶ By awarding damages, the law enforces the promise, makes it *bind*.

More than a century ago, in *Randall v. Newson*,¹⁹⁷ the English Court of Appeal held that the “implied undertaking” of the seller of a carriage pole was an “absolute warranty that the pole be reasonably fit for the purpose”, making the seller of a defective pole liable for buyer’s consequential loss: injuries to buyer’s horses and

193. See Gomard, *Obligationsret* 2. hæfte 139-40 (“store forventninger ... ikke i sig selv et grundlag ...”).

194. See generally *supra*, part 2.5.

195. See Calamari, *Contracts* at 518, Corbin, *Contracts* § 995 at 13 and Lookofsky, *Kontrakt-sansvarsgrundlag*. Compare Gomard, *Erstatningsregler* at 51 re. English law.

Compare *De Bloos v. Bouyer*, Judgment of European Court of 6. 10.1976, case 14/76 (in context of EC Judgments Convention, whether obligation to pay damages is an “independent” contractual obligation or one “replacing” the unperformed obligation is question of national law).

196. Holmes, *The Common Law* (1881) at 236 (Howe ed. 1963). See also Kessler & Gilmore, *Contracts* at 742-43 and (re. English law) Atiyah, *Sale of Goods* (6th) at 47 (buyer may be compelled to accept defective goods, but “no doubt of his right to damages”).

197. (1877) 2 Q.B.D. 102.

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carriage.¹⁹⁸ Recent American decisions confirm that there is no “state of the art” exception to contractual liability.¹⁹⁹

This “automatic” substitution of a secondary right to damages may explain why Continental jurists sometimes read a “guarantee” into the Common conception of contractual obligation.²⁰⁰ But in American doctrine, the concept of a “tacit” (implied) agreement to pay damages in the event of breach is all but a doctrinal dead letter.

The “tacit agreement” test “was based on the dubious assumption that damages for breach are based on the contracting parties’ implied or express promise to pay damages in the event of breach, rather than based upon a secondary duty imposed by law as a consequence of the breach”.²⁰¹

Breach of promise activates the primary remedy. But because the Common law enforces only a “bargain-promise”, the concept of consideration is tied to liability. It is breach of the binding bargain-promise, “supported by” consideration, which is said to activate the primary remedy.²⁰² The “bargain theory” of consideration leads to the “bargain principle” of damages for breach of contract: the rule that absent a traditional defense,²⁰³ “the courts

198. *Id.* See also Lookofsky, *Kontraktansvarsgrundlag*.

199. See *eg.* *Spartanburg County School District Seven v. National Gypsum Co.* 842 F.2d 1292, 2 UCC Rep. 2d 850 (4th Cir. 1988) (asbestos manufacturer liable under implied warranty of merchantability).

Compare (re. strict liability in English law) *H. Parsons (Livestock) Ltd.* [1978] Q.B. 791: “the breach does not have to be foreseen, or contemplated ... it does not matter if the defect is latent”.

200. See, *e.g.*, Zweigert & Kötz, *Introduction* II at 175 (“Common law treats all contracts as *guarantees* ...”) and Gomard, *Erstatningsregler* at ** (“erstatningsbeføjelse støttet på garantiløfte fra sælgeren ... endnu [i 1958] den herskende opfattelse i angloamerikansk ret”).

The UCC “express”-warranty concept (*supra*, part 2.2) indicates that the American line between promise and guarantee is often thin.

201. See Calamari & Perillo, *Contracts* at 525-26, citing 11 *Williston, Contracts* § 1357. See also 5 Corbin, *Contracts* § 1010 with n. 10.

On the other hand, there is sometimes only a thin conceptual line between tacit agreement and other limits on liability for indirect loss: see *infra*, part 4.4.4.

202. See Farnsworth, *Contracts* at 39, discussing consideration and alternative “grounds for a promisor’s liability [i.e.] the question of *whether* a promisor is liable ...” (Emphasis added.)

203. *Eg.*: fraud, duress, mistake, etc.

will enforce a bargain according to its terms, with the object of ... putting a bargain-promisee in as good a position as if the bargain had been performed.’²⁰⁴

Whether we emphasize the bargain or the secondary right, the breach, without more, leads to liability in American law. And contractual *fault* – (eg.) Owner’s willful repudiation in *Cancelled Exhibition* – doesn’t make a particle of difference: an idea which rings true in the Law & Economics school,²⁰⁵ but ‘stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.’²⁰⁶

And so the American and Scandinavian doctrines seem diametrically opposed. But experienced comparativists, wary of such dramatic distinctions, should hardly be surprised to find a number of significant exceptions to each system’s ‘general rule’.

4.4.1.2. No-Fault Liability in Scandinavian Contracts

The Scandinavian starting point for substitutionary relief may be viewed in light of the system’s primary remedy: specific performance. Whereas a Scandinavian court might well find it natural to enforce an express promise *in natura* on a no-fault basis, the same court, traditionally more reluctant to ‘make law’ than its Common counterpart, might not find it natural to impose substitutionary relief, at least in the absence of some legislative authority.

Of course, even in Scandinavia, the parties themselves may provide a sufficient piece of private law, for example, an express guarantee. The precise nature of the commitment is a question of contractual interpretation.²⁰⁷

In UfR 1941.61 H (‘*Contagious Abortion*’)²⁰⁸ a 5-4 majority of the Danish Supreme Court, emphasizing a trade association’s expert opinion regarding the meaning of Seller’s express guarantee against disease, held Seller not liable for Buyer’s consequential loss.²⁰⁹

204. Eisenberg, *Bargain Principle* at 742.

205. Re. the theory of ‘efficient breach’ see Posner, *Economic Analysis of Law* 106-07 (3d ed. 1986) and Knapp & Crystal, *Problems* 881-83. See also Kornhauser, ‘An Introduction to the Economic Analysis of Contract Remedies’, 57 *Univ. Col. L.R.* at 683, 686 (1986) (if gain to promisor outweighs loss to promisee, promisor should not perform).

206. Holmes, *The Path of the Law*, in *Collected Legal Papers* 174-75 (1920) (discussed in Knapp & Crystal at *id.*)

207. See, e.g., Dahl, *Produktansvar* at 424-25.

208. *Supra*, part 2.4.

209. See *infra*, part 5.3.

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Moreover, no-fault liability is often imposed in Scandinavia on the basis of public legislation:

*Lightning Bikes (Revisited).*²¹⁰ On January 1, Retailer phones Middleman to order “10 Lightning-model bikes”. Middleman promises delivery at his warehouse on Jan. 3. On Jan. 2 he sets 10 bikes aside, but later that day lightning strikes the warehouse, the bikes are destroyed, and Middleman does not deliver.

There is no legal excuse: performance as agreed, delivery of 10 “Lightning” bikes (which we assume are available somewhere), is possible. And indeed, for this reason, Middleman’s failure to deliver is *culpable* breach.²¹¹

But in a case like this, Middleman is liable for another reason: he is liable by statute. The statutory starting point pursuant to KBL (I) § 24 is that, as regards a generic obligation, non-performance itself triggers liability. Equally important, the statutory exception is narrow: only “unforeseeable impossibility” will serve as a valid excuse for non-performance of the promise.²¹² So even if we prefer to call this a specially formulated fault rule,²¹³ it is clear that this brand of “fault” is virtually identical with the American “no-fault”.²¹⁴ In fact, we might well describe KBL § 24 in American terms: liability based upon a secondary duty imposed by law. In generic sales like this, the Scandinavian starting point has long been just as strict as the American, maybe more so.²¹⁵

In Scandinavian law, generic sales have traditionally been defined to include “semi-generic”: as in a situation like that previously considered in “*Bird Song*”,²¹⁶ the sale of a certain quantity of a designated lot.²¹⁷ So although only seed from the Farmer’s Bird Song farm can conform to the contract, and although delivery of

210. Inspired by Ussing’s example, *Køb* at 73. See *supra*, parts 2.2 and 3.2.1.

211. See Ussing, *Køb* at 73.

212. See Ussing at *id.* and *supra*, part 3.2.

213. See Gomard, *Erstatningsregler* 215-16 (“særligt formuleret culpapregel”).

214. In American law, breach is non-performance without (a § 24-type) legal excuse: see *supra*, part 3 and Ussing, *Obligationsretten* at 100 (noting that the English “exceptions” reduce the Common rule to a sort of fault liability).

215. See Augdahl, *Obligasjonsrett* at 229 (“[genus]utgangspunktet ... erstatningspliktig ... uten skyld”).

216. See *supra*, part 3.2.2. at note 97.

217. See KBL (I) § 3 (“køb af en vis mængde af et angivet parti”).

Expectation Liability Basis

Bird Song seed has become impossible (without fault), Farmer's obligation is not necessarily discharged.²¹⁸ True, his obligation to perform specifically (*in natura*) ends for all practical purposes, for not even a Scandinavian court would engage in the futile exercise of trying to make him perform the impossible. But his generic obligation to pay damages is still possible. Scandinavian shades of *Paradine v. Jane*?²¹⁹

In UfR 1928.796 (the case on which the *Bird Song*-paradigm is based), the Danish Eastern High Court held that the defendant Farmer should bear the risk of and liability for the harvest failure. The court emphasized (1) that plaintiff (Middleman) clearly indicated his desire to purchase a *definite quantity* (15,000 kg.)²²⁰ and (2) that defendant Farmer did not qualify his obligation.²²¹ The Court made no reference to KBL §§ 3 or 24. The decision is over 50 years old, and perhaps only the formalism of yesterday kept the Court from finding a more reasonable "agreement to the contrary", interpreting its way "around the statute".²²² As it stands, the precedent reflects the harshness of KBL I § 24,²²³ the questionable distinction between specific and generic liability standards,²²⁴ and the undesirable extension of generic standards to "semi-generic" sales. KBL II does not distinguish between specific and generic sales and contains no special rules for semi-generic sales. Whether or not performance as agreed is possible would still be a question of interpretation.²²⁵

Where performance is *delayed*, the generic supplier is almost always liable, and so, according to the traditional KBL (I) rule, the fault/no-fault distinction is largely academic.²²⁶ And as with delay, so with *defect*: the most significant rules are those which govern the generic kind of contractual obligation. In this area, the Scandinavian systems have moved far beyond their Civilian heritage.²²⁷ If I promise to deliver a given "result", I am bound by my word;

218. Compare Gomard, *Obligationsret* 1. del at 40 ("[species] Forpligtelsen falder bort, jfr. Købelovens § 23").

219. Compare *supra*, part 3.2.1 (re. *Music Hall* and *Paradine*). See also Sevón et.al., *Huvudpunkter* at 77.

220. "[Sagsøgeren] udtalte ... at han ikke som forrige Aar ... vilde handle med et Spillerum, men vilde have et bestemt Kvantum ...".

221. "[Ikke taget] Forbehold".

222. E.g. by holding that the crop was not a "lot" (or "batch") pursuant to KBL § 3 or that the parties impliedly had contracted with respect to a specific source.

223. See *supra*, part 3.2.1 (text of KBL § 24). See also Gomard, *Erstatningsregler* at 212 ("En sådan almindelig ansvarsregel er formentlig altfor streng") with note 68.

224. See Jørgensen, *Kontraktret* II at 159-60 ("kan næppe gives nogen rationel begrundelse for en sådan forskel mellem genuskøb og specieskøb").

225. Regarding the new "control-liability" standard, see *supra*, part 3.3.

226. Regarding the new rule in KBL II, see *infra*, part 4.4.5.2.

227. In the case of delay, German law employs a strict standard as regards generic obligations. See generally, von Mehren, *Civil Law* Ch. 15.

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if I agree to sell you “fish”, you have a right to expect “merchantable” goods.²²⁸ In either case, if I am in breach, you get your damages: I am liable pursuant to the generic rule.²²⁹ As regards the paradigm contract for the sale of goods KBL (I) applies the near-strict (delay) standard of § 24 to defective delivery in generic sales.²³⁰

“Thus, a man may warrant or promise that a certain machine is without flaw. If the flaw actually then exists, it might be thought that the warranty or promise is an impossibility; instead, however, the undertaking is interpreted as one of indemnity. “If the machine is not flawless, I will indemnify you against all injury or loss.””²³¹

Thus, as regards these important generic rules, Scandinavian law has achieved a degree of severity quite on a par with that of American law. And KBL provides the general paradigm.

In a recent Danish case, Contractor constructed a housing project for Owner. The building specifications supplied provided for the installation of a given brand of radiator valves. Unbeknownst to Contractor, a large number of the valves installed contained a defective rubber ring and had to be replaced. In a subsequent arbitration proceeding, Contractor was held liable to Owner for damages, his good faith as to performance notwithstanding.²³² Some Scandinavians have come to question this departure from traditional (fault-based) liability principles.²³³

The distinction between fault and no-fault liability is sometimes thin. If an architect selects unsuitable tiles, his advice is unfit for the contractual purpose,

228. Compare UFR 1963.633 VL (fish sold at auction “merchantable”/*almindelig god handelsvare*).

229. Barring only “unforeseeable impossibility”: a rare excuse for defective delivery. See (re. generic sales) Nørager-Nielsen & Theilgaard, *Købeloven* 811-12.

230. Cf. § 43, subsec. 3. Pursuant to KBL (I) § 30, subsec. 1, the same strict liability standard applies to the debtor’s (generic) obligation to make timely payment: see *id.* As regards breach of the implied warranty of title (*vanhjemmel, retsmangler*), the Scandinavian liability standard is truly absolute: re KBL (I) § 59, see Nørager-Nielsen *id.* 980-99.

231. Corbin, *Contracts* § 1327 at 341 (distinguishing the case where, unbeknownst to the seller-promisor, specific goods have been destroyed at the time of sale).

232. KFE 1982.293 DIV. Compare (re. American law) Farnsworth, *Contracts* at 529 (building contractor warrants soundness of materials used).

233. See Hørlock, *UFR* 1986 B at 116 (suggesting an exception to strict liability both (a) where the contractor has limited freedom of choice with respect to materials and (b) a “state of the art” (*udviklingsrisiko*) defense).

Expectation Liability Basis

but he may well also be guilty of contractual fault.²³⁴ The lines between rule-sets are not easily drawn, and some Scandinavian courts have been reluctant to let the no-fault “exceptions” swallow the traditional rule of fault.²³⁵

In a recent Norwegian case,²³⁶ Supplier agreed to develop and deliver an accounting program for Recipient according to Recipient’s specifications by January 1972. Delivery was delayed and defective, and after repeated attempts to test and cure, conforming delivery first took place 2 years late. Rather than apply the law of sales, the court chose to subsume Supplier’s obligation as a *de moyen* type obligation (*arbejdsopdrag*). Characterizing the initial period after delivery as a “test period”, the court determined that Supplier’s 2-year delay was culpable breach.²³⁷

In a recent Danish case,²³⁸ Owner discovered during construction that slate roofing originally proposed by the architect and to have been laid by the plumbing contractor was not currently available. So as not to delay the project, Owner chose tiles as a substitute material and asked Mason to lay them, which Mason did in a good, workmanlike manner. Ten years later, the tiles proved defective and had to be replaced, and Owner sought to hold Mason responsible for replacement costs. The Danish Supreme Court held for the defendant, but it did not phrase its ratio in terms of fault.²³⁹

KBL II lays down a dualistic approach to the basis of liability by letting the type of loss for which compensation is claimed (“direct” versus “indirect”) determine the basis of liability (no-fault versus fault).²⁴⁰

In any event, the strictness of Scandinavian (generic) liability is only one side of a comparative paradox. We also need to take a critical look at the American no-fault rule.

234. See *supra*, part 2.5. See also, e.g., UfR 1985.555 H (consulting engineer liable for consequences of professional error (*faglig fejl*)).

235. Accord Hellner, *Kontraktstypen* at 316 (“saknas skäl att analogisera till andra kontraktstyper”).

236. Dom 7. maj 1976, Oslo Byrett. See also Nørager-Nielsen, *EDB Kontrakter* at 138-40.

237. Dom 7/5 1976, Oslo Byret, s. 19 (“mislighold at programmet først noenlunde feilfritt ... nærpå 2 år senere ... utvist en uforsiktighet som må medføre erstatningsansvar”). Re. Recipient’s contributory negligence, see *infra*, part 4.4.4.2. at note 402.

238. UfR 1985.880 H.

239. See Hørlyck in *UfR B* 1986 at 115 (“Højesteret ikke har ønsket at tiltræde Landsrettens [culpa-]begrundelse”).

Regarding conflicting views as to the currently applicable rule, see, e.g., Hørlyck at *id.* (“kunne fastslås med nogen sikkerhed, at der stadig gælder en særlig regel om entreprenørens ansvar for mangler ved materialer, og culpereglen i AB § 22, stk. 1 er således kun gældende for mangler ved udførelsen”) and compare Krüger Andersen m.fl., *Dansk Privatret* at 486 (“overfortolkning ... at nå frem til et domsstolsskabt krav om culpa ... som betingelse for ... afhjælpning og skadeserstatning ... *materialefejl* (dårlige eller uhensigtsmæssige materialer), som entreprenøren har købt hos tredjemand i god tro ...”).

240. See *infra*, part 4.4.5.2.

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4.4.1.3. Fault Liability in American Contract Law

To be sure, American contract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault.²⁴¹ But there are, as always, exceptions to the rule. There is a “temptation to depart from a rule oblivious to blame ...”²⁴²

For one thing, the general (no-fault) American rule is addressed mainly to the *basis* of contractual liability, and it is acknowledged in doctrine that fault sometimes plays a role in limiting the *extent* or measure of damages for breach.²⁴³ Moreover, even as regards the *de resultat* situations with which American doctrine is so often concerned, we find traces of fault in the liability base.

KBL (I) § 23, which Scandinavians describe as a rule of fault (with a reversed burden of proof) is almost identical to the American UCC § 2-613.²⁴⁴ To be sure, generic obligations play a greater practical role, but even the UCC § 2-615 kinds of legal excuse are not wholly divorced from the concept of *culpa*.²⁴⁵

We have also seen that a supplier’s duty is often “implied in law”.²⁴⁶ And although the *de moyen* conception is likely to receive greater attention in a system where fault is the general basis of both contractual and delictual liability,²⁴⁷ the American reality in such “contort” cases is hardly distinguishable: “the defendant’s obligation to exercise ordinary care ... is the same in either contract or tort”.²⁴⁸ And we are not just talking about a *Horseshoe Lost*.²⁴⁹ “American courts have extended tort liability for misfeasance to virtually every type of contract where defective performance may injure the promisee.”²⁵⁰

241. Farnsworth, *Contracts* at 842.

242. *Id.*

243. *Accord: id.* with note 19. Regarding avoidability and cost to remedy defect, *see id.* § 12.13. Regarding avoidability, foreseeability, and certainty, *see generally infra*, part 4.4.4.

244. *See supra*, part 3.2.1, text with note 45.

245. *See, e.g.*, Ussing, *Obligationsretten* at 100 and *generally* Lookofsky, *Fault and No-Fault*.

246. *See supra*, part 2.5.

247. *Compare, e.g.*, Farnsworth, *Contracts* at 529.

248. 5 Corbin, *Contracts* § 1109 at 122, note 66, citing, *Western Union Tel. Co. v. Lawson*, 182 F. 369 (9th Cir. 1910). In these cases, it makes “no difference whether the action should be regarded as in contract or in tort”: Corbin at *id.*, citing *Western Union Tel. Co. v. Hogue*, 79 S.W. 33, 79 Ark. 33 (1906).

249. *Supra*, part 2.5.

250. Prosser & Keeton, *Torts* at 660.

American writers have begun to question the distinction between contract and tort.²⁵¹ The old causes of action ought not rule from their grave.²⁵² The books are still different, but the remedies overlap. We can still generalize, but only with the aid of difficult exceptions.²⁵³ Indeed, even *Hadley*, the most famous of “contract” cases, involves *negligent* performance: misfeasance.²⁵⁴

A recent historical investigation has revealed the nature of the “neglect” referred to in the *Hadley* decision: Carrier shipped the broken shaft by canal instead of by rail (the usual and “reasonable” means).²⁵⁵

Since the negligence in *Hadley* is said to involve a “special” contractual relationship, the so-called “general [tort] rule” regarding pure economic loss does not apply.²⁵⁶ Nor can we successfully apply the much-scorned nonfeasance/misfeasance distinction, because “a carrier remains liable in tort, as well as on the contract ... [not only] for negligent loss or damage to goods shipped ... [but also] for delay in their delivery.”²⁵⁷ And yet, tort doctrine deals with *Hadley* as a contractual paradigm.²⁵⁸

The *Hadley* facts involve contract of carriage. Similar problems confront modern courts:

Gravity Meter.²⁵⁹ O (engaged in offshore drilling operations) contracts with carrier C for the latter’s logistical support and helicopter trans-

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251. See, e.g., Gaebler, *Negligence* at 593. See also sources cited in Fried, *Contract as Promise* 2-5.
252. Compare Farnsworth, *Contracts* at 14 with note 6 (quoting Maitland). Regarding the merger of legal and equitable forms of action in American law, see James & Hazard, *Civil Procedure* §§ 1.5-.6.
253. Compare Prosser & Keeton, *Torts* at 655-58.
254. See *id.*: “a carrier remains liable in tort, as well as on the contract, for ... negligent loss or damage to goods shipped, or for delay in their delivery.”
255. See Danzig, *Hadley v. Baxendale* at 251 (citing *The Times* (London), Aug. 8, 1853) and 260 with note 45 (canal shipment at this time an anachronism for Pickfords).
256. See Gaebler, *Negligence* at 603 and 634. Compare Prosser & Keeton, *Torts* at 657 (stating the general rule) and at 708 (re. the product liability exception). But see, e.g., *People Express Airlines, Inc. v. Consolidated Rail Corporation*, 100 N.J. 246, 495 A.2d 107 (1985) (railroad held liable for “foreseeable” economic damages suffered by airline due to evacuation of its offices following tank car accident despite lack of physical damages) and *Milton J. Womack, Inc. v. House of Representatives of the State of Louisiana*, 509 So.2d 62 (La.Ct.App. 1987) (architect negligently failed to indicate existence of hidden metal brace, thus delaying completion of modernization project; architect held liable to contractor for latter’s loss of \$100,000 early completion bonus).
257. Prosser 5th at 660.
258. See Prosser, *id.* at 665.
259. Based on *ERA Helicopters, Inc. v. Digicon Alaska, Inc.*, 518 P.2d 1087 (Alaska Sup.Ct. 1974).

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portation of supplies. C, ordered to return O's sensitive gravity meter from shore to ship, negligently damages the device. O sues C for both property damage to the meter and business disruption losses sustained until a replacement meter could be obtained.

Once again, a profit-producing machine stands still. But before we can rely on the *Hadley* precedent, we must ask whether *Hadley* applies in a case like this. For although the relationship between Carrier and Owner is contractual,²⁶⁰ the injury to property and profits can be described in terms of both contract and tort.²⁶¹ Should we seek to place the injured party in a post-performance or a pre-tort position; are all kinds of loss governed by the same kinds of liability limitations?²⁶²

In *ERA Helicopters* (the real *Gravity Meter*), Owner was "placed ... in the position he would have occupied had it not been for the *tortious* conduct"²⁶³ and was held entitled to recover "all damages, whether special or general ... *proximately* caused by ... [Carrier's] tortious actions ..."²⁶⁴

The concurrence between contract and tort is the subject of continuing debate.²⁶⁵ A related problem is whether to apply an all-or-nothing (fault or no-fault) rule to a combination sale/service;²⁶⁶ another is whether a special measure of dam-

260. 518 P.2d at 1060.

261. *See id.*

262. *Compare* (re. Scandinavian delictual doctrine) *Vinding Kruse, Erstatningsansvarets grænser* at 789 (requiring "special conditions" before compensating pure economic loss).

263. *Id.* at 1059-60 (emphasis added).

264. *Id.* at 1060. Re. the distinction between "special" and "general" damages, *see* comment b to *Restatement 2d* § 351 and Knapp & Crystal, *Problems* at 797-98. Re. the "proximate/foreseeable" damage-distinction, *see infra*, part 4.4.4.3.

265. *See supra*, note 256.

Where a buyer of *goods* suffers a *purely* economic loss, most American courts will not consider tort as an alternative theory of recovery. *See, e.g.*, *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660, 40 UCC Rep. 1184 (1985) (since "economic expectations that are protected by the UCC are not entitled to supplemental protection by negligence principles", no strict tort recovery – *inter alia*, as against remote distributor – for economic loss resulting from allegedly defective transmissions). *Accord*: *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899, 900, 3 UCC Rep. 2d 1759 (Fla. 1987) (following the "majority view in the United States": buyer of steam generators not entitled to recover purely economic losses in tort) and the recent decision of the U.S. Supreme Court in *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986) (injury only to the product itself, pure economic loss: no product liability claim lies in admiralty).

266. *See* Gaebler, *Negligence* at 599 (advocating a "narrow exception").

Expectation Liability Basis

ages should apply to liability for breach of “warranty”: the hybrid child of contract and tort.²⁶⁷

In American law, “intentional” conduct²⁶⁸ is the key prerequisite to tort liability for *punitive damages*,²⁶⁹ *eg.*, for “tortious interference with a contractual relationship”.²⁷⁰ “[American] Courts have occasionally gone to considerable lengths to find the necessary tortious conduct.”²⁷¹ In a recent case,²⁷² the buyer of a mini-computer system was awarded more than \$2 million damages in punitive damages: the seller was found to have misrepresented the nature and capacity of a system *known* to have many problems and shortcomings.²⁷³

Fault *does* play a part on the Common law contractual stage,²⁷⁴ and it is no longer “a matter to be talked about only in private ... in whispers”.²⁷⁵ General equitable principles and everyday morals are also the concern of an American court: “the gravity of the fault must be compared with the gravity of the hardship”.²⁷⁶

Neither American nor Scandinavian law can lay claim to a pure doctrinal line. The flurry of rules and exceptions shows that there are numerous bases of contractual liability in each system.

“One can imagine a continuum of liability rules establishing a gradual transition between complete, unconditional liability and liability conditioned on subjective

267. See *infra* part 4.4.2 re. UCC § 2-715(2)(b) and Prosser & Keeton, *Torts* § 95A.

268. Hereunder, “reckless disregard” (*dolus eventualis*).

269. Regarding the general rule that punitive damages are not awarded in contract actions (and the exceptions thereto) see Farnsworth, *Contracts* 842-44 and Calamari & Perillo, *Contracts* 520-21.

270. For a Comment on the much-publicized *Pennzoil-Texaco* decision, awarding Pennzoil \$3 billion in punitive damages, see Knapp & Crystal, *Problems* at 285-89.

271. Farnsworth, *Contracts* at 843.

272. *The Glovatorium, Inc. v. NCR Corp.*, 684 F.2d 658 (9th Cir. 1982).

273. See Raysman & Brown, *Computer Law* § 13.04[3].

274. See, *e.g.*, *Womack* (*supra*, note 256), *Maudlin v. Sheffer*, 113 Ga.App. 874, 150 S.E.2d 150 (1966) (discussed *infra* in part 5.2: *School Plans*), and - in an equitable context - *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*, 42 N.Y.2d 392, 366 N.E.2d 1313, 397 N.Y.S.2d 958 (1977).

275. Bauer, *Consequential Damages* at 699.

276. See *J.N.A. Realty*, *supra* note 274, 397 N.Y.2d at 962, quoting *Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, 171 N.E. 884 (Cardozo, Ch.J., dissenting).

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fault”²⁷⁷ ... “an infinite number of [fault] degrees, depending upon the facts of each case, and this has a genuine effect upon the administration of justice.”²⁷⁸

But to give fault full credit is to overstate the case. There are often a number of good reasons for awarding (or denying) monetary relief in a given situation, and there is a complex relationship between what we call the “basis” of liability and the “extent” (or “measure”) of monetary relief. In the real world, these problems are not to be found in separate chapters.

4.4.2. The Extent of Liability: the General Rule

The rules and exceptions which govern the basis of expectation (/positive interest) protection in American and Scandinavian law are designed to explain why and when we sometimes seek to place an injured promisee in the full performance position.

Once a basis is established, and we move on to the next doctrinal segment, the extent (*omfang*) or measure (*udmåling*) of liability, we find that the American and Scandinavian models seem built upon an essentially similar superstructure. In both systems, the starting point for the computation of such damages is simply “full compensation” for all loss: the injured party is entitled to the full measure of expectation protection.²⁷⁹

The “*governing purpose* of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed”.²⁸⁰

Perhaps the most common form of loss is the kind suffered as a result of the breach in a case like *Cancelled Exhibition I*:²⁸¹ the *loss in value*, which we calculate by subtracting the contract price from the replacement price.²⁸²

277. Gomard, *Erstatningsregler* at 197 (translation mine). *Accord*: Speidel et al., *Commercial Law* at 1079-80 (fault & no fault both part of “single graduated scale of legal responsibility”).

278. Bauer, *Consequential Damages* at 699.

279. *See, e.g.*, Gomard, *Obligationsretten 2. hæfte* at 139 and UCC § 1-106(1).

280. *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2. K.B. 528, 539 (emphasis added).

281. *Supra*, part 4.4.1.1, text with note 175.

282. *See* Farnsworth, *Contracts* at 844, 857-58. *Accord*: Augdahl, *Obligasjonsrett* at 238 and Gomard, *Obligationsretten 2. hæfte* at 164 (“prisdifference”).

Expectation Liability Basis

The contract-market differential is often described as an “abstract” measurement of loss.²⁸³ In Scandinavian law, KBL sets out the measure of buyer’s damages in terms of the contract-market differential, a measure to be applied “absent *proof* of other loss”.²⁸⁴ In American law, the corresponding differential codified in UCC § 2-713 has been called “a statutory liquidated damage clause, a breach inhibitor the payout of which need bear no close relation to plaintiff’s actual loss.”²⁸⁵

When a supplier breaches a contract to build, the loss suffered by the recipient will depend upon the purpose to which he intended to put the building: if (*eg.*) he intended to resell, the loss in value is the loss in income from that sale; if he intended to rent, the lost value is lost rental income.²⁸⁶ Depending on the circumstances, rental value may also represent “other” (indirect/consequential) loss.²⁸⁷

We sometimes refer to lost value as a *direct* loss. In the many cases where a promisee suffers only this kind of loss, compensation for loss in value will return him to the full performance position.

The problem of measuring direct loss has received extensive attention in both American and Scandinavian doctrine.²⁸⁸ One special problem in this area relates to the fact that a middleman’s *lost profits* may be conceived as a “direct” loss in value.²⁸⁹ Another complication involves compensation for *disproportionate* – albetiet “direct” – loss.²⁹⁰

283. See Treitel, *Remedies* at 44.

284. See, regarding damages when buyer cancels, KBL (I) § 25 and Rodhe, *Quantum of Damages* at 153. Seller may prove that the actual loss is less: see Nørager-Nielsen, *Købeloven* 444 and compare note 285.

285. See White & Summers, *Uniform Commercial Code* at 225 and compare Ussing, *Køb* at 137 (“erstatning for ... værdiforringelse ...”).

UCC § 2-713 measures damages for “non-delivery or repudiation”. Compare White & Summers, *id.* at 233 (arguing that a buyer who has covered cannot sue under UCC 2-713 to recover higher damages) and *Allied Cannery & Packers, Inc. v. Victor Packing Co.*, 209 Cal. Rep. 60, 39 UCC 1567 (1984) (middleman’s actual (consequential) loss held to define the outer limit for recovery based on the abstract measure). Where the buyer has accepted, damages are measured according to § 2-714(2) as the difference between the value of the goods accepted and value they would have had as warranted.

286. See Farnsworth, *Contracts* at 855-56. Professor Farnsworth (*id.*) defines a recipient’s loss in value broadly, so as to comprise even profits lost by a building-recipient in an intended collateral transaction. Compare generally, Gomard, *Obligationsretten* 2. hæfte 164-67.

287. See *id.* at 887-88 regarding this as an alternative to lost profits and (as a last resort) interest on the value of the property. Regarding interest claims as damages, see Knapp & Crystal, *Problems* at 788 and compare, *e.g.*, Vinding Kruse, *Købsretten* at 55.

288. See, *e.g.*, Farnsworth, *Remedies*, Rodhe, *Quantum of Damages*, and Krokeide, *Erstatningsberegningen* 195 ff.

289. This problem is considered *infra* in part 4.4.4.2 under the heading of avoidability.

290. See, *e.g.*, *Chatlos Systems v. National Cash Register Corp.*, *infra*, part 4.4.5.1, text with note 572.

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In other situations the governing purpose of contract damages can only be achieved by (also) compensating a promisee for “other”, *i.e.*, *consequential* loss (*følgeskader*),²⁹¹ the kind of a loss we sometimes call *indirect*.

We can even subdivide the heading of consequential loss. Sometimes, this indirect kind of loss is “purely economic”.

Cancelled Exhibition II.²⁹² Same facts as in *Cancelled Exhibition I*,²⁹³ except that no reasonable substitute for the repudiating Owner’s hall is available. The conventions cannot be held as planned, and Promoter demands compensation for lost profits: Dkr. 1 million.

Claims for lost profits are not the only kind of consequential claim.²⁹⁴ Another major consequential category in a commercial context is physical damage to property (as in *Contagious Abortion*).²⁹⁵ Here the remedial situation is complicated by the overlapping principles of contract and tort.²⁹⁶

UCC § 2-715(2) provides, in pertinent part:

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 has reason to know ... and
- (b) injury to person or property proximately resulting from any breach of warranty.

KBL I contains no analogous provisions, but a new statutory definition of indirect loss is set forth in KBL II.²⁹⁷

In both systems, certain kinds of (minor) “incidental” expenses (*udgifter, utlegg*) are placed in a separate conceptual class.²⁹⁸

291. See Gomard, *Obligationsretten* 2. hæfte at 166.

292. Based on UfR 1976.776 Ø.L.

293. *Supra*, part 4.4.1.1, text with note 175.

294. Nor are lost profits always best characterized as “consequential”: re. claims by a lost volume seller, *see infra*, part 4.4.4.2. Regarding various kinds of consequential and “indirect” loss, *see generally infra*, part 4.4.5.2 (re. KBL II) and part 5.

295. *Supra*, part 2.4, text with note 212.

296. *See, e.g., supra*, part 4.4.1.3 (*Gravity Meter*).

297. *See supra*, part 1.3 and *infra*, part 4.4.5.2.

298. *See* the Norwegian *Ot prp nr 80* at 121 (“tre ulike slag tapsposter ... utlegg, prisforskjell og tapt fortjenste ... Med *utlegg* menes slike kostnader som parten har måttet dekke på grunn av kontraktbruddet”). *See also* *SOU* 1976:66 at 161 (“‘incidental damages’ motsvarer utlägg”). *Compare* UCC § 2-715, defining incidental damages, *inter alia*, as reasonable expense incident to the delay or other breach.

Re. UCC § 2-710, *see infra* part 4.4.4.1, text with note 374, and *Petroleo Brasileiro, S.A. Petrobras v. Ameropan Oil Corp.*, 372 F.Supp. 503, 508 (E.D.N.Y. 1974) (defining the incidental/consequential distinction) and *Sprague v. Sumitomo* *infra* part 5.3 note 154 (allowing UCC seller to recover “incidental” but not “consequential” damages).

Expectation Liability Extent

The rule is full compensation, full expectation protection of the injured promisee. We often attach various labels to characterize various types of loss, but these are not critical: all loss suffered “but for” the breach might well be described as “consequential”,²⁹⁹ and “the general principal is that all loss, however characterized, is recoverable.”³⁰⁰

In UfR 1976.776 Ø.L. (the real *Cancelled Exhibition*) plaintiff promoter was awarded 300,000 Dkr. as compensation for lost profits.³⁰¹

Expectation protection is the general rule in both American and Scandinavian law, but the exceptions are legion, particularly where the claim involves indirect loss. The problem of “measuring” expectation damages is in large measure seen as a problem of *limitation*.³⁰² Before considering this problem, however, it seems appropriate to consider an equally fundamental issue, an alternative to monetary relief based on expectation: damages based on and measured by the reliance (negative) interest.

4.4.3. Reliance and the Negative Contract Interest

Expectation damages are the top of the line: the highest, but not the only, form of interest protection.

Retail Store II.³⁰³ Buyer (B) and Seller (S) enter into a written agreement regarding the sale of Retail Store to B for \$100,000. After B makes a down payment of \$20,000, S refuses to go through with his part of the deal. B seeks not only (1) return of the down payment but also (2) compensation for expenses (\$5,000) incurred in anticipation and furtherance of the transaction (travel, lawyer’s fees for negotiating and drafting, etc.).

Because the payment of something for nothing runs counter to notions of fundamental justice, B is surely entitled to cancel the contract and to a re-

299. Compare CISG Article 74: “Damages for breach ... equal to the loss ... suffered ... as a consequence of the breach ...” (emphasis added).

300. Farnsworth, *Contracts* at 846. Accord: Gomard, *Obligationsretten 2. hæfte* at 164 (“*Hovedreglen om fuld erstatning*”).

301. See UfR 1976.776 Ø.L. at 779 (“udgangspunkt tages i regnskabsresultaterne vedrørende de sidst afholdte udstillinger”) and *infra*, part 4.4.4.4 (re. certainty of lost profits).

302. In both systems, consequential limitations are traditionally discussed under the headings of avoidability, foreseeability, and certainty: see generally *infra*, part 4.4.4.

303. Compare *supra*, part 4.3.2 re. *Retail Store I*.

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stitutionary recovery of the down payment, both in American and in Scandinavian law.³⁰⁴

Unlike the down payment, however, the travel and legal expenses entail no benefit for Seller: as regards these, there is nothing to “disgorge”, no restitutionary interest to protect. The protection sought here involves compensation for another kind of loss incurred in reliance on Seller’s promise; in the case, the remedial goal is to restore *Buyer* to his pre-contractual position. Compared with a claim for Buyer’s hypothetical expectation (*eg.*, anticipated profits from running the store), the reliance (negative contract) claim may seem more down to earth. And yet, reliance interest protection poses doctrinal difficulties of its own.

Reliance lies after restitution and before expectation on the interest-protection scale, but expectation protection remains the “general rule”, and much reliance doctrine is derived in terms of expectation theory.³⁰⁵

Both the American concept of reliance and the Scandinavian negative interest have developed far beyond the German *culpa-in-contrahendo* paradigm.³⁰⁶ In American law, enforcement grounded on reliance has been described as “the most radical and expansive development in this century in the law of promissory liability.”³⁰⁷ But much of this development – in particular, the part which relates to promissory estoppel – seems neither radical nor expansive in the Scandinavian view. For in Scandinavian law, we have never had a consideration-gap to fill.

The classical Common deduction went like this: if (1) no “bargain-promise” could be found, then (2) no contractual obligation could exist, so (3) there could be no breach, and thus (4) no remedy. Therefore when justice demanded that a given promise not “supported” by consideration be protected, the Common law had a conceptual problem. Thus it was that *promissory estoppel* came to function as a belated attempt to plug the gap left by the artificial and unfortunate doctrine of consideration.³⁰⁸ When, for example, it was found undesirable that an offer was not

304. *Id.*

305. See *infra*, this part and compare, *e.g.*, Farnsworth, *Contracts*, § 12.16 at 888 (discussing reliance as an “Alternative [to the Expectation] Measure of Damages”) and Gomard, *Obligationsret* 2. hæfte, kap. 11.2 (discussing reliance first).

306. Compare Augdahl, *Obligationsrett* 247-48 and Kessler & Fine’s “Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study”, 77 *Harv. L.R.* 401 (1964).

307. Knapp, *Reliance* at 53.

308. Fried, *Contract as Promise* at 25, note *.

binding unless actually “paid for”,³⁰⁹ American courts hit on promissory estoppel: enforcement (of a one-sided promise) *grounded* on detrimental reliance.³¹⁰

Like the doctrine of consideration it was designed to supplement, the promissory estoppel doctrine sometimes seems “over-loaded”.³¹¹ In the leading reliance case of *Hoffman v. Red Owl*,³¹² no “promise” (/offer capable of being accepted or supported by consideration) was even made.³¹³ A Scandinavian court would probably protect the *Hoffman*-plaintiff’s “negative interest” by reason of the defendant’s *negligent* conduct.³¹⁴ “Indeed, although the [*Hoffman*] court spoke of promissory estoppel, its decision may fit better into that field of liability for blameworthy conduct that we [Americans] know as tort ...”³¹⁵

Because there is no bargain-promise in the promissory estoppel situation, Common contract law must point to justifiable reliance as a special liability base, a special reason for enforcing the commitment made. But where we do have binding bargain-promise, as in *Retail Store II*, neither system needs a special solution. And in both systems, protection of the reliance interest seems grounded in the same kind of reasoning. Both tend to treat reliance as a smaller slice of a larger economic (expectation) pie, *det mindre i det mere*.

In American law, the *Retail II* Buyer is “automatically” entitled to full compensation by virtue of Seller’s breach, because breach of a bargain-promise is itself a sufficient basis for protecting Buyer’s expectation interest. And since there is a basis for the whole, there is a basis for the part: given S’s

309. *I.e.*, a (pure-bred) “option” contract: *Restatement 2d* § 25. *Compare* § 87 (“binding as an option contract”).

310. *See Friedman v. Tappan Dev. Corp.*, 22 N.J. 523, 126 A.2d 646 (1956): “The reliance is on a promise, and not on a misstatement of fact, and so the estoppel is termed “promissory” to mark the distinction.”

311. *Compare* (re. consideration) Fried, *Contract as Promise* at 36, citing Dawson.

312. 26 Wis.2d 683, 133 N.W.2d 267 (1965) (collapse of ongoing negotiations re. supermarket franchise). The case is briefed and discussed by Farnsworth, *Contracts* at 191-92.

313. *Accord*: Fried, *Contract as Promise* at 24. The most specific “assurance” made to plaintiff – and the one equated with promise in the *Restatement 2d* (Illustration 10 to § 90) – was: “everything is ready to go. Get your money together and we are set.” *Compare* Knapp, *Contract to Bargain* at 688 (“The court compensated plaintiff for his reliance on defendant’s *assurance* ...” [emphasis added]); *see also* Farnsworth, *Contracts* at 191 (*Red Owl* “assured” *Hoffman*) and Knapp, *Reliance* 57-58.

314. Regarding the generally restrictive Swedish practice, *see* Hellner, *Avtalsrätt* 37-38.

315. Farnsworth, *Contracts* at 192. *See also* Prosser & Keeton, *Torts* at 658 (duty of reasonable care even if promise not enforceable under contract law).

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breach we can deduce (syllogistically) B's right, *inter alia*, to reliance interest protection.³¹⁶

In Scandinavia there has been some doctrinal disagreement as regards the basis of liability for the reliance (negative contract) interest liability. But there is no disagreement as to the general rule: contractual liability is grounded in fault (*culpa*). So when Seller in *Retail II* (willfully) refuses to keep his promise, he is liable by reason of culpable breach.

In UfR 1963.280 H (*Butcher Shop*)³¹⁷ Buyer was awarded reliance damages in conjunction with the right to cancel the contract.³¹⁸ Although the decision itself provides no clue as to the basis of reliance damages,³¹⁹ the Seller's statement may be characterized as a *negligent* misrepresentation.

Some Scandinavian writers would subsume reliance liability within the general fault-rule.³²⁰ Another theory – in line with the American, no-fault idea – would protect the reliance interest in all cases of breach.³²¹ A third (middle) position would let the basis of reliance liability follow the positive performance (expectation) rule otherwise applicable.³²²

Both systems protect the reliance interest, but for entirely different reasons. Both protect reliance as a better-than-nothing alternative to expectation (*/positiv oplydelsesinteresse*), but each employs its own general basis of expectation protection – the Common law's no-fault and the Scandinavian *culpa* – to provide a rationale for awarding reliance damages. When we deal with a clear-cut bargain-promise, the role of reliance seems hardly decisive under either approach. In a case like *Retail Store II*, the promisor is clearly liable whatever the liability base: fault or no-fault.

316. Compare *Restatement Second*, Comment c to § 344 (re. situations where recovery is "based on" [= measured by?] reliance even though consideration is the "basis of" enforcement). See also *id.*, §§ 346 and 349.

317. See *supra*, part 2.3 (text with note 112).

318. Negative interest protection is also available where a contract is "terminated" by reason of invalidity (fraud, duress, etc.) as well as in a *culpa in contrahendo* situation.

319. See UfR 1963.280 H ("efter det i øvrigt foreliggende, må appellanten have krav på godtgørelse for de ham ved handlen påførte udgifter ...").

320. Regarding Norwegian law, see Augdahl, *Obligationsrett* at 248 and Hagstrøm, *Selgerens ansvar* at 804. For an instance of no *culpa in contrahendo*, see UfR 1986.747 H (denying compensation for rental of premises, etc.) ("udgifter ... ikke forårsaget ved uforsvarligt forhold").

321. See A.Vinding Kruse, *Ejendoms køb* 49-52. See also UfR 1986.728 Ø (awarding compensation for moving expenses and legal fees ("da misligholdelsen skyldtes mangler ved [sælgerens] ydelse"))

322. See Gomard, *Obligationsretten* 2. hæfte at 146-47. Accord: Nørager-Nielsen and Theilgaard, *Købeloven* at 391.

Both systems make use of the concept of reliance damages to provide an alternative *measure* (/extent) of liability: a next best substitute for the sometimes speculative expectation of lost profits. Perhaps for this reason, reliance damages are often relegated to a subsidiary and somewhat uncertain doctrinal status.³²³

In the leading American case on which the *Gas Convention* paradigm is based,³²⁴ defendant-carrier was held liable for plaintiff's wasted travel, hotel, and Convention expenses to and in Atlantic city, but recovery for highly speculative lost profits (anticipated Convention-sales of the new stove) was denied.

Even far-reaching "consequential" kinds of loss are subsumable under both expectation and reliance headings, in both American and Scandinavian law.³²⁵ Lost profits, however, are usually kept off the reliance list:³²⁶ an obvious result at least when we revert to reliance because profits are too speculative to measure.

Because of the potential reach of reliance damages, numerous theories have been advanced in limitation of full reliance protection. Least controversial perhaps is the idea that the limits traditionally placed on the expectation measure of damages should also serve to cap claims involving reliance.³²⁷

Both the American and Scandinavian versions of reliance (/negative) interest-protection tend to "put the aggrieved party into the situation in which he would have been if the contract had never been made".³²⁸ For this reason, this contractual remedy may seem tort-like;³²⁹ the "cause of action" may be a borderline case.

323. See, e.g., Hudec, *Reliance Interest* at 718 (terms not well developed).

324. *Security Stove & Mfg. Co. v. American Ry. Express Co.*, 227 Mo. App. 175, 51 S.W.2d. 572 (1932). See *supra*, part 2.2.

325. See (re. "følgeskader") Nørager-Nielsen & Theilgaard, *Købeloven* at 389. KBL II says nothing about the concept of reliance (negative) interest protection, but the exceptions to the new statutory definition of indirect loss seem explainable in terms of reliance-damages for consequential loss: see *infra*, part 4.4.5.2.

326. See, e.g., Nørager-Nielsen & Theilgaard, *Købeloven* at 389 ("tabt avance ... kun i ganske særegne tilfælde ...") and compare Hudec, *Reliance Interest* at 708-09.

327. See Harvey, *Discretionary Justice* at 671, Hudec, *Reliance Interest* at 730 and Krokeide, *Erstatningsberegningen* at 173 and 218 (re. foreseeability: *påregnelighed*, *adekvans*). Compare Gomard, *Obligationsetten* (Kap. II.3.3: subsuming such liability limitations under "positiv opfyldelsesinteresse").

Regarding avoidability, unforeseeability and uncertainty as liability limits, see *generally infra*, part 4.4.4.

328. See, e.g., the 4 Illustrations of *Restatement Second* § 349 (all involving repudiation by the promisor). Accord Treitel, *Remedies* at 28.

329. See Knapp, "Reliance Damages: Compensation for Loss Suffered," *Commercial Damages* 2-3 (C.Knapp ed. 1986).

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*Fake Furniture (Continued).*³³⁰ Norwegian Buyer sees a Renaissance-style furniture set in Dealer's Copenhagen shop and agrees to pay the asking price (with nothing being said about the quality or origin of the goods). When the goods arrive in Norway, Buyer is disappointed to discover that the set is Renaissance in style only, a cheap imitation camouflaged to look like the real thing.³³¹ Buyer seeks not only termination and refund of the purchase price but also reimbursement for shipping and customs charges, etc.

We have a choice between alternative doctrinal conceptions.³³² If we focus on the bargaining process, we see the act of camouflage (or the failure to disclose it) as a species of culpable conduct: a trap which hooks the unwary Buyer. Because of Dealer's culpable conduct, we let Buyer avoid the sale, and we make Seller foot the bill: return Buyer to his pre-reliance position. Liability for the negative/reliance-interest imposed via this "procedural" approach may be seen as delictual, the formal reason being that there is no binding contract.³³³

Americans also find tort-book authority for this approach to reliance-type damages. But in American tort law (where the basis of liability is sometimes fraud, sometimes negligence, sometimes strict),³³⁴ damages for misrepresentation are measured "at their most generous" by the benefit of the bargain!³³⁵ English law in this area is also plagued by complex conceptions.³³⁶

330. See *supra*, parts 2.5 (with note 256) and 4.3.1 (with note 130)

331. This accords with the expert opinion rendered in UfR 1923.518 H ("paasmurt med en farve svarende til den antike møbler har ...").

332. See *supra*, 4.3.1. and Krokeide, *Estatningsberegningen* at 151 (comparing English and Norwegian law re. misrepresentation). The approaches are seen as mutually exclusive: see Gomard, *Kontraktret*, 4.5 with note 28 ("konkurrence mellem klager").

333. See Gomard, *Obligationsretten 2*. hæfte at 145 ("rent formelle ræsonnement"). See also Ussing, *Aftaler* at 129 with note 29.

334. See Prosser & Keeton, *Torts* § 107 and Farnsworth, *Contracts* at 242 with note 1.

335. See Prosser & Keeton, *id.* at 768: "As a matter of the strict logic of the form of action, the (out-of-pocket) rule is more consistent with the purpose of tort remedies, which is to compensate the plaintiff for a loss sustained, rather than to give him the benefit of any contract bargain".

336. § 2(1) of the Misrepresentation Act 1967 provides: "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered a loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."

Regarding the interface of such national conceptions and the CISG, see *infra*, part 6.3.3 (*Barge Capacity*).

Buyer need not proceed on procedural lines. He can concede (*arguendo*), that the contract is valid, cancel (*/hæve*) by virtue of the material defect, and recover reliance-damages on a contractual theory grounded in an implied warranty (*stiltiende garanti*) that the goods to be “merchantable” must be genuine.³³⁷

In UfR 1923.518 H (the real *Fake Furniture*), the Danish Supreme Court awarded reliance damages. Whereas the High Court had denied damages absent proof of fault,³³⁸ the Supreme Court premised its holding on *implied warranty*.³³⁹ In a case like this, the implied warranty serves as the functional equivalent of a theory of liability grounded in Seller’s culpable conduct (negligent failure to disclose the defect).³⁴⁰

In another Danish case,³⁴¹ S told B that buyers of his pinball machines average a 70% return on their investment. B signed a contract of sale (which contained no such information about investment return), but later discovered that the actual return on his (and similar machines) was far lower. Because B made his promise to buy in reliance on S’s misstatement of fact,³⁴² he was held entitled to *rescind*,³⁴³ but the High Court found “no basis” of liability for recovery based on the positive interest,³⁴⁴ and reliance (negative interest) damages were denied as undocumented.³⁴⁵ One commentator has argued that an award of performance-interest damages would be appropriate so as to discourage the kind of conduct exhibited by S.³⁴⁶

If, under American law, used goods are held not to “conform to the contract”, then the buyer is automatically entitled to expectation protection. Under Scandinavian law, a finding that used (specific) goods are defective need not trigger full liability. For this reason, an American court might be more reluctant to imply a war-

337. See Hagstrøm, *Selgerens ansvar* at 803-04 and generally *supra*, part 2.5.

338. See UfR 1923.518 H (“Sagsøgeren, der ikke har godgjort, at Sagsøgte har udvist et til Erstatning forpligtende Forhold, ikke kan kræve sine Udgifter ...”[Landsrettens dom]).

339. See *id.* (“da Møblerne ikke har haft de Egenskaber, som maa anses at have været tilsikret ...”).

340. Compare (re. UfR 1923.518 H) Hagstrøm, *Selgerens ansvar* at 804 (“Muligens kunne det sies å ha vært utvist culpa”). Re. KBL (I) § 42, subsec. 2, see Gomard, *Obligationsretten* 2. at 156-57.

Compare (re. American law) White & Summers, *Uniform Commercial Code* at 327 (“only a naughty seller is guilty of misrepresentation or fraud, but a seller can be Simon pure and yet break a ... warranty”). See also Calamari & Perillo, *Contracts* at 290 (in sales of goods question of non-disclosure usually not relevant).

341. UfR 1977.876 V.L.D.

342. See UfR 1977 s. 879 (“løfte om køb ... fremkaldt af disse ... vildledende oplysninger”).

343. Regarding the terminological distinction between rescission (avoidance) and other termination (*e.g.*, cancellation), see *supra*, part 4.3.1. with note 75.

344. UfR 1977.879 (“findes ikke grundlag”). Compare Nørgaard, *Ugyldighed* at 279.

345. *Id.*

346. See Nørgaard, *Ugyldighed* 281-82.

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ranty of merchantability in a case like *Fake Furniture*, but the limited (reliance) nature of the relief sought ought to be relevant in making this determination.³⁴⁷

“Reliance has often been used as the basis for *measuring* recovery”,³⁴⁸ but it may also be conceived as a *raison d’être* of contractual liability, *inter alia*, liability for consequential loss.³⁴⁹

Empty Tank.³⁵⁰ Oil Supplier advertises an automatic delivery system: “Don’t worry, our service assures you there’s always oil in the tank”. Recipient orders the service for his vacation residence, but his tank runs dry in mid-winter. As a consequence the pipes burst, and the residence suffers extensive damage.

“Don’t worry”, indeed! If we couldn’t count on our suppliers, we would all have cause to worry. We are entitled to rely on the merchant because of his status;³⁵¹ the business “risk” of foreseeable reliance lies – and should lie – with the merchant supplier of the bargain-commitment: the commercial promise-maker/breaker.³⁵²

In UfR 1984.392 H the Supreme Court of Denmark held the (*Empty Tank*) Supplier liable for Recipient’s consequential loss.³⁵³

We may experience the shift from expectation to reliance as a lunging leap between distinct conceptual pigeonholes. But in real life, shades of meaning are not always this well-defined. “In distinguishing between the reliance and expectation interests we encounter not so much a shifting line of division as a miscellaneous group of cases which seem equally happy in either cate-

347. *Accord*: Honnold, *Sales* at 47 (asking what we may surely presume is a rhetorical question: “Is it legitimate to consider the scope of recovery in deciding whether there was a ‘warranty?’”).

348. Farnsworth, *Contracts* at 889 (emphasis added).

349. *Accord*: Fried, *Contract as Promise* at 4 (“basis”) and Farnsworth, *Contracts* at 97-98 (“ground”).

350. Based on UfR 1984.392 H.

351. *Accord*: Farnsworth, *Implied Warranties* at 670 (speaking of merchantability: “element of reliance ... implicit in the requirement that the seller be a dealer”).

352. *See generally infra*, part 5.2.

353. *See* UfR 1984 s. 394 (“sagsøgeren kendeligt for sagsøgte er gået ud fra, at sagsøgte ved aftalen påtog sig at levere således, at der til enhver tid var olie på tanken ... ”[landsrettens præmisser]).

gory.’³⁵⁴ And, in the present comparative context, we have reason to note at least two subgroups within this larger, mixed bag: (1) “those cases where the breach of a contract results not simply in the loss of the promised value but in some direct harm ...”³⁵⁵ and (2) those cases “where the reliance interest is conceived to embrace the loss of the opportunity to enter similar contracts ...”³⁵⁶ If, for example, Seller delivers a defective bolt which breaks and causes damage to Buyer’s property, we can right the wrong by seeking to restore Buyer *either* to his pre-contractual (pre-reliance) *or* to his post-contractual (expectation) position.³⁵⁷ And where Patient cancels an appointment with his (fully-booked) Physician, we can compensate the profit lost using either conceptual construction.³⁵⁸ Protecting reliance or expectation, we can award *consequential damages*, to Buyer and Physician alike.

Such conceptual alternatives are not always discussed. In the case of product damage, the rules of tort often provide the dominant paradigm, and in the case of lost profits, the emphasis is almost invariably directed at the expectation measure which is seen to cover adequately such “other loss”. And yet, the reliance paradigm remains relevant in these situations. Protection of the positive performance interest is not necessarily something wholly different, more “far out” than reliance-interest protection.³⁵⁹

4.4.4. Traditional Liability Limits

4.4.4.1. Introduction

Just as Scandinavian and American law recognize significant exceptions to the fault and no-fault rules regarding the basis of contractual liability, there are also important exceptions as regards the extent or measure of damages

354. See Fuller & Perdue, *Reliance Interest* at 73. Compare Krokeide, *Erstatningsberegningen* at 136 (“De to definisjonerne ... gir ikke noen sikker veiledning om hva som kan kreves erstattet.”)

355. Fuller & Perdue, *id.* at 75. Accord: Gomard, *Obligationsretten* 2. hæfte at 136 (“ydelsen, mens den er hos modtageren, forvolder skade på person eller ting”).

356. See Fuller & Perdue, *id.* at 74. Accord: Gomard, *id.* at 136 (“tab ved at chansen for anden kontrahering er blevet forpasset ...”) and Krokeide, *Erstatningsberegningen* at 172 (“disponeringstab”). Fuller & Perdue (*id.* at 73) also note a third group: cases where the reliance consists of acts essential to the performance of the contract; accord: Gomard at *id.* (“for-gæves afholdte rene kontraheringsomkostninger”).

357. See Fried, *Contract as Promise* 22-23.

358. See Fuller & Perdue, *Reliance Interest* at 60.

359. The fact that reliance damages for breach are often seen as tied to termination (*e.g.* requiring Buyer to return the broken bolt) is hardly a significant distinction in this regard.

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for breach. For the general rule in both these systems, expectation protection to the full extent,³⁶⁰ is just that: a generalization, an oversimplification, even an exaggeration.³⁶¹ Not only is reliance an alternative to expectation, but – under either standard – damages are limited to *unavoidable, foreseeable, and certain* loss.

These three liability limitations have particular significance as regards our primary focal point: these are the factors most often emphasized as those which limit or prevent the awarding of *consequential* damages in both American and Scandinavian law.³⁶²

4.4.4.2. Avoidable Loss

American and Scandinavian courts do not compensate an injured party for avoidable loss. The American codifications serve to denote the comparative common core:

§ 350(1) of the *Restatement 2d* provides that “damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.”

UCC § 2-715(2)(a) limits recovery for consequential damages resulting from seller’s breach to loss *which could not reasonably be prevented* by cover or otherwise...

The doctrine of avoidability is usually discussed in terms of mitigation: that aspect of loss-avoidance which relates to the promisee’s *post-breach* conduct.³⁶³ Mitigation in the wake of breach is by no means the entire avoidance story, but it is an appropriate point at which to start:

Wet Straw.³⁶⁴ By a contract of correspondence finalized on November 9, Merchant accepts Farmer’s offer of “4 wagonloads of Prime Cock’s Foot Straw” at 4 Dkr. per kilogram, delivery the following week. On November 24, Farmer writes Merchant that heavy rains soaked the straw he had intended to purchase for resale, and that he therefore considers the November 9 deal to be off. Merchant’s subsequent letters

360. *See supra*, part 4.4.2.

361. *See, e.g.*, Farnsworth, *Remedies* at 1158, citing Washington (“generous aspiration ... put sparingly into practice”).

362. In America, these “three important limitations ... now serve as a basis not merely for instructing jurors, but for passing on the admissibility of evidence and for withdrawing some elements of damage from the jury’s consideration altogether.” *See* Farnsworth, *Contracts* at 841.

363. *Accord*: Gomard, *Egen Skyld* at 171.

364. Based on UfR 1918.374.

(which maintain that the deal is on) go unanswered, and after covering in late January at twice the contract price, Merchant sues Farmer for the contract-cover differential.

Farmer has no excuse for his failure to perform the generic obligation incurred, but Merchant cannot recover “damages for losses that [he, the injured party] could have avoided by reasonable effort without risk of other substantial loss or injury.”³⁶⁵ So, once Merchant “has reason to know that performance by the other party will not be forthcoming ... he is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss ...”³⁶⁶ His recovery even for this kind of direct loss is limited by the general principle of substitution³⁶⁷ and (more specifically) by the obligation to cover.³⁶⁸ If Merchant is to recover for this loss, he must minimize his loss on this bargain, maximize his cost avoided:³⁶⁹ he must cover his loss by securing a substitute. The avoidability principle determines the point in time at which we calculate the contract-market price-differential.³⁷⁰

In UfR 1918.³⁷⁴ (the real *Wet Straw*), Merchant’s damages were held limited to the price at which he could have covered when Seller’s intent to repudiate became clear.

In Scandinavian law, this same mitigation principle also serves to limit the availability of *specific performance*, this system’s “primary” remedy. And if we define binding promise in terms of the availability of primary and secondary remedy, we might draw a far-reaching conclusion about the mitigation principle: if plaintiff can cover at the market price, defendant’s promise is simply not binding.³⁷¹

The principles of substitution and cover play a key role in analyzing a seller’s right to recover damages for lost profits:

*Opel Order.*³⁷² In early fall, Buyer places an order with Dealer for next year’s model Opel automobile. After 2 months of waiting (but before

365. 5 Corbin, *Contracts* § 1039 at 214. See also *Restatement 2d* § 350(2).

366. See *Restatement 2d*, Comment b to § 350. Compare Gomard, *Obligationsretten* 2. hæfte at 170 (“ikke ... erstatning for tab, som er indtrådt efter det tidspunkt, hvor det må have stået ham klart, at kontrakten ikke ville blive opfyldt ...”). See also Corbin, *Contracts* Vol. 5 § 1039 at 249. Regarding repudiation, see *Restatement Second*, § 250 and Comment f to § 350.

367. See Farnsworth, *Remedies* at 1188.

368. Re. KBL (I) § 25 (*dækningskøb*), see Nørager-Nielsen & Theilgaard, *Købeloven* at 403.

369. See Farnsworth, *Contracts* at 860-61.

370. See Gomard, *Obligationsretten* 2. hæfte at 169-70 and Treitel, *Remedies* at 48 (making an exception for anticipatory breach).

371. See Atiyah, *Rise & Fall* at 430-31.

372. Based on UfR 1956.116 V.L.

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the new models appear on the market), Buyer gets impatient, cancels the order, and buys a Volkswagen. Dealer sues Buyer for the profit lost.

If we define “direct loss” as the promisee’s loss of value on the transaction in question (as opposed to loss suffered on collateral transactions), then the loss in *Opel* may be dubbed direct,³⁷³ but the label should not affect the disposition of the case.³⁷⁴ If we assume that Dealer’s own supply of Opel autos exceeds his demand, he cannot cover: his loss is unavoidable. Given these relevant market conditions,³⁷⁵ a subsequent sale of the same car to another buyer is simply no substitute for the first; there is no causal relationship between Buyer’s breach and Seller’s subsequent sale.³⁷⁶ In this situation, the contract-market differential is “inadequate to put the seller in as good a position as performance would have done.”³⁷⁷ The profit lost by reason of Buyer’s repudiation can only be recovered by damages which protect the lost-volume Seller’s justifiable expectation.³⁷⁸

The Scandinavian Sales Acts do not address the issue, and courts are left free to compensate the lost volume seller by awarding expectation damages, as was done in UFR 1956.116 V.L. (the real *Opel Order*). KBL I regulates the extent of liability only in terms of the contract/market differential,³⁷⁹ and KBL II would not seem to affect the existing law on this point: in contrast with the rules for seller’s breach, the new formulae for buyer’s breach do not distinguish between direct and indirect loss.³⁸⁰

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373. Accord Farnsworth, *Contracts* at 844 (re. loss in value).
374. Accord Farnsworth, *Contracts* at 846 (“all loss, however characterized, is recoverable”). But see *infra*, part 4.4.5.2 re. the legal effect tied to the new KBL II definitions of direct and indirect loss as regards seller’s breach. Re. a similar species of formalism pursuant to UCC § 2-710, see *supra*, part 4.4.2, text with note 298, Farnsworth, *id.* at 845 with note 3 and *Nobs Chem. v. Koppers Co.*, 616 F.2d 212 (5th Cir. 1980) (no recovery for seller’s loss of discount from its supplier when buyer’s breach reduced amount of seller’s order).
375. See Farnsworth, *Remedies* at 1193 (quoting Lord Dunedin in *Charrington & Co. v. Wooder*, [1914] A.C. 71, 74: “You have always to ask yourself, ‘what market.’”).
376. See Farnsworth, *id.* at 1195.
377. See UCC § 2-708(2).
378. Accord: UFR 1974.119 H and Nørager-Nielsen & Theilgaard, *Købeloven* at 428 (“Fuld erstatning ... opnår S kun, hvis han kan betragte [“dæknings”-salget] som værende K uvedkommende ...”).
379. Regarding the contract/market differential as an “abstract” means for measuring a buyer’s loss, see *supra*, part 4.4.2.
380. Except where buyer’s breach consists of a failure to take delivery/*fordringshaver mora*: see KBL II §§ 51(2) and 57.
Regarding lost volume caused by seller’s breach, see Farnsworth, *Contracts* 857-58 and Nørager-Nielsen & Theilgaard, *Købeloven* at 426. Re KBL II § 67 (2), see *infra*, part 4.4.5.2 with note 598.

Avoidable Loss

Comment 2 to UCC § 2-708(2) indicates clearly that the provision was intended to provide an adequate remedy in cases like *Opel Order*, but because of a gross drafting error, the statutory formula itself “will not yield the recovery which all right-minded people would agree the lost volume seller should have.”³⁸¹ American commentators have therefore advised courts to “simply ignore the [UCC] “due credit” language in lost volume cases” ... and they do!³⁸²

A suggestion has been made, *de lege ferenda*, in recent American doctrine that where (as in *Opel Order*) a consumer breaches his promise to buy, damages should not be measured in terms of seller’s expectation.³⁸³

As with the losses we dub direct, the kinds of loss we traditionally characterize as “indirect” or “consequential”, are sometimes avoidable. For example, where a promise to deliver a key ingredient or tool for a given production process is breached, the recipient who makes no reasonable efforts to secure a substitute cannot recover lost production profits suffered in consequence of supplier’s breach.³⁸⁴ Similar considerations apply in cases of defective delivery.³⁸⁵ In such contexts, the elastic standard of reasonableness is a source of considerable difficulty. Whether a supplier’s breach ends up causing his

381. In this situation, UCC § 2-708(2) provides: 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 ... due allowance for costs reasonably incurred and due credit for payments or proceeds of resale. See White & Summers, *Uniform Commercial Code* at 284-85.

382. See *id.* at 285 with note 85 (citing, *inter alia*, *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 398-9, 334 N.Y.S.2d 165, 169-70, 295 N.E.2d 311, 314, 10 UCC 950, 954 (1972). Compare *Fertico Belgium S.A. v. Phosphate Chemicals Export Association, Inc.*, 70 N.Y.2d 76, 517 N.Y.S.2d 465, 510 N.E.2d 334, 3 UCC Rep. 2d 1812 (1987) (notified by S that delivery was delayed, Middleman-buyer covered and sold to his Buyer I, then accepted late delivery from S and resold to his Buyer II at substantial profit. *Held*: not a “windfall” to be set off against damages payable by Seller). See also *infra* with note 510.

383. See Eisenberg, *Bargain Principle* at 797 (re. “*Buick Buyer*”: Teacher repudiates contract for \$10,000 car before factory fills Seller’s order ...”). See also *id.* at 785-86 with note 121 (critical of Professor Atiyah’s more far-reaching suggestion).

384. Regarding supplier’s breach of a contract to lend money under American law, see Farnsworth, *Contracts* at 879 (compensation for borrower’s collateral loss if inability to cover foreseeable by lender).

385. Compare *Carnation Co. v. Olivet Egg Ranch*, 189 Cal.App. 3d 809, 229 Cal.Rptr. 261, 1 UCC Rep. 2d. 1531 (1986) (seller of defective chicken feed has burden of proof pursuant to UCC § 2-715(2)(a) re. inadequacy of buyer’s efforts to mitigate consequential damages for loss of goodwill).

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recipient lost profits will often depend not only on recipient's ingenuity,³⁸⁶ but also his status in general.³⁸⁷

The doctrine of mitigation does not tell the whole avoidance story. There is another side to the avoidance-coin, a concept equally important for a fuller understanding of the consequential question:

*Hot Horses.*³⁸⁸ Plaintiff-carrier contracts to deliver timber to a place to be designated by defendant-recipient in Ipswich, but defendant delays "by the space of six hours the appointment of the place; insomuch that his horses being so hot ... and standing in aperto aere, they died soon after."

Plaintiff's "indirect" loss of livestock is surely avoidable,³⁸⁹ but we need not regard this loss as an avoidable "consequence" of recipient's failure to perform (designate).³⁹⁰ Rather, it seems that this loss is a consequence of the plaintiff-carrier's own negligent act:³⁹¹ "it was the plaintiff's folly to let the horses stand".³⁹² In Scandinavian doctrine, we describe this tort-like aspect of avoidance in terms of contributory negligence (*egen skyld*).³⁹³

*Waterproof.*³⁹⁴ Commercial Artist buys a pen and ink set advertised in an accompanying brochure as "waterproof"³⁹⁵ and "suitable for laun-

386. See Gomard, *Egen Skyld* at 167 ("opfindsomhed").

387. See, e.g., *Nyquist v. Randall*, 819 F.2d 1014, 3 UCC Rep. 2d 1823 (11th Cir. 1987) (buyer of nonconforming cattle not denied recovery of consequential damages pursuant to UCC § 2-715: loss could not "reasonably be prevented" when financial inability to cover partly attributable to seller's breach) and *compare infra*, part 5.4 (re. *Oil Additive*).

388. Based on Professor Farnsworth's account (*Remedies* at 1184 with note 157) of the 17th century English case of *Virtue v. Bird*. 3 Keble 766, 84 Eng. Rep. 1000, (same case) 1 Ventris 310, 86 Eng. Rep. 200 (1678).

389. See Farnsworth, *Remedies* at 1184, citing 3 Keble at 767, 84 Eng. Rep. at 1000 ("for the plaintiff might have taken his horses out of the cart, or have laid down the [timber] any where in Ipswich ...").

390. In Scandinavian law: *fordringshaver mora*.

391. *Accord*, Farnsworth, *id.*, note 162: "Where [avoidable loss] takes the form of *other loss*, the considerations are much like those encountered in connection with contributory negligence in the law of torts."

392. 86 Eng. Rep. at 200.

393. See Nørager-Nielsen, *Købeloven* at 404 with reference to Gomard, *Egen skyld*. See also Treitel, *Remedies* at 75.

394. Based on NJA 1952.184 H.

395. *Accord: id.* at 184: "vattenfast".

dry-marking’’.³⁹⁶ She uses the product to decorate 64 scarves, but customers complain that the ink runs when exposed to moisture, so the returned and unsold scarves must be discarded. Artist sues Seller (manufacturer/retailer) for lost profits: what she could have earned by selling 64 “waterproof” scarves.

This is a case of both contract (sale) and tort (product liability): a broken promise of “waterproof” goods causing physical damage to another thing. And though the bases of liability seem to reinforce one-another (Seller’s breach of express promise is a “defect” traceable to his culpable conduct), Seller’s lawyer may still have a case, at least in a Scandinavian court. And if we re-phrase the avoidance-problem, both fault and no-fault buffs should get the gist: we ought not compensate loss (consequential or otherwise) which the promisee “helped to cause by not avoiding it.”³⁹⁷ The avoidance-issue here is not whether Buyer, with knowledge of Seller’s breach, could have “mitigated” her loss in the traditional sense. Rather, the problem is whether she could and should have discovered the breach before ruining the scarves and thus avoided, *i.e.*, prevented, the (consequential) loss entirely.

Of course, we would hardly expect this Artist to set up her own laboratory just to test Seller’s claim. But once again, the liability question is a question of degree: the degree of preventability weighed against the size of potential loss. Had Artist washed but one scarf before labelling the rest, she could have prevented the loss of 63. And suppose she had relied to a far greater extent: labeled (and ruined) ten thousand scarves. Ought her Seller (or worse yet, a mere middleman with no “reason to know”) be made to bear a risk of this size?

Compared with corresponding Scandinavian theory, American law seems to play down contributory negligence as an aspect of avoidability.³⁹⁸ Given the classical Common law view, that the promisor’s fault doesn’t make “a particle of difference”, American courts are not prone to consider fault on the promisee’s side;³⁹⁹ in Scandinavia, however, where fault is the traditional basis of contractual liability, we are likely to see *culpa* as a two-way street.⁴⁰⁰

396. *See id.* at 187: “passar utmärkt för märkning av tvätt”.

397. Corbin, *Contracts* at 243 (emphasis added).

398. *See* Knapp, *Problems* at 925 and *infra*, part 5.4 with note 165.

399. *See, e.g.*, *Taylor & Gaskin, Inc. v. Chris-Craft, Industries, Inc.*, 812 F.2d 1408 (6th Cir. 1987) (unpublished disposition, text in WESTLAW) (Michigan’s statutory law on comparative negligence does not apply in a breach of warranty). The *Taylor* decision is noted *infra*, part 5.2, text with note 73.

400. *Compare* Gomard, *Egen Skyld* at 167-72 (comparing contributory negligence and “avoidable damages”/mitigation in Anglo American law).

Part 4.4.4.3

Yet under either system, we must regulate the obligations of promisor and promisee alike: fill in the gaps as regards the duties of each. The duty to prevent (and mitigate) is part and parcel of the general obligation to act in good faith: not only in one's own interest, but also in the interests of the other.⁴⁰¹

In Scandinavian law, when a Supplier is to develop a computer program to suit a commercial Recipient's needs and specifications, both parties are expected to their best. Just as Supplier may be guilty of culpable breach, Recipient's failure to provide a professional degree of assistance and cooperation constitutes contributory negligence, reducing the damages to which he is entitled.⁴⁰²

Just as the buyer of a defective product cannot always recover in tort for losses caused by his own contributory negligence, the same buyer cannot always recover in contract (/warranty) for losses caused by a discoverable defect (*synlig mangel*).⁴⁰³ Risk prevention and contributory negligence are relevant factors in a contractual context, factors which should be accounted for in the consequential equation.⁴⁰⁴

4.4.4.3. Foreseeability and *Adækvans*

The liability-limiter which Common legal systems label as foreseeability is traditionally compared with the Germanic doctrine of adequate causation, and the corresponding Scandinavian concept bears a similar name.⁴⁰⁵ Adequate causation (*adækvans*) and foreseeability address the same kind of general problem,⁴⁰⁶ and both relate directly to the consequential issue: the *Hadley*-problem of "where do we stop?"

401. See Gomard, *Egen Skyld* at 171-72 ("almindelig forpligtelse til at vise hensyn"), citing Mason, 38 *Col. L.R.* 804. See also *supra* part 2.1 with note 21.

402. This was the situation in Oslo byrett's judgment of May 7, 1976, discussed *supra* in part 4.4.1.2 at note 236.

403. Accord: White & Summers, *Uniform Commercial Code* at 415 ("gross distortion" to say contributory misconduct no defense to warranty action). See also UCC § 2-316(3)(b) and compare *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 297 N.Y.S.2d 108, 244 N.E.2d 685, 5 UCC 1213 (1968) (defects in yarn allegedly undiscoverable before processing).

404. Regarding the resolution of NJA 1952.184 H (*Waterproof*), see *infra*, part 5.2. Regarding risk-sharing and contributory negligence, see also *infra*, part 5.4.

405. Regarding the German doctrine of adequate causation and the corresponding theory in Scandinavian law, see Hellner, *Contractual Damages*, and Andersen, *Skadeforvoldelse* at 62 (tracing the original doctrine to the German physiologist v. Kries). See also Kruse, A.V. in TFR 1951.321 and "Law of Torts" in *Danish Law* (Copenhagen 1982) p. 171.

406. Compare Gomard & Skovgaard, *Contract and the Pools* at 66 (translating *adækvans* as "reasonably foreseeable").

Foreseeability

*Horseshoe Lost (Revisited).*⁴⁰⁷ Rider is on his way to marry Heiress when his horse loses a shoe. Rider asks Blacksmith to replace it, and Blacksmith goes to work. Blacksmith does a bad job, the horse becomes lame, and Rider loses a fortune.

Because Blacksmith's performance is below the professional par, he is in breach and at fault, so there is a basis for holding him liable in both American and Scandinavian law. And so (the hypothesis goes): "but for" the breach, Rider might well be sitting in a nice economic position.

So, "but for" some liability-limiter, the law threatens to hold Blacksmith liable for the consequences: Rider's lost fortune. One such limiter, and the one most often applied to situations like this, is the concept of foreseeability. "The Commonest person lives according to the maxims of prudence founded on foresight of consequences ..."⁴⁰⁸ and because Blacksmith could not be expected to foresee this loss, he ought not be held liable to Rider therefor.

"The principle of foreseeability has been an exceedingly influential one; it forms one of the comparatively rare instances in which a major doctrine of the CIVIL LAW appears to have been taken over in the nineteenth century by the COMMON LAW."⁴⁰⁹ In American contract law, the doctrine of foreseeability often overshadows the problem of causation, sometimes rendering this latter issue "academic".⁴¹⁰

Our Common test of foreseeability is drawn from own most famous case:

*Hadley (Revisited).*⁴¹¹ The crankshaft in Miller's Gloucester mill breaks and must be sent to Greenwich to serve as a model for a new one. Carrier undertakes to ship the shaft but negligently delays delivery. As a result, the reopening of the mill is delayed. Miller suffers lost profits, for which he sues Carrier.

Carrier is in breach and Miller is entitled to the primary remedy.⁴¹² But though the "governing purpose" of damages is to protect Miller's expecta-

407. See *supra*, part 2.5 with note 220.

408. John Stuart Mill, quoted in Atiyah, *Rise & Fall* at 432.

409. Treitel, *Remedies* at 60.

410. See Farnsworth, *Remedies* at 1199 (re. lost value). Regarding competing cause in Scandinavian law, compare *supra*, part 4.4.4.2.

411. See *supra*, part 1.1 with note 4.

412. See *Restatement 2d*, § 346, Comment a.

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tion, the rule is not “relentlessly pursued”.⁴¹³ The Common law does not “indemnify for all loss *de facto* resulting from a particular breach, however improbable, however unpredictable. ... [T]he aggrieved party is only entitled to recover such part of the loss ... as was at the time of the contract reasonably foreseeable as liable to result from the breach.”⁴¹⁴ Codifying the *Hadley* rule for American contract law in general, § 351(1) of the *Restatement 2d* 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.⁴¹⁵

Reasonable foreseeability depends on “knowledge possessed”, in particular by the party who later breaches the contract, and the two kinds of “knowledge possessed” are the subject matter of the two famous “branches” of the *Hadley* decision.

“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.”⁴¹⁶

Codifying this century-old Common law distinction, § 351(2) of the *Restatement 2d* provides:

Loss may be foreseeable as a probable result of a breach because it follows from the breach

- (a) in the ordinary course of events, or
- (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know ...

413. *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2K.B. 528, 539.

414. *Id.* See also Farnsworth, *Remedies* at 1202 (comparing the similar French conception).

415. This is indeed the *Hadley* “rule” (*ratio*): no recovery for *unforeseeable loss*. Regarding the more controversial (*e contrario*) dictum, see Bauer, *Consequential Damages* at 702 and *infra* part 4.4.5.1 with note 522.

Regarding the relevant point in time for the foreseeability determination, see Note, *Promissory Estoppel* at 594. But compare Ussing, *Obligationsretten* at 144 (where fault is basis of liability in Scandinavian law, relevant time is culpable breach); see also Hellner, *Beräkning* at 299 and *Contractual Damages* at 52.

416. 9 Ex. 341 at 354 (emphasis added): the word “or” separates the two branches.

The first kind of knowledge-possessed is *imputed* knowledge, that kind of knowledge relating to “the usual course of things” which every *bonus pater familias* is deemed to know. This is the first branch, that of the *Restatement 2d* § 351(2)(a).

If we assume that in a market economy, a recipient can usually cover in the wake of supplier’s breach, and thus avoid profits lost on collateral transactions, then such lost profits are not foreseeable “in the *ordinary* course”.⁴¹⁷ *I.e.*, this kind of consequential loss is *often* (but not always) unforeseeable.⁴¹⁸

To this imputed knowledge which a contract-breaker is assumed to possess – whether or not he actually does – “there may have to be added in a particular case [actual] knowledge ... of special circumstances outside the ‘ordinary course of things’, of such a kind that a breach in those special circumstances would be liable to cause more loss.”⁴¹⁹ This is the second *Hadley* branch, that of *Restatement* § 351(2)(b).

In *Hadley* itself, the want of a new shaft was “the only cause of the stoppage of the mill, and ... the loss of profits really arose from not sending down the new shaft in proper time ...”⁴²⁰ But a century ago, it was “obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not in all probability, have occurred; and these special circumstances were here never communicated ...”⁴²¹

Because a misleading headnote has caused considerable confusion in both England and the United States, “it is essential to bear clearly in mind the facts on which *Hadley v. Baxendale* proceeded”,⁴²² The *Hadley* Court found “the only circumstances ... communicated by the plaintiffs to the defendants at the time when the contract was made were that the article to be carried was the broken shaft of a mill and that the plaintiffs were the millers of that mill.”⁴²³

A leading American case of knowledge held not possessed under either *Hadley* branch is *Kerr*.⁴²⁴ In reply to an inquiry from Manila requesting instructions re-

417. See Farnsworth, *Contracts* at 878 and *id.* at 879 (recipient-plaintiff must show that both inability of cover and collateral loss foreseeable) and compare Knapp, *Mitigation* 41-43 (difference of judicial opinion re. the burden of proof).

418. *But see infra*, part 4.4.5.2 re. KBL II § 67(2)(5).

419. *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 K.B. 528, 539.

420. *Hadley*, 9 Ex. at 355.

421. *Id.* at 356.

422. *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 K.B. 528, 537.

423. *Hadley*, 9 Ex. at 355.

424. *Kerr S.S. Co. v. Radio Corp. of America*, 245 N.Y. 284, 157 N.E. 140 (1927).

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garding the loading of a ship, P gave D a reply in “Scott’s Code” for transmission to Manila. D’s agent (who had a copy of the Scott’s Code book)⁴²⁵ mislaid the telegram, the cargo was not loaded, and P lost the freight. *Held*: for the defendant. Scandinavian law has a similar precedent.⁴²⁶

Each time the *Hadley* paradigm reappears, the Common law courts breathe new life into the case. In England, home of *Hadley*, the original paradigm is now read as the first part of a judge-made “trilogy”; the second segment of the saga involves the paradigmatic contractual transaction, the sale of goods:

Laundry Boiler.⁴²⁷ Buyers are in the laundry and dying business. They conclude a contract by correspondence with Sellers (an engineering company) for the purchase of a heavy steam boiler, advising Sellers that they “require the boiler urgently”.⁴²⁸ But because third parties employed by Sellers to dismantle the boiler allow it to fall and sustain damage, delivery is delayed 5 months. Buyers sue Sellers for:

1. Profits lost during the delay because their existing business could not be expanded to meet increased demand in general, and
2. Profits lost because special, particularly lucrative, dying contracts could not be performed during the delay.

Contract of carriage or contract of sale, the key Common question is still knowledge possessed at the time of the contract.⁴²⁹ When the *Laundry Boiler* contract was made, Sellers “did not know ... the precise role for which the boiler was cast in [Buyer’s] economy,”⁴³⁰ though they did know it was “ur-

425. See Farnsworth, *Remedies* at 1207 with note 261.

426. R.T. 1878.407 (negligent failure to send sealed telegram). See also Ramberg, *Almän Avtalsrätt* (1986) at 160-61 and Gomard, *Kontraktetsret* at 127 with note 34.

427. Based on *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 K.B. 528.

428. In *Victoria Laundry* (*id.* at 533) defendant-sellers “knew before, and at the time of the contract, that the plaintiffs were laundrymen and dyers, and required the boiler for purposes of their business as such. They also knew that the plaintiffs wanted the boiler for immediate use ... The plaintiffs had conveyed to the defendants that they required the boiler urgently [and] finally ... in the concluding letter of the series by which the contract was made: “We are most anxious that this boiler should be put into use in the shortest possible space of time”.

429. See UCC § 2-715(2), *supra* part 4.4.2, text following note 296. See also the English SGA sec. 54 re. “special damages”.

430. “[E].g., whether (as the fact was) it was to function in substitution for an existing boiler of inferior capacity, or in replacement of an existing boiler of equal capacity, or as an extra unit to be operated side by side with and in addition to any existing boiler”: see *Victoria* at 534.

gently required”.⁴³¹ But under either branch of *Hadley*, the loss need not actually have been “contemplated” or foreseen by the party in breach: a seller need only have reason to know.⁴³²

Under either branch, the loss need only be foreseeable as *probable*.⁴³³ In *The Heron II* Lord Hodson could not improve on Asquith, L.J.’s “colourless” formulation in *Victoria Laundry*: “liable to result” (i.e. a “serious possibility” or “real danger”).⁴³⁴ In *Victoria* (the real *Laundry* case), the plaintiffs recovered lost profits under the first head of damage, but not for loss relating to the “particular lucrative” contracts under the second head. The second head may be subsumed as an unforeseeable (unusual) *type* of loss,⁴³⁵ but the real distinction would seem to lie in the *magnitude* thereof.⁴³⁶

One trend seems clear: in an information-based society, our wealth of common, readily foreseeable knowledge continues to grow.⁴³⁷ However short Lord Alderson may have pruned the first *Hadley* branch in 1854, the concept of general foreseeability has grown steadily in the twentieth century, in America⁴³⁸ and in England: in the third act of the *Hadley*-trilogy.

431. The *Victoria* decision does not specify whether the first head of damage was to be subsumed under the first or second branch. Compare Lord Pierce in *Heron II* [1967] 3 All E.R. at 712: “According to whether one categorises a fact as basic knowledge or special knowledge the case may come under the first part of the rule or the second. For that reason there is sometimes a difference of opinion as to which is the part which governs a particular case, and it may be that both parts govern it.”

432. See UCC § 2-715(2)(a), cited *supra* in part 4.4.2 at note 296, and *Victoria* at 540: “it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance.” Compare Gomard, *Obligationsretten* 2. at 175 with note *).

433. See *Victoria* at *id.* Accord: Lord Hodson in *The Heron II* [1967] 3 All E.R. at 707 (“‘probable’ ... covers both parts of the rule ...”). Both cases are cited with approval by Farnsworth, *Contracts* 877 with note 19.

434. [1969] 3 All E.R. at 708.

435. See Farnsworth, *Contracts* at 877, with note 20 (citing *Victoria*).

436. Compare *id.* (quoting Danzig’s *de lege ferenda* query, implying that such matters do not yet concern the courts). Re. extraordinary profits on resale, see Corbin, *Contracts* § 1015.

437. See Peters, *Roadmap* at 272, citing *Victoria Laundry* and *Murarka v. Bachrack Bros.*, 215 F. 2d 547 (2d Cir. 1954) (parachute seller held liable for profits lost on buyer’s resale contracts without notice of such contracts where no substitute available).

438. See Peters, *Roadmap* at 272 and, e.g. *Mead v. Johnson Group, Inc.*, 615 S.W. 2d 685 (Tex. 1981) (buyer of business failed to pay its debts as agreed; damages awarded for injury to the former owner’s credit reputation upheld on appeal, *id.* at 688: “Recognition that loss of credit may be a foreseeable result of breach of contract is in line with the realities of today’s economy”).

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Heron II.⁴³⁹ Carrier agrees to carry Merchant's sugar cargo to Basrah on the "Heron II". The cargo is delivered 9 days late, during which time the market price for sugar in Basrah drops significantly. Merchant sells for less and sues Carrier for the difference.

"Had this been a case of non-delivery on sale of goods ... it is uncontested that the defendants would be liable for the loss of market ... the difference between the value of the article contracted for at the time when it ought to have been and the time when it actually was delivered."⁴⁴⁰ Common law contracts for carriage are not in a special class: "the measure of damages is the difference in the market value [of the goods] at the time when actually delivered and when they should have been delivered ..."⁴⁴¹ And though there is no special notice in *Heron* to bring the second *Hadley* branch into operation, Carrier is still liable for the loss of market, in that this loss arises "according to the ordinary course of things".⁴⁴²

"[T]he duration of voyages may now be calculated with at least some approach to certainty, even when they are to the ends of the earth. In these days merchants make their calculation accordingly, and it is not unreasonable to insist that shipowners shall do the like. There would seem to be little injustice in so doing, when it is remembered that they are *not answerable at all* when they are able to show that the delay was caused by something which due diligence on their part was powerless to prevent."⁴⁴³

"It would ... be unfortunate if the law as to the measure of damages based on the decision in *Hadley v. Baxendale* in [the United States and England] should be held to have developed on different lines, and ... it has not in truth done so."⁴⁴⁴ Renewed by its progeny in England and America, the old *Hadley* precedent remains the Common "fountainhead of the limitation of foreseeabili-

439. *The Heron II* [1969] 1 A.C. 350, 3 All E.R. 686 (H.L.).

440. *Id.* at 712-13 (Lord Hodson) citing Blackburn, J. in *Elbinger Actien-Gesellschaft v. Armstrong* (1874), L.R. 9 Q.B. 473 at p. 477.

441. *Id.* at 709 (Lord Hodson), citing the *American Corpus Juris Secundum* (Vol. 80, p. 931, para. 124). *Accord*: *United States v. Middleton*, 3 Fed. R. (2d) 384 (1924).

442. *Heron II* at *id.* (*per* Lord Hodson).

443. *Id.* at 713-14 (Lord Pearce), citing *United States v. Middleton*.

444. *Id.* at 709 (Lord Hodson).

ty”; it “laid down general principles that are still honored today.”⁴⁴⁵ Foreseeability remains the key Common test of legal cause.⁴⁴⁶

In *Scandinavian* law, the full measure of expectation liability is tempered by the theory of adequate causation (*adækvans*).⁴⁴⁷ Because no single Scandinavian case could reign with *Hadley*-like authority, we cannot find a perfect analog. But even in Scandinavian law, foreseeability is often the extent-of-liability key.

*Exchange-Rate Loss.*⁴⁴⁸ Builder agrees to construct a home on Owner’s plot, it being understood that “time is of the essence”.⁴⁴⁹ As Builder knows, Owner intends to finance the project by customary means: a bond-loan at the exchange rate prevailing on issuance of the building certificate. The work is indeed completed on time, but, due to an error (on the part of the surveyor and/or the architect) the new home is situated too close to the adjoining property. In consequence, the building certificate is delayed eight months (pending dispensation), during which period bond-loan exchange rates fall, and the bonds issued to Owner are worth far less than those available at the time of completion. Owner sues builder for the difference.

Until the defect is cured, delivery is delayed. Builder has clearly breached his contractual obligation, so we should surely hold him liable, at least to *some* extent.

Liability for breach of Builder’s generic obligation would seem to follow from the no-fault principle codified in KBL I § 24.⁴⁵⁰ But this is also a case of culpable

445. Farnsworth, *Contracts* at 873. Also by the Law & Economics school: *see id.* at 876 with note 14.

446. *See* 5 Corbin, *Contracts* § 1006 at 70. *But see* Dunn, *Lost Profits* at 47 (arguing that proximate causation, not foreseeability, is the proper test).

447. Regarding the doctrine’s German ancestry, *see generally* Hellner, *Contractual Damages* 40-50 and Treitel, *Remedies* 66-67.

Regarding the more restrictive version of the doctrine developed by Julius Lassen and others *see* Hellner, *id.* 50 *et. seq.* Still, Lassen’s version seems less restrictive than *Hadley*; *see Obligationsretten* s. 407: “aldeles usædvanlige eller unaturlige [Tab]”.

448. Based on UfR 1970.340 H.

449. *Compare* UfR 1970 at 344 (“der var lovet særlig hurtig færdiggørelse”). *Accord:* Spleth, *UfR B* 1970 at 220 (“Det var forudsat, at byggeriet skulle gennemføres hurtigt ...”).

450. *See supra*, part 3.2.1. Builder’s obligation is *de resultat*: *see* Gomard, *Obligationsret* 1. del at 77 and *supra*, part 2.5.

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breach, either on the part of Builder or those he has engaged to help him do the job.⁴⁵¹ In any event, the mistake is Builder's contractual risk.⁴⁵²

For a Scandinavian judge faced with a situation like this, adequacy (*adækvans*) is a mere pigeonhole.⁴⁵³ But even in Scandinavia, foreseeability is often a good indicator.⁴⁵⁴

The Scandinavian concept of foreseeability does not espouse the kind of conceptual thinking inherent in the *Hadley* dichotomy.⁴⁵⁵ And yet we identify a key common core:⁴⁵⁶ both systems seem to attach central significance to the *degree of foreseeability* in the concrete case. The *Exchange-Rate* Builder is clearly on notice: the consequences of breach are readily apparent when the promise is made. Although there is no express remedial agreement, no contract clause regarding the "consequences" of breach, Builder is, at the time of contracting, fully aware that Buyer is relying on his clear promise of timely performance. And he should easily foresee the attendant risk of reliance loss.⁴⁵⁷

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451. *Compare* Spleth, *UfR B* 1970 at 221: "Med hensyn til ansvar i kontraktsforhold for fejl begået af medhjælperer bør man formentlig gå videre end udenfor kontrakt ... Dette synes særlig klart i en situation som den foreliggende [UfR 1970.340 H], hvor man måtte antage, at der var begået en fejl, men at det var tvivlsomt, om fejlen var begået af B's egne folk eller af landinspektøren."
452. *See* UfR 1970.344 H "Uanset om bygningens ulovlige placering på grunden skyldes fejl, begået af entreprenørernes folk eller af den af dem antagne landinspektør, findes de i medfør af entreprisekontrakten overfor indstævnte at være ansvarlige for fejlen og den deraf følgende forsinkelse ...".
453. *Accord:* Spleth, *UfR B* 1970 at 219 ("overskrift").
454. *See* Spleth, *UfR B* 1970 at 219 ("påregnelighed giver en god vejledning"). *See also* UfR 1986.16 H ("At bortkomsten af eksportlicens ville medføre tab på 100.000 kr. ikke upåregneligt for [erfaren] fragtfører").
455. *But compare* Gomard, *Obligationsretten* 2. hæfte at 172 (formulating a *Hadley*-like rule: "Debitor må indrette sin adfærd enten efter det ... almindelige, eller efter hvad der særligt er oplyst af kreditor").
456. *Compare* Gomard, *Obligationsretten* 2. hæfte at 174 (describing the *Hadley* formula and that in UfR 1968.282 H as essentially similar: "ganske tilsvarende").
457. *Accord:* Spleth, *UfR B* 1970 at 222 ("Dommen lægger vægt på at det stod B klart at ... en væsentlig forsinkelse ville medføre risiko for betydeligt tab ... Hertil kom, at det ved et byggeri af denne art måtte være *evident* for entreprenøren, at bygherren ikke selv rådede over de fornødne midler, og at han ville fremskaffe disse gennem offentlige lån ..." [fremhævet her]).

Foreseeability

In UfR 1970.340 H (the real *Exchange Rate* case) the Supreme Court of Denmark held Builder liable for Owner's consequential loss.⁴⁵⁸

In another leading Danish case,⁴⁵⁹ Danish Seller S sold 2000 tons calcium chloride to Dutch Buyer B1 for \$20.40 per ton. B1 then resold the goods to Belgian Buyer B2 for \$22.10 per ton. The goods were not delivered by S, and a Dutch court held B1 liable to B2 for lost profits of 740.000 Belg. francs, calculated according to the price at which B2 could have resold the goods in Belgium. The Supreme Court of Denmark then held S liable to B1 not only for B1's own lost profits but also for the 740.000 francs. The Court emphasized that S *knew* that the goods' destination was Belgium and that such a resale price in that market was *not unforeseeable*.⁴⁶⁰ Recent English precedent is in full accord.⁴⁶¹

Unlike American law, with one test (foreseeability) for contract and another (proximate cause) for tort, Scandinavian theory uses a single label (adequate causation) for obligations in general. In both systems, however, the liability line between delictual and contractual obligations remains difficult to draw.

The single label notwithstanding, the Scandinavian tort-limitation is said to be less severe than its contractual counterpart;⁴⁶² but in the Scandinavian law of tort, certain arguably "remote" consequences are subsumed as "unprotected interests".⁴⁶³ In the contractual grain of *adækvans* doctrine, foreseeability has been linked to the *degree of fault*.⁴⁶⁴

458. In addition to the clearly foreseeable nature of the loss, the court referred to other concrete circumstances, hereunder the nature (materiality) of the breach.

459. UfR 1964.74 H. Regarding this and other lost profits cases in Danish law, see Sparlund & Terkildsen, "Erstatning for drifts- og avancetab", 3 *Justitia* (1987).

460. See UfR 1964 at 86 ("kan ikke anses at have været upåregneligt"). The same result had previously been reached by a Dutch Court, but in those days (1958), a Danish court was not bound (by the EC Jurisdiction and Judgments Convention) to respect the foreign judgment.

461. See *International Minerals and Chemical Corpn. v. Karl O Helm AG*, [1986] 1 Lloyd's Rep. 81 (S to sell subsidiary to B, B to pay in Belgian francs according to exchange rate on certain date, payment "delayed" in part. *Held*: S compensated for special loss due to fall in value of franc against the dollar; B had knowledge of circumstances which made that loss a "not unlikely consequence" of late payment).

462. See Ussing, *Obligationsretten* at 144 ("bør ... vistnok drage grænsen for de følger, ansvaret omfatter, noget snævrere end uden for kontraktsforhold.').

463. See generally A. Vinding Kruse, *Erstatningsret* § 20 ("De erstatningsretligt beskyttede interesser") and e.g. *id.* at 375 (recommending that lost profits *never* be compensated). Compare *supra* part 4.4.1.3 with note 256.

464. See Augdahl, *Obligationsrett* at 235 ("[erstatningsplikt for fjern eller upåregnelig følge] bør i nogen utstrekning avhenge av hvorvidt der er misligholderen å legge subjektiv skyld til last, og i tilfelle hvor meget").

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An American anomaly is the tort-like standard codified in the American law of sales, UCC § 2-715(2)(b): Consequential damages resulting from the seller's breach include injury to ... property proximately resulting from any breach of warranty. The American tort test is "proximate cause",⁴⁶⁵ but the distinction remains elusive: foreseeability is the only substantial test of proximate cause.⁴⁶⁶

Like Lord Denning, we "cannot swim in this sea of semantic exercises ... [we are] swept away by the conflicting currents."⁴⁶⁷ General definitions of adequacy, foreseeability and proximate cause provide little aid. "The law solves these problems pragmatically."⁴⁶⁸

*Stamp Collection.*⁴⁶⁹ Before leaving for summer vacation, Collector takes the usual precautions: he locks his stamp collection in a suitcase, takes it to Bank for safe keeping, and receives the usual receipt: "suitcase to be returned undamaged ..." Bank's Employee, unaware of the contents of the case, places it on the floor of the safety-deposit room. On a subsequent Saturday evening, torrential rains fall and water seeps into the deposit room floor, causing Dkr. 20,000 in damage to the collection. The police arrive Sunday morning and alert Employee, but by the time he shows up the next day, the damage to the collection has doubled.

This is a contract of bailment,⁴⁷⁰ and the general, Scandinavian rule of fault liability applies. The *de moyen* duty impliedly assumed by the bailee-bank is

465. See Prosser & Keeton, *Torts* at 666 and (eg) *Nirdlinger v. American District Telegraph Co.*, 245 Pa. 453, 91 A. 883, 885 (1914) (supplier's negligent failure to reset burglar alarm held "not a consequence which followed directly from such negligence ... a remote as distinguished from the proximate cause" [my emphasis]).

466. See Corbin, *Contracts* § 1007 at 71 and § 1019 at 116 (little discussion of applicable rule when cause of action subsumable as both contract and tort) and compare *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971) (lost profits held foreseeable if "proximately caused" by breach of warranty). For a comparison of the contractual and delictual tests, see generally McDowell, *Contract and Tort*.

467. *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.* [1978] Q.B. 791, 1 All E.R. at 532 (re. contemplation, foreseeability).

468. Cardozo in *Bird. v. St. Paul F. & M. Ins. Co.*, 224 N.Y. 47 at 51-52.

469. Based on UfR 1953.12 H.

470. *Forvaring*. See (in Denmark) D.L. 5-18-14 and compare UCC § 4-103.

to exercise reasonable care.⁴⁷¹ If we assume, *arguendo*, that even a well-designed deposit room cannot keep out torrential rain, and that placement of a suitcase on a deposit room floor is a reasonable act, then neither the design of the building nor the placement of the case warrants charging the bank with collector's loss.⁴⁷² And since Collector's receipt is no guarantee in Scandinavian eyes,⁴⁷³ Bank can be charged only for the consequences of Employee's negligent failure to react quickly: (at most) for half the damage done.

But though Bank may thus be charged with half the loss, this is only the (full compensation) starting point. For one thing, Scandinavian courts are free to consider the nature of the particular contract-type, the relationship between contract consideration and contract risk. Contracts of bailment (like this) and contracts of carriage (like *Hadley*) have something in common. In both kinds of cases, a relatively small charge is paid for services supplied, and the price may be judged too low to support even a (generally) foreseeable risk of consequential loss.⁴⁷⁴

We can also defend a limitation of liability in terms of causation and contributory negligence: *if* Collector had notified Bank about the delicate contents of the case at the time of contracting, the loss might have been avoided altogether. And if Collector may therefore be said to have helped cause the loss, some would say he should share the risk.

In UfR 1953.12 H (the real *Stamp Collection*) a unanimous Danish Supreme Court held defendant bank liable in principle for the consequences of its employee's negligence (i.e. 50% of the 40,000 Dkr.), but a majority of the Court agreed to reduce the liability by 25% because plaintiff collector failed to advise the bank of the delicate contents of the suitcase.⁴⁷⁵

471. See Lawson, *Fault and Contract* at 301 (comparing the Common law bailment with Civilian obligations *de moyen*). Regarding the latter, see *supra*, part 2.5. Regarding American law, see, e.g., *Phillips Home Furnishings, Inc. v. Continental Bank*, 331 A.2d 840, 16 UCC 798 (Pa. 1974) (bailee-bank cannot contract out of liability for negligence).

472. *Accord*: UfR 1953.12 H ("anbringelse på gulvet i boksrummet i sig selv [ikke] kan begrunde et erstatningsansvar ...").

473. See *id.* ("kvittering findes ikke at give tilstrækkeligt sikkert grundlag for at anse tilbagelevering i uskadt stand garanteret ...").

474. The risk in *Stamp Collection* is clearly foreseeable: see Frost in *TJR* 1953.425 ("der var Tale om bankmæssig Opbevaring af Ting, som Banken netop maa forudsætte er af betydelig Værdi ..."). Compare Calamari & Perillo, *Contracts* at 527 (re. disproportionate loss and a strict foreseeability test in American carrier and telegraph cases) and *Kerr* (text *supra* with note 424).

475. See UfR 1953.12 H ("da appellanten har undladt ved indleveringen ... at gøre ... bekendt med, at kuffertens indhold let kunne beskadiges af vand ...")

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In this Scandinavian version of the *Hadley* tree, the second knowledge-branch seems sometimes stronger than the first: general (first branch) foreseeability is not enough to support full compensation for this consequential loss. Absent Bank's actual notice, the court reduces Collector's award. The Scandinavian line of logic in *Stamp Collection* looks much like the old Common law doctrine of "tacit agreement":

*Coin Collection.*⁴⁷⁶ Collector decides to move his coin collection out of his house and into his Bank. He reserves 3 safety-deposit boxes at Bank and pays 25 dollars for each; Bank promises to notify him as soon as the boxes are available. The boxes become available on August 30, but Bank fails to notify Collector. On September 4, a thief breaks into Collector's house and steals the coins. Collector sues Bank, alleging breach of contract and consequential loss: coins worth 32,000 dollars.

According to the letter of the Common law, this Bank's promise may well spell trouble: to impose liability, an American court need not even imply a warranty; and though Bank may not be aware of the collection's exact value,⁴⁷⁷ it knows at least that such things are often banked precisely because they have substantial value.

So the loss is at least foreseeable in the general sense. But *Hadley* means all things. And to some, albeit a vanishing Common law few, *Hadley* conjures notions of "tacit agreement."

"By that test the plaintiff must prove more than the defendant's mere knowledge that a breach of contract will entail special damages to the plaintiff. It must also prove that the defendant at least tacitly agreed to assume responsibility."⁴⁷⁸

If we apply this test, Bank's breach does not make it automatically liable for Collector's foreseeable consequential loss. If we require tacit agreement, we do not imply or deduce consequential liability from the bare breach of promise. And put this way, the idea seems quite compatible with the Scandinavian treatment of the express promise in *Stamp Collection*. The promise of performance itself does not always trigger liability, full expectation protection. "[W]here the damages arise from special circumstances, and are so large

476. Based on *Morrow v. First Nat. Bank of Hot Springs*, 550 S.W.2d 429 (Arkansas 1977).

477. Compare 550 S.W.2d at 430 (plaintiff-collector had previously applied to defendant-bank for a loan, advising its loan department that the coins were worth at least 12,000 dollars).

478. 550 S.W.2d at 430.

Foreseeability

as to be out of proportion to the consideration agreed ... it raises a doubt ... as to whether the party would have assented to such a liability had it been called to his attention ...'⁴⁷⁹

In *Morrow* (the real *Coin Collection*), the Supreme Court of Arkansas – the last Common Law citadel of the tacit test – held defendant bank not liable for plaintiff-collector's consequential loss.⁴⁸⁰

The tacit conception is almost dead, rejected as a doctrinal misconception in almost every American jurisdiction.⁴⁸¹ But the theory underlying the just result in *Coin Collection* has been born again in a new suit of clothes.⁴⁸²

4.4.4.4. Certainty

The third traditional liability-limitation in both American and Scandinavian contract law is the requirement of certainty: the evidentiary burden which courts place on a plaintiff to prove that he has suffered a given loss.

The certainty-requirement has been described as the “distinctive contribution” of American courts to the Common law of damages.⁴⁸³ In England the certainty requirement is usually discussed under the heading of *remoteness*.⁴⁸⁴

As with avoidability and foreseeability, the certainty requirement applies in principle to all types of loss. But as with these other liability-limiters, the main focus is on loss of the indirect, consequential variety: most often lost profits. When plaintiff seeks compensation for direct loss in value, both American and Scandinavian law usually permit resort to abstract means of measurement: we award plaintiff the benefit of the bargain by giving him the benefit

479. 550 S.W.2d at 430.

480. The court also denied recovery on a delictual theory: *see* 550 S.W.2d at 431 (citing Prosser, *Torts*, 4th ed., § 92 for proposition that bank's mere “failure to act” should be distinguished from misfeasance).

481. *See* Farnsworth, *Contracts* at 875 and 892 with note 4 and UCC § 2-715, Comment 2. *But see* dictum in *Western Industries, Inc. v. Newcor Canada, Ltd.*, 739 F.2d 1198, 38 UCC Rep. at 1464 (7th Cir. 1984) (consequential damages “not recoverable unless specifically negotiated for”).

482. Regarding disproportionate loss, *see infra*, part 4.4.5.1.

483. *See* Farnsworth, *Contracts* at 881 (citing McCormick).

484. *See* Farnsworth, *Remedies* at 1210 with note 277.

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of the doubt.⁴⁸⁵ When it comes to indirect (consequential) loss, however, both systems often insist on more concrete evidence, a greater degree of certainty.

*Ceramics Workshop.*⁴⁸⁶ Builder contracts to build a house with a ceramics workshop for Potter. Builder delays completion, and during the delay Potter cannot make (or sell) his ceramics. Although the delay has obviously had a negative effect on his business, Potter cannot provide conclusive documentation for the Dkr. 15,000 in income he alleges to have lost.

We hesitate to place Potter in the alleged expectation position, because we cannot be sure of where he would be had Builder performed. Unlike death and taxes, we can never be certain about future profits. And yet, because both American and Scandinavian courts regularly award damages for lost profits, and because such profits are inherently uncertain, we can safely say that neither system demands an air-tight case. In both systems, the applicable evidentiary standards lie well beyond the usual burdens of persuasion,⁴⁸⁷ but American commentators trace a relaxation of the certainty requirement in recent years: only reasonable certainty is now required.⁴⁸⁸ In Scandinavian law there has been no attempt to define or codify the applicable standard, and courts retain a considerable measure of discretion. As with the limitations of foreseeability and avoidability, so with certainty: rather than deny compensation altogether, we limit the extent (degree) of liability according to the facts of the individual case.

In a realistic court, a case like *Ceramics Workshop* is a case for compromise. And although such a seeming “compromise on liability” might run counter to some Common legal logic,⁴⁸⁹ it is American doctrine that provides us with a scientific explanation for what Scandinavians sense is a just result (*forholdets natur*). The theory is that of the aleatory contract, the value of chance.⁴⁹⁰ Anticipated profits have a current, discounted value as do op-

485. See Gomard, *Obligationsretten* 2. hæfte at 167 (bevislættelse). See also *supra* part 4.4.2, text with notes 283-85.

486. Based on Østre Landsrets dom 2. afd. nr. 28/1976 af 1. juli 1977.

487. See Farnsworth, *Remedies* at 1210 and compare Gomard, *Obligationsretten* 2. hæfte at 167-69.

488. See Farnsworth, *Contracts* at 881-82 and *Restatement 2d* § 352. Accord: UCC § 1-106, Comment 1.

489. See, e.g., *Luria Brothers & Co., Inc. v. Pielet Bros. Scrap Iron & Metal, Inc.*, 600 F.2d 103, 115 (7th Cir. 1979) (reduced jury award not “compromise on liability”).

490. See Farnsworth, *Contracts* at 886-87 (with note 34, citing *Locke v. United States*, 283 F.2d 521).

tions to buy stock, bets placed at the racetrack, etc. We consider the nature of Potter's business, hereunder its track-record and Potter's willingness to document same, and we find a figure which reflects a reasonable (discounted) value. There is likely to be some guesswork involved,⁴⁹¹ but in a case like *Ceramics Workshop*, we can only achieve absolute certainty by the *unjust* alternative of denying compensation altogether.⁴⁹²

In the real *Ceramics* case, plaintiff was awarded partial compensation for his (partially documented) commercial loss.⁴⁹³

Judged by Scandinavian standards, the willingness of American plaintiffs to document claims for lost profits may be a source of some wonder.⁴⁹⁴ Here as elsewhere, a party choosing to hide behind the veil of business secrecy should be made to pay the price.⁴⁹⁵

In both American and Scandinavian law, the doctrine of certainty is itself uncertain. As with avoidability and foreseeability, so with this liability-limiter: it is more difficult to define the exceptions than to state the general (full-compensation) rule. In both systems, it sometimes seems difficult even to discuss certainty as a category separate from the others.⁴⁹⁶ When American courts find the principles of causation, avoidance, and/or foreseeability inadequate to limit disproportionate compensation, they sometimes add to the confusion by applying the doctrine of certainty as a covert surrogate.⁴⁹⁷

Some (but by no means all) of the difficulty encountered in this area concerns the relation between the basis and the extent of contractual liability: the relationship be-

491. See Gomard, *Egen Skyld* at 170 ("bevistivl overvindes ved gisning").

492. See Farnsworth, *Remedies* at 1214. Accord: UfR 1976.776 Ø.L. (*Cancelled Exhibition II*, *supra*, part 4.4.2).

493. See Østre Landsrets dom nr. 28/1976 af 1. juli 1977 (claim for lost income: 15.000 kr.; award: 4.000).

494. Compare Hellner, *Consequential Loss* at 24.

495. Compare Lookofsky in *UfR B* 1987 at 406 ff (comparing American and European attitudes towards pre-trial discovery and defendant's duty to document matters relating to product-liability claims).

496. Accord: Gomard, *Obligationsret* 2. hæfte at 168 ("snart under henvisning til ... adækvans ... snart ... kravene til beviset").

497. See Farnsworth, *Contracts* at 884 (disproportionate loss, certainty as surrogate) and *id.* at 893 with note 9 (citing Fuller & Perdue, *Reliance Interest* at 376 in support of the principle in § 351(3) of the *Restatement 2d*). The argument made by Fuller & Perdue at *id.* (re. the structure of plaintiff's business) may also be seen as bearing on the related issues of causation and avoidance: see *supra*, part 4.4.4.2 and *infra*, part 5 with notes 154 and 172-77.

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tween the requirements and contractual fault and certainty of loss⁴⁹⁸ – a problem which even “no-fault” American law is forced to face.⁴⁹⁹

Once again, the question may be seen as one of degree: where the profits lost are *highly* speculative, a plaintiff is not entitled to full protection of his (wild) expectation.

Flagpole Sitter.⁵⁰⁰ Hightower, an enterprising entrepreneur, plans an unusual promotional venture: to gain fortune, fame, and a spot in the Guinness Book of World Records, he will sit on a mobile flagpole (fully equipped with bed, fridge, toilet & heat) for a period of nine months, commencing April Fools Day and ending at Times Square on New Years Eve before a nationwide television audience. To finance the scheme, he engages Lawyer to form a corporation, so shares worth \$250,000 can be sold. \$43,000 in initial financing is raised, but Lawyer fails to comply with relevant securities laws, resulting in considerable delays and expenses and, ultimately, the abandonment of the entire project. Hightower sues Lawyer to recover, *inter alia*, compensation for outstanding corporate obligations in excess of \$150,000.

Lawyer’s contractual commitment is to supply Hightower with reasonable professional services.⁵⁰¹ His failure to structure the corporation in accordance with applicable law is a culpable breach for which he is liable according to both American and Scandinavian law.⁵⁰² And but for Lawyer’s breach, High-

498. See, e.g., Gomard, *Obligationsretten* 2. hæfte at 168-69 (“kravene til sandsynligheden ... afhænger [bl.a.] af ansvarsgrundlaget”) and A. Vinding Kruse, *Ejendoms køb* at 100 (quoting Spleth in *UfR B* 1955 61 ff: “[bevískrav] svækkes, såfremt sælgeren har handlet i ond tro”).

499. See Corbin, *Contracts*, § 1020 (re. certainty and willful breach) and Farnsworth, *Remedies* at 1214 with note 301.

500. Based on *Wartzman v. Hightower Productions, Ltd.*, 456 A.2d 82 (Md.App. 1983).

501. See *supra*, part 2.5 and A. Vinding Kruse, *Advokatansvaret* at 9 (“faglig dygtighed, som man med rimelighed må kunne forlange”). Some might prefer to say that Lawyer has incurred (and breached) a *de resultat* type of obligation: to deliver a well-defined result, a (legally incorporated) entity.

502. *Wartzman*, *supra* note 500 at 87. Accord: A. Vinding Kruse at *id.* In *Wartzman* (the real *Flagpole-Sitter*) plaintiff alleged both breach of contract and negligence (*id.* at 85). The trial court charged the jury in terms of negligence (see *id.* at 88: “proximate cause”), but the appellate court’s decision seems worded largely in contractual terms.

tower might have become a successful entrepreneur. The consequences of breach are foreseeable by the promisor and unavoidable by the promisee.⁵⁰³

On the one hand, Lawyer is no surety for this recipient's highly speculative venture.⁵⁰⁴ And we would hesitate to put Hightower in his hypothetical, expectation position,⁵⁰⁵ because we would be too unsure about the hypothesis. Then again, the doctrine of certainty does not always warrant a total denial of compensation. Hightower has incurred substantial expenditures in justifiable reliance on Lawyers's creation of a viable corporation, and the speculative nature of Hightower's expectation does not necessarily negate a claim for reliance-interest protection.

Of relevance here is the classical concept of *compensatio lucri cum damno*:⁵⁰⁶ (as applied to *Flagpole*) if plaintiff's speculative venture was doomed to failure, reliance recovery should be denied.⁵⁰⁷

The general conception of an "expectation ceiling" is traced to German law,⁵⁰⁸ and there is some Scandinavian authority in support thereof.⁵⁰⁹ Other Scandinavian writers would calculate the negative interest *independently* of what plaintiff

503. See 456 A.2d 82 at 88 (Hightower not obligated to accept, as "mitigating device", defendant's post-breach offer to engage securities expert at plaintiff's expense) and at 85 ("substitute counsel employed but shareholders decided to discontinue the entire project").

504. See 456 A.2d 82 at 85 (in accord with appellant's contention).

505. Even if he makes such a demand. The plaintiff in *Wartzman* (456 A.2d 82) did not seek such an extensive recovery.

506. The advantages which result from contractual breach shall be subtracted from damages otherwise compensable. Re. Scandinavian law, see generally Nørager-Nielsen & Theilgaard, *Købeloven* pp. 418-30 (discussing, *inter alia* the lost-volume seller problem, *supra* part 4.4.4.2, in terms of *compensatio*) and Krokeide, *Erstatningsberegningen* pp. 219-23 (discussing certain exceptions to the general *compensatio* rule).

507. See *Restatement 2d* § 349.

508. See Fuller & Perdue, *Reliance Interest* at 75 and Ussing, *Obligationsretten* at 157 ("begrænse ansvaret, således at det ikke overstiger opfyldelsesinteressen ...") with reference to the German BGB §§ 122, 307 & 309.

509. See, e.g., Krokeide, *Erstatningsberegningen* s. 220 ("hovedreglen"). Compare Ussing, *Obligationsretten* at 161 ("hvor fordringshaver udelukkende tilstræber fortjeneste").

There is little modern precedent (for or against) an "absolute" rule. In UfR 1960.499 H plaintiff was awarded reliance damages but denied recovery for lost profits because *he* could not prove same with sufficient certainty: see *id.* at 501. Compare Gomard, *Obligationsretten* 2. at 147 (citing this case in connection with a broader proposition). Regarding UfR 1923.518 see *infra* note 511. See also note 510.

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stood to *gain or lose* from proper performance.⁵¹⁰ A middle (Scandinavian) position would let expectation cap reliance, but only where liability is not based on *fault*.⁵¹¹

In American doctrine, a distinction is made between “essential” and “incidental” (a/k/a “collateral” or “consequential” reliance).⁵¹² Conduct such as that described in *Retail Store II*⁵¹³ (incurring expenses in preparation for performance of the contract) is described as essential reliance; in this kind of case, illustrated by strikingly similar paradigms in American and Norwegian doctrine,⁵¹⁴ the American position is that the value of the return performance constitutes a ceiling upon reliance damages.⁵¹⁵ Where, on the other hand, plaintiff prepares for collateral transactions (the promotional venture in *Flagpole*) the ceiling on recovery is the expected return from those consequential transactions.⁵¹⁶ In either event, under American law, the *burden* of proving that plaintiff had entered a losing transaction is on the defendant who would limit his liability for reliance damages.

510. See Gomard, *Obligationsretten* 2. at 147 (“uafhængig af ... gevinst eller tab ...”) and Nørager-Nielsen & Theilgaard, *Købeloven* at 423 (“også hvor køber har indgået en dårlig handel ...”).

As regards gains, see UFR 1920.305: Seller sold real property to Buyer I for Dkr. 115,000. When Buyer I delayed payment, Seller cancelled and sold to Buyer II for 125,000. Seller successfully sued Buyer I for Dkr. 1,109 in fees paid to his lawyer for drafting the aborted contract; the “indirect gain” made possible by the breach did not defeat the claim. See Gomard, *Obligationsretten* 2. at 148. Compare the “windfall” in the *Fertico* case, *supra* part 4.4.4.2, note 382.

511. See Kristen Andersen, *Kjøpsrett* (1965) 158-60, Krokeide, *Erstatningsberegningen* 220-22 (“*unntakene*”), and *infra* part 5.2 (*Blue Fox*).

512. See Comment a to *Restatement Second* § 349, Knapp, *Reliance* at 77 with note 124, and Hudec, *Reliance Interest* at 725.

513. *Supra*, part 4.4.3.

514. See Fuller & Perdue, *Reliance Interest* at 76 (Seller contracts to build machine for Buyer for \$1,000 but fails to foresee \$1,500 expenditure to tear down and replace a wall in his plant to remove the machine upon completion. When Buyer delays payment, Seller cancels the contract and sues for reliance damages.)

Compare Augdahl, *Obligationsrett* at 249, citing Brækhus, *Tidsskrift for Rettsvitenskap* 1947 at 535 (A undertakes to build and deliver a special machine to B for 100,000 Crowns. It ends up costing A 110,000 to build, and when B fails to make timely payment, A cancels and sells the machine to best-bidder TP for 95,000).

515. See Hudec, *Reliance Interest* at 725. Accord: Fuller & Perdue at *id.* But see Augdahl at *id.* (would limit recovery in the paradigm at *id.* to the “performance interest”: 5,000). Regarding the “contract price” as a ceiling, see Hudec, *id.* at 705.

516. See, e.g., *Albert & Sons v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949): to reclaim scrap rubber to meet the wartime demand Buyer contracted to purchase 4 rubber refining machines from Seller. 2 machines were delivered late, and since, by then, the war was over, Buyer rejected all 4. He refused to pay for the machines and sued Seller (*inter alia*) for costs incurred in laying a foundation for the 4 machines. The case is discussed in Hudec, *id.* at 728-31 and Treitel, *Remedies* at 37.

Disproportionate Loss

Although the *compensatio* idea has not met with the same measure of acceptance in American and Scandinavian contract law, we might reach agreement on a fair *Flagpole* result. Whether or not we would willingly put a “plaintiff [like Hightower] in a better position than he would have occupied had the contract been performed”,⁵¹⁷ we should at least assign Lawyer the burden of proving the probability of Hightower’s loss.

In *Wartzman*, “[defendant] appellants were unable to establish that the stunt was doomed to fail”, and plaintiff Hightower was awarded reliance damages.⁵¹⁸

Because the burden of proving a negative expectation is often difficult to lift, reliance protection remains a kind of general rule, *compensatio* notwithstanding. Still, reliance protection is itself a question of degree, and we cannot always separate the *compensatio* problem from the larger consequential context.⁵¹⁹

4.4.5. New Liability Paradigms

4.4.5.1. Limiting Disproportionate Loss

Particularly as regards liability for consequential loss, the classical limitations have been judged insufficient. The post-breach (/mitigation) aspect of avoidance deals only with one part of a larger problem; conceptual constructs like foreseeability and *adækvans* sometimes seem to miss the mark; and covert use of the certainty-surrogate hardly contributes to doctrinal clarity.

Perhaps because of the strictures of precedent, the need for new rules and paradigms has been seen as particularly acute in American law. The *Hadley* precedent and progeny, dealing only with foreseeability, hardly solve the entire *Hadley* problem. “This is not a part of the law which can be satisfactorily solved by search for a single verbal formula”.⁵²⁰

517. Farnsworth, *Contracts* at 890, quoting Fuller & Perdue, *Reliance Interest* at 79.

518. 456 A.2d 82, 87.

519. See discussion *infra*, part 5.2 with note 83 (“*Blue Fox*”).

520. See Atiyah, *Introduction* at 320-21 (discussing the English House of Lord’s approach in *Heron II*, *supra*, part 4.4.4.3, and *H. Parsons (Livestock) v. Uttley Ingham & Co. Ltd.* [1978] Q.B. 791).

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Night Light.⁵²¹ Retail dealer S contracts to sell farmer B a tractor with lights. S knows B needs the lights to harvest at night. Delivery of the lights is delayed and, since no substitute is available, B is unable to use the tractor at night. He sues S for profits lost.

Farmer suffers a loss foreseeable by Dealer at the time of contracting, but “[the affirmatively formulated *Hadley*] *dictum* that probable damages, or the damages contemplated by the parties, *can* be recovered, has not commanded the same respect of courts as has the principle [liability-limiting] rule of the case ...”⁵²² For a long time, cases like *Night Light* were subsumed under the notion of “tacit agreement”, which denied recovery for consequential loss unless plaintiff proved that defendant “at the time of the contract tacitly consented to be bound to more than ordinary damages in case of default on his part,”⁵²³ that “he accepts the contract with the special condition attached to it.”⁵²⁴

Common lawyers exposed the doctrinal weakness of tacit agreement,⁵²⁵ but the *Night Light* problem did not go away, and in 1979 a new liability-limiter was added to the traditional list. § 351(3) of the *Restatement 2d* now provides:

(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

At first blush, this open-ended standard seems to cut deeply into the general rule of full expectation protection.

Perhaps the most prominent feature of § 351(3) is the remedial option of “excluding recovery for loss of profits”: a feature worth comparing with the new liability provisions of KBL II.⁵²⁶ But the new American rule seems to say that not only consequential damages, but also the “abstract” (direct) measure of expectation protection is now subject to discretionary limitation.⁵²⁷

521. Patterned after *Lamkins v. International Harvester Co.*, 207 Ark. 637, 182 S.W.2d 203 (1944). The facts in *Night Light* are somewhat closer to the real case than those in Illustration 18 to § 351 (3) of the *Restatement 2d*. As noted below, both paradigms oversimplify the foreseeability issue in *Lamkins*.

522. Bauer, *Consequential Damages* at 702. Regarding the *Hadley* rule, see *supra* part 4.4.4.3 with note 415.

523. *Lamkins*: 207 Ark. 637 at 643.

524. *Id.* at 642, citing *Hooks Smelting Co. v. Planters Compress Co.*, 72 Ark 275, 79 S.W. 1052.

525. See *supra*, part 4.4.1.1 with note 201 and 4.4.4.3 with note 481.

526. See generally *infra*, part 4.4.5.2.

527. See Harvey, *Discretionary Justice* at 668 (“discretionary exclusion”) and *infra*, this part, text with note 572, re. the new rule’s application to a case like *Chatlos Systems v. National Cash Register Corp.*, 670 F.2d 1304 (3d Cir. 1982).

But closer examination reveals that the principle stated is designed mainly as a safety-valve for the exceptional case.⁵²⁸ In fact, the new provision finds little direct support in American *judge-made* law.

The cases cited by the *Restatement* in illustration of § 351(3) show that this provision is but a limited restatement of past precedent. Illustration 17 is a pure hypothetical, “suggested” by the quite different facts of *Kerr*,⁵²⁹ and Illustration 19 is, *inter alia*, a borderline “contort”.⁵³⁰

Although *Lamkins*⁵³¹ (Illustration 18) is usually cited for its accept of the now-outmoded “tacit agreement” test, the *Lamkins* court expressed doubt as to whether farmer communicated *any notice* of his intention to work at night,⁵³² and the holding seems inextricably bound up with other elements relating to the consequential equation: the fact that at least part of seller’s delay was due, not to *fault*, but to “governmental priority regulations”⁵³³ and that appellant farmer presented *no proof* as to the relevant measure of consequential loss.⁵³⁴ Still, the decision does express the 351(3) idea: “where damages arise from special circumstances, and are so large as to be *out of proportion* to the consideration agreed ... it raises a doubt at once as to whether the party would have assented to such liability had it been called to his attention ...”⁵³⁵

Thus far, American courts have made only limited overt use of § 351(3).⁵³⁶ A computer search, done 9 years after the adoption of the revised *Restatement*,⁵³⁷ revealed but 3 citations of the new rule among reported State and Federal decisions.⁵³⁸

Still, the future importance of the new *Restatement* provision ought not be underestimated. The black-letter of this highly respected, secondary source does serve to codify the considerable dissatisfaction previously expressed

528. See Comment f to § 351 (“unusual instances”).

529. See *supra*, part 4.4.4.3, text with note 424.

530. Re. Sullivan v. O’Connor (“*Long Nose*”), see *supra*, parts 2.2 and 2.5 and 296 N.E.2d 183 (1973) with notes 4 & 5 (“non commercial field”).

531. See *supra*, note 521.

532. See *Lamkins*, 207 Ark. at 643.

533. See *id.* at 639. Regarding the *force majeure* character of this contingency, see discussion *supra*, part 3.1 (“*Jawboning*”).

534. See *id.* at 644 (proof of the rental value of land absent from the record).

535. *Id.* at 642 (emphasis added).

536. Compare the limited overt use thus far of § 36 of the Scandinavian Contracts Act: see *supra*, part 2.1.

537. Using the following WESTLAW query in the ALLSTATES/ALLFEDS databases: *restate-ment rest /s contracts /7 351(3) & date(after 5/17/79)*.

538. The most relevant of these being: *All Points Towing, Inc. v. City of Glendale*, 153 Ariz. 115, 735 P.2d 145 (Ariz. App. 1987) (rejecting plaintiff’s claim for lost profits *either* as not within “defendant’s contemplation” *or* in the interest of justice “in order to avoid disproportionate compensation”).

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in American contract doctrine with covert limitations on consequential liability.⁵³⁹ When flexible standards supplant formal rules,⁵⁴⁰ we are permitted to talk more openly about all the relevant operative facts. When “justice so requires”, an open-ended rule like that in § 351(3) may serve to take up some of slack left after the merger of (Common) Law and Equity.⁵⁴¹

Equitable considerations have long been the business of Scandinavian courts, but like foreseeability in America, the Scandinavian *adækvans*-analog has been judged an inadequate liability-limit. In Scandinavia, the disproportionate loss idea is now codified by statute. § 24 of the Danish *Liability Act* provides:⁵⁴²

Liability may be reduced or eliminated when the imposition of same would be unreasonably burdensome or when other exceptional circumstances make such reduction or elimination reasonable. In making this decision attention shall be given to the extent of the injury, the nature of the liability, the injuring party's situation, the injured party's interests, existing insurance, and other circumstances.⁵⁴³

In some respects, the American and Scandinavian provisions seem similar. Both are drafted as “caps” on the measure of liability which would otherwise follow from the general rules. Both are designed, *inter alia*, as overt replacements for covert techniques.⁵⁴⁴ Both are intended to apply only in the exceptional or unusual case.

If we read beyond the black letter of the law, however, we find significant differences. Not only does the Scandinavian safety-valve apply to both con-

539. See Farnsworth, *Remedies* 1208-10.

540. See Farnsworth, “Some Prefatory Remarks: From Rules to Standards”, 67 *Cornell L.R.* 634 (1982).

The § 351 standard cuts deeply into the “rule” that the adequacy of consideration is irrelevant. See *supra* part 2.1 with note 25.

541. I am grateful to Professor Charles Knapp for this suggestion and his reference to *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*, 42 N.Y.2d 392, 366 N.E.2d 1313, 397 N.Y.S.2d 958 (1977) (although tenant neglected to exercise option to renew, equitable interest recognized and protected against forfeiture if landlord not harmed).

Regarding the merger of Law and Equity, see generally, James & Hazard, *Civil Procedure*, §§ 1.5, 1.6. Re. UCC § 1-101 see White & Summers, *Uniform Commercial Code* at 20.

542. *Lov om erstatningsansvar*, Lov nr. 228 af 23. maj 1984. Compare the comparable Swedish rule i Skadeståndslagen 6:2 and § 5-2 in the Norwegian lov nr. 81 af 21. juni 1985 om endringer i erstatningslovgivningen.

543. Translation mine.

544. See, e.g., A. Vinding Kruse, *Erstatningsret* 198-99 (“adækvansbegrænsningen som lempelsesregel”).

tractual and delictual liability,⁵⁴⁵ it is the new Scandinavian provision which seems a true re-statement of judge-made law, a codification of established precedent:

Lost Wager (Revisited).⁵⁴⁶ Gambler predicts the outcome of the week's soccer games. He places a (legal) 5-crown bet by delivering a coupon to Dealer (a tobacconist owner) who, for a 10% commission, undertakes to pass it on to the central betting authority. The coupon is misplaced and the bet not registered. When Gambler's prediction proves correct, he sues Dealer for the 6,000 crowns he would have won.

We may compare this problem to the one in *Night Light*. In both cases, the application of traditional, general rules leads to the imposition of liability. Even if an award of damages in *Lost Wager* presupposes a finding of contractual fault in a Scandinavian court, Dealer will bear the burden of proof, and he will be hard pressed to make a viable excuse.⁵⁴⁷ And once a basis of liability is established, the application of the Scandinavian adequacy principle will lead to a *Hadley*-like result, for the loss in *Lost Wager* is clearly foreseeable.⁵⁴⁸

Just as Americans hesitate to subsume *Night Light* solely under *Hadley*, Scandinavians are likely to reject traditional pigeonholes in a case like *Lost Wager*. In both cases, the breaching promisor is a marginal merchant: an uninsured "little guy" with a big problem likely to threaten his economic well-being. In each case, the supplier's fault is at best a mere presumption. In each case, we sympathize with the obligor's plight, and the conventional conceptions provide little consolation.

545. The Norwegian version of the rule (*supra* note 542), however, does *not* apply to contractual liability: see Lødrup, P., *Lærebok i erstatningsrett* at 274.

Even the Danish and Swedish provisions are intended to be applied primarily in delictual contexts: see the *travaux préparatoires (motiver)* to the Danish EAL (Bemærkninger til Lovforslag nr. L 7 fremsat den 6. februar 1984); regarding the corresponding Swedish rule, see Hellner, *Kontraktssätt* at 333 (with reference to Bengtsson) and Gomard & Wad, *Erstatning* at 145 with note 1.

546. See *supra*, part 1.2.

547. See UfR 1964.803 H [flertal:] "ikke anses godtgjort, at kuponens bortkomst ikke skyldes fejl eller forsømmelse ..."; [mindretal:] "må ... påhvile indstævnte i hvert fald at antagelig-gøre, at kuponen er bortkommet uden nogen fejl eller forsømmelse ...").

548. See Trolle, *UfR B* 1965.145 ("man har nok anset tabet og eventuelt også et større tab - for påregneligt i den almindelige adækvansbetydning ...").

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In Scandinavia, the general rules provide guidance, but they need not be applied in every case.⁵⁴⁹ The precedents do not bind us, *stare decisis*, to unreasonable results.⁵⁵⁰ In *Lost Wager* the remedial result of *this* contractual bet is determined not by the rigors of legal logic, but by the court asked to decide this concrete case. This is the spirit of Scandinavian Realism:⁵⁵¹ justice breaks the rules when the rules break with justice. Faced with a multitude of competing considerations in a case like *Lost Wager*, the Scandinavian judge need not wend his way to the decision by conceptual reasoning; the axiomatic legal logic of rules and exceptions does not lead him to an inevitable result. Instead, he takes Corbinian account of all the relevant operative facts, *starts with the result*, and then reasons “backwards”:⁵⁵² he uses applicable legal logic to test the correctness of his decision.

A Danish Supreme Court Justice who participated in the decision has described the majority’s starting point in the real *Lost Wager* as judicial discretion (*/skønnet*): that which often *determines the conclusion before the premises are found*.⁵⁵³

For the majority in *Lost Wager*, it is simply *not reasonable* to hold this Dealer liable: this small-time, uninsured, corner-cigar-store supplier who, in exchange for small-change, has agreed to pass on Gambler’s noncommercial bet.⁵⁵⁴ So we depart from the rule of contractual fault:⁵⁵⁵ we do not provide expectation protection, a “queer kind of compensation” for the loss of something Gambler never had.⁵⁵⁶ For this given Scandinavian majority at least,

549. *Accord*: Gomard & Skovgaard, *Contract and the Pools* at 55 (“merely guiding maxims”).

550. Re. the 1955 Norwegian precedent (NRt 1955.1132: “Tippekak”) directly on point in UfR 1964.803 H, see Hagstrøm, *Culpanormen* at 55, Trolle in *UfR B* 1965 at 145 and Gomard & Skovgaard, *id.* at 64.

551. Regarding the Realist school of legal thought, see *supra*, part 1.3. See also Kruse, A.V. in 18 *Am. J. Comp. L.* 60-61 re. the Scandinavian law of torts.

552. *Accord* Ross, *Ret og Retfærdighed* at 181: (“Det er ikke dem [“fortolkningsmetoder” til manipulation af lovteksten] der bestemmer resultatet, men resultatet der bestemmer dem”). Compare Atiyah, *Introduction* at 46-46 (advocating a similar approach for English courts).

553. See Trolle in *UfR B* 1965 s. 148 (“bestemmer konklusionen, før man finder frem til de præmisser, som tjener til at prøve dets rigtighed ...”).

554. See *id.* (“[tipsforhandlerens beskedent] vederlag ... [dennes] ringe indtægt ... retsforhold udenfor omsætningen ...”). The central betting authority had (validly) disclaimed liability. The Court assumed (in the absence of proof) that the risk was not only uninsured but also uninsurable: see *id.*

555. See UfR 1964.803 H (“den omstændighed alene, at den modtagne kupon er bortkommet på uoplyst måde, [findes] ikke at kunne medføre ansvar ...”).

556. See Fuller & Perdue, *Reliance Interest* at 53.

Disproportionate Loss

it seems less painful for Gambler to lose an expected profit than for Dealer to lose what he already had.⁵⁵⁷

For the average American observer, this flexible analysis may be too realistic, too close to the letter of *Restatement* 351(3), too far from the “legacy of Willistonian conceptualism”,⁵⁵⁸ too far from the certainty of the general rule. Even in Scandinavia, we do not all agree in a case like *Lost Wager*.⁵⁵⁹

A minority of 4 (of 11) Supreme Court justices, would (in accordance with a Norwegian precedent clearly on point)⁵⁶⁰ have held Dealer liable.⁵⁶¹

Contract-paradigms which account for a recipient’s *consumer* status, without abandoning the expectation rule, have been suggested as a means of helping reconceptualize the “bargain principle” (liability for the full expectation) in American law.⁵⁶²

Open-ended paradigms, if carried too far, can pose a threat to the security of *commercial* transactions.⁵⁶³

Roof Fire (Revisited).⁵⁶⁴ Supplier (a small-time, uninsured entrepreneur) contracts with (“self-insured”) Recipient (municipality) to renovate the latter’s roof. As Supplier’s employee is joining tarpaper sections with a blowtorch, the supporting structure catches fire and suffers extensive damage. Recipient sues Supplier seeking compensation (Dkr. 63,000) for this consequential loss.

The open-ended letter of the Scandinavian *Liability Act* lets us pay overt attention to the status of these contracting parties, to their “situation”, and mandates, *inter alia*, the reduction or elimination of liability which would be

557. See Trolle in *UfR B* 1965.145 (“mindre smerteligt at gå glip af en fortjeneste, man har udsigt til ...”).

558. See Harvey, *Discretionary Justice* at 675 (speaking of the *Restatement Second*’s expanded version of section 90).

559. See generally, Gomard & Skovgaard, *Contract and the Pools*.

560. NRt 1955.1132.

561. UfR 1964.803 H (“må ... påhvile indstævnte i hvert fald at antagelig gøre, at kuponen er bortkommet uden nogen fejl eller forsømmelse fra hans eller hans hustrus side ...”).

562. See generally Eisenberg, *Bargain Principle*.

563. See Harvey, *Discretionary Justice* at 679 (§ 351(3) portends impairment of much of law of contract damages).

564. See *supra*, part 1.3.

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“unreasonably burdensome”. And indeed, liability for a big loss like that in *Roof Fire* might well force this small-time Supplier into bankruptcy.⁵⁶⁵

The Liability Act also prompts us to consider a related status-factor: “existing insurance”. In *Roof Fire*, neither party carries insurance in the traditional sense. Small Supplier has no liability insurance to cover this loss,⁵⁶⁶ presumably because it would be too expensive: either because the risk is difficult to calculate and/or because he is a bad risk. Recipient-municipality is “self-insured”: it has no property insurance, presumably because it is big enough to make internal risk-spreading more economical than paying others to do the same.⁵⁶⁷

Finally, the Liability Act invites us to consider the degree of fault. In the Scandinavian (or Civilian) system where fault provides the general basis of contractual liability, it seems natural to see liability as a function of fault:⁵⁶⁸ if Supplier exhibits a negligible degree of negligence, his liability should be limited to a corresponding degree.⁵⁶⁹

In UfR 1984.23 H the Danish Supreme Court relieved the defendant-supplier of liability on facts essentially similar to those in *Roof Fire*.⁵⁷⁰

Comparatively speaking, the Scandinavian courts sometimes seem more willing to socialize the private law and invade the privacy of Classical contract,

565. In UfR 1984.23 H (the real *Roof Fire*), Supplier, whose taxable income for 1975 (the year of the accident) was negative, alleged that he would have to close down the business if held liable: *see id* at 25.

566. *See id.* at 24 (“Forsikringen dækker ikke ansvar for skade på ting, som sikrede har påtaget sig at bearbejde eller behandle eller som på grund af en umiddelbar forbindelse ... lider skade ...”).

567. The relative ability of contracting parties to foresee and prevent (and thus efficiently insure against) consequential loss is discussed *infra*, this part.

568. Re. the degree of fault as a relevant factor for reducing damages in German law, *see* Treitel, *Remedies* at 57 (proposal for a new § 255a in German Civil Code). In France (and Louisiana) fault may work to increase liability: *see id.* at 57-58 and *infra* part 4.4.5.2, text with notes 585-86.

Re. fault and liability for indirect loss in KBL II, *see infra*, part 4.4.5.2.

569. *Compare* UfR 1985.880 H, noted *supra*, part 4.4.1.2 at note 238.

570. Citing the principle in (the then applicable) FAL (Insurance Contracts Act) § 25, stk. 1, 2. pkt. *See also* Gomard & Wad, *Erstatning* 147-48 and *infra*, part 5.3.

more willing to engage in “episodic altruism”.⁵⁷¹ For the Scandinavian observer of American law, the problem sometimes seems reversed. A hard-nosed American decision which goes by the book may well be insensitive to the equities of the concrete case. Enforcement of a disproportionate “expectation” may make certainty a dubious virtue.

In a recent American case,⁵⁷² involving the supply of a computer system for a contract price of \$46,020, damages for breach of warranty were measured under UCC § 2-714(2) as the difference between the value of the goods accepted (found to be \$6,000) and the value they would have had if as warranted (found to be \$207,826.50!).⁵⁷³ The court relied solely on the testimony of plaintiff-appellee’s expert as to the value of brands which could have performed the warranted functions, testimony which defendant-appellant likened to “substituting a Rolls Royce for a Ford.”⁵⁷⁴

Though the Scandinavian rules seem more open-ended than their American analogues, a new element is emerging in the common contractual core. Both systems are moving farther away from merciful enforcement of the expectation ideal. In the general law of contract, enforcement seems increasingly to be a question of degree.

4.4.5.2. Liability Differentiation in Scandinavian Sales

The contract of sale is the paradigm transaction. And so we should not be surprised to find that the developments in general Scandinavian contract law just described are reflected in recent developments within the Scandinavian law of sales.

571. Compare Fried, *Contract as Promise* at 108-09 (rejecting this kind of judicial tampering with the laws of bankruptcy) and Gomard & Wad, *id.* at 146 (“*Gældsanering ... kan være en mere velegnet fremgangsmåde ...*”).

The American idea of *discharging* personal (as opposed to corporate) debts is relatively new in Danish bankruptcy law. Of course, the reality of eliminating liability in *Lost Wager* is to nip this Supplier’s “debt” in the bud.

572. *Chatlos Systems, Inc. v. National Cash Register Corp.*, 670 F.2d 1304 (3d Cir. 1982).

573. Regarding formulae for calculation of “direct” loss, *see supra*, part 4.4.2.

Although a contractual clause excluding consequential damages was upheld, another clause providing for an exclusive or limited remedy (*maskinklausul*) “failed of its essential purpose”, so recovery of damages for the breach of warranty was not precluded. *See Chatlos Systems, Inc. v. National Cash Register Corp.*, 635 F.2d 1081 (3d Cir. 1980), noted *infra*, part 4.5 at note 646.

574. *See* 670 F.2d 1304, 1306 (3d Cir. 1982). Compare UfR B 1983.36, discussed in Vinding Kruse, *Købsretten* at 80.

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The problem of seller's liability, *inter alia*, for indirect (/consequential) loss has received considerable attention during the quarter-century of cooperative efforts to reform the original Scandinavian Sales Acts (KBL I). For one thing, the basis of seller's liability laid down in KBL § 24 had been criticized as too strict, too influenced by German doctrine.⁵⁷⁵ And to make things worse, the doctrine of *adækvans*, though a far cry from the corresponding German idea, was still seen as an inadequate limitation on this no-fault protection of buyer's expectation interest.⁵⁷⁶

As previously discussed, the new starting point for Scandinavian sales is the CISG-inspired, rule of "control-liability". The name is new, but this basis of KBL II liability is essentially unchanged: control liability is (still) *no-fault* liability.⁵⁷⁷

As regards the extent of liability, the exceptions to the rule of full compensation remained controversial. In particular, the drafters of KBL II were confronted with the problem of seller's liability for *indirect* (consequential) loss, and during the process of law reform, a number of solutions have been on the Scandinavian drafting boards at one time or another.

One set of proposals sought to maintain the status quo, letting general (judge-made) principles continue to apply to the law of sales. Complex problems like *adækvans* are arguably best dealt with in contract law's general part, and Scandinavian courts have hardly clung to the expansive concept of adequate causation traditionally ascribed to German law. The broad letter of the limitation rule now codified in the Liability Acts lends support to the view that any earlier gap has been filled, and that there is no need for a special sales rule regarding indirect loss.⁵⁷⁸ As the drafters of KBL II were well aware, Scandinavian law does not always protect the performance interest as the automatic consequence of supplier's breach.⁵⁷⁹ So, for a time at least, part of the Scandinavian community seemed satisfied to make do with *gældende ret*. Others seemed satisfied in principle with the general solution but still preferred an express *re-statement* in the special law of sale.⁵⁸⁰

575. See *SOU 1976:66* at 138, citing Hellner in *Ius privatum gentium* (Festschrift für Max Rheinstein), 1969 at 713 ff.

576. See generally Hellner, *Contractual Damages*.

577. See generally *supra*, part 3.3.

578. Accord: *SOU 1976:66* at 259: "Nedsättningsregeln får ... antas ha sin största betydelse vid ersättning för följdförlust."

579. See Sevón et. al., *Huvudpunkter* at 87 ("skadeståndsbeknigen i praktiken inte kan ske utgående från något fast och generellt schema av detta [positiva kontraktsintresset] slag ...").

580. See (re. § 25(3) of the 1976 Swedish draft of KBL II) *SOU 1976:66* at 35.

Liability Differentiation KBL

Another course of action, suggested by Norway in its 1984 draft, was to add the *Hadley* limitation of foreseeability as a supplement to the “general” solution outlined above.⁵⁸¹ The logic of this proposal rests on the proposition that foreseeability limits liability more than *adekvans*.⁵⁸²

As with all KBL rules, the various extent-of-liability formulae seek only to fill contractual gaps. As with KBL I, the various KBL II proposals all permit the parties to limit or disclaim consequential liability. The (now abandoned) 1984 Norwegian KBL II draft defined indirect loss, but only to serve as a gap-filling tool to interpret limitations of liability drafted by the contracting parties themselves.⁵⁸³

These various proposals differed only in degree, and none would have disturbed the course already adopted by Scandinavian courts regarding the extent of liability for breach. But others continued to argue for more radical reform, and in the late 1980’s, after the continued urging of business groups,⁵⁸⁴ a “new” principle emerged: there is no longer to be a single KBL liability standard. In particular, the liability of the seller is to be differentiated according to the type of loss suffered by the buyer: *indirect* loss is tied to *fault*.

A similar differentiation concept was contained in the Prussian and Austrian codes dating back to 1800.⁵⁸⁵

The French Civil Code contains rules which integrate the concepts of foreseeability, fault, and indirect loss. A debtor is liable only for foreseeable loss, unless he is guilty of fraud or gross negligence (*dol*). Even in the latter case, he is liable only for “direct” loss, but this is an “elusive” criterion.⁵⁸⁶

In 1987 Finland passed its new *Köplag* which embodies the concept of liability differentiation.⁵⁸⁷ In 1988 similar legislation was passed in Norway.⁵⁸⁸ Sweden and Denmark prepared similar drafts.⁵⁸⁹ The threat of Scandinavian disunity, magnified by the advent of CISG, seemed to press agreement on KBL II where more traditional arguments alone could not succeed.

581. See *NU 1984:5* at 357-58 re. § 71(1).

582. See *id.* For a contrary view, see generally *supra*, part 4.4.4.3.

583. See re. § 71(2): *NOU 1984:5* at 359.

584. See *Ot prp nr 80* at 35 (“Under den norske høringen er det bare Norges Industriforbund som har kommet inn på spørsmålet om en differensiering av ansvaret ...”).

585. See Hellner, *Contractual Damages* at 44.

586. For comparative discussion of CC articles 1150-51, see Treitel, *Remedies* 59-60 and Nicholas, *French Law of Contract* at 224, citing an illustration from Pothier which indicates the product damage done to Farmer’s Herd in *Contagious Abortion* (*supra*, part 2.4) is “direct” pursuant to French law. See also Hellner at *id.*

587. *Lag om köp av lös egendom av 27 mars 1987*.

588. *Lov nr. 26 af 13. maj 1988*.

589. See *Ot prp nr 80*.

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In ratifying CISG, the Scandinavian states have made a “neighbor-declaration” (*nabo erklæring*). The CISG permits “Contracting States which have the same or closely related legal rules on matters governed by [the] Convention [to] declare that the Convention is not to apply to contracts of sale ... where the parties have their places of business in those States ...”⁵⁹⁰

As indicated, the CISG provision requires only “closely related” national rules, and differing KBL II national solutions regarding liability for indirect loss would hardly preclude such a neighbor-declaration.⁵⁹¹

According to KBL II, no-fault (“control”) liability for seller’s delayed or defective performance is only the starting point:⁵⁹² though expectation (performance) interest protection remains the general contractual rule,⁵⁹³ the control rule provides the applicable liability basis only where buyer claims compensation for “direct” loss. If a buyer seeks compensation for “indirect” loss, the new KBL II liability standard is *fault*. Finland’s *Köplag* § 67(2) defines indirect loss as:

- 1) loss resulting from reduction or cessation of production or sales activity,
- 2) loss resulting from the goods being unusable for their intended purpose,
- 3) gains lost by reason of the termination or breach of contracts with third parties,
- 4) loss resulting from damage to a thing other than the goods themselves,
- 5) other loss which is similarly difficult to foresee.⁵⁹⁴

(Loss not falling into one of these categories is deemed “direct”).⁵⁹⁵

One thing seems sure at the outset: the new rules add a considerable measure of complexity to a codification once known for its elegant simplicity. The

590. CISG Article 94 (emphasis added).

591. *Accord*: Winship, *Scope of Vienna Convention* at 1-46 (re. the American and Canadian laws of sale). *See also supra*, part 2.3, text with notes 142-47 re. the arguably more significant divergencies between the various versions of KBL II as regards the provisions requiring notice of defects.

592. Pursuant to §§ 27(1) and 40(1).

593. *See* KBL II § 67(1) and *Ot prp nr 80* at 120 (“Utgangspunktet er prinsippet om full erstatning ... stilles i samme økonomiske stilling som ... riktig oppfyllelse ...”).

594. Translation mine.

595. *See* Sevón et. al., *Huvudpunkter* at 87.

authors of previous KBL II drafts had found it both inadvisable and impracticable to introduce a distinction between direct and indirect loss.⁵⁹⁶ Indirect loss has no clear meaning in contract practice,⁵⁹⁷ and § 67(2) hardly helps to set things straight.

67(2) (1) is designed to cover certain common kinds of *lost profits* often associated with claims for “consequential damages” (eg.): where seller’s breach prevents buyer’s performance of contracts with his own customers or renders the entering of new contracts impossible.⁵⁹⁸ But the letter of the law is deceptive, for the losses labeled “indirect” in 67(2) do *not* comprise (external or internal) costs incurred which compensate for or mitigate against the effects of breach (eg. increased overtime expenses, etc.). Such out-of-pocket expenditures are, for purposes of this new statutory scheme, *deemed direct*,⁵⁹⁹ and a sharp-witted promisee will sometimes be able to *transform* an “indirect” loss into a “direct” one.⁶⁰⁰

67(2) (2) – which bears a most puzzling resemblance to the CISG-inspired definition of *defective goods* now in KBL II § 17(2)(2)⁶⁰¹ – is intended as a “catch-all” provision comprising all lost profits not directly tied to production or sale, (*i.e.*) loss outside the scope of 67(1).⁶⁰² Like 67(2)(1), 67(2)(2) is subject to a (similar) list of exceptions, with the result that this latter subsection is expected to have limited significance.⁶⁰³

596. See *SOU 1976:66* at 159 (“inte möjligt att i detalj precisera förutsättningarna för att skyldighet att ersätta följd förlust skall inträda ...”). *Accord: NU 1984:5* at 187 (“en uppdelning på olika skadetyper inte låter sig genomföras på et tillfredsställande sätt”). *Re. Betænkning 845/1987* see *Routamo, Säljarens ansvar* at 216 (“avstått från avskilja indirekta skador från direkta ... inte gick att göra uppdelningen tillräckligt tydligt ...”).

597. See *Ot prp nr 80* at 40 (“ikke noe helt entydig innhold i kontraktpraksis”).

598. See *Ot prp nr 80* at 123. The provision thus ignores the logic of the “lost volume” buyer’s claim for *unavoidable* loss: see *supra* with note 380.

599. All four Scandinavian versions of § 67 make an *ex tunc* reservation in 67(3) for losses incurred in mitigation; such losses lie *outside* the scope of 67(2): see *Ot prp nr 80* at 125 (“uten videre bli reknet som direkte tap”). Only the Norwegian version expressly subsumes as direct so-called “surrogate solutions”: costs otherwise *within* 67(2) resulting from *usual measures which compensate* for delayed or defective delivery (see § 67(3)(a)), but all the Scandinavian versions of KBL II are likely to be read this way: see *Ot prp nr 80* at 125 (“klart forutsatt at slike kostnader skal anses som direkte”). Regarding “loss avoided”, see *generally supra*, part 4.4.4.2.

600. Compare Sevón et al., *Huvudpunkter* at 90 (“inno m vissa gränser ... ’forvandla’ indirekta intäktsförluster till ... direkta ...”).

601. The new rule in § 17(2)(2) provides a direct translation of CISG Article 35(2)(b) which Common lawyers know as the criterium of “fitness for purpose”: see *supra*, part 2.5 and (re. CISG) *infra*, part 6.2.2.

602. See *Ot prp nr 80* at 124 (“fanger opp alt tap som ikke er direkte knyttet til produksjon eller omsetning ... [f.eks.] mangler ved et innkjøpt EDB-anlegg vanskeliggjør virksomhetens kontorfunksjoner ...”).

603. See *id.* (“derfor forholdsvi begrenset betydning”).

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67(2) (3) defines profits lost in contracts with third parties as indirect,⁶⁰⁴ but compensation for direct loss which buyer pays to a third party in consequence of seller's breach is deemed direct as regards the latter's liability.⁶⁰⁵ More striking is the *Norwegian* version of 67(2)(3)⁶⁰⁶ which provides that this subsection is applicable only where buyer has unreasonably failed to *avoid or mitigate* loss.⁶⁰⁷ This seems to water down the entire Norwegian version of 67(2)(3) to a restatement of prior Scandinavian law.⁶⁰⁸

67(2) (4) makes it clear that physical injury to *property* resulting from *defective* delivery is a kind of "consequential" loss, and the legislative history indicates that at least *some* such kinds of loss are regulated by the Scandinavian law of sales.⁶⁰⁹

67(2) (5) is present in all except the Norwegian version of § 67(2). Although no legislative provision can list all types of indirect loss,⁶¹⁰ and although *foreseeability* is undoubtedly an important criterion for limiting liability, 65(2)(5) rests on the dubious proposition that the four kinds of indirect loss listed in the preceding subsections are all inherently difficult to foresee.⁶¹¹

In our comparative context, we are reminded of the deductive mechanics of Common formalism: if "extraneous" evidence, then no promise; if no "bargain", then no enforcement. The American experience with concepts like consideration and parol evidence⁶¹² shows that we cannot solve difficult legal problems by searching for the proper pigeonhole.⁶¹³

So we are surprised by the new Scandinavian formula: if no "indirect" loss, then no liability without fault. And indeed, such a sharp liability differen-

604. *Compare* (re. American law) McLaughlin, G., "Breach by Buyer or Lessee of Goods", Commercial Damages at 35B-31 (C. Knapp Ed. 1986) (re. indemnity claims for reasonable settlements with third parties) and Comment c with Illustration 8 to *Restatement 2d* § 351 (reasonable legal expenses, settlements and liquidated damages).

605. *See Ot prp nr 80* at 124.

606. Kjøpslov § 67(2)(c).

607. *See Ot prp nr 80* at 124 ("kan virke noe urimelig at kjøperen ikke skal få dekket sitt fulle tap i kontrakten med tedjemann ...").

608. *See generally supra*, part 4.4.4.2 and (re. UfR 1964.74 H) 4.4.4.3 at note 459. The Norwegian version contains no catch-all provision corresponding to Köplag § 67(2)(5).

609. *See* Sévón, *id.* at 129. Re. "ingrediensfallet", etc. *See generally* Dahl, *Produktansvar* 151-52 and Nørager-Nielsen & Theilgaard, *Købeloven* at 749-50. *See also infra*, part 6.3.4 re. product liability in international sales.

610. *See* Sévón et. al., *Huvudpunkter* at 90-91.

611. *See* Köplag § 67(2)(5) ("annan liknande svårförutsebar förlust" [fremhævet her]). The Norwegian version of KBL II is in better accord with the international rule: § 67(1) limits liability for unforeseeable loss but makes no claim that the losses labeled in § 67(2) as indirect are inherently unforeseeable. Regarding CISG Article 74, *see infra*, part 6.2.4.4.

612. *See generally supra*, parts 2.1 and 2.3.

613. *Compare* (vedr. formregler) Gomard, *Kontraktsfrihed* at 556 ("tvinger et retssystem tilbage til begrebsjurisprudence").

tiation runs counter to other aspects of KBL liability reform. The drafters of KBL II decided early on to drop the “overly schematic” distinction between specific and generic rules of liability,⁶¹⁴ and the idea of lengthening the old § 24 contingency-list was scrapped in favor of the open-ended rule of CISG Article 79.⁶¹⁵ While far from a total capitulation to the (sellers’) business lobby,⁶¹⁶ the new conception does represent a fundamental change of course. Like the UCC of the 1950’s, the KBL of the 1980’s has become a sort of joint-venture: formalism and realism in a single law of sales.⁶¹⁷

There is often reason to limit liability for indirect loss, and both the insurance factor and the practice of disclaiming liability are important considerations. Sellers find it difficult to predict the risk of buyers’ consequential loss, and since buyers are seen as better able to predict, prevent, and (perhaps also) insure against consequential loss, it is argued they should be made to bear the risk.⁶¹⁸ And since “agreed documents” like the General Conditions for the supply of machinery and equipment in Scandinavia (“NL”)⁶¹⁹ limit or disclaim supplier-seller’s liability for consequential loss in practice, it is argued that this also should be the supplementary rule.⁶²⁰

Neither the insurance nor the agreed documents argument seems to justify a mechanical solution to the problem of consequential damages. The argument that the least-cost insurer should always assume the risk, an argument often persuasively applied in a delictual setting,⁶²¹ does not necessarily apply with equal force in a contractual context. The idea that the risk of indirect loss should always lie with the buyer (or his insurer) seems too simple a solution to a complex problem.⁶²² Business risk is a two-way street, and not every

614. See *Ot prp nr 80* at 34.

615. See generally *supra*, part 3.3.

616. See text *supra* with note 584 and *Ot prp nr 80* at 36. See also Sevón et al., *Huvudpunkter* at 84 (“ett steg i riktning ...”).

617. Compare (re. the American Uniform Commercial Code) Gilmore, *Ages* at 85 (“a compromise solution which satisfied no one”).

618. See Hellner, *Consequential Loss* 44-48.

619. Nordiska Leveringsbetingelser: see *infra*, part 4.4.6.

620. According to the NL rule, seller is not liable for consequential loss absent *gross negligence*: see *id.* at note 695.

621. Compare (regarding non-privity, product liability) White & Summers, *Uniform Commercial Code* at 410: “Remote buyers may use a seller’s goods for unknown purposes [which] seller cannot predict ... Insurers are hesitant to insure against risks they cannot measure.”

622. Compare (re. validity of exemption clause) Hellner, *Consequential Loss* at 46 (“insurance possibility furnishes only an uncertain argument ...”). Re. the Swedish conditions for machine insurance, see *id.* (exception for losses due to defects in machines for which supplier is responsible).

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loss ought lie where it happens to fall. “Free enterprise is prized ... precisely because it fosters the creation of entrepreneurs who will take ... *uninsurable* risks ...⁶²³ If an entrepreneur cannot obtain *cheap* insurance, he may decide to “go naked”.⁶²⁴ The larger the risk, the greater the potential gain; this is the “system”.

The agreed documents argument can also be carried too far. *If* the current custom is no compensation for indirect loss, then we need not bother to fill the KBL (I) gap on the extent of liability, because there is no contractual gap to fill. In any event, we cannot assume that the rules which customarily apply in some branches of trade are the rules which apply (or ought to apply) among sellers and buyers everywhere,⁶²⁵ and a purportedly “agreed” limitation of liability for consequential loss itself cannot be ripped out of its (agreed document) context and transplanted to the supplementary system of KBL sales.⁶²⁶ Indeed, we cannot even assume the validity of all “agreed”, documentary provisions: some of the extremely pro-seller provisions of these documents seem suspiciously one-sided,⁶²⁷ hardly the product of a conscious allocation of risk.⁶²⁸

The KBL II rule is new, but the open-ended flexibility of Scandinavian commercial law is not changed overnight. Indeed, the net effect of the new legislative formula seems difficult to predict. On the one hand, the new rule in § 67(2) defines as direct certain losses traditionally seen as indirect. On the other hand, the traditional liability limiters remain in effect.

The principles of avoidability, *adækvans*, contributory negligence, mitigation, certainty and *compensatio* continue to apply.⁶²⁹ And the most recent limitation of

623. Calebresi, *Product Liability* at 321 (emphasis added).

624. *See id.* at 326 (re. product liability).

625. *Accord*: UfR 1986.654 H at 661 (High Court ratio).

626. Regarding KBL II and the liquidated damages provisions of NL, *see* Routamo, *Säljarens avsvar* at 220 (“Systemet [uppdelning i indirekta/direkta skador] ... påminner inte om någon standardavtalspraxis som skulle vara allmänt godkänd i Norden”).

627. Re. the ECE 188 contract, *see* Hellner, *Consequential Loss* at 28 with note 46 (“gives the impression that the seller’s interests are looked after better than the buyer’s ...”).

628. *See, e.g.*, NL 85 § 36, which provides, *inter alia*: “To the extent the Vendor might incur product liability towards any third party, the Purchaser shall indemnify the Vendor as far as the Vendor’s liability has been limited [herein]”. Regarding the (questionable) validity of such provisions, *see infra*, part 4.4.6 at note 701.

629. Re. these principles, *see generally supra* part 4.4.4.

Liability Differentiation KBL II

the Liability Acts, the rule limiting *disproportionate* compensation, is now part and parcel of KBL II.⁶³⁰

Fault is the new supplementary standard of liability for indirect loss: courts need resort to the new conception only where they find a contractual gap in the parties' express agreement, course of dealing, or custom of trade. Scandinavian courts can (and should) continue to impose no-fault liability for indirect loss on the basis of either express or implied warranty.⁶³¹

As regards fault itself, KBL II provides no definition; it does not even allocate the burden of proof.⁶³² The traditional, Scandinavian concept of *culpa*, that slippery concept of uncertain outline, remains within the province of the courts.

In reemphasizing the role of contractual fault, the drafters of KBL II have highlighted what is often a relevant element in the consequential equation. But by gearing indirect loss solely to fault, the point is at once overstated and mechanized in a manner not consistent with modern Scandinavian law.

The underlying theme of § 67(2) seems hardly to be a general disavowal of indirect loss: many *reliance* losses remain "direct", by virtue of the complex statutory definition. But if the drafters unstated point is to advance the certainty of the reliance (*negative*) interest at the expense of the lost profit (expectation) hypothesis, the new rule seems an awkward tool. "The borderline is vague, and case-by-case resolution appropriate."⁶³³

4.4.6. Disclaimer and Limitation of Liability

If my promise is binding, you have a remedy for breach: by supplementary rule of American and Scandinavian law. But the classical maxim of contractual freedom implies the freedom to disclaim or limit the supplementary measure of remedial relief.

630. Re. Köplag § 70.2, see Sévón at 91 (listing, *inter alia* factors such as economic status, foreseeability, and the relationship between price and loss). Compare *supra*, part 4.4.5.1 (*inter alia*, re. *Night Light*).

631. KBL II makes express provision only as regards warranty liability for *defects*: see Köplag § 40 ("särskilt har utfäst") and *infra*, part 5.2 at notes 10 and 35.

632. See Sévón et. al., *Huvudpunkter* at 85.

633. Hudec, *Reliance Interest* at 721 (re. out-of-pocket reliance expenditures).

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American doctrine makes a conceptual distinction between (1) disclaimer of warranty and (2) limitation of liability.⁶³⁴ “As is” (*caveat emptor*) clauses are examples of the former (no promise) situation, whereas a clause limiting damages in the event of breach is an example of the latter. The situations differ in kind and degree, and different rules may apply to each subcategory.⁶³⁵ Scandinavian doctrine does not operate with the disclaimer/limitation classification as such.⁶³⁶

The special Scandinavian provision which once governed clauses fixing in advance the amount of damages payable in the event of breach (*konventionalbod*) has now been absorbed by the “general (reasonableness) clause” of the Contracts Act.⁶³⁷ The formalistic American distinction between a (valid) contractual clause which provides for *liquidated damages* and an (invalid) clause which provides a *penalty* seems also grounded in a reasonableness test.⁶³⁸

As with promise, so with remedy; we look first to the language of the contract itself:

Paté Oven.⁶³⁹ Manufacturer M sells Butcher B an industrial “paté oven”. B signs M’s standard bill of sale which provides:

1-year guarantee for defects ... Repairs covered by guarantee performed by us without charge.

The oven proves defective, and when M’s repeated attempts at cure fail to succeed, B seeks to cancel the contract.

By express provision, Manufacturer grants a (cure) remedy which the sales codes do not. But the remedial agreement may extend beyond this: custom is part of the bargain-in-fact, and if the custom of this particular trade provides that a promise to repair displaces the statutory (KBL or UCC) right to cancel, then the supplementary rule may be taken away.

634. See, e.g., White & Summers, *Uniform Commercial Code* § 12-8.

635. The distinction is sometimes unconvincingly applied to rationalize awards which effectively deny compensation for nearly all consequential loss. See, e.g., *Atkinson v. Pacific Fire Extinguisher Co.*, 40 Cal.2d 192, 253 P.2d 18 (1953) (Lessor’s liability for defective fire detection system “limited” by contract to \$25.00). See also *infra*, part 5.3 at notes 102-03 (*Documentary Film*).

636. In Norwegian doctrine the term “limitation of liability” (*ansvarsfraskrivelse*) is applied to cover any remedial agreement which departs from the supplementary rule of law: see Augdahl, *Obligasjonsrett* at 291-92.

Regarding “as is” clauses in contracts of sale, see *supra*, part 2.5.

637. Re. § 36, see *supra*, part 2.1.

638. See Farnsworth, *Contracts* at 898 (emphasis shifted to reasonableness of amount).

639. Based on UfR 1969.152 H.

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In American sales at least, the rule *expressio unius est exclusio alterius* has been repealed,⁶⁴⁰ and the fact that a contract obligates the promisor to cure defects need not be read as negating the promisee's right to terminate in the event of material breach.

“[T]he probability is small that a real price is intended to be exchanged for a pseudo-obligation”.⁶⁴¹ The supplementary rules of remedial relief are designed to provide a reasonable solution in the average case, and the parties are not free to impose an unreasonable substitute.⁶⁴² Because the parties' agreement must provide for minimum adequate remedies,⁶⁴³ we are inclined to construe the agreed remedy in *Paté Oven* in accordance with the supplementary rule. When the remedy agreed fails to fulfill its essential purpose, we let Butcher cancel upon material breach. The supplementary remedy not only fills the contractual gap; it colors the will of the parties with a mandatory message: minimum adequate remedial relief.⁶⁴⁴

In UfR 1969.152 H (the real *Paté Oven*) the Supreme Court of Denmark held buyer entitled to cancel in the wake of seller's ineffective attempts at cure.⁶⁴⁵

When a repair-or-replace clause which is the contract's exclusive remedy is held to fail of its essential purpose pursuant to UCC § 2-719(2), the specific circumstances determine whether this also renders ineffective an exclusion of consequential damages.⁶⁴⁶

640. See *Western Industries, Inc. v. Newcor Canada Ltd.*, 739 F.2d 1198, 38 UCC Rep 1458, 1465 (7th Cir. 1984) re. UCC § 2-719(1)(b): resort to a remedy as provided [in the contract] is optional unless the remedy is expressly agreed to be exclusive ...

641. Comment 4 to UCC § 2-316 ad disclaimer of “all warranties, express or implied”.

642. *Accord*: Farnsworth, *Contracts* at 895 (parties less free to fashion their own remedy than to define their own promise).

643. See Comment 1 to UCC § 2-719.

644. *Accord*: UfR 1975.339 S.H.D (“En forudsætning for ansvarsfraskrivelse [iht Almindelige leveringsbetingelser] må ... være, at udbedring af manglen lykkes”).

645. See UfR 1969.152 H (“gentagne forsøg på at afhjælpe manglerne har været resultatløse ... føje til at hæve købet”).

646. See Comment 1 to UCC § 2-719(2), White & Summers, *Uniform Commercial Code* at 428 (“almost boundless discretion”) and 469-71, *Fargo Machine & Tool Co. v. Kearney & Trecker Corp.*, 428 F.Supp. 364, 21 UCC 80 (E.D.Mich. 1977) (exclusion of consequential damages ineffective to limit plaintiff's recovery under §§ 2-714 and 2-715), *Chatlos Systems, Inc. v. National Cash Register Corp.*, 635 F.2d 1081, 30 UCC Rep 416 (3rd Cir. 1980) (clause disclaiming consequential damages must be evaluated on its own merits), and *Kearney & Trecker Corp. v. Master Engraving Co., Inc.*, 107 N.J. 584, 527 A.2d 429, 3 UCC Rep. 2d 1684 (1987) (exclusion of consequential damages not “inextricably tied” to the limitation of remedies).

Regarding the interpretation of an express (UCC) warranty in seeming conflict with a disclaimer clause, see, e.g., *infra*, this part, text with note 663 (re. *Consolidated Data Terminals v. Applied Digital Systems*).

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The modern conception is total obligation, but we continue to start on a classical tack:

Buick Overboard.⁶⁴⁷ Intending to take his car across the Liim Fjord, Owner buys a ticket on Company's ferry, and his Buick is the last vehicle to be driven onboard. Approaching the destination, Company's crew prematurely remove the lashings which secure the car and open the gate. The ship then changes direction, keels apart, and the Buick rolls overboard. Sued by Owner's insurer for the value of the car, Company refers to the back of the ferry-ticket:

"RESERVATION. Owner should provide for insurance coverage ... Company disclaims/limits its (and its agents') liability to the greatest extent possible permitted by the Law of the Sea'".

The said Law permits a limitation of liability for all but 5% of the Buick's value.

We ask first whether a remedial bargain has been struck at all, whether the terms of the ticket (and the terms of the statute) have been incorporated (*vedtaget*) in the contract of carriage. In both Scandinavian and American law, incorporation problems like this have often been dealt with in terms of "notice": if the ticket is deemed sufficiently clear (*fremhævet*), the liability term is part and parcel of the contract. This is a concrete question of fact, but to the extent that the classical precedents provide a general rule, Company's notice is likely to pass the incorporation test.

In England "the main principles were settled as early as 1877 ... where a person buys a ticket for a railway or sea journey, he should, as a reasonable man, know that the ticket is bound to contain certain conditions ... Does notice of the conditions mean notice of their existence or notice of their contents? Unfortunately it has been held that notice of their existence suffices."⁶⁴⁸

This Common line of reasoning on the issue of notice accords with that of the Danish Supreme Court in UfR 1971.81 H ("*Buick Overboard*") where the notice was held to be "sufficiently clear".⁶⁴⁹ Although recent English cases demand more

647. Based on UfR 1971.81 H.

648. See Atiyah, *Introduction* at 157-59, citing *Parker v. South Eastern Railway* (1877), 2 C.P.D. 416 and *Thompson v. L. M. & S. Rhy.*, [1930] 1 K.B. 41.

649. See UfR 1971.81 H ("Ved det af appellanten på automobilbillettens bagside tagne forbehold, der henviser til de nævnte bestemmelser, findes appellanten på tilstrækkelig tydelig måde at have begrænset sit ansvar i overensstemmelse med lovens § 171, jfr. § 122, stk. 2 ..."). See also Spleth, *UfR B* 1971 s. 72 (citing Günther Petersen as regards corresponding English law).

in the way of notice,⁶⁵⁰ English courts may be less hesitant to deem a given clause “incorporated” after passage of the Unfair Contract Terms Act,⁶⁵¹ at least where a consumer is involved. Similar considerations apply as regards § 36 of the Scandinavian Contracts Act.

Cases decided solely on the basis of incorporation may tend to bear an artificial look.⁶⁵² And even under the classical analysis, the job is not done. The next step is judicial construction (*fortolkning*) of the private agreement. For even if plaintiff concedes that the incorporation of a liability-limitation “to the greatest extent possible” means the 95%-limitation permitted by law, he can still argue that the limitation was not meant to apply to the kind of *culpa* exhibited here: Company’s act of gross negligence. The problem with this is that a construction-solution may seem no less artificial than the incorporation route, at least if we view the process of interpretation as a search for the true will of the parties: we seldom know anything about their real intent. And even if we could discern these two parties’ wills, we would not be likely to unearth a classical mirror-image. Whereas Company may intend a full limitation, no Owner “in his senses would agree to a contract which permitted the other party to commit negligence with impunity ...”⁶⁵³

In the difficult case, we cannot divine the intention, the private will. So Scandinavian and American judges are likely to interpret the agreement in accordance their own sense of justice. And because the supplementary rules represent the legislative solution for the normal case, they provide a guidepost for the validity of remedial agreement. Even where the intent is clear, the unbridled freedom of classical contract is now under public control; even in the citadels of contractual freedom, the will of the courts infects that of the parties by virtue of a complex mixture of private, supplementary and mandatory rules.

Both Scandinavian and American law have long been aware of the limitations inherent in the classical tools of incorporation and interpretation. And both systems have developed a third, often more realistic conception, an overt test of contractual validity (*gyldighed*): the American concept of unconscionability and the Scandinavian standard of reasonableness. Whereas sup-

650. See Atiyah, *Introduction* at 159.

651. Regarding the U.C.T.A., see *infra*, this part with note 656.

652. See Atiyah, *Introduction* at 159.

653. Atiyah, *id.* at 168 (“unless, perhaps, by doing so he were to get the goods or services offered at a cheaper price”: *id.*)

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plementary rules serve to limit liability absent agreement,⁶⁵⁴ these mandatory standards of validity permit judges to censor private attempts to contract out. In both Scandinavian and American law, a disclaimer (or other) clause which seeks to overreach beyond accepted community standards simply does not bind.⁶⁵⁵

In English law, the Unfair Contract Terms Act 1977 provides, *inter alia*, that as between merchants, an exemption clause is binding only if *reasonable*.⁶⁵⁶ In a recent case decided by the House of Lords,⁶⁵⁷ plaintiff-farmers ordered 30 lb of seed for cabbage suitable for human consumption from defendant seed merchants. The purchase price was about £ 200. The contract of sale on defendant's standard terms included an exemption clause limiting liability in case of supply of defective goods to replacement or refund of the purchase price. When the seeds planted produced only a crop of unusable weeds, plaintiffs claimed in excess of £ 60,000 in damages. *Held* for the plaintiffs: the exemption clause was unreasonable.⁶⁵⁸

A recent American case⁶⁵⁹ offers some striking parallels. Plaintiff-farmers bought 600 bushels of soybean seed which produced a poor crop. *Held* for the plaintiffs (damages in excess of \$ 160,000): the purported warranty-disclaimer on the seed bags (not brought to the farmer's attention prior to the sale and not evidenced by trade custom) was a "post-contract, unbargained-for unilateral attempt to limit [seller's] obligations under the contract."⁶⁶⁰

And yet, these doses of modern realism notwithstanding, we do not discard the classical tests of incorporation and interpretation. There are no sharp lines among conceptual categories: between the classical/covert and modern/overt forms of judicial censorship.⁶⁶¹ The older conceptions are still applied, but less mechanically; the classical subsumptions seem less inevitable, more guided by justice than accepted axiom.

654. See generally *supra*, part 4.4.4 and 4.4.5.

655. See generally *supra*, part 2.1 re. UCC § 2-302 and § 36 of the *Contracts Act*. See, e.g., the advice to American practitioners in *Warrens Forms of Agreement*, Vol. 1A sec. 34 at 827: "Unconscionability is not defined in the U.C.C. and therefore the draftsman must be wary of driving too hard a bargain. Any state of facts which would explain an otherwise suspicious agreement should be recited in the agreement."

656. See generally Atiyah, *Introduction* at 171 ff.

657. *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.* [1983] 3 W.L.R. 163.

658. See *J.B.L.* 1983 at 368 with note 13: the applicable reasonableness-test was sec. 55 of Schedule 1 to the Sale of Goods Act 1979, the relevant part of which is identical with the "Guidelines" for Application of Reasonableness Test in Sched. 2 of the 1977 Act.

659. *Pennington Grain & Seed, Inc. v. Tuten*, 422 So.2d 948, 36 UCC Rep. 458 (Fla. 1983).

660. *Id.*, 422 So.2d at 951.

661. *Accord*: Gomard, *Obligationsretten* 2. hæfte at 199 ("Denne censur, der snart har karakter af fortolkning snart af ugyldighed").

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The UCC supplements its general clause (§ 2-302) with a codification of more classical tools; both incorporation and interpretation continue to play an important role in the American and Scandinavian assessment of standard form liability limitations.⁶⁶² In a recent American case,⁶⁶³ manufacturer's written *specifications* indicating that its computer terminals would operate at a given speed were held to constitute an "express warranty" not limited by an express disclaimer of warranty liability in the contracts of sale. In the wake of repeated, unsuccessful attempts at cure, manufacturer was held liable, *inter alia*, for consequential loss of customer goodwill and for expenses incurred by plaintiff in trying to recapture that goodwill.⁶⁶⁴

We limit the private freedom to deal by the conscience of the public, in both Scandinavian and American law.⁶⁶⁵ To decide whether to give effect to the limitation in *Buick Overboard*, we take account of all the circumstances of the particular case and the reasonableness of a given result. Fault is one key factor. Company is in culpable breach, and we are reluctant to read the ticket as negating a delictual basis of liability.⁶⁶⁶ The contract/tort overlap affects our interpretation of the remedial agreement. Fraud is always an exception to the general rule,⁶⁶⁷ and *gross negligence*, a first cousin to fraud, is rarely open

662. Regarding UCC §§ 2-316 & 2-719, *see generally* White & Summers, *Uniform Commercial Code* Ch. 12.

663. *Consolidated Data Terminals v. Applied Digital Systems, Inc.*, 708 F.2d 385, 36 UCC Rep. 59 (9th Cir. 1983), applying N.Y. law.

664. However, the lower court's award of damages for lost profits could not be sustained since the buyer had not made an adequate showing that it had lost any profits because of the defective state of the equipment sold to it for resale to customers.

Compare UfR 1978.793 SH (sub-contractor who supplied defective mirrors held liable to building contractor for "direct" expenses, hereunder kr. 19.000 in arbitrator's fees, notwithstanding express disclaimer ("krav på godtgørelse efter varens fakturerede værdi. Ethvert andet krav, såsom erstatning ... godkendes ikke").

665. *See Jones v. Star Credit Corp.*, 298 N.Y.S. 2d 264 (1969): "Section 2-302 of the Uniform Commercial Code enacts the moral sense of the community into the law of commercial transactions."

666. *See, e.g., re UfR 1929.707 H* (mover liable for negligent damage to marble figure, contractual disclaimer notwithstanding) and Gomard, *Obligationsretten* 2. at 132.

667. *See (re French and Belgian law) Lando*, "The EEC Convention on the Law Applicable to Contractual Obligations", *Common Market Law Review* 24: 159 at 182.

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for negotiation by private agreement.⁶⁶⁸ If we label Company's negligence as gross,⁶⁶⁹ we can ignore the attempt to contract out.

Sometimes, however, "an exemption clause is in practice merely a reasonable agreement about the allocation of responsibility for insuring against certain risks."⁶⁷⁰ In *Buick*, Company not only attempts to disclaim liability; it encourages Owner to insure against the loss. And since Owner is in fact insured, a decision which upholds the disclaimer will not leave him out in the cold. Then again, if we let this loss lie where it falls (at the bottom of the fjord) we cover up the fact that Company is a bad insurance risk.⁶⁷¹

In UfR 1971.81 H (the real *Buick* case) the Supreme Court of Denmark, judging the ticket to be a sufficiently clear reference to the liability limitation permitted (though not required) by statute, and finding Company's limitation valid even as regards gross negligence, let Owner (and his insurer) bear the "risk" of loss.⁶⁷²

In recent times, the standard form agreement has replaced the ticket as the bearer of the incorporation issue. Like the ticket, the standard form often carries a disclaimer, and the first question is still whether the term is part of the contract. Like their ticket-analogs, these cases are often formally grounded in the classical jargon of offer and acceptance, but even in this age of information, we cannot (yet) program the computer or the expert-system with all the relevant operative facts.

At one extreme, the terms of the disclaimer or liability limitation may be up front: in bold print on page one. In practice, however, the draftsman is more likely to bury the clause in question either at the end of the document itself or

668. Regarding the circumvention by American courts of disclaimer clauses in computer contracts by application of tort (fraud and misrepresentation) theory, see Raysman & Brown, *Computer Contracts* §§ 3.04[2][c] and 13.04[3], citing *Chatlos Systems, Inc. v. National Cash Register Corp.* (see *supra*, note 646) and *The Glovatorium, Inc. v. NCR Corporation*, 684 F.2d 658 (9th Cir. 1980).

669. As did Denmark's Maritime and Commercial Court in UfR 1971.81 H. (On appeal, the Supreme Court did not rule on this point).

670. See Atiyah, *Introduction* at 168-69.

671. Compare Atiyah, *id.* at 168 re. cases where *only* the company is insured: "premiums vary according to whether the company is a good or bad risk; insurance acts as an indirect method of enforcing standards of behavior in compliance with the law."

672. See UfR 1971.81 H ("denne ansvarsbegrænsning ikke kan tilsidesættes, selv om der ... er begået fejl, der måtte anses som grov uagtsomhed ...").

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amidst the “boilerplate” of a standard form, attached or enclosed. In a modern word-processed contract, we cannot even spot the standard terms.⁶⁷³

In other instances, the terms are not even there for the reading, purportedly incorporated by reference alone. The methods of incorporation defy classification, and the disclaimers themselves vary to an even greater extent.⁶⁷⁴ So the realist reacts with a graduated scale: the more burdensome the clause, the greater the gap between private and public legislation, the more difficult the incorporation, the more narrow the interpretation.⁶⁷⁵ The hip-pocket power to set aside the unreasonable agreement broadens our conception of the agreement process itself.

“[O]ne suspects that the length, complexity and obtuseness of most form contracts may be due at least in part to the seller’s preference that the buyer will be dissuaded from reading that to which he is supposedly agreeing.”⁶⁷⁶ “The *burden [of proof]* should be on the party submitting [a standard contract] in printed form to show that the other party had knowledge of any unusual or unconscionable terms contained therein.”⁶⁷⁷

We may label the contest a “battle of forms”, but the winning solution is not easy to pick.

*Projection Welders.*⁶⁷⁸ In order to fulfil its contractual obligation to deliver microwave oven-cavities in Japan, American Buyer (AB) negotiates for the purchase of custom-built (Japanese-type) “projection” welding machines with Canadian Seller-manufacturer (CS). On

673. Regarding exemption clauses contained in “standard written terms of business” pursuant to the English U.C.T.A., see Atiyah, *Introduction* at 172 and *compare* (regarding German law) Sandrock, “The Standard Terms Act of 1976”, 26 *Am.J.Comp.L.* 551 (1978) and Lando, *Kampen*.

674. See, e.g., UfR 1982.137 H (“vedlagte betingelser bekræfter som følger: ... Ansvar. Såfremt lovgivningen ikke præceptivt foreskriver et ansvar, hæfter vi – ligegyldigt af hvilken grund – med hensyn til ansvarsgrundlag og størrelsen ... kun i de i det foregående udtrykkeligt anerkendte tilfælde ... [maskinklausul] ... Særaftale: Vi er villige til at tage maskinen tilbage efter 3 måneders forløb, hvis den ikke præsterer den garanterede ydelse på 400 poser/minut ...”).

675. *Accord*: Gomard, *Obligationsretten* at 205 (“jo mere usædvanlig bestemmelsen er, jo større krav stilles ...”).

676. *A & M Produce Co. v. FMC Corp.*, 136 Cal.Rptr. 114, 125 (App. 1982).

677. *Id.* at 124. *Compare* UCC § 2-719(3) (limitation of consequential damages not *prima facie* unconscionable where loss is commercial).

678. Based on *Western Industries, Inc. v. Newcor Canada Ltd.*, 739 F.2d 1198, 38 UCC Rep. 1458 (7th Cir. 1984).

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May 17 AB places an order by telephone with CS for the purchase of several such welders. On May 23 CS sends AB a formal written quotation, including a back-page of standard terms which disclaim all liability for “consequential damages”. In mid-July AB replies with its own standard purchase order and back-page of standard terms which expressly provide that CS is to be liable for “general as well as special damages” resulting from defective goods. CS then sends AB its standard acknowledgment form: “In accordance with our previously stated conditions ... we accept your order”. The machines delivered prove unusable for making microwave oven cavities. CS rebuilds them as spot welders, redelivering them to AB a year later. AB sues CS for its losses, including increased production costs incurred between delivery and redelivery .

As early as 1960 the drafters of the UCC saw that Common law conceptions of mirror-image were of little use in the modern process of commercial contracting. But the rule developed in UCC § 2-207 seems hardly destined to meet the test of time.

UCC § 2-207 provides:

- (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
 - (a) The offer expressly limits acceptance to the terms of the offer;
 - (b) they materially alter it; or
 - (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

*If the agreement in **Projection Welders** is deemed entered by phone on May 17, “then [CS’s] formal written quotation was merely a written confirmation,*

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which under the UCC could not alter the oral contract materially.’⁶⁷⁹ And since the Code would supplement the May 17 agreement with the major remedy of consequential damages, neither Seller’s form of May 23 nor the subsequent acknowledgment could work to deprive Buyer of the expectation protection provided by law.⁶⁸⁰

But all this rests on the assumption that the contract was formed on May 17. For *if* the parties did *not* “intend” to make a contract on the basis of the bare-bones terms of May 17, then perhaps Seller’s “May 23 written quotation, coupled with [the] acknowledgment ... followed by silence from [Buyer], created an agreement to exclude consequential damages ...”⁶⁸¹

How should the jury or the judge decide?⁶⁸² Once the consequential damage is done, it is too late to call off the agreement process: who is to bear the burden of Buyer’s indirect loss?

Few UCC sections have prompted so much controversy.⁶⁸³ English courts have been confronted with similar problems.⁶⁸⁴

Although few Scandinavian cases directly address the problems created by the battle of forms, a recent study argues for an open-ended approach, taking account of the various circumstances of the particular case.⁶⁸⁵ In NJA 1970.478 the Supreme Court of Sweden held a Finnish importer not bound by the disclaimer of liability (first) appearing on Seller’s order-confirmation form, even though Seller had made his telegraphic acceptance “subject to final confirmation”.⁶⁸⁶

679. See 38 UCC Rep at 1466, citing § 2-207(2)(b) and Official Comment 6. Compare: *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 4 UCC Rep. 2d 641 (7th Cir. 1987) (addition of arbitration clause, in line with previous course of dealing, see UCC § 1-205(1), not material alteration pursuant to UCC § 2-207).

680. See *id.*

681. See 38 UCC Rep at 1467.

682. See *id.* at 1466 (“a classic [American] jury question ... unless no reasonable trier of fact could have found that it was made after May 17”).

683. See generally White & Summers, *Uniform Commercial Code*, § 1-2.

684. For an analysis of the leading case of *Butler Machine Tool v. Ex-Cell-O*, see Adams, “Battle of Forms”, *J.B.L.* 297 (1983) (comparing English and American law). See also Lando, *Kampen*.

685. See Lando, *id.*

686. See Bernitz, *Standardavtalsrätt* at 35 and Hellner, *Avtalsrätt* at 48. Compare UFR 1986.838 Ø (transport association’s disclaimer held not incorporated in contract between bailor and bailee of carpet) and UFR 1986.552 (conspicuous notice of mechanic’s lien provision).

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A “disclaimer of liability for consequential damages is certainly not something which may be lightly assumed from a flurry of forms between buyer and seller.”⁶⁸⁷ Then again, if the content of a given form reflects the custom of the particular (eg: specialty welding) trade,⁶⁸⁸ the disclaimer may be incorporated by more convincing means. “[T]he theory that trade custom had supplied a silent contractual term excluding liability for consequential damages [and] the theory that the explicit terms of the contract excluded such liability ... are not completely independent of each other ...”⁶⁸⁹ And yet, like the evidence of consequential loss itself, there is often much uncertainty associated with proving customary limitations of consequential liability.

Because trade usage does not arise by express agreement, the parties must (at least) be presumed to know it,⁶⁹⁰ and to have contracted in reference to it ...⁶⁹¹ Though Common and Scandinavian requirements for proof of trade usage may have relaxed somewhat in recent years,⁶⁹² a “published trade code ... does not necessarily constitute a trade usage ...”⁶⁹³

The kind of standard form sometimes referred to as “agreed documents” has attracted special attention. By virtue of widespread use, such documents may achieve status as the standard forms customarily incorporated within a particular trade and/or geographic area. One such form which enjoys widespread use in connection with the supply of machinery and equipment in Scandinavia is the document known as *General Conditions: NL*. As with other standard forms, its provisions relating to damages in general and consequential damages are among the most discussed and the most controversial. As regards the seller’s liability, Clause 35 provides, *inter alia*:⁶⁹⁴

687. 38 UCC Rep at 1471 (Cudahy, Cir.J., concurring).

688. This is the “relevant market” in a case like *Projection Welders*: see 38 UCC Rep at 1460.

689. 38 UCC Rep at 1465.

690. Actual knowledge is not required: see Farnsworth, *Contracts* at 511.

691. 38 UCC Rep at 1470 (Cudahy, Cir. J., concurring).

692. See 38 UCC Rep at 1463, citing White & Summers, *Uniform Commercial Code* (1980) at 103. See also *Ebasco Services, Inc. v. Pennsylvania Power & Light Co.*, 460 F.Supp. 163 at 210 (E.D.Pa. 1978) re. Comment 5 to UCC § 1- 205: “full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers ...” See also *infra*, part 5.2 (“*Documentary Film*”).

Compare UfR 1980.42 H (damages for loss of inventory absent trade custom), UfR 1985.23 H (hotel’s cancellation policy substantially in accord with industry custom) and UfR 1986.676 V (no liability for insufficient information since liability not customary!)

693. 38 UCC Rep at 1470 (Cudahy, Cir. J., concurring).

694. The terms described here are those of an English translation of the (official) Danish NL 85 text.

Disclaimer

Save as [regards the obligation to cure], the Vendor shall not be liable for defects. This applies to any loss the defect may cause including loss of production, loss of profit or other consequential damage and other indirect loss. This limitation of the vendor's liability shall not apply if he has been guilty of gross misconduct.⁶⁹⁵

These terms provide the NL Purchaser with a lesser degree of protection than that afforded by the supplementary rules of KBL I or II.⁶⁹⁶ It is significant that other NL provisions provide the Purchaser with *liquidated damages* in the event of delayed delivery⁶⁹⁷ and a right to demand that the Vendor *cure* defects.⁶⁹⁸ Still, compared with the traditional law of contract and sales regarding liability for indirect loss, NL reads like a very pro-Vendor document, and courts do not always accept such departures from the judge-made law.

Like other standard forms, the terms of an agreed document apply only if they pass the three-stage tests of incorporation, interpretation and validity.⁶⁹⁹ In a recent American case,⁷⁰⁰ a standard-form clause in a contract between merchants of equal bargaining power which obligated the buyer of a machine to indemnify the manufacturer-seller against any third party claims was held *unconscionable*.⁷⁰¹ A recent case decided by the Supreme Court of Sweden⁷⁰² has been said to signal a new era in (Swedish) judicial acceptance of liability-limitations. The Court upheld a standard form disclaimer of liability by the supplier of defective goods as regards lost profits suffered by its gas-station recipients.⁷⁰³

We still conceive in terms of incorporation and interpretation, but the reality of overt censorship colors a more formal, covert approach. Freedom of contract is hardly dead, but in our time the most remarkable development is

695. Clause 36 reiterates the same principle as regards the special case of product liability.

696. The departure is less marked in the case of KBL II: *see supra*, part 4.4.5.2.

697. *See* clauses 13 – 14.

698. *See* clauses 21 – 31 and *compare* buyer's expanded right to demand cure pursuant the new supplementary rule in KBL II § 34.

699. Recent Scandinavian decisions regarding liability limitations in standard forms are analyzed by Stolt, "Fraskrivesklausuler i standardkontrakter", 5 *Justitia* 1987.

700. *Maxon Corp. v. Tyler Pipe Industries, Inc.*, 497 N.E.2d 570, 3 UCC Rep 2d 52 (Ind.App. 1986).

701. *See id.* at 55: "BUYER AGREES TO INDEMNIFY SELLER AGAINST ALL LIABILITY ... ARISING OUT OF ANY CLAIM OF ANY NATURE INVOLVING THE USE OR MISUSE OF THE GOODS, INCLUDING, BUT NOT LIMITED TO, ANY ALLEGED OR ACTUAL NEGLIGENCE ..."

Compare (re. such an *omvendt regresregel* in the NL/ECE context) Nørager-Nielsen & Theilgaard, *Købeloven* at 759-60 and Deullar & Nordström, *ECE/NLM* at 214.

702. NJA 1979.483.

703. *See generally* Hellner, *Exemption Clauses* and Bernitz, *Standardavtalsrätt* at 76.

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governmental intervention regarding the conditions for the exercise of trade.⁷⁰⁴ Here as elsewhere on the comparative map, the lines of private agreement cross those of supplementary and mandatory public rule, *inter alia* as regards damages for breach.⁷⁰⁵

704. Ussing, *Køb* at 4 (“Hvilken betydning denne udvikling vil få for reglerne om køb, lader sig endnu ikke overse”).

705. For additional examples of disclaimers held unreasonable and unconscionable in commercial contexts, see *infra*, part 5.2.

See also (re. Danish and Swedish law) Gomard, *Introduktion* at 58 (in accord with Bernitz re. the interpretation of standard contracts in accordance with supplementary rules).

PART 5

The Consequential Equation

*That codeless myriad of precedent,
That wilderness of single instances ...*¹

*hvad umiddelbart forekommer et væld
uden orden og sammenhæng
af specialbestemmelser og enkelttilfælde ...*²

5.1. Introduction

Hadley is the symbol of an open-ended idea: it “declares in effect that just as it is wise to refuse enforcement altogether to some promises ... so it is wise not to go too far in enforcing those promises which are deemed worthy of legal sanction.”³ When a court or arbitral tribunal awards or denies damages for consequential commercial loss, the decision is often best understood in terms of a motivational mixture tied to the operative facts of the particular case. The best reasoned decisions, and there are many of these, indicate attention to a broad range of promissory and remedial factors stretching from the nature of a given contractual commitment to the appropriate degree of substitutionary relief. These factors often bear juristic labels, but they are rooted directly in common business sense.

The law library is our lab, but ours is not a natural science. Our rules remain useful, but not if taken literally. It is easier to describe the individual doctrinal categories than to explain their interaction in the mind of the judge, our only “expert system”. We cannot write the program which takes account of all relevant factors, because so much is relevant, because *Hadley* and *adækvans* stand for so much. We can summarize the decisions of Scandinavian and

1. Tennyson, *supra*, part 1, text with note 1.

2. Gomard, *Obligationsretten* 2. at 130 (describing [in prose] the law of damages for breach of contract as a seeming flood of unorganized, unconnected special rules and single instances).

3. Fuller & Perdue, *Reliance Interest* at 84.

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American courts in these cases of so-called indirect loss, but only in general, open-ended terms: when the positive factors tip the consequential scales, the consequential loss is held to be the commercial promisor's commercial risk; when the factor-mix points the other way, the risk remains with the promisee; sometimes, the most just result is to split the difference (*slå halv skade*). There is no standard solution to this complex problem. In the concrete case there is no general rule.⁴

5.2. Promisor's Risk

To allocate the commercial risk of a given consequential loss, we look to the concrete mix of operative facts.

*Fishing Motor.*⁵ Buyer, a commercial fisherman, orders a diesel engine with gear on April 4th. Advised of Buyer's intention to use the equipment during the coming (May-June) season, Seller agrees to deliver "May 4th, completely installed". However, Seller cannot obtain an import license, and a substitute engine is first installed (without gear) on May 9th. The gear is installed on May 20th, but the defective equipment remains unusable. After Seller's abortive attempts to cure, Buyer cancels the contract on June 11th, claiming (*inter alia*) damages for 5 weeks' lost profits.

In this kind of case, the courts of both systems do – and should continue to – hold Seller liable, but the liability rationale is not best explained by the presence of consideration, the absence of extraordinary impediments to performance, and the like.⁶ Buyer has secured Seller's express promise of timely and proper performance: "May 4th, completely installed".⁷ There may be

4. *Accord*: Gomard, *Egen Skyld* at 159 ("jo større almindelighed, jo mindre reel vejledning"); Jørgensen, S., "Spredte bemærkninger om adækvans", *Juristen* 1961 at 195 ("mere realistisk ... spørgsmål: ... Skal skadevolderen erstatte i det foreliggende tilfælde?").

Regarding the modern doctrinal trend (the reduced importance of general rules), see Gomard & Skovgaard, *Contract & the Pools* at 55 and *compare* (regretting the trend) Eisenberg, *Bargain Promise* at 242.

5. Based on NRt 1962.175.

6. Regarding the bargain theory of consideration as a basis of expectation protection, see *supra*, part 4.4.1.1. Regarding KBL § 24 and the basis of liability, see *supra*, part 4.4.1.2.

7. *Compare*: NRt 1962.175 at 175 ("komplett") and 177 ("skulle leveres monteret innen 4. mai") and 180 (kontrakten).

no “tacit agreement” in the traditional sense, but Seller has chosen to make this clear commitment knowing full well that Buyer intends to rely thereon,⁸ and that his breach would almost surely cause a reliance loss. There is nothing inherently unforeseeable about indirect (consequential) loss,⁹ and Buyer’s foreseeable reliance gives us good reason to hold Seller liable: the foreseeability criterium is no mere liability-“limiter”; it is part and parcel of the compensatory *raison d’être*. Buyer’s loss may be “indirect”, but it is clearly caused by Seller’s breach. The dominoes in this instance of unavoidable reliance-loss fall with all the certainty of the contract-market-differential.

Under the gap-filling rule for “indirect” loss in KBL II § 27, Seller would be liable for Buyer’s consequential loss *if* Seller’s conduct is subsumed as a *culpable* breach. The regrettable absence of an express KBL II statutory mandate notwithstanding, a court could also hold Seller liable pursuant to the new scheme if his express promise of timely delivery is deemed to be an “implied warranty” (*stiltiende garanti*) thereof.¹⁰

In a case like this, to deny consequential damages would be to deny Buyer a minimum adequate remedy, and American and Scandinavian courts usually avoid such unreasonable results. In this kind of situation, it seems reasonable to interpret the absence of a contractual disclaimer as an implied allocation of risk. (Call it an “implied warranty” if you like, but we can hardly discern the parties’ “will”.) We place the contractual burden on Seller: if he wanted to escape responsibility for the consequences of breach, he should have contracted out of the clearly foreseeable implications of his binding obligation, *de résultat*.¹¹ The courts do – and should – compensate this sure-fire kind of consequential loss.

8. See NRt 1962 at 177 f: “Det sier seg selv at rederiet ikke kunne gå med på å avtale et helt uvisst leveringstidspunkt, idet kjøperens *uttalte hensigt* var å få fastsatt en leveringstid som gjorde det mulig for Vestbrona a være med på fiskesesongen mai-juni 1956 [fremhævet her].”

9. *But see* the Finnish Köplag § 67(2)(5): *supra*, part 4.4.5.2.

10. See also *Ot. prp. nr 80* at 93: “Bestemmelsen tar på dette punkt ikke sikte på noen endring i forhold til gjeldende [Norsk] rett, jf kjøpsloven § 42 andre ledd.” Re. *defective delivery* and warranty liability pursuant to the Finnish Köplag § 40.3 (det som säljaren *särskilt har utfäst*), see Sevón et. al., *Huvudpunkter* at 127 (“skadeståndsskyldighet kan grundas direkt på det faktum att en särskild utfästelse föreligger. Problemet är då ... när så skall anses vara fallet”).

11. See NRt 1962.175 at 177 (“Det er ikke tatt noe forbehold i kontrakten om fritagelse for erstatningsansvar for det tilfelle at kontraktens leveringsbetingelser ikke ble overholdt”) and Kruger, *Kjøpsrett* at 208 (“man får *risikoen* for at man makter å prestere det forventede *resultat* i forholdet til kjøperen” [fremhævet her]).

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In NRt 1962.175 (the real *Fishing Motor*) the Supreme Court of Norway held Seller liable for Buyer's lost profits.

Holmes was right about the general rule: in Scandinavian and American law, the remedial consequence of a binding generic promise is that the law makes the promisor pay damages if the promised event does not come to pass.¹²

Norwegian Mine (Continued).¹³ Seller, the Norwegian branch office of an English mining company, contracts to supply Danish Buyer (/manufacturer) with 10,000 tons of iron pyrites from its Norwegian mine; in so doing, the branch ignores a request received earlier the same day from its English sales agent to suspend sales in Scandinavia. Seller subsequently refuses to deliver, referring to a prohibition by the English government. Buyer, who had contracted with Carrier to ship the goods from Norway to Denmark, is forced to annul the charterparty and pay Carrier a 50,000 kr. penalty. Buyer sues Seller for damages: *inter alia*, compensation for the penalty paid.

On the strength of the commitment, we enforce the promise, even in the face of foreseeable impossibility. Once Seller's promise is secured, Buyer can act in reliance (*handle i tillid til*). He can proceed to make other commitments, not only to his buyers but also to Carrier, who also plans his business on the basis of commitment. This chain of commitment and reliance is *held together* because Seller's promise is (and in this case remains) legally binding.¹⁴ We should hold him liable in general for foreseeable loss, and the "indirect" loss (penalty) in *Norwegian Mine* is generally foreseeable: this merchant-seller should be aware that a loss like the penalty actually suffered is a real possibility in this particular contractual situation.

The fact that Seller is guilty of *culpa in contrahendo* means he has no legal excuse. As indicated previously, a distinguished Scandinavian minority would hold this Norwegian Seller liable pursuant to KBL I § 24 even if he had no advance notice of the impending impediment.¹⁵

12. See (re. American law) Holmes, *The Common Law* at 236.

13. See *supra*, part 3.2.2 with note 72 (re. NRt 1922.31 and foreseeable impossibility).

14. See (critical of the Law & Economics doctrine of "efficient breach") Knapp, *Promise of the Future* at 951 (promise keeping is "an absolutely necessary glue for holding society together"). See also generally, Macneil, *Efficient Breach*.

15. See *supra*, part 3.2.2 at note 82. In KBL II the issue may be formulated in terms of "sphere of control": see generally *supra*, part 3.3.

Promisor's Risk

In NRt 1922.31 the Supreme Court of Norway held Seller liable, *inter alia*, for Buyer's consequential loss pursuant to the then applicable provisions of KBL I.

The Norwegian version of KBL II would permit compensation for the penalty paid even absent a finding of culpable breach, in that this version of the revised Sales statute deems this kind of loss to be "direct".¹⁶

We usually discuss cases like *Fishing Motor* and *Norwegian Mine* in terms of the recipients' (performance or) expectation interest.¹⁷ But this is not the only conceptual possibility, and such consequential losses may also be compensated as a means of protecting the recipient's reliance interest. When we compensate for the profit lost and penalty paid, we not only put the injured parties in their hypothetical (post-) performance positions; we also return them to their pre-reliance positions.¹⁸ If we discount the reliance-character of losses such as these,¹⁹ we may lose sight of the significance of reliance as a commercial basis of liability in cases "covered" by the expectation interest:²⁰ "the notion that the rule protecting the expectancy is ... the most effective means of compensating for detrimental reliance seems not at all far-fetched."²¹

There is a close interrelationship between the "economic" and "juridic" justifications for reliance-interest protection:²² When courts protect the reliance interest in resolving a concrete dispute, they encourage future promisors to keep their word: they encourage efficient (and honorable) business behavior on a larger scale.²³

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16. Regarding § 67(2)(c), *see supra*, part 4.4.5.2 with notes 606-08.
 17. *See, e.g.*, Gomard, *Obligationsretten* 2. hæfte, kap. 11.3 ("Positiv opfyldelsesinteresse") at 159-60.
 18. *See Fuller & Perdue, Reliance Interest* at 75: "This loss would not have occurred either if the defendant had not broken his contract, or if the plaintiff had not entered and relied on the contract."
The penalty is an obvious (collateral) reliance loss. The lost profits are describable as an opportunity cost.
 19. *See, e.g.*, Nørager-Nielsen & Theilgaard, *Købeloven* at 389 ("kun i ganske særegne tilfælde kræves [tabt avance] erstattet uden for positiv opfyldelsesinteresse ..."). *Compare* Gomard, *Obligationsretten* 2. hæfte at 136-37 ("[vigtigt] tvivlsspørgsmål ... om og i hvilket omfang følgeskader kan kræves erstattet på linie med de direkte - ofte mindre og lettere konstaterbare - kontraheringstab ...").
 20. *See generally supra*, part 4.4.3. Even Fuller & Perdue (the founding fathers of reliance in America) saw the "divergence of measure and motive ... most acute" in non-bargain, i.e., no-consideration cases: *see Fuller & Perdue, Reliance Interest* at 69.
 21. Fuller & Perdue, *id.* at 60.
 22. *See id.* 60-63.
 23. *Accord*: Knapp, *Promise of the Future* at 951.

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The arguments in favor of encouraging reliance retain their force notwithstanding a certain degree of uncertainty regarding the precise contours of the actual loss.

Silo Parts.²⁴ To start his own business manufacturing mining explosives, B accepts S's offer for the rapid supply of all necessary parts to construct 3 silos to be used for storage of an essential explosives ingredient. S's delivery is delayed and defective, and some parts arrive one year later than promised. As a result, explosives production is delayed by 8 months, and B sues S for lost profits based on the actual, average monthly net profit during the first year of production.

To compensate Buyer for "expected" lost profits is to compensate him for something he never had: a "queer kind of compensation"²⁵ for an inherently uncertain loss. But there are two sides to this consequential equation. "[O]ur disapproval of speculative awards ..." ²⁶ notwithstanding, a defendant who, by his clear contractual commitment, has invited plaintiff's reliance, and thus caused him a reasonably foreseeable reliance-loss, "should not be allowed to escape liability because the amount of the loss cannot be proved with precision."²⁷

Where the business is a new one, as in *Silo Parts*, the measure of uncertainty may be substantial, but a good track record between breach and trial may provide a convenient solution. Both American and Scandinavian courts sometimes settle for a "reasonable approximation of the amount of loss."²⁸ The alternative – a hard "rule" against lost profits for new ventures – would not only dilute the binding force of promissory commitment in general; it would also be particularly hard on those aspiring to enter established markets and thus tend to cement existing shares in a perhaps non-competitive situation.

In *Cook*²⁹ (the real *Silo Parts*), Seller was held liable for Buyer's lost profits.

24. Based on *Cook Associates, Inc. v. Warnick*, 664 P.2d 1161, 36 UCC Rep. 1213 (Utah 1983).

25. Fuller & Perdue, *Reliance Interest* at 53.

26. *Cook*, *supra* note 24, 36 UCC Rep at 1218.

27. *Id.* at 1219 (emphasis added).

28. *Id.* See also *Rogerson Aircraft Corp. v. Fairchild Industries, Inc.*, 632 F.Supp. 1494, 1 UCC Rep. 2d 1512 (C.D. Cal. 1986) (neither new nature of plaintiff's business nor fact that contract terminable at will deprived seller of right to lost anticipatory profits) and *infra*, this part re. *Fishing Net*.

29. 664 P.2d 1161 (Utah 1983).

Expectation protection is our remedial supplement. But the rule does more than just plug the random gap. There is still much left of contractual freedom, but the private agreement is now exposed to the public view.

*Beauty Box.*³⁰ With a view to producing a new type beauty box, Buyer B places an order on September 3 with Seller/manufacturer S for 3 spray-casting tools, to be delivered “Latest January 4, guaranteed”.³¹ Seller’s confirmation refers to standard terms of agreement³² which provide that Seller must cure defects in the event of breach, but with “no liability for lost profits”. The goods delivered in January are defective, and, after S’s repeated attempts to cure during the next 8 months fail, B cancels and claims damages for lost profits.

To produce the product according to plan, Buyer need not produce the tools of production. Instead, he secures Seller’s firm commitment: an express guarantee of timely delivery of goods impliedly fit for the purpose. Seller makes his promissory commitment fully aware of the potential consequences of breach for this Buyer. Like promissory commitment, foreseeability is a question of degree. The more foreseeable the reliance, and thus the likelihood of reliance loss, the closer we come to a “tacit agreement”, the more reason to let the promisor run the risk of breach, the more reason to enforce the promise by consequential compensation.

True, this kind of enforcement does not itself keep the wheels of commerce turning. Businessmen often keep their promises voluntarily, and people in business often settle their differences by amicable means: not only because this is good business morality, but also because this is just plain good business.³³ Still, we cannot discount the need for legal enforcement. On the contrary, the specter of enforcement, legal sanctions for breach, often plays a significant role in encouraging “voluntary” compliance, amicable dispute settlement, renegotiation, etc. In these situations, the law defines the parameters of the negotiating table. The cases which do reach the courthouse provide the most clear, but not the only, evidence of the need for enforced compliance.³⁴

30. Based on UfR 1986.654 H.

31. *Compare* UfR 1986 at 655 (“leveringstid: senest den 4. januar 1978”) and 656 ([påtegning:] “garanteret leveret senest den 4. januar ...”).

32. In UfR 1986.654 H, the standard terms referred to were those in NL 70: *see supra*, part 4.4.6, text following note 693.

33. *See generally* Macaulay, *Relations. Accord: Gomard, Kontraktsret* at 25 with note 5.

34. *Accord: Knapp & Crystal, Problems* 14-15.

Part 5.2

In a case like *Beauty Box*, the agreement of the parties will continue to override the supplementary rules of the new KBL II statute. And the “guarantee” can be read as a “promise” of liability for consequential loss. More generally, the courts retain their ability to “interpret” a firm contractual commitment – delivery “not later than January 4” – as an “implied warranty” (*/stiltende garanti*).³⁵

Seller will argue that his promise of delivery is tied to a contractually agreed remedy, but the court retains firm control over the parties’ private legislative efforts. It reads an “agreed” remedy like this within the total contractual context. Seller’s strong, promissory commitment is backed up by a single, limited method of enforcement. Where, as here, Seller cannot seasonably cure, the agreed remedy fails to achieve its essential purpose. Because we cannot turn back the clock, enforcement of the letter of the private agreement would deny Buyer a minimum adequate remedy. So we interpret the agreement to produce a fair result: when the private agreement fails, the statutory remedy fills the gap, because in this situation consequential damages provide the only fair means of compensation.

In UfR 1986.654 H (the real *Beauty Box*) the Danish Supreme Court found Seller liable, upholding the High Court’s award of 300,000 Dkr. in damages, 200,000 of which were “consequential” (compensation for estimated lost profits). The High Court decision emphasized the interrelationship between the clear nature of Seller’s *commitment* and the degree of Buyer’s (justifiable) *reliance*.³⁶ Like the High Court, the Supreme Court emphasized the Seller’s failure to cure³⁷ and rejected Seller’s claim regarding an allegedly “agreed” remedy pursuant to NL 70.³⁸

Each case is decided on its own set of distinct operative facts: contract of sale or contract of carriage.

35. *See supra*, text with note 10.

36. *See* UfR 1986 at 660 (“det fra sagsøgerens side var klart tilkendegivet, at sagsøgeren lagde afgørende vægt på levering tidligt i 1978, og dette blev ganske særligt fremhævet ved [sagsøgttes] erklæringen af 16. november ... [fremhævet her]”).

37. *Id.* at 660 and 661. Regarding “failure of essential purpose”, *See supra*, part 4.4.6 with note 639 *et. seq.*

38. *See* UfR 1986 (High Court decision) at 660-61 (“for det første usikkert, om de kan anses for vedtaget ... heller ikke [fremdraget] ved en henvisning ... ikke godtgjort, at [NL 70] betingelser var almindeligt anvendte ved levering af værktøjer til sprøjtetøbning”) and *id.* (Supreme Court) at 661 (“ansvarsfraskrivelse ... ikke ... omtalt under salgsforhandlingerne og ikke ... indstævnte bekendt). Re. NL 70, *see supra*, note 32.

*Equipment Demonstration.*³⁹ Danish Manufacturer plans to exhibit its pollution-control equipment in Aberdeen, England on February 4. Carrier accepts a telex request to ship these “very urgent exhibition goods” on time, but Carrier’s employee assigned to the shipment is absent from work for 3 days, so shipment from Denmark is delayed. Manufacturer is first advised of the delay on February 6, the goods do not arrive in Aberdeen until February 8, and (after several postponements) the demonstration must be cancelled. Manufacturer sues Carrier for (consequential) losses 10 times greater than the agreed carriage fee. The (CMR) convention applicable to this contract of carriage limits liability, in the absence of gross negligence, to the carriage fee.

Contracts of carriage sometimes carry consequential risks out of proportion to the consideration supplied. In *Equipment Demonstration*, the same idea has found expression in the applicable gap-filling statute. The starting point for Carrier’s breach of his *de moyen* duty to exercise reasonable care is a restitutionary remedy: where late performance is worth nothing, Carrier receives nothing. The supplementary rule is the starting point, providing a statutory minimum of reasonable protection.

But this Carrier has agreed to deliver “very urgent exhibition goods” on a fixed date, *de resultat*. There is no express guarantee in the traditional sense, but we often find it fair to ground implied warranty on a “naked” promise, particularly where a strong degree of promissory commitment is matched by foreseeable and (therefore) justifiable reliance by the promisee.

If we imply a warranty, we supplant the public, gap-filling rule by divining a kind of private will. An alternative in this case is to focus on the degree of fault: “gross negligence” (like fraud) is an exception to almost every contractual rule.⁴⁰ But like fault in general, gross negligence seems a slippery concept of uncertain outline. For example, we would hardly want to characterize every “internal” breach attributable to the promisor as an act of gross negligence:⁴¹ this would seem too gross a generalization. Then again, in this case, a gross subsumption leads to a just result: reliance damages for indirect loss.

39. Based on UfR 1984.903 S.H.D.

40. See *supra*, part 4.4.6, text with note 667.

41. Compare UfR 1984 at 905 (“interne, andre uvedkommende, forhold virksomheden ...”).

Part 5.2

In UfR 1984.903 S.H.D. (the real *Demonstration* case) the Danish Maritime and Commercial Court held for the Manufacturer and awarded full compensation for the losses suffered.⁴² The court characterized Carrier's negligence as gross, emphasizing both the *internal* cause of Carrier's omission and (2) Carrier's failure to give Manufacturer reasonable notice of the delay.

The Scandinavian result in this and similar cases⁴³ accords with the results reached in analogous American cases like *Gas Convention*.⁴⁴

The consequential equation is a complex mix. Liability may be grounded on reliance and fault, and the liability base may affect a liability limit.

Fishing Net.⁴⁵ With a view toward the coming spring season, Buyer, a commercial fisherman, places an October order with Seller for a net to be woven to suit Buyer's special needs. Seller confirms the March 1st delivery date in writing. During the winter, however, delivery to Seller of a component (Italian line available only through the Norwegian government monopoly-importer) is delayed. Seller first notifies Buyer of the problem on March 2nd. The net is delivered on March 27, and Buyer sues for profits lost in the interim.

Seller's binding promise is impliedly conditioned: he is not deemed to promise timely delivery in the face of unforeseeable impossibility.⁴⁶ And yet this promisor is liable nonetheless: by failing to notify of the delay, Seller has kept Buyer hanging on the contractual hook, with no cause to mitigate against profits lost.⁴⁷ The failure to notify is itself a basis of liability:⁴⁸ cul-

42. See UfR 1984 at 905 ("det tab, som sagsøgte har lidt ved forsinkelsen ... der størrelsesmæssigt er ubestridt ...").

43. See, e.g., UfR 1967.181 V.L.D. at 182 ("tab ... en følge af den ved appellantens fejl opståede forsinkelse ...").

44. See *supra*, parts 2.2 at note 65 and 4.4.3. at note 324. See also *infra*, this part re. "*Weed Control*".

45. Based on NRt 1970.1059 (noted *supra* in part 3.2.2, text with note 87).

46. See *id.* and NRt 1970 at 1063 ("erstatningsansvar etter kjøpslovens regler for forsinkelse ikke vil foreligge selv om forholdet bedømmes etter den strengere bestemmelse - [KBL I] § 24").

47. See NRt 1970 at 1065 ("Med de forsinkelser i leveringene fra Italia som allerede var intrådt, finner jeg at A/S Fiskeredskap burde ha orientert Gullvik om situasjonen kanskje allerede i desember ... slik at han kunne ta stilling til hva man under disse omstendigheter skulle foreta seg").

48. NRt 1970 at 1065 ("A/S Fiskeredskap må være erstatningsansvarlig på annet grunnlag, idet firmaet burde ha underrettet Gullvik om faren for forsinkelse").

Accord: UCC § 2-615(c): "seller must notify the buyer seasonably that there will be delay ..."

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pable failure to warn of an impending (non-culpable) breach. And because it has a reasonable means of estimating (*skjønnsmessig*) Buyer's loss,⁴⁹ the court does not deny compensation rightfully due.

In NRt 1970.1059 (the real *Fishing Net*) the Supreme Court of Norway awarded Buyer compensation for lost profits.

Delay or defect, contract of carriage or contract of sale, a strong degree of contractual commitment need not be couched in language of guarantee.

*Chickenfeed (Revisited).*⁵⁰ Chicken Farmer buys Seller's "All-in-One" chickenfeed blend. Each sack contains a slip stating: "Vitamin E content appx. 28 mg./kg. No supplement necessary". Actually, the feed contains a lesser, inadequate amount of vitamin E, so Farmer's chickens become diseased, many die, and Farmer's production and profits decline.

Our conceptions of contract and tort compete. In this commercial context, a black-letter commitment invites commercial reliance. The loss which results may be dubbed "indirect", but it is a reasonably foreseeable (and not reasonably avoidable) consequence of the broken promise. It may be easier to count dead chickens than to calculate lost profits, but however we cut it, this is a dead, commercial loss. There need be nothing delictual about damage to "things". To call this vitamin-deficiency a breach of express promise is to call a spade a spade.⁵¹

In NRt 1972.1350 (the real case) the Supreme Court of Norway awarded Buyer damages for consequential loss of profits, notwithstanding a certain degree of uncertainty as to the precise extent of loss.⁵²

In NJA 1952.184 H (*Waterproof*)⁵³ the Supreme Court of Sweden held the Seller of ink marketed as "waterproof" and "suitable for laundry-marking" liable to Buyer (commercial artist) for consequential loss: the retail value of 64 ruined

49. See NRt 1970 at 1066 ("gjennomsnittsfangsten for 21 fortøyer med lastekapasitet mellom 2500 og 3000 hl ...").

50. See *supra*, part 2.2 at note 84.

51. *Accord*: Krüger, *Kjøpsrett* at 206 ("At dyrefôr har et vitamininnhold svarende til leverandørens oppgaver hører under garanti-ansvarets område ...").

52. See NRt 1979 at 1357 ("Aktiemøllen har etter dette hatt anledning og oppfordring til å sikre beviser i saken. Når ankemotparten ikke har gjort dette, finner jeg at den bevistvil som råder i saken, må gå ut over den").

53. *Supra*, part 4.4.4.2. at note 394.

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scarves. Although this loss could conceivably have been avoided (prevented by testing),⁵⁴ the Majority held Buyer entitled to rely on the “waterproof” description as an “implied warranty” of quality.⁵⁵

A recent Danish case involved a related kind of situation.⁵⁶ In connection with the construction of an office building, subcontractor R was to deliver and install an air compressor and accompanying drying device (this to regulate the climate-control components being installed by subcontractor X). Middleman S supplied R with the drying device and a brochure stating that the dryer will “cleanse compressed air of moisture”. It did not, and the damp air produced caused serious damage to X’s climate-control components. R’s insurance company C reimbursed X, and C sought reimbursement by suing S. *Held*: S was liable for the damage caused by the “defect”.⁵⁷

In a recent American case,⁵⁸ defendant-seller’s defective tobacco barns caused physical harm to plaintiff-buyer’s tobacco. The U.S. District Court of Appeals held that the law of sales (as opposed to the law of tort)⁵⁹ applied to the dispute: “A showing that the barns caused physical injury to tobacco by failing to cure it does not establish that the barns were unreasonably dangerous to plaintiff or his property”.⁶⁰

Express agreement is the core of the total contractual obligation, but contracting parties sometimes speak with a forked tongue, both for and against the imposition of consequential liability:

Weed Control.⁶¹ Experienced Farmer has had good results using brand X herbicide to control weeds. Y-company’s agent tells him that Y (although cheaper) “will control the same weeds that X will”. Farmer buys 1,500 gallons of Y and applies it to 1,500 acres of his soybeans. (He continues to treat 200 acres with X.) The Y-treated crop is bad (the X-crop is significantly better), and farmer sues Y-company for damages.

54. See *supra*, part 4.4.4.2 and *compare* (regarding the majority opinion in NJA 1952.184 H) Dahl, *Produktansvar* at 157 (“Flertallets udtalelser kan opfattes blot som en kommentar til mindretallets betragtninger om egen skyld, men kan også opfattes som en egentlig culpa-rekvisit ...”).

55. See NJA 1952 at 187 (“Bolaget får härmed anses hava utfäst, att bläcket ... icke påverkas av vatten ... Bläcket har ... icke varit av den beskaffenhet som Isabella Wrangel ... haft fog att förutsätta”). See also NJA 1985.641, noted *supra*, part 2.2 at note 90.

56. UfR 1984.543 H.

57. See UfR 1984 at 554 (“oprindelige mangler ... fabrikationsfejl i form af utæthed”).

58. *Purvis v. Consolidated Energy Products, Co.*, 674 F.2d 217, 223 (4th Cir. 1982).

59. Pursuant to § 402A of the *Restatement* (Second) of *Torts*.

60. *Purvis*, *supra* note 58, 674 F.2d at 223.

61. Based on *Hill v. BASF Wyandotte Corp.*, 782 F.2d 1212, 35 UCC Rep. 91 (4th Cir. 1986).

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The label on the cans (which Farmer admits he read) disclaims liability for “consequential, special or indirect damages”.

Farmer has his mind fixed on performance rather than breach. This merchant-recipient has chosen to rely not on the label addressed to recipients in general but on Seller's word. And the Willistonian formalism of parol evidence notwithstanding, his reliance seems both reasonable and foreseeable, and an award of consequential damages provides the only reasonable kind of compensation; the more symbolic (restitutionary) return of the purchase price would serve neither the interests of commercial certainty nor commercial justice. So we censor the disclaimer at the expense of the parol. If we prefer an open-ended analysis, we use a kind of sliding scale: the more severe the departure from the supplementary standard, the more suspect the deviation becomes; the greater the degree of promissory commitment, the more resilient the supplementary remedy to the privately legislated disclaimer, the boilerplate-label. Those who feel constrained by formal rules may have to resort to more covert means. In either case, we seek to reach a reasonable, conscionable result.

In the real *Weed Control*, a U.S. Court of Appeals held that Farmer was bound by the disclaimer on the label and that the agent's oral statements could not be allowed to vary the terms of sale;⁶² it then remanded the case to the court below. Answering a certified question from the U.S. District Court (retrying the case on remand), the South Carolina Supreme Court held that the measure of actual “direct” damages was the *value the crop* would have had if the product had conformed to the warranty less the value of the crop actually produced,⁶³ thus laying the groundwork for an award of damages in excess of \$150,000.⁶⁴

In another recent American case,⁶⁵ Farmer B bought a weight-sizer from S for \$30,000. S stated that the machine's high speed would obviate the need for a hydrocooler. The machine was installed in April, but the May harvest was a near total loss: the weight-sizer overflowed and damaged the tomatoes, which quickly rotted without a hydrocooler. *Held*: B could recover lost profits in excess of \$200,000, notwithstanding the bold print on S's standard order form (signed by B) disclaim-

62. See *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287 (4th Cir. 1982). *Accord*: *Lindemann v. Eli Lilly & Co.*, 816 F.2d 199, 4 UCC Rep 2d 395 (5th Cir. 1987) (express warranty as to quality of herbicide breached; exclusion of consequential damages not unconscionable).

63. See *Hill v. BASF Wyandotte Corp.*, 280 S.C. 174, 311 S.E.2d 734, 38 UCC Rep. 1254 (1984).

64. The (retrial) award of the Federal District Court was upheld on appeal: see *Hill v. BASF Wyandotte Corp.*, 782 F.2d 1212 (4th Cir. 1986).

65. *A & M Produce Co., v. FMC Corp.*, 186 Cal.Rptr. 114, 135 Cal.App.3rd 47 (1982).

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ing both warranties and “consequential damages”, in that the disclaimer was deemed *unconscionable*, technical compliance with UCC disclaimer-requirements notwithstanding.⁶⁶

With obvious justification, merchants rely on express promise. But the implied kind of promise is often equally strong.

*Poisonous Syrup.*⁶⁷ Rancher buys a barrel of syrup for his cattle from Retailer. The syrup proves poisonous, in that all cattle fed with it die.

The law affords Rancher reason to rely on the quality of the merchant’s wares, because the law enforces the merchantability standard on a no-fault, implied warranty basis. Rancher should be entitled to recoup not only his direct loss in (syrup) value but also his other, more “indirect” loss. The labels notwithstanding, both types of loss are clearly a consequence of the breach. The contractual rules are well-suited to govern the liability for this kind of commercial loss.

In UfR 1939.16 H the Danish Supreme Court, by a 6-5 majority, held the merchant-seller liable on essentially similar facts. The majority found the “dangerous quality” of the syrup to be the cause of the livestock loss,⁶⁸ while the minority found the evidence insufficient (*inter alia*) to support a finding that the molassas delivered did not conform to the *contract*.⁶⁹ As already indicated, Scandinavian doctrine usually subsumes such instances of commercial product-damage solely in terms of tort (product liability).⁷⁰

In a recent Danish High Court case,⁷¹ P (plaintiff/owner) engaged D (defendant/plumber) to connect his furniture factory’s pipes to the public water mains (D to supply parts and materials). One of the items used by D for the job was a small, inexpensive plastic coupling. Soon after a fault-free installation by D, the coupling

66. Compare *infra*, part 5.4 at note 155 re. *Computer Conversion*. Regarding UCC § 2-302 see *supra*, part 2.1 with note 35 and 4.4.6 with note 655.

67. Based on UfR 1939.16 H.

68. See *id.* (“Melassen ved Leveringen ... har været behæftet med sundhedsfarlige Egenskaber, som har haft til Følge ... [Kreaturerne] Død ... Indstævnte efter Omstændighederne maa være ansvarlig ...”).

69. See *supra* part 2.5, text with note 285.

70. See, e.g., Dahl, *Produktansvar* at 172 (“bemærkelsesværdigt ... at Købelovens § 43 overhoved ikke drøftes i kommentaren til UfR 1939.16 H af *Rump*: TfR 1939.112”).

71. V.L.D. af 23. januar 1976 V.L. nr. 2371/1974.

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burst, and P suffered both extensive property damage and lost profits. *Held*: as between these two innocent parties, defendant ought to bear the risk.⁷²

In a recent American decision,⁷³ Seller sold Buyer (a pleasure boat manufacturer) inexpensive painted fuel tanks to be installed instead of the galvanized tanks previously used in B's boats. Though neither S nor B had conducted corrosion tests prior to production, S obtained industry-association approval of a painted model and provided B with a prototype sample. More than one year later, B began to receive numerous complaints of tank-corrosion from its boat purchasers, and it was determined that the tanks would rust through after 2 years of use. B recalled the 500 boats concerned and replaced the tanks. *Held*: S was liable to B for consequential damages: all expenses incurred in connection with the recall.⁷⁴

The concept of reliance serves as a common ground for both fault and no-fault theories of liability.

School Plans.⁷⁵ Architect engages Engineer to provide plans, drawings, and specifications for the construction of 5 school buildings. The plans, incorporated by Architect in the overall projects, prove contrary to: (1) accepted engineering standards, (2) the laws of physics, and (3) the laws of Georgia. Architect sues Engineer for consequential damages (costs of rewriting plans, loss of customers, etc.).

Engineer has clearly bungled the job, and he has only himself to blame. The contractual context notwithstanding, this supplier's fault ("misfeasance") provides us with a basis of delictual liability in both American and Scandinavian law.⁷⁶ But we are not compelled to apply delictual conceptions to the contractual situation at hand. Engineer should also be held liable pursuant to a contractual test, because he failed to do a "reasonable" job and (more

72. *See id.* ("i forhold til sagsøgeren ... nærmest til bære risikoen for den af koblingens defekt følgende skade ...")

73. *Taylor and Gaskin, Inc. v. Chris-Craft Industries*, 812 F.2d 1408 (unreported decision, text in WESTLAW (6th Cir. 1984).

74. Buyer's contributory negligence notwithstanding: *see id.* Compare UfR 1985.320 H: cement factory purchased machine designed to produce cement blocks; factory held to bear the risk of machine's fitness for purpose ("brugbarhed").

75. Based on *Mauldin v. Sheffer*, 113 Ga.App. 874, 150 S.E.2d 150 (1966).

76. Compare *Maudlin*, 150 S.E.2d 150 at 153 ("Generally, a mere breach of a valid contract amounting to no more than a *failure* to perform in accordance with its terms does not constitute a tort or authorize the aggrieved party to elect whether he will proceed ex contractu or ex delicto.") and *id* at 154 (re. misfeasance).

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specifically) because he failed to produce a result fit for the known purpose. Fully aware that his recipient would rely on his skill and judgment, Engineer accepted and lost a contractual bet. His recipient ought to be compensated for foreseeable loss directly linked to reasonable reliance on the promise of fit-for-purpose results which is implicit in the professional supplier's contractual obligation.

In *Maudlin*⁷⁷ plaintiff architect alleged, *inter alia*, that defendant's plans "were *not suited* or in any way reasonabl[y] ... adapted to the plaintiff's architectural plans for said five school building projects ..." ⁷⁸ The Georgia Court of Appeals held that plaintiff's petition stated a cause of action *ex delicto*: it found no contractual "cause of action" set forth therein.⁷⁹

Both American and Scandinavian courts enforce the implied obligation of merchantable performance by compensating consequential losses tied to reasonable reliance.

Architect's Advice (Revisited).⁸⁰ Acting on Owner's instructions to cut costs during a factory construction project, Architect selects roof tiles of corrugated aluminum. Because such tiles are unsuitable for a project like this (where the roof slopes only 5 degrees), the roof leaks and the tiles must be replaced.

If compensation for consequential damages demands "something like a promise",⁸¹ this case fills the bill. Owner is entitled to expect and rely on fit-for-purpose results (a roof that doesn't leak), because we read that obvious requirement into a professional supplier's contractual obligation. For breach

77. *Id.*

78. *Id.* at 152 (emphasis added).

79. *See id.* at 153: "the petition as finally amended set forth a cause of action *ex delicto*." *Compare* DCR Inc. v. Peak Alarm Co., 663 P.2d 433, 435 (Utah 1983) (supplier of burglar alarm system and maintenance service who failed to warn recipient, retail store owner, of the system's vulnerability held liable for \$55,000 in stolen inventory, notwithstanding \$50 contractual limitation of liability: "if the cause of action arises from a breach of a promise set forth in the contract, the action is *ex contractu*, but if it arises from a breach of duty growing out of the contract it is *ex delicto*").

80. *See supra*, part 2.5 at note 263.

81. *See* Trolle, J., *UfR B* 1973 at 323 ("noget i retning af, at der er lovet at materialet er brugbart, - at der er givet en tilsikring ...").

of an obligation like this, fault provides an alternative, not an exclusive, explanation for the imposition of contractual liability.⁸²

The consequential equation involves a finely woven net of rules and exceptions, general maxims and limitations thereon.

*Blue Fox.*⁸³ Norwegian furrier N contracts to purchase 40 "guaranteed healthy" Blue Fox pairs from American A. Upon shipment, the American authorities issue a certificate of good health; on delivery, the Norwegian authorities declare the animals to have lung-worms. N cancels, claiming not only his money back, but also Dkr. 10,000 as compensation for expenses incurred (freight, quarantine, and fodder). Because of a severe market collapse shortly after delivery, even healthy animals would have left N with a loss in excess of the said expenses.

Because N's expectation is a negative one, he asks only for restitution and reliance damages. The guarantee given provides a no-fault basis for full expectation protection, but it does not guarantee N a resale profit. A fair starting point might be that *compensatio* should apply: N has lost the contractual bet, and his negative expectation ought to cap the negative interest.⁸⁴ But if we assume that A ought to have discovered the defect before shipment, it also seems reasonable to trace N's reliance loss to A's failure to act in good faith.

In NRt 1938.602 a majority of the Supreme Court of Norway held for N, emphasizing that A could and should have discovered the defect prior to shipment.⁸⁵

The dissenting opinion emphasized the clear proof of N's negative expectation⁸⁶ and found the opinion of Norwegian veterinary authorities to be inadequate proof of A's fault.⁸⁷ Absent fault, it was argued, there was only a KBL I basis of liability for (positive) expectation protection.⁸⁸

82. *See id.* and UfR 1973.675 H.

83. Based on NRt 1938.602 (UfR 1940 B.87).

84. *See supra*, part 4.4.4.4 ("*Flagpole Sitter*"): re. conflicting American and Scandinavian views as regards expectation as a ceiling on reliance damages).

85. *See* NRt 1938.602 at 603 ("må gå ut fra at manglene ved de infiserte blårev vilde ha latt sig konstatere ved en tilstrekkelig omhyggelig undersøkelse ... Hvorledes spørsmålet vilde ha stillet sig hvis det ikke hadde vært noget å legge Associated Fur Farms til last, behøver jeg ikke å uttale mig om"), citing Stang, *Erstatningsansvar* s. 325-26.

86. *See id.* at 604 ("på det rene at ... opfyllelse ... vilde ha medført et tap for ham adskillig ut over ... erstatningspåstanden").

87. *See id.* ("ikke betryggende å bygge på denne indirekte bevisførsel ...").

88. *See id.* ("erstatningspåstand ... avgjørelse vil da alene bero på den utsikt til fortjeneste som kontraktens opfyllelse vilde gitt"), citing Almén, *Kjøp* I, 2nen utgave side 381.

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Although KBL II contains no special rules as regards the negative interest, out-of-pocket losses like those suffered by N in *Blue Fox* are arguably “direct” pursuant to § 67(2) and thus subject to the no-fault, “control” liability rule (or its analog).⁸⁹ If we apply the new basis of liability for “indirect” loss, A’s liability is predicated on fault.⁹⁰

Here as elsewhere, it seems “unwise to lay down a categorical rule”:⁹¹ fault or no-fault, compensation or not.

5.3. Promisee’s Risk

Hadley serves most prominently as a symbol for the *supplementary* rules of law which serve to limit liability for consequential loss. But when we discuss the limits to contractual liability, the most natural starting point in both these legal systems is still the parties’ freedom to determine for themselves the content of promise and the remedial consequences of breach. And in a commercial kind of case, the parties often bargain with respect to a given kind of commercial risk: a promisor can disclaim or limit liability for consequential loss.

*Documentary Film.*⁹² Producer P prepares to shoot a documentary film. Following Manufacturer M’s recommendation, P buys film No. 7252 for the venture. P is unaware that the film has been negligently manufactured, and shooting proceeds. During the developing process, scratches appear on the film which make it commercially worthless. P must reshoot the film and sues M for increased costs, etc. M claims his liability is limited to the replacement price of the film, alleging (a) trade custom and (b) the label on the film packaging:

“Read this notice: This film will be replaced if defective in manufacture, labeling or packaging or if damaged or lost by us or any subsidiary company, even though by negligence or other fault. Except for such replacement, the sale, processing or other handling of this film for any purpose is without other warranty or liability.”

89. *Compare id.* at 609 ([Byrettens dom]: “kravet på erstatning for utlegg kr. 10000 ... de direkte utgifter denne har hatt med frakten fra Amerika, karanteneutgifter og foring” [fremhævet her]).

90. *See generally supra*, part 4.4.5.2.

91. *See supra*, part 4.4.4.4 at note 511. *Accord*: Fuller & Perdue, *Reliance Interest* at 77 (comparing tort actions for deceit; quite possible in case of “particularly inexcusable breach” to shift loss to plaintiff).

92. Based on *Posttape Associates v. Eastman Kodak Co.*, 537 F.2d 751 (3d Cir. 1976).

Prima facie, this express notice is a contra-indication of consequential liability. But in a case like this, “we are required to evaluate ... *competing gravitational pulls* ...”⁹³ To determine whether to give effect to the clause purporting to limit liability to the restitutionary interest, we evaluate the total contractual obligation within the relevant commercial context.

The notice notwithstanding, this consequential equation has a pro-liability side. Producer has suffered a consequential loss, and Manufacturer is the perpetrator: his contractual breach is the cause of the trouble. When this merchant-Manufacturer recommends film for Producer's commercial purpose, he invites the latter to expect quality and to (justifiably) rely thereon. It is reasonable that an implied warranty of fitness becomes part and parcel of the contract.

According to the KBL I conceptual model, both the quality of the goods and the liability for “adequate” consequential loss are implied as secondary duties, adjuncts to the primary, generic obligation. In those systems adopting the new, differentiated liability rule of KBL II, a similar result may well obtain by virtue of the still viable doctrine of implied warranty (*stiltiende garanti*).

To implied warranty we add another even more public aspect to the pro-liability argument. Manufacturer has breached the duty to exercise due care, and holding Manufacturer liable for “the consequences of negligent acts”⁹⁴ is by no means excess baggage in a strict liability action based on breach of implied warranty.

In American law, we speak of two, independent “causes of action”.⁹⁵ In *Post-tapes*⁹⁶ the Federal Circuit Court (predicting the *sub judice* opinion of Pennsylvanian State courts) denied the applicability of *Restatement* § 402A but acknowledged a supplementary rule of *general* tort liability: “whether the claim be in tort or contract.”

This conceptual model may well be compared to Scandinavian law (*eg.*) where a clearly culpable breach may well be significant even in a case subsumable under the rule of strict liability in KBL I § 24.⁹⁷

93. *Id.* at 753 (emphasis added) (speaking of the tension between the UCC and the law of torts, particularly § 402A of the *Restatement (Second) of Torts*).

94. *Id.* at 753.

95. *See id.* at 756, holding that UCC governs an *agreement limiting* liability as regards either such claim. *Compare supra*, part 4.4.1.3 regarding tort liability for “pure economic loss”.

96. *Id.*

97. *See, e.g., supra* part 4.4.4.3, text with note 464.

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These days, courts not only referee the contracting contest; they also censor the substantive result. They read a given disclaimer against the background of the supplementary rules deemed fair for the ordinary case. Against this background, they demand minimum adequate remedies for breach, because the absence of same is strong evidence that the bargaining process has gone awry. Before they cast aside the gap-filling rules of contract and tort, the rules which provide the pro-liability side of *Documentary Film*, they require some proof of a commercial bargain-in-fact.

In a noteworthy American case,⁹⁸ involving a claim of consequential damages against the seller of turbine generators, defendant presented clear evidence that during contract negotiations, it had “offered, for a *dollar adder* of 3% of the contract price, to omit from the contract any ... limitation of liability” ...⁹⁹

A potential claim for consequential compensation is a remedial right under the supplementary rule, a saleable item with a monetary value. But only in the rare case do we have proof of a clear meeting of minds on the consequential issue. And not every clause which suppliers draft to avoid liability for consequential loss achieves the intended effect: such express clauses notwithstanding, both American and Scandinavian courts impose liability for consequential loss (a) where the clause is not incorporated in the parties’ agreement, (b) where the clause, although incorporated, is interpreted as not covering the liability claim in question, or (c) where the clause, although formally applicable, is found either unconscionable or unreasonable (in general or as applied: “failure of essential purpose”).¹⁰⁰

In a case like *Documentary Film*, all three arguments may be framed, *arguendo*, in Producer’s favor: (a) a packaging label is a weak means of incorporating a significant remedial restriction; (b) although the label provides for product replacement even if due to negligence, the label does not expressly disclaim responsibility for negligent conduct (only “warranty or liability” in general); and (c) the agreement, even if made, should be denied effect because it denies Producer of a minimum adequate remedy.

In *Posttapes*, the Federal Court of Appeals addressed stage (b) above by accepting (without comment) the trial court’s holding that “the legend on the box of film

98. *Ebasco Services, Inc. v. Pennsylvania Power & Light Co.*, 460 F.Supp. 163 (E.D.Pa. 1978).

99. *See id.* at 180 (emphasis added).

100. *See generally supra*, part 4.4.6.

was *not so clear and unequivocal* under Pennsylvania law as to support a [summary] judgment in favor of the defendant ...”¹⁰¹

As regards (c), the validity issue, “an agreement setting damages at a nominal level may have the practical effect of *avoiding almost all culpability* for wrongful action”,¹⁰² and where, as in *Documentary Film*, the agreed (restitutionary) remedy provides no compensation for plaintiff’s consequential loss, it seems overly formalistic to decide the validity issue via the conceptual distinction between “mere” limitation and total exculpation/disclaimer of liability, but this was the approach taken by the Court in *Posttapes*.¹⁰³

Then again, we may not need to even launch this multi-stage conceptual rocket. In a case like *Documentary Film*, express agreement explains only part of these merchants’ bargain in fact, and if the *custom* of this trade is no liability for this kind of loss, then there is nothing to disclaim, so we need not consider the express disclaimer at all.

If the legend in *Documentary Film* is seen as *evidence* of custom, the line between the two aspects of “agreement” becomes thin.¹⁰⁴

In American law, a defendant who would displace the supplementary rule holding him liable for plaintiff’s consequential loss bears the burden of proving contrary custom: he must prove “such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.”¹⁰⁵ Regularity of observance in the particular trade, not the actual knowledge of the particular plaintiff-trader,¹⁰⁶ is the key concept.¹⁰⁷ Regularity of observance of a liability-limitation may be evidenced not only by repeated applications of the limitation, but also by “in-

101. See 537 F.2d at 755 (emphasis added) and *id.*: “Pennsylvania permits parties to contractually relieve themselves from the consequences of negligent acts, but any agreement must spell out the intention of the parties with particularity.”

102. *Id.* (emphasis added).

103. See *id.* (“the difference between the two concepts is nevertheless a real one”: comparing the film “limitation” with the Warsaw Convention!).

Re. the American distinction between limitation and disclaimer, see *supra*, part 4.4.6. Re. unconscionability and failure of essential purpose, see *infra*, this part.

104. Compare the District Court opinion (on remand) in *Posttape Associates v. Eastman Kodak Co.*, 450 F.Supp. 407, 410, 23 UCC Rep. 855, 860-61 (E.D.Pa. 1978) re. “the characterization of the language printed on film boxes or cannisters of the trade usage”.

105. UCC § 1-205(2) (emphasis added).

106. See 537 F.2d 751 at 757.

107. See 450 F.Supp. 407 at 409.

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industrywide recognition and acceptance of such a practice ...”¹⁰⁸ Still, regularity of observance may be difficult to prove, and plaintiff’s actual knowledge of a customary risk-allocation may be the best evidence available. If the plaintiff who suffers a given loss in fact carries insurance to protect against same, this may tend to indicate plaintiff’s actual knowledge of a customary allocation (/acceptance) of a given contractual risk.¹⁰⁹ If Manufacturer can prove both regularity of observance and actual knowledge, the case for custom is strong indeed.

In *Posttapes*, the District (trial) Court refused to admit evidence that Posttapes’ owner had purchased insurance indemnifying against defective film (and thus that plaintiff had actual knowledge of trade usage), but this ruling was reversed by the Circuit Court and the case remanded for retrial.¹¹⁰ On remand, plaintiff introduced evidence sufficient to support a finding by the jury of “industrywide recognition and acceptance” of “a trade usage limiting a commercial buyer’s remedy to replacement of the negligently manufactured film.”¹¹¹

An unreasonable trade custom deserves neither “industrywide recognition” nor court approval: a wholly inadequate remedy offends our sense of justice, and the strong-arm tactics of a given monopolistic supplier, however widespread, are hardly justified by a reference to the usage of the trade. In *Posttapes*, however, the Producer “was hardly the sheep keeping company with wolves that it would have [the Court] believe.”¹¹²

Custom is often a key part of the commercial bargain in fact. Even where no express disclaimer modifies a supplier’s clear commitment to perform, we may have no “tacit agreement” on the consequential issue:

*Impotent Boar.*¹¹³ Supplier contracts to establish Recipient in the pig-production business, hereunder to supply Recipient with one “Yorkshire Boar”. Production gets off to a very slow start, so Recipient sends a semen-sample for testing. When the lab-results show “pure water”, he sues Supplier for profits lost.

108. *Id.* at 409.

109. On the other hand, it may merely indicate that plaintiff has chosen to insure against the risk of litigation.

110. *See* 537 F.2d 751 at 757-58.

111. *See* 450 F.Supp. 407, 409-10 and *id.* at 411: “In these [*Posttapes*] circumstances, the commercial film maker is not abandoned without protection but is free to purchase raw stock insurance as the plaintiff did in this case.”

112. *Id.* at 412.

113. Based on UfR 1984.525 H.

We all read an implied commitment into Supplier's express description: a commitment to supply a *Boar* fit for the purpose to which such beasts are usually put. Supplier is in breach, and he is liable pursuant to the supplementary rule.

In America, we call this kind of commitment a warranty (express or implied), and the bare breach triggers the supplementary rules of no-fault contractual liability. In Scandinavia, we distinguish first between the supplementary rules of KBL I and KBL II. The no-fault rule of KBL I serves as the functional equivalent of the implied warranty: the generic Supplier is automatically liable, *inter alia*, for consequential loss. If the new KBL II rule applies, we need either to find fault or to ask the court to imply a warranty (*stiltiende garanti*).

Even in a sale of specific goods, a promise by description can negate any inference of *caveat emptor*. In an English case,¹¹⁴ P (plaintiff-buyer) was in the market for a stallion for stud purposes. While P was examining a horse in D's (defendant-seller's) stable, D entered and said: "You need not look for anything; the horse is perfectly sound." When the horse proved unsound, D was held liable. Whether D actually "intended" his "perfectly sound" statement to have contractual force, a point often emphasized in English law, ought not be decisive.¹¹⁵

In NJA 1949.680, seller led buyer to believe that a bull could be insured against impotency.¹¹⁶ The Supreme court of Sweden held that the contract of sale contained an implied warranty that the animal was potent¹¹⁷ and that buyer was entitled to consequential damages for breach.¹¹⁸

In a recent American case,¹¹⁹ seller orally assured buyer that an Arabian stallion was "breeding sound". In fact it was not, and buyer sued for the return of the purchase price and reliance damages. *Held*: for the buyer, notwithstanding a clause in the written contract that the animal was sold "as is".

Call the warranty express or implied, a strong commitment makes a strong case for both justifiable reliance and remedial relief. But a proven contrary custom in the relevant locale and trade will serve to displace the supplementary rule of (consequential) damages for breach.

114. *Schawel v. Reade* [1913] 2 Ir. R. 81.

115. *Accord*: Atiyah, *Introduction* at 163-64, noting that the traditional distinction between representation and warranty is also fading in English law.

116. *See* NJA 1949 at s. 681 ("förutsattes, att tjuren vore av den beskaffenhet att den kunde försäkras för ... ofruktsamhet ...").

117. *See* NJA 1949 at s. 683 ("köpeavtalet måste anses innebära ... att tjuren verkligen hade normal avelsförmåga [fremhævet her]").

118. *Id.* ("för hämtning av tjuren, för två spermaundersökningar och för vård av tjuren [och] ... ersättning för det kor löpt och kalvningen fösenats får ..."). *Compare* Hellner, *Kontraktetsrätt* at 326-27 (asking whether this constituted positive or negative interest protection).

119. *Alpert v. Thomas*, 643 F.Supp. 1406, 2 UCC Rep 2d 99 (D.Vt. 1986).

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In UfR 1984.525 H (the real *Impotent Boar*), the Supreme Court of Denmark found for the defendant-supplier by reason of trade custom.¹²⁰ The proof of such custom had been obtained by defendant via questionnaires submitted to Danish trade organizations for use by the High Court below; plaintiff's objection to this evidence made for the first time during oral argument in the Supreme Court (*domsforhandlingen*) was deemed untimely.¹²¹

As a general rule, proof of custom is not dependant on a party's actual knowledge thereof.¹²²

Given the complexity of the consequential equation, we are not surprised by the subtleties upon which these cases sometimes turn. To err is human, but who is in the wrong? Not even the judges on a given (national) bench always agree as to a given set of operative facts:

Contagious Abortion (Revisited).¹²³ Seller sells her cow to Buyer with an express "guarantee: free from Contagious Bovine Abortion". Buyer then gives Farmer a similar guarantee and places the cow in Farmer's stable. The cow proves Contagious and infects Farmer's herd. When Farmer sues Buyer and recovers the value of the herd, Buyer sues Seller for an equivalent amount.

We would all call this an express guarantee (*udtrykkelig garanti*), an above-average degree of contractual commitment. The exact content of the commitment, however, is a question of contractual interpretation. Seller has guaranteed against a contagious disease: a defect which, if present, obviously bodes of a consequential danger. And it seems natural to interpret a guarantee against this particular defect as a guarantee against the clearly contemplated danger. Absent clear evidence to the contrary, this kind of guarantee invites the promisee to rely and invites the court to protect his reliance interest.¹²⁴

120. See UfR 1984.525 H at 527 ("må ... anses godtgjort, at det inden for handelen med avlsorner er sædvane, at køberen af en ufrugtbar orne ikke kan kræve erstatning for driftstab").

121. See UfR 1984 H at 527 ("Under disse omstændigheder findes der ikke at kunne tillægges indsigelsen nogen vægt").

122. See UfR 1984.525 H at 527 ("ikke findes at kunne tillægges betydning, at appellanten ikke kendte denne sædvane ..."). Compare UfR 1986.654 H (*Beauty Box*) at 661 (NL "ikke fra tidligere forretningsforbindelse var indstævnte bekendt").

123. See *supra*, part 2.4 at note 212.

124. Compare Treitel, *Remedies* at 30-31 (seller's liability for infected cattle neither expectation nor reliance).

The ordinary meaning does not always equate with the special, mercantile meaning, and the mercantile meaning is not always clear-cut. Some lawyers trained in Scandinavian systems may be less disposed than their Common colleagues to read even express contractual commitment as the automatic bearer of consequential relief.

In UfR 1941.61 H, the Danish Supreme Court, in a 5-4 decision, held the Seller not liable on facts essentially similar to those in *Contagious Abortion*. The majority apparently placed considerable emphasis on an expert opinion provided by a Danish farmers' association. Asked whether the guarantee was an "ordinary" trade-guarantee or one that comprised "other consequences" of non-conformity, the association based its narrow interpretation solely on seller's good faith with respect to the cow's actual health:¹²⁵ hardly a persuasive argument as regards the interpretation issue presented, in that the very giving of an express guarantee may itself be seen as an act of *negligence*.¹²⁶ The judgment also makes reference to two precedents presumably in support of the decision, but both are clearly distinguishable.¹²⁷ One year later, in UfR 1942.26 H, a unanimous Supreme Court reached a contrary result (liability for consequential loss) on facts similar to those in the 1941 decision.¹²⁸

When we interpret away the express commitment, we are free to decide the consequential issue in accord with the Scandinavian standard applicable to obligations in general and in accordance with the new KBL II test for indirect loss: the supplementary rule of liability based on culpable breach.

125. See UfR 1941.61 H ("efter de foreliggende Oplysninger ses det ikke, at Sagsøgte paa det Tidspunkt, hvor Handlen afsluttes, har været eller kunde være vidende om, at omhandlede Ko maatte anses for smittefarlig, og det af Sagsøgte i Almindelighed afgivne Garantitilsagn kan derfor ikke anses at omfatte den af omhandlede Sygdom flydede Skade ..." [fremhævet her]).

126. Compare Finland's Köplag, Regeringens proposition till Riksdagen at 88 ad 40 § 3 mom: "Ansvarighet ... förutsätter inte att säljaren borde ha känt till at varan avviker ... säljarens förfarende anses innebära vårdslöshet i det avseendet, att han har gjort en särskild utfästelse om varans egenskaper ... utan att vara säker på att det som han har utfäst svarar mot verkligheten [fremhævet her]".

127. See footnote 1 to UfR 1941.61 H. In both cases referred to there was no express guarantee as regards the disease in question: "reel i alle Maader, idet han derhos paa Anledning udtalte noget i Retning af, at han ikke i mange Aar havde haft smitsom Kalvekastning i sin Besætning" (UfR 1939.788 H).

128. See Dahl, *Produktansvar* at 425 ("udtrykkelig garanti mod smitsom kalvekastning").

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Roof Fire (Revisited).¹²⁹ Supplier contracts with Recipient to renovate the latter's roof. As Supplier's employee is joining tarpaper sections with a blowtorch, the supporting structure catches fire and suffers extensive damage. Recipient sues Supplier for his consequential loss.

Breach of the contractual obligation to exercise reasonable care often bears a close resemblance to negligence *in delicto*, but this observation does not negate the contractual element in *Roof Fire*. The agreement itself does not allocate this risk, but Supplier's employee is no non-privity interloper on Recipient's roof.

The general rule is – and ought to be – that Supplier is liable, in both Scandinavian and American law: Supplier is liable for the foreseeable consequences of his (culpable) breach. And the general rule is that all merchants are equal in the eyes of the law. Business is a risky business: if you do bad business, you may well lose your shirt. This is the custom of all trades, and we charge Supplier with knowledge thereof. If Supplier wins our contract but loses the contractual bet, he may command our sympathy, but he does not deserve a special liability rule.

The safety-valve exceptions ought not affect the outcome of the case: if I pay a man to fix my roof, and he (his employee) burns the house down, I shouldn't have to listen to his hard-luck story about "negligible" negligence. Nor should this Supplier's (alleged) inability to obtain insurance make a "particle of difference": even a Supplier with a sloppy track record can insure against loss if he's willing to pay the necessary premium. Of course, if the premium outweighs the potential profit, Supplier can either choose to run the risk or get out of the business. If he gets out too late, the rules of bankruptcy may force him out, but we should not make this Recipient's problem, even if he himself is a "self"- (i.e. *un-*) insured "bigger guy".

As noted previously, the Danish Supreme Court has relieved a defendant-supplier of liability on facts essentially similar to those in *Roof Fire*.¹³⁰ This was a reversal

129. *See supra*, part 4.4.5.1 at note 564 (with additional facts relating to the status of the contracting parties).

130. *See supra*, part 4.4.5.1 and *compare* Gomard & Wad, *Erstatning* at 148 (recommending a reduction of, as opposed to total relief from, liability in a case like this).

Promisee's Risk

of the decision by the Danish High Court which had refused to apply (the then applicable) statutory rule to reduce the liability of this *professional* obligor.¹³¹

It seems that Scandinavian courts apply a somewhat more socialized version of contract law: they sometimes limit liability where “hard-nosed” American courts would not, and Common lawyers may fail to see the contractual logic or economic wisdom of holding for the defendant in a case like *Roof Fire*.

Then again, there are limits to the conventional Common wisdom of contractual certainty. We cannot regulate risk by pigeonhole alone; not every promise is deserving of the same, extensive protection. And in Scandinavia, to determine the degree of contractual commitment, and to determine whether breach of the commitment ought to give rise to liability for a given consequential loss, we look at the concrete situation:

Late Lemons.¹³² International Carrier makes an oral promise to Danish Importer: to load lemons purchased from Greek Seller on November 28/29 and ship same to Denmark. On Nov. 29 Carrier cables Importer: “loading in Greece OK”. In fact, the goods are not loaded until December 1. By the time they arrive in Denmark (3 days later than if loaded on time) the lemon market has turned sour, the goods are sold for much less, and Importer sues Carrier for the difference. Carrier argues that Importer (for an increased freight charge) could have made a written booking which specified a fixed delivery date,¹³³ as well as Carrier’s liability for late delivery.

As in *Hadley*, so in *Late Lemons*: (a) Carrier is in breach of his generic obligation,¹³⁴ (b) Carrier is at fault,¹³⁵ and (c) there is a causal connection between Carrier’s breach and recipient-Importer’s loss. But we distinguish this

131. See UfR 1984 at 26 (“branden og den derved forårsagede skade skyldes manglende opfyldelse af *fagmæssige* krav ... ej heller hensynet til sagsørgtes økonomiske forhold findes at kunne begrunde nedsættelse ...” [fremhævet her]). The comparable (now applicable) provisions of the Liability Act (see *supra*, part 4.4.5.1) were designed to be applicable to contractual situations, but only as a safety valve, in the “exceptional” case.

132. Based on UfR 1983.287 S.H.D.

133. See UfR 1983 s. 288: *terminstransport*.

134. See UfR 1983.287 S.H.D.: “Som følge af forsinkelse ankom lastvognstoget ... først til Velo søndag den 30. november ... Nødvendig reparation of lastvognstoget bevirkede, at lastning herefter først fandt sted mandag den 1. december ...”

135. At least as regards the communication: “loading OK”.

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case, because (unlike *Hadley*) (d) the kind of consequential loss suffered here is readily foreseeable by Carrier at the time of contracting.¹³⁶ So if we plug these facts into the *Hadley* syllogism, out comes the axiomatic result: Carrier is liable for Importer's consequential loss.

But the Scandinavian judge, more concerned with concrete justice than with the abstract contours of doctrine and precedent, looks to both sides of the liability coin. In a complex situation, our modern liability motives may well be mixed. Neither promissory commitment nor promissory liability need be described in terms of "either/or", and the degree of this Carrier's commitment – as it relates to the kind of (consequential) relief sought in this commercial context – may leave something to be desired.

Carrier has given no express guarantee of timely loading or timely delivery, and a weak degree of contractual commitment may sometimes be seen to bear an implied disclaimer. Importer's informal (oral) commitment to load on November 28/29 says nothing about the date of delivery, and Importer has given no special notice of action contemplated in reliance. And although the general foreseeability of loss will sometimes suffice, we have reason to require more in a situation like this. We charge this merchant-recipient with the knowledge that an alternative, more expensive form of contractual obligation was available: if he wanted a stronger degree of contractual assurance and commercial security, he should have been willing to pay for it. In this sense, a barely tested American doctrine is already a reality in Scandinavian practice: "A court may limit damages for foreseeable loss by excluding recovery for loss of profits ... or otherwise if it concludes that in the circumstances justice so requires ..."¹³⁷

In UfR 1983.287 S.H.D. (the real *Late Lemons*), the Danish High Court (*landsretten*) held Carrier not liable for Importer's loss.¹³⁸

Late Lemons is a close case,¹³⁹ but promissory liability is often a question of degree.

136. See, e.g., *Heron II*, discussed *supra*, part 4.4.4.3.

137. See *supra*, part 4.4.4.5. re. *Restatement 2d* § 351(3).

138. See UfR 1983 at 289 ("mundligt indgåede fragtaftale ... ikke anses for at tilsikre levering ... til bestemt tid ...").

139. As an exception to the Scandinavian rule that the losing party bears all costs, in UfR 1983 at 289 each party was ordered to bear his own costs (hereunder attorney's fees). See *id*: "Efter omstændighederne findes sagsøgeren at have haft en sådan rimelig grund til at rejse denne retssag ..."

*Used Generator (Revisited).*¹⁴⁰ Seller offers Buyer (electric utility) a “rebuilt” 40-year old, war surplus generator for 50,000 kr. In its acceptance, Buyer agrees to pay the price, describing the machine as “rebuilt and fully reliable”. Neither party tests the generator prior to installation. Once installed, the generator proves unreliable due to a serious, latent defect, and Buyer seeks (a) to cancel the contract and (b) to recover damages for installation costs, lost profits, etc.

Because Buyer gets little or no value for his money, Seller should be held in breach of his contractual obligation. But such a subsumption ought not always trigger full expectation interest-protection. Particularly when it comes to specific used goods, courts need a flexible set of conceptual tools. In deciding whether to read “fully reliable” as *Seller's* implied guarantee,¹⁴¹ we need to tie the nature and degree of promissory commitment to the desired degree remedial relief: “satisfaction or your money back” need not also imply coverage for consequential loss.¹⁴²

In NRt 1960.1055, the Supreme Court of Norway denied Buyer's claim for consequential damages. Although Buyer was made to bear the full consequential risk,

140. Re. NRt 1960.1055 and termination, *see supra*, part 4.3.1 at note 94.

141. In the *Used Generator* paradigm as in the real case, “fully reliable” is *Buyer's* description; Seller, at most, impliedly concurs by sending the goods. The court in NRt 1960.1055 did not discuss this point.

142. *See* NRt 1960.1055 at 1059 (“Det synes ikke urimelig at den som avhender en maskin, ny eller brukt, som alminnelig regel får stå inne for at den i hvert fall ikke er beheftet med slike feil at den er ubrukbar i drift. Og dette så å si naturlige garantiansvar er i den foreliggende sak forsterket ved at selgeren har påtatt seg å levere maskinen “fullt driftssikker” ... Allikevel ... vekt på de spesielle omstendigheter i saken, særlig at det dreiet seg om tyske etterlatenskaper hvis realisasjon under formelig garanti formentlig var både særskilt betenkelig og uvanlig. Heller ikke har jeg kunnet se bort fra at rettspraksis hittil synes å ha vært tilbøye- lig til å stille forholdsvise strenge krav for at en garanti skal ansees overtatt”).

Accord: Augdahl, *Norsk Obligasjonsret* at 171-72 (“Når man utenfor de ... [tilfelle hvor man har *lovet* å levere med visse egenskaper] skal bestemme det retslig relevante mangelbegrep ... må man se hen til *virkingen* av mislighold ... slik at disse virkninger inntre hvor de fra en legislativ betragtning *bør* inntre, og ikke ellers [fremhævet her]”). *See also* Krüger, *Kjøpsrett* at 205.

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he was granted restitutionary relief.¹⁴³ As regards avoidability (risk prevention), the court noted that neither party had chosen to test the goods.¹⁴⁴

In a recent American case,¹⁴⁵ a mechanic's assurance that a car's frame was in "good condition" was held to be an "express warranty"¹⁴⁶ (attributable to the seller and) not necessarily inconsistent with the written "as is" disclaimer in the bill of sale. Yet the court limited the buyer-plaintiff's recovery, thus refusing to "fully reward her for her misconception that the doctrine of *caveat emptor* is completely dead."¹⁴⁷

Contributory negligence is not just a conception for the law of torts. The promisor's conduct is only one side of the causation coin.

*Damaged Fodder.*¹⁴⁸ Merchant offers Farmer 150 bags of damaged oil-cakes at a reduced-price. He shows Farmer a sample and informs him that the cakes have not been exposed to fire. Farmer buys 150 bags and feeds them to his cattle. The cattle become ill and must be slaughtered because – unlike the sample shown to Farmer, but like cut-rate fodder in general – the bags contain burnt cake-chunks, stones, nails, wood, etc. Farmer refuses to pay for the goods and seeks damages for lost profits.

Promissory commitment, remedial relief and notions of justice are all questions of kind and degree. In American sales, we read an "express" warranty of quality into Merchant's sample cakes.¹⁴⁹ In Scandinavian sales, our traditional starting point in a specific sale is only rough (restitutionary) justice: an experienced Farmer who acts in reliance without first (a) obtaining a truly express quality commitment or (b) taking the kind of safety precautions that can avoid injury loss, may be forced to bear a resulting consequential loss,

143. See *supra*, part 4.3.1.

144. See NRt 1960 at 1059 ("selgeren har [ikke] utvist forsømmelighet ved ikke på forhånd å foranstalte en betryggende undersøkelse og prøve ...") and at 1064 ("tydelig at ingen av partene i det hele tatt har tenkt på å prøvekjøre generatoren. Det er kanskje ikke grunn til å rette bebreidelse mot noen av dem forat dette ikke ble gjort").

145. *Bernstein v. Sherman*, 497 N.Y.S.2d 298, 130 Misc.2d 741, 1 UCC Rep. 2d 375 (1986).

146. Compare the equivalent warranty implied in UfR 1964.87 ("pæne dæk"): *supra*, part 4.4.1.1 with note 188.

147. Compare the example provided by Augdahl, *Obligasjonsrett* at 170 (noted *supra*, part 2.3, text with note 193).

148. Based on UfR 1932.33 H.

149. See UCC § 2-313(c) and *supra*, part 2.3.

because he – like the second collision motorist who neglects to “buckle up” – has, in some real sense, helped to cause it.¹⁵⁰

A recent American case¹⁵¹ involved similar considerations. In 1972 plaintiff C chartered a ship from owner O for a period of one year with two successive one-year renewal options exercisable by C, payments to be made semi-monthly “in advance” to O’s account in Swiss Bank 1. C paid the installments due by requesting its American bank to make a wire transfer of funds; B would then telex its London office for retransmission to its correspondent bank in Geneva, Swiss Bank 2 for further transmission. On April 25, 1973, C instructed the American bank to transfer the \$25,000 payment due on April 26. The telex reached England during the afternoon of April 25 and was retransmitted to Swiss Bank 2 the next morning, but – due to an error at Bank 2 – the payment never reached Swiss Bank 1. O promptly cancelled its charter contract with C, and C, forced to “cover” for 26 months at market rates, sued Swiss Bank 2 for the contract-market differential: \$2 million. Conceiving the non-privity plaintiff’s cause action as one sounding solely in tort, the U.S. Court of Appeals, reversing the District Court below, held for the defendant. Circuit Judge Posner applied what he called the “animating principle” of *Hadley v. Baxendale*: “the costs of the untoward consequence of a course of dealing should be borne by that party who was able to avert the consequence at least cost and failed to do so.”¹⁵² “The seat-belt cases show that the doctrine of avoidable consequences applies ... before or after the tort is committed.”¹⁵³

Conversely, an obligor who, at the time of contracting, knows full well his promisee cannot “take a punch” may “tacitly agree” to assume liability for the consequences of breach.¹⁵⁴

150. See UfR 1932.33 H and Gomard, *Egen skyld* at 174 and compare the similar reasoning of the English House of Lords in *R.W. Green Ltd. v. Cade Bros. Farm* [1978] 1 Lloyd’s Rep 602 (sale of *uncertified* potatoes; express disclaimer of liability for consequential loss upheld). See generally *supra*, part 4.4.4.2.

151. *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (1982)

152. *Id.* at 957.

153. *Id.* at 958.

154. Compare *Sprague v. Sumitomo Forrestry* 104 Wash.2d 751, 709 P.2d 1200, 42 UCC Rep 202 (1985) (Seller had carefully explained that due to a pre-existing situation, he was in precarious financial circumstances and could not withstand buyer’s breach; seller awarded, *inter alia*, contract market differential and \$40,000 in “incidental” damages to cover the cost of refinancing, but other damages deemed “consequential” were denied pursuant to UCC § 2-710: see *supra*, part 4.4.4.1, text with note 374).

5.4. Risk Sharing

To solve the consequential problem, we take into account a broad range of factors, balance competing interests both for and against, and allocate the consequential risk. Because we are dealing with a balancing test, the answer to the consequential question is not always best answered in yes or no terms. Even the various, individual factors which enter into the consequential equation themselves involve questions of degree. So, conventional contract wisdom notwithstanding, we should not be surprised to find that both Scandinavian and American judges sometimes act like the arbitrator in search of a compromise: there is often good reason to “split the [consequential] baby”.

Freedom of contract lives on – as a question of degree. The supplementary rules of law are designed, *inter alia*, to protect a recipient’s legitimate contractual interests, and this kind of public protection is not wiped out by every supplier’s private attempt to disclaim liability.

*Computer Conversion.*¹⁵⁵ Recipient R provides electronic data-processing services to commercial clients. Business is booming, and R must either upgrade the Brand X computer it now has or change to Brand Y. Although the Y alternative entails a new computer language (and therefore significant conversion costs: reprogramming, retraining personnel, etc.), Supplier S (the manufacturer/lessor of Y) assures Recipient of Y’s capacity and reliability and that “conversion costs will soon be recovered”. After a 6-month installation effort during which the Y machine consistently malfunctions, the parties agree to an early termination of the lease. Supplier refuses, however, to reimburse Recipient for either conversion costs or lost profits, in that the contract provides: “Supplier shall not in any event be liable for indirect or consequential damages.”

At the minimum, this Recipient can enjoy a justifiable expectation that the new machine be “fit for the purpose” and perform at least as well the one it is meant to replace.¹⁵⁶ In *Computer Conversion*, however, Recipient has good reason to expect and demand more. Supplier, by making a clear express commitment as regards the consequences of his performance (conversion costs), has not only solicited and obtained Recipient’s reliance; he has done the next-best thing to promising compensation for consequential (reliance) loss.

155. Based on *Applied Data Processing, Inc. v. Burroughs Corp.*, 394 F.Supp. 504 (1975).

156. *Accord*: *Strange Beck & Bruun Nielsen* (review of Nørager-Nielsen, *EDB Kontrakter*) in *UfR B* 1987 at 225 (re. “minimumskrav”).

In a situation like this, full enforcement of the disclaimer clause will lead to an unreasonable result: something both American and Scandinavian courts try hard to avoid. Rather than deny a disclaimer any effect, we sometimes seek a middle ground. In this case, it seems fair to draw a distinction between out-of-pocket conversion expenses (which relate directly to the express commitment) and lost profits (which relate to more general notions of fitness for purpose). Although both kinds of loss seem “indirect” and “consequential” in the ordinary meaning of lawyer’s words, there are ways to avoid the distasteful consequences of private legislation.

In *Applied Data* (the real *Computer Conversion*),¹⁵⁷ the U.S. District Court held that expenses incurred in converting to the new computer system “were not in any sense incurred as a consequence of the breach, but were instead incurred before the breach occurred and in reliance on the promises in the contract.”¹⁵⁸ This strained conception, that such reliance losses are not subsumable as “consequential”, though contrary to widely accepted doctrine,¹⁵⁹ bears a striking similarity to the new Scandinavian statutory approach in KBL II.¹⁶⁰ In *Applied Data*, even those consequential damages held disclaimed (re. lost profits) were held recoverable under a tort theory (misrepresentation).¹⁶¹

Where no disclaimer stands in the way, we base our conclusion on the general rules. Once again, there may be a middle ground.

Barn Ventilator.¹⁶² Seller supplies and installs a ventilating system in pig Farmer’s barn. In the weeks which follow, a large number of Farmer’s pigs die, a fact which, according to expert opinion, is attributable to a combination of 2 factors:

- 1 – Farmer continually adds new pigs to his stock, some of which may be diseased, and
- 2 – the ventilation system is “primitive” and fails to reduce the humidity in the barn.

157. *Supra*, note 155.

158. 394 F.Supp. at 508. *But see* Corbin, *Contracts* § 1035 at 210 (“worthlessness [of pre-breach reliance expenditures] directly caused by seller’s breach”) (emphasis mine).

159. *See, e.g.*, Hudec, *Reliance Interest* at 725 (re. “consequential reliance”).

160. *See supra*, part 4.4.5.2 with notes 598-600..

161. *See* 394 F.2d at 511 and Raysman & Brown, *Computer Law* at 13-16. This also accords with the KBL II scheme: fault liability for “indirect” loss.

162. Based on UfR 1974.501 H.

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Seller has supplied a defective system, but he has only *caused* part of the loss, and whether or not we choose to apply a strict or a fault-based test of contractual liability, we ought not hold Seller liable for loss not traceable to the breach itself. However much it may taste of tort, competing cause is also a contractual problem.¹⁶³

In UfR 1974.501 H (the real *Barn Ventilator*) the Danish Supreme Court affirmed 20,000 Dkr. in damages awarded by the High Court. A court-appointed expert had estimated that 60% of the total 29,000 Dkr. loss could be attributed to the defective ventilation system.¹⁶⁴

“Relatively few [*American*] contract cases have grappled with the problems created by ‘multiple causation’, where the actions (or inaction) of several persons combine to produce an injury to plaintiff.”¹⁶⁵ In a recent English case, it was held that where a defendant’s liability in contract was the same as his liability for the tort of negligence (independently considered), the court had the power to apportion blame and reduce damages recoverable by the plaintiff (Scandinavian insurer) even though the claim was made in contract.¹⁶⁶

The problem of competing cause appears in a variety of consequential contexts:

*Basement Business (Revisited).*¹⁶⁷ Lessee is interested in renting Lessor’s basement for the purpose of manufacturing radio parts. Lessor’s agent orally advises Lessee that the premises have been approved for such commercial purposes, and a lease is signed. After Lessee moves in, at considerable expense, he learns that the basement is not – and cannot be – approved for commercial use.

163. See, e.g., UfR 1985.542 H (delayed transport, damage to meat caused by customs official’s error and negligent packing; 50-50 split on liability) and UfR 1985.1040 H (corrosion-damage, an indirect result of defendant’s negligence, compounded by plaintiff’s delayed repair).

164. See also Oslo byretts judgment of May 7, 1976, dom 7/5 (briefed *supra*, part 4.4.1.2 at note 236): plaintiff’s negligence was held to have contributed to its loss.

165. Knapp, *Problems* at 925, citing *Krauss v. Greenberg*, 137 F.2d 569 (3d Cir. 1943) where defendant-supplier’s late delivery was held to be the “legal cause” of plaintiff-manufacturer’s loss (penalty paid to plaintiff’s buyer) because the delay was the substantial or predominant (though not the only) cause of plaintiff’s loss. See also *supra*, part 4.4.4.2 (re. *Waterproof*) and *infra* part 6.3.3, text with note 160 (re. *Maru*).

166. *Forsikrings Vesta v. Butcher* [1988] 2 All E.R. 43 (C.A.). See also *supra*, part 4.3.1 with note 107 (same case re. termination).

167. See *supra*, parts 1.2 (at note 22) and 2.3 (at note 177).

This is a case of conflicting *caveats*: Lessee's legitimate interest in relying on the information supplied conflicts with his own duty to look out for himself. Even though a Scandinavian court will admit all relevant evidence, and though justifiable reliance on even a parol promise may provide a basis for reliance interest protection, there is no inevitable logic in awarding full compensation for a loss which could have been prevented by a particularly prudent (less trusting) promisee. In order to award damages which balance the nature and degree of the promissory commitment with the nature and degree of action in reliance thereon,¹⁶⁸ it seems reasonable to shorten the reigns of interest protection.¹⁶⁹

In J.D. 43.92 (the real *Basement Business*) the Danish Court,¹⁷⁰ taking account of Lessee-plaintiff's failure to investigate whether the premises could be used for the contemplated purpose, limited Lessee's compensation to two-thirds of the expenses incurred.

There is often good reason to rely on the merchant. But in the commercial world, reliance is not a one-way street: people in business must rely on each other. On the one hand, the merchant-supplier must provide conforming, merchantable, and fit-for-purpose goods. On the other hand, the merchant-recipient cannot rely without limit: there is a countervailing duty to take reasonable steps not only to mitigate once a breach becomes known, but also to take reasonable measures to guard against reasonably foreseeable loss. The only means at our disposal to resolve such interests is the ever-present reasonableness-test. "Such a standard may vary with the size of the [Scandinavian judge's or the American] jurymen's foot, and it certainly varies with the contents of his head; but we have no better."¹⁷¹

168. Compare Restatement 2d Contracts § 351(3), *supra*, part 4.4.5.1.

169. Accord (regarding sale of realty) A. Vinding Kruse, *Ejendoms køb* at 148 (rimeligste løsning at nedsætte erstatningen ud fra en konkret afvejelse ..."). But see Gomard, *Egen skyld* 174-75 and *Obligationsret* at 168-69 with note 52 ("egenskyldsregel om tabsfordeling kan næppe finde anvendelse på mangelsansvaret"). Compare Hellner, *Kontraktsträtt* at 314 (finding no cases to support a proposal by Karlgren) and *infra*, part 6.3.3 (re. CISG & *Barge Capacity*).

170. Copenhagen *Boligvoldgiftsret*.

171. 5 Corbin, *Contracts* § 1012 at 89 (speaking of foreseeability and the standard of the reasonable and prudent man).

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*Lewis v. Mobil Oil Corp. (the real Oil Additive)*¹⁷² illustrates how complex, competing interests can be reconciled by a balanced compromise. Basing his cause of action on Seller's breach of an implied fitness warranty, Miller-buyer sued for profits lost (1) during the two and one-half years it took Seller to locate and cure the problem, and (2) during the two and one-half years which followed. As regards the *first* period, the court allowed Miller to recover damages for the full two and one-half period during which he used the unfit oil. While Miller was under a "duty to use diligence to minimize his damages", he was not under a duty "to bring in an independent expert to assess the cause of his trouble."¹⁷³ "Throughout this period, defendant continued to supply plaintiff with Ambrex 810, knowing both of his reliance on it to supply the proper oil and his difficulties in operation."¹⁷⁴ And "[w]hile the lost profits could not be proved with absolute certainty ...", the court was content to make a "reasonable approximation" based on the evidence offered regarding the substantial market for plaintiff's lumber and his business profits made both before and after using Ambrex 810.¹⁷⁵ As regards the second period, the court rejected Miller's argument that, nearly bankrupted by Seller's breach, he was unable to finance his operations during the succeeding period at more than 50 to 60 per cent capacity. The court held that this loss was not "due to" a breach of warranty: "The defendant oil company cannot be held responsible for the capitalization of plaintiff's business."¹⁷⁶ *Query*: "If at the time of plaintiff's purchases of oil the defendant had known how thinly capitalized plaintiff's operations were ... should defendant have been liable for the additional lost profits claimed in *Lewis*?¹⁷⁷

Mitigation – the other side of the avoidability coin – may also be seen as a question of degree. Part performance by defendant of his "duty to mitigate" may also result in a compromise verdict.¹⁷⁸

We can often agree that the promisor is bound, but the question remains: just where shall we stop? Consider these "companion" cases:

172. See *supra*, part 1.1, text with note 9; *Lewis v. Mobil Oil Corp.* 438 F.2d 500 (8th Cir. 1971).

173. *Id.* at 509.

174. *Id.* at 510.

175. See *id.* at 511.

176. *Id.*

177. Knapp, *Problems* at 925. Re. *Sprague v. Sumitomo Forrestry*, see *supra*, note 154.

178. See *Cates v. Morgan*, 780 F.2d 683, 42 UCC Rep. 451 (7th Cir. 1985) (relying on seller's promises to repair, Cates did nothing for 8 months). See also *Sitlington v. Fulton*, 281 F.2d 552 (10th Cir. 1960) and 297 F.2d 458 (10th Cir. 1961) (In purchasing the cattle – and then electing to repudiate rather than accept seller's delayed tender – the buyers failed to mitigate).

Fertilizer Machines.¹⁷⁹ Buyer's business is to spread fertilizer for local farmers. With a view to increasing his capacity, he contracts with Manufacturer to trade in his old spreaders for 5 new machines to be delivered "before March 1". Because Manufacturer's parts supplier delivers late, delivery to Buyer is delayed 10 days. Buyer sues Manufacturer for (1) profits lost during the 10-day delay and (2) profits lost because disappointed customers reduced their orders for the following season. Seller demands that the alleged loss be documented, but Buyer refuses to let Seller (or the Court) see the relevant business records.

Bull Semen.¹⁸⁰ In 1971 Merchant sells Rancher a quantity of bull semen for artificial insemination. The semen is put to immediate use but proves defective, and Rancher sues Merchant for (1) the loss of the 1972 calf crop and (2) the loss of the 1974 calf crop that Rancher had expected from the calves born in 1972.

Both *Fertilizer Machines* and *Bull Semen* involve a clear breach of contractual obligation. Both recipients are surely entitled to some degree of protection for consequential loss. But there are opposing factors at work, factors which tend to limit our liability assessment. And one fact sets the *Fertilizer* case apart: the plaintiff-Buyer refuses to document his loss, and no court should help him if he won't help himself.¹⁸¹ But even if he, like the plaintiff in *Bull*, were willing to open the books of his business, we would still have a difficult problem to solve.

For one thing, certainty of loss is a question of degree: what we expect as tomorrow's lost profit seems less remote than that hoped for next year. For another, because the avoidability of losses like these depends on the resourcefulness demonstrated by the particular plaintiff, full compensation might run counter to our interest in encouraging the professional to do his very best.

We have to stop somewhere, but rather than draw an arbitrary line,¹⁸² both American and Scandinavian courts sometimes prefer a rule of reason: a rule which recognizes both the justification and the uncertainty of a conse-

179. Based on UfR 1965.43 H.

180. Based on *Baden v. Curtiss Breeding Service*, 380 F.Supp. 243 (D.Mont. 1974).

181. Compare Gomard, *Civilprocessen* at 334-35 re. UfR 1977.876 (no information from defendant-seller re "normal [pinball machine] profits"). Re. this case, see also *supra*, part 4.4.3 with note 341.

182. Compare Trolle in *UfR B* 1965 at 160 ("selv om et tab af denne art havde været dokumenteret, ikke ... erstatning herfor").

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quential award. “The duty to cover, the duty to minimize, and the rule requiring some certainty in the measurement of consequential damages are designed to extend some rule of reason to the amount of consequential damages which may be awarded.”¹⁸³ In a case like *Bull Semen*, we do well to reach a liability compromise:¹⁸⁴ given the complexity of the consequential equation, this is often a just result. Formalistic rules which demand yes-or-no answers to the consequential question, irrespective of the complex mix of concrete operative facts, run counter to the wisdom of our best judge-made law.¹⁸⁵

In UfR 1965.43 H (the real *Fertilizer* case), plaintiff-buyer was awarded compensation for profits lost during the first period, but was denied any compensation for profits allegedly lost in the subsequent season.

In *Baden* (the real *Semen* case), plaintiff-buyer was awarded compensation for profits lost during the first but not the second period in question.

183. 380 F.Supp. at 245 (citations omitted).

184. *Compare* *Luria Bros. & Co. v. Pielet Bros. Scrap Iron*, 600 F.2d 103, 115 (7th Cir. 1979) (partial compensation for lost profits upheld as “a conservative approach on projected profits rather than a compromise on liability”). *See also* *Czarnikow-Rionda v. Federal Sugar Refining Co.*, 255 N.Y. 33, 173 N.E. 913 (1930) (compromise) and *Locke v. United States*, 283 F.2d 521, 524 (Ct.Cl. 1960) (uncertainty of damages no excuse for defendant’s misconduct).

185. *Accord*: Comment, *Promissory Estoppel* at 594 (at odds with the traditional all-or-nothing approach) and 603 (re. allocation of damages on basis of comparative fault). *See also* Farnsworth, *Remedies* at 1209.

PART 6

International Commercial Sales C.I.S.G.

No statute can specify detailed rules for measuring damages in all possible cases.¹

6.1. Introduction

Neither American nor Scandinavian contract law is fully tailored to a transnational context: “[national] considerations are not controlling in an international commercial agreement.”² As regards the key commercial contract type, a special set of internationally acceptable rules is finally at hand: the 1980 United Nations Convention on Contracts for the International Sale of Goods, the *CISG*.³

The core of the Convention is grounded in the common core of all contractual regimes: freedom of contract, the primacy of express promise, etc.⁴ The Convention is “full of common sense and spelled out in businessmen’s language”,⁵ and the new transnational statute represents a marked improvement on the previous provincial state of affairs, with the fortuities of forum shopping and conflict of laws.

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1. Honnold, *Uniform Law* at 408.
 2. *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 15 (1972) (clause in towing contract, whereby supplier disclaimed liability for “defaults and/or errors” in navigation, invalid if judged by American precedent, but contractual choice of English forum held binding on American recipient, notwithstanding likely enforcement of clause in English forum).
 3. See *supra*, part 1.4.
 4. See Schlechtriem, *Seller’s Obligations* at 6-19 (re. Ernst Rabel and conformity of the goods to the agreement). See also Rabel, *Nature of Warranty*.
 5. Sono, *Vienna Sales* at 14.

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And yet, international law lags behind its national roots. The Convention is the product of 50 years of ongoing negotiation;⁶ it could hardly be expected to comprise the many significant developments in national law during this period. The multitude of factors which affect the consequential conundrum persist in the new international setting, as do many of the complications of national law. The result reached reflects not only “agreement resting on common fundamental criteria”,⁷ but also compromise as to diverging points of view.⁸ The new statute seems “relatively straightforward and uncluttered with detail”,⁹ not only because domestic “anacronisms” have been refined away,¹⁰ but also because some “loose ends”¹¹ were tucked under the rug.¹²

This is not to imply an unfortunate or unworkable result.¹³ It is rather to say that this new international compromise poses problems which businessmen, lawyers, judges and arbitrators now need to face, *inter alia*, the problem of consequential damages in Convention context. We need to map out the CISG’s comparative common core, but we also need to chart the interface of national and supranational law and to define the gaps to be filled by jurisprudence and precedent in the years to come.

6.2. C.I.S.G. Rights and Remedies: a Comparative Nutshell

6.2.1. Sphere of Application

The Convention is the KBL and UCC (Article 2) of the international arena. The heart of the Convention is its Part III which sets forth “the rights and obligations of the seller and the buyer”: the new substantive law of international sales.

6. This period includes the time spent on the unsuccessful Uniform Law of International Sales (1964) which, because of limited adherence, served as little more than a “first draft” to the CISG.

7. Lookofsky, *Fault and No-Fault* at 138 (re. the CISG basis of liability).

8. See Zeigel, *Remedial Provisions* at 9-3.

9. Honnold, *Uniform Law* at 69.

10. See *id.*

11. Nicholas, *Force Majeure* at 232.

12. On certain points, the Convention codifies only an agreement to disagree. Contracting States can “opt out” of certain rules entirely: see, e.g., *infra*, part 6.2.1 at note 17.

13. For a contrary view, see Rosett, *Critical Reflections*.

To determine what is a “sale” the Convention employs a dominant-element test.¹⁴ Unless the parties agree otherwise, the Convention does not apply to sales of “ships, vessels, hovercraft or aircraft”; nor does the Convention apply to “consumer sales”: sales of goods “bought for personal, family or household use ...”¹⁵ The Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.¹⁶

Part II of the Convention, which lies outside the scope of this study, governs the formation of the international contract of sale. In ratifying CISG, the Scandinavian countries have made an Article 92-reservation, so that Scandinavian courts will not be bound by Part II. The Scandinavian countries, having “the same or closely related legal rules on [sales] ...”, have also made an Article 94 declaration, so they will not apply the Convention where both parties have their places of business in Scandinavia.¹⁷

Like the national sales statutes, the Convention is designed to function as a supplementary, back-up system. Its primary role is to fill in the gaps, provide the supplementary rule. The Convention rules of sale are activated only when the parties enter an international agreement and only when that agreement proves incomplete. As in American and Scandinavian national law, contractual freedom is our point of departure. Article 6 provides:

The parties may exclude the application of this Convention or ... derogate from or vary the effect of any of its provisions.

The Convention is concerned only with substance, only the “rights and obligations” of the parties. Conversely, Article 4 also tells us that the Convention is not concerned with:

(a) the validity of the contract or of any of its provisions ...¹⁸

14. Article 3(2) provides: This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services. *See infra*, part 6.3.3 at note 135 (re. *Diesel Parts*).

15. Regarding these and other exclusions, *see generally* Article 2 of the Convention.

16. *See* Article 5 and Honnold, *Uniform Law 100-04* and *infra*, part 6.3.4.

17. Regarding the relation of Article 94 to KBL II and the indirect loss issue, *see supra*, part 4.4.5.2 at note 591.

18. Nor is the Convention concerned with (b) the effect which the contract may have on the property in the goods sold (*id.*).

Part 6.2.1

Thus, the Convention does not address questions like error, mistake, fraud, duress and illegality.¹⁹ Nor does the Convention deal with contract-censorship based on principles of unconscionability or reasonableness. Such topics remain within the province of national law.

As at the national level, sales agreements – which imply exchange (by definition) – do not normally pose problems of consideration. Without applying the validity label, the Convention does address that aspect of the contract-modification problem which Common lawyers associate with consideration. Article 29(1) provides that a contract may be modified or terminated by the mere agreement of the parties.²⁰ At the same time, the provision dispenses with the Statute of Frauds and similar requirements.²¹

“Professor Eörsi from Hungary proposed the inclusion of a provision that would oblige both parties to observe the principles of good faith and fair dealing”.²² Some “delegations ... from common law countries rejected the proposed provision as being too vague.”²³

The Convention draws the classical line, but when we evaluate the effect of a given term, we cannot always distinguish between the contacting process, substantive interpretation and overt censorship grounded in standards of fairness or “validity”.²⁴ Moreover, the Convention serves not only as a gap-filler but also as a yardstick:²⁵ “the Convention aims at justice between the

19. See Winship, *Scope* 1-37, citing, *inter alia*, the study prepared by Professors U. Drobnig and O. Lando for UNIDROIT: Mistake, Fraud, Threat, Unequal Bargaining Power and Gross Unfairness (Study L-Doc. 20, February 1982). Regarding this aspect of the Convention and Swiss law, see generally Heiz, *Validity*.

20. See Honnold, *Uniform Law* at 229-31 and *compare supra*, part 2.1 at notes 20-21 re UCC §§ 2-209(1) and 1-203 (*Steel Supply*).

21. Article 6 contains a proviso referring to Article 12, which in turn refers to Article 96. Pursuant to Article 96, a Contracting State may (the form-free rule of Article 11 notwithstanding) require a “writing” as evidence of a contract (/modification, etc.). Article 29 overrides Article 6. In its ratification of the Convention, the United States did not make an Article 96 declaration. Regarding the American (national) Statute of Frauds, see *supra*, part 2.3, text with note 153).

22. See Enderlein, *Rights* at 136.

23. See Enderlein at *id.* *Compare supra*, part 2.1, text with note 21 re. UCC § 1-203.

Without imposing an obligation on the parties to deal fairly, the CISG provides, in Article 7(1), *inter alia*, that the Convention is to be *interpreted* so as to “promote the observance of good faith in international trade”. See also *infra*, part 6.3.4.

24. See, e.g., as regards disclaimers, *supra*, part 4.4.6 and *infra*, part 6.3.3 (*Barge Capacity*).

25. See Schlechtriem, *Seller's Obligation* at 6-6 (re. clauses imposed through the use of standard terms, etc.).

parties ...”²⁶, and its remedial system is relevant, *inter alia*, as regards rules of validity which strive to maintain a reasonable balance between contractual obligations and minimum adequate remedies for breach.

6.2.2. Total Convention Obligation

The Convention starting point is promise, the classical heart of contractual obligation.²⁷ And the Convention deals with more than express agreement. As with the KBL and the UCC, the key elements of the new, international compromise remain: (1) express promise, (2) custom and usage, and (3) Convention supplementary rule – in that order.²⁸

As at the national level, the first problem is to determine and interpret the content of the parties *express agreement*.²⁹ Custom, usage and course of dealing serve in the front ranks – along with express promise – to determine the bargain in fact.³⁰ As in national law, an international trade custom, if the criteria for its application are met, can have a dramatic effect on the interpretation of express promise and thus turn a seeming breach into proper performance of Convention obligation.³¹

26. Hellner, *Vienna Convention* at 351 (“whereas ... the ECE 188 contract protects the interests of the seller better than those of the buyer”); regarding ECE 188 and (the similarly lopsided) NL, *see supra*, part 4.4.6, note 694 *et seq.*

27. *Accord*: Enderlein, *Rights* at 136.

28. *Accord*, Enderlein, *id.* at 138. In UCC terms, the first and second elements are comprised by the concept of *agreement* which, when taken together with supplementary rules of law, constitute the entire *contract*: *see supra*, part 2.1.

29. Article 30 provides:

The seller must deliver the goods ... as required by the contract and this Convention. And, as further provided in Article 35, he must deliver goods which are of the ... quality and description required by the contract ...

Article 53 sets forth an analogous obligation for the buyer: The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Regarding interpretation of the agreement pursuant to Article 8, *see infra*, part 6.2.3.

30. CISG Article 9 provides:

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, the parties to contracts of the type involved in the particular trade concerned.

31. *Compare supra*, part 2.4 (*Half-Inch Staves*). Regarding *local* custom, *see* Honnold, *Uniform Law* at 148.

Part 6.2.2

Both promissory and remedial custom take precedence over the Convention's supplementary rules. Thus, whether a buyer who fails initially to detect a defect in performance can later allege an Article 35-breach may well depend, not only on the letter of Article 35(3), but also on trade custom regarding a duty to inspect (*caveat emptor*). Custom may also affect the right to claim consequential damages.

“It is, however, often difficult to make a distinction between the interpretation and the implied terms of a contract.”³² As in national law, when promise and custom leave a contractual gap, the private agreement requires supplementary rules. In the international context, the Convention helps to complete the total legal obligation. As regards the obligations of the seller, Article 35(2) provides (*inter alia*):

- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
 - (a) are fit for the purposes for which goods of the same description would ordinarily be used ... [and]
 - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment ...

As under national laws of sales, the implied obligation to supply goods “fit for the purpose” will often overlap with the “merchantability” requirement.³³ But this is not always the case.

As regards the implied qualities of merchantability, fitness for purpose, etc., Article 35(3) of the Convention provides: The seller is not liable ... for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity. As noted by Professor Honnold, “an obligation based on facts of which one ‘could not have been unaware’ does not impose a duty to investigate,”³⁴ and although the provision does not expressly apply to an Article 35(1) express promise of quality, the same principle (no duty) might well be applied by analogy.³⁵

32. Lando, *Law of Contracts* at 151.

33. See, e.g., *infra*, part 6.3.3 (re. *Diesel Parts*).

34. Honnold, *Uniform Law* at 256.

35. Regarding Article 7(2), see *infra* part 6.3.3 at note 140.

In any event, the right to a Convention remedy for nonconforming goods presupposes compliance with (or contractual deviation from) the Convention's rules regarding *timely notice*.³⁶

Merchants who sell in the international market automatically incur an implied *obligation* to supply merchantable goods; whether such merchants also make an "implied warranty" is another matter, one which lies outside the scope of Article 35: we cannot draw any remedial conclusions based solely on this provision.

It should also be noted that the Convention addresses only *interpartes* problems. In *Midland Forge*,³⁷ a German manufacturer's implied warranties pursuant to the UCC regarding the merchantability and fitness of drop forge hammers were held to extended to the ultimate commercial purchaser pursuant to UCC § 2-318, Alternative C. CISG Article 35 regarding conformity of the goods displaces the UCC's gap-filling warranties, but the Convention contains no correlate to § 2-318,³⁸ nor to the Norwegian analog in KBL II.³⁹

36. Article 39 provides:

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

The more controversial of these provisions is 39(2), with its absolute, 2-year cutoff. Predictably, the provision was opposed by those CISG delegates whose national rules provide for even shorter cutoff periods: see Enderlein, *Rights* at 172 and Honnold, *Uniform Law* at 278.

Article 44 relaxes the just-cited notice rule as follows:

Notwithstanding the provisions of paragraph (1) of article 39 [and paragraph (1) of article 43: the corresponding notice rule re. third party claims,] the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the notice required.

Regarding contractual periods of (express and implied) guarantee, see Honnold, *Uniform Law* at 282 and Enderlein, *Rights* at 173-74. Re. the corresponding problem pursuant to KBL, see *supra*, part 2.3 at note 142.

37. *Midland Forge, Inc. v. Letts Industries, Inc.*, 395 F.Supp. 506, 17 UCC 50 (N.D. Iowa 1975). Regarding the jurisdictional aspect of this case, see *supra*, part 1.4 at note 79.

38. Accord Honnold, *Uniform Law* at 96 ("Convention neither enforces nor disturbs these developments of domestic law").

39. See Lov nr. 27 af 13. mai 1988 § 84.

Part 6.2.3

6.2.3. Exemptions⁴⁰

The CISG-promisor is bound by his commitment, but, as in national law, the promise does not necessarily continue to bind unabated in the face of a supervening change in circumstances: an “impediment” to performance.

As in national law, contractual freedom is the starting point, not only as regards performance, but also as regards the consequences of non-performance. Where the parties to a CISG- contract have drafted a valid *force majeure* clause, the primary problem is again interpretation of the private statute.

As in American and Scandinavian law, the Convention will be called upon to fill both total and partial gaps on the excuse issue. And as in national law, we may assume that the new, public statute will exert an influence on the interpretation of international parties’ private legislation. Article 79 of the Convention provides, in pertinent part:

- (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences ...

Following the (Civilian and) Scandinavian pattern, Article 79(1) deals with the excuse-issue solely in terms of liability, leaving both parties free to “exercis[e] any right other than to claim damages under this Convention,” but the real result of an impediment will often be to discharge the obligation.⁴¹

Although a promisor is exempted from liability pursuant to Article 79, the promisee retains (pursuant to section 5) the right to avoid the contract (and seek restitution), and the non-performance of a primary contractual obligation will surely be a CISG “fundamental failure”.⁴²

40. See generally Nicholas, *Force Majeure*, Lookofsky, *Fault & No-Fault* and Nicholas, *Impracticability*.

41. See Article 79(5). Regarding the contrast between Scandinavian and American conceptions, see *supra*, part 3.1. Regarding the implications for specific performance pursuant to the Convention, see *infra*, part 6.2.4.2.

42. See Honnold, *Uniform Law* at 427 and *infra*, part 6.2.4.3 regarding Article 25.

To qualify for an exemption, the CISG-promisor has the burden of proof: he must establish (1) that non-performance was due to an impediment, (2) that the said impediment was beyond his control, (3) that he could not reasonably have taken it into account, and (4) that it and its consequences were unavoidable.⁴³

When an “unavoidable impediment” stands in the promisor’s way, we say that performance has been rendered impossible. If the impediment lies beyond the promisor’s control and could not reasonably have been taken into account, we describe such non-performance as unforeseeable. So, for lawyers schooled in national rules like KBL I § 24 and UCC § 2-615, the essence of CISG Article 79 is quite simply described in terms of “unforeseeable impossibility”,⁴⁴ and Article 79 is a no-fault rule.⁴⁵

The promise to deliver is almost always a generic obligation, and the performance of such an obligation will rarely be deemed impossible pursuant to the Convention test. Even assuming the sort of extraordinary contingency which a reasonable promisor can neither control nor (reasonably) foresee, the generic obligor should rarely qualify for an Article 79 exemption. He can – and must – *avoid* (/overcome) the consequences of a given “impediment” by seeking alternate sources of supply. Should he fail to overcome the impediment without undue delay, his (continuing) failure to perform is no longer “due to an impediment”,⁴⁶ but rather to his own lack of diligence, his disregard of the promise made.

The new “control liability” rule of KBL II § 27 is a virtual carbon copy of CISG Art. 79.⁴⁷ Although the new KBL II rule is designed to govern only liability for *direct* loss, Scandinavians can hardly revert to their Civilian heritage and read fault into Article 79 when a defect (causing consequential loss) is “beyond [a seller’s] control”.

Just as we are willing to classify an extreme rise in price as an “impediment” and a “contingency” at the national level, we should be willing to make a similar subsumption under the Convention.⁴⁸ Assuming that the problem of economic *force majeure* is “expressly settled” (/covered) by Article 79, there is no Article 7 “gap”,

43. See generally *supra*, part 3.3 (re. KBL II).

44. See generally *supra*, part 3.2 and (regarding KBL I and CISG) Lookofsky, *Fault and No-Fault*.

45. Compare (re. Civil law systems) Nicholas, *Force Majeure* at 237-38.

Re. *non-conformity* (defect) as an “impediment”, see *infra*, part 6.3.3. at note 142.

46. As pursuant to the national law, the Convention provides (in Article 79(3)) for “temporary impossibility”: “The exemption provided by this article [79] has effect for the period during which the impediment exists.”

47. See *supra*, part 3.3.

48. Accord: Honnold, *Uniform Law* at 443 (reviewing Article 79’s legislative history).

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and we resort neither to “general principles” nor to domestic law.⁴⁹ Assuming market fluctuations to be both “beyond control” and “unavoidable”, our main concern becomes “foreseeability”, and the overwhelming weight of American and Scandinavian authority suggests that changes in price should be taken into account.⁵⁰

Should a CISG Buyer buckle under pressure and give Seller the price-increase he demands (but does not “deserve” according to Article 79), we have a new problem, and we can hardly remain within the Convention to solve it. If Seller secures a contract modification by virtue of his “threat” (the “offer” Buyer can hardly refuse), his conduct may be characterized as *economic duress*.⁵¹ The Convention (like the UCC) has dispensed with the formal requirement of consideration;⁵² it has not dispensed with – nor does it purport to regulate – the requirements of contractual validity.⁵³

6.2.4. Remedies for Breach

6.2.4.1. Remedial Matrix

The CISG promisor is bound by his contractual commitment. If one party is in breach, the CISG provides the other with a remedy – by definition. Article 45 provides (in pertinent part):

- (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
 - (a) exercise the rights provided in articles 46 to 52;
 - (b) claim damages as provided in articles 74 to 77.

- (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies ...

49. See Honnold, *Uniform Law* at 442-43 (Convention bars recourse to domestic law in this field).

Similar questions arise with respect to “frustration of the venture”, *afbestillingsret*, etc. See Honnold at *id.* Regarding national law, see *supra*, part 3.4.

50. He who sells long-term at fixed prices may be able to avoid the price-“impediment” by securing his own, long-term sources of supply at fixed prices. Compare Rohde, “Adjustment ...”, 3 *Scan. Stud.* 151 (1959).

51. See *supra*, part 2.1 at note 21.

52. See *supra*, part 6.2.1 at note 20.

53. Regarding the overlap of the KBL (substantive) rules said to define the so-called “sacrifice-threshold” regarding liability for breach and the reasonableness (validity) rule of the Contracts Act (§ 36), compare *supra*, part 3.2.3 at note 120.

Article 45 sets the remedial stage. It distinguishes between (a) the (essentially) non-monetary remedies provided for in articles 46 to 52⁵⁴ and (b) monetary relief: damages for breach. Buyer's resort to non-monetary relief will not prejudice a possible claim to damages. Though our main concern is with the latter, we should briefly take in the larger view.

6.2.4.2. Specific Performance (*naturalopfyldelse*)⁵⁵

Following the lead of Scandinavian and Civilian law, the Convention accepts the logic of specific performance: if a promisor fails to keep his promise, we bind him to his word simply by making him do what he said he would; we make him deliver, deliver substitute goods, or cure defective delivery. Article 46 provides (in pertinent part):

- (1) The buyer may *require performance* by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.
- (2) If the goods do not conform with the contract, the buyer may require delivery of *substitute goods* only if the lack of conformity constitutes a fundamental breach of contract ...⁵⁶
- (3) If the goods do not conform with the contract, the buyer may require the seller to *remedy* the lack of conformity *by repair*, unless this is unreasonable having regard to all the circumstances...⁵⁷

These Convention provisions seem to extend the role of performance *in natura* far beyond that which applies in American law, but here as elsewhere, the right to require performance is subject to both express and implied limitations. First come the elastic limits expressed in the Article itself ("unless ... inconsistent"; "if ... fundamental breach"; "unless ... unreasonable"). To these we might add some open-ended statutory construction: "Compelling specific performance ... after a market change that permits a party to speculate at the other's expense, may well be inconsistent with the Conven-

54. The exception is the proportionate price reduction in Article 50.

55. See generally Ziegel, *Remedial Provisions*, § 9.03[1].

56. And (the section continues) "a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter."

57. "A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter."

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tion's provisions ... when ... construed in the light of the principle of good faith.'⁵⁸

These substantive limitations notwithstanding, Article 46 might still be indigestible for Common lawyers were it not for Article 28:

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

As already noted, the sole express effect of a Convention "impediment" is to relieve the obligor of liability in damages. But as we have seen, the distinction between this type of model and the Common law concept of total discharge is often a distinction without a difference. Since a Scandinavian court would not order the "impossible" performance of a KBL obligation, and since the "sacrifice threshold" as regards damages defines the corresponding KBL line for specific performance,⁵⁹ such a court is not bound to reach an irrational result pursuant to the Convention. In other jurisdictions, these provisions seem more problematical.⁶⁰

6.2.4.3. Avoidance: the Right to Terminate

"Avoidance" is the Convention equivalent of the right to cancel (*hæve*) in the American and Scandinavian laws of sale. If Buyer will not or cannot enforce the contract specifically, he may go to the other extreme and avoid the deal, call off (specific) performance on both sides: Buyer gets back his money, Seller gets restitution of his (non-conforming) goods.⁶¹

The Convention acknowledges the "basic inconsistency" between specific performance and avoidance.⁶²

58. Honnold, *Uniform Law* at 125. *See also id.* at 302. Re. similar reasoning in Scandinavian law, *see supra*, part 4.2 at note 55.

59. *See supra*, part 4.2, text with note 59 and KBL II § 23(1).

60. *See* Nicholas, "Impracticability" in *International Sales* (New York 1984) at 5-19 citing German authorities ("You are exempt from paying damages for your nonperformance, but you are required to pay an even larger sum by way of penalty ...")

61. *See* Article 81.

62. *See id.* and Honnold, *Uniform Law* at 300-01.

As under national law, we need to fill the remedial gap only where we find no express remedial agreement. If, for example, a Buyer's performance is "expressly conditioned" on Seller's "perfect" tender, there is no need for a remedial supplement.⁶³ If we find a gap, we look to Article 49 which provides (in pertinent part):

- (1) The buyer may declare the contract avoided:
 - (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach...⁶⁴

The criterion for avoidance translates as "material" breach.⁶⁵ The rule is simple, but difficult to apply. Time is often of the essence in the custom of the trade, and custom takes precedence over supplementary rule; then again, the letter of the supplementary rule may well influence the interpretation of an express provision. And there are competing interpretations of the Convention rule itself.⁶⁶

There are even competing conceptions of the avoidance problem. The doctrines of mistaken assumptions (*forudsætningslæren*) and mistake continue to play a role in national law,⁶⁷ and it may be argued that these conceptions, easily subsumed in the "validity"-class,⁶⁸ overlap with Convention rules on avoidance.

63. See Ziegel, *Remedial Provisions* at 9-13.

64. This subsection (1)(a) is supplemented by a German-inspired *nachfrist* rule in Article 49(1)(b), a rule which applies only in cases of non-delivery (as opposed to non-conforming delivery). Article 49(2) establishes a series of "reasonable" time limits within which the right to avoid must be exercised.

Article 25 defines "fundamental breach": A breach of contract is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

65. Compare *supra*, part 4.3.1 re. "perfect tender" pursuant to the UCC.

Regarding the relationship between cure (*afhjælpning*) and remedies based on fundamental breach, see CISG Articles 37 and 48 and Honnold, *Uniform Law* 309-14.

66. See, e.g., Ziegel, *Remedial Provisions* at 9-19 (re. the correct time for determining "foreseeability" pursuant to Article 25) and at 9-20 (suggesting a link to the foreseeability test of Article 74).

67. See *supra*, part 3.4.

68. See generally Heiz, *Validity*.

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6.2.4.4. Monetary Relief: Damages for Breach⁶⁹

Contrasted with some corresponding national rules, the Convention provisions on damages are a model of simplicity. Under Article 45(1)(b)

If the seller fails to perform any of his obligations ... the buyer may ... claim damages as provided in articles 74 to 77.⁷⁰

The failure to perform is the liability linchpin in all situations; there are no distinctions between specific and generic obligations, between late as opposed to defective performance, between the rights of seller and buyer.⁷¹

Article 45 provides the basis of seller's Convention liability, a basis tied solely to contractual breach. The exemptions provision of Article 79, most readily applied to *force majeure* contingencies, does not water down Convention liability to a subjective standard of culpable breach. There is no sharp dividing line between fault and no-fault liability,⁷² but viewed against the background of American and Scandinavian sales, we look forward to an essentially uniform interpretation:⁷³ the basis of Convention-liability is best described as no-fault.⁷⁴

As in national law, the Convention rules which determine the basis of liability do not tell the whole story of damages for breach. The basis of liability relates to the extent. The first part of Article 74 provides the starting point.

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach...

The general rule is full compensation. The starting point is compensation for all loss suffered "in consequence of" (/caused by) the breach: both direct loss in value and other indirect loss (profit, etc.) Such compensation will often tend to place the injured party in the expectation position: where he would have been (financially) had there been no breach.

69. See generally Ziegel, *Remedial Provisions* § 9.05[2].

70. See *supra*, part 6.2.4.1.

71. Article 61(1)(b) corresponds to the letter of Article 45 as regards the seller's right to damages upon buyer's breach.

72. See Gomard, *Erstatningsregler* at 214 ("ingen skarp grænse mellem culpaansvaret og det objektive ansvar") and *generally supra*, part 4.4.1.

73. Lookofsky, *Fault and No-Fault* at 138.

74. See *supra*, part 6.2.3 and (re. KBL II § 27) part 3.3.

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Regarding compensation for direct loss where buyer avoids the contract, Article 75 provides for the recovery of the contract-cover differential; where the buyer does not cover, Article 76 provides for the “abstract” measure of direct loss: the contract-market differential.

The Convention does not relentlessly pursue the expectation ideal. As in American, Scandinavian, and other national law, the international synthesis bars recovery for loss either avoidable by the promisee or unforeseeable by the promisor. As regards the first of these two key concepts, the familiar principle of *mitigation*, 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 second part of Article 74 places another important cap on expectation damages. The limit here is the familiar foreseeability principle of *Hadley v. Baxendale*.

Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Some civilians may find the new system “bold and innovative”.⁷⁵ But even those used to a no-fault rule may find the transnational solution wanting in other respects. For one thing, the Convention says nothing about the concept of reliance or reliance damages. And while full expectation protection will always embrace a reliance claim,⁷⁶ the developing idea that compensation should sometimes extend only to reliance is hard to reconcile with the Convention rules. So is the conflict between contract and tort.

The Convention deals with liability for defects, but, as we have seen, the law of sales has no patent on the problem: what the law of contract conceives as non-conform-

75. Ziegel, *Remedial Provisions* at 9-37 (“if they have become accustomed to a regime of fragmentary and complex damage rules” and damages based on “fault”).

76. *See supra*, part 4.4.3 and *compare* Ziegel at *id.* (“clear that [Article 74] ... is intended to protect the injured party’s expectancy as well as reliance and restitutionary claims”).

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ity may also be described in terms of tort. So a CISG plaintiff may also have a national cause of action based (eg.) on “negligent misrepresentation” or “product liability”.⁷⁷

Nor does the Convention reflect other significant features of modern national contract law. Conspicuously absent is a safety valve to regulate liability for (foreseeable yet) disproportionate loss or, more generally: as justice might otherwise require.⁷⁸ Though Article 74 may be “sufficiently flexible to accommodate further wisdom”,⁷⁹ the wisdom may have to be hidden in outmoded covert techniques.

Article 74 clearly provides for full compensation of foreseeable indirect loss. Conceptions like “tacit agreement” and “normal loss” are out of place in the Convention context.⁸⁰

A Scandinavian middleman selling in an international market may have a special cause for concern: under the supplementary rule of KBL II, middleman’s Scandinavian supplier is liable only for indirect loss due to fault, but under the CISG, middleman may be liable to his buyer to the full extent.

6.3. Consequential Damages in International Context

6.3.1. Introduction

It is one thing to analyze rules in the abstract, another to predict a concrete result. We stand by the decisions as our best guide to the future, but the Convention precedents are yet to be set. For the present, we can only speculate. We can, however, add some measure of realism to our predictions on the issue of consequential liability by employing again the case method mode.

The Convention rules on liability in damages do not distinguish between kinds of breach: a single set of rules applies whenever the “seller fails to per-

77. See *infra*, parts 6.3.3 and 6.3.4.

78. Compare *supra*, part 4.4.5.1 re. the *Liability Act* § 24 and *Restatement Second* § 351(3).

79. Honnold, *Uniform Law* at 411.

80. But see the *travaux préparatoires* to Finland’s new *Köplag* (Regeringens proposition at 36), asserting that a CISG seller’s Article 74-liability is limited to a “normal” loss (*normal förlust*).

form any of his obligations ...”⁸¹ To facilitate a comparative Convention analysis, however, we may group different consequential situations according to their distinctive types of operative facts.

6.3.2. Delay, non-delivery, and *force majeure*

Consequential cases where the seller fails to deliver (or delivers late) are distinguishable from those where the goods delivered do not conform. Only in the former kind of case do we expect to find claims of *force majeure*.⁸²

Sugar Resale.⁸³ Seller, a government-controlled manufacturer and exporter of Federal Brand cane sugar, and Buyer, a middleman importer, have their places of business in different CISG Contracting States. On January 1, Seller contracts to provide Buyer with 75,000 tons of “fine granulated grade”, to be delivered April 1. On January 15, Buyer contracts to resell the sugar to TP, describing it as “fine granulated grade, Federal Brand”. On March 1, Seller’s government bans all sugar export. Unable to secure alternative sources of Federal Brand, Buyer makes a reasonable settlement with TP and then sues Seller to recoup this “indirect” loss.

The contract sets forth the delivery date, and Seller is bound to his Convention promise. Rather than deliver on time, this Seller fails to deliver at all. Unless Seller can qualify for an Article 79 exemption, his non-performance will be sufficient to pull the Convention’s liability linchpin.

To promote the Convention ideal of uniform application, we should “purge our minds of presuppositions derived from domestic traditions and, with innocent eyes, read the language of Article 79 ...”⁸⁴ Still, we are struck by the similarities between the new international rule and national rules we already use. As in American and Scandinavian law, the essence of Article 79

81. See *supra*, part 6.2.4.1 re. Article 45.

82. See generally Lookofsky, *Fault and No-Fault* at 136-37 and *Commentary* at 209 (where unforeseeable export restriction prohibits particular packaging of goods as provided by contract, seller required to obtain commercially reasonable substitute).

83. Inspired by (1) *Czarnikow-Rionda Co. v. Federal Sugar Refining Co.*, 255 N.Y. 33, 173 N.E. 913 (1930) and (2) *Czarnikow Ltd. v. Rolimpex* [1978] 2 All ER 510.

84. Quoting Honnold, *Uniform Law* at 429.

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excuse is unforeseeable impossibility.⁸⁵ The difficult problem under any of these systems is one of subsumption: whether delivery as agreed has been rendered impossible,⁸⁶ and (if so) whether this government ban is the kind of impediment which should qualify as an unforeseeable contingency which relieves a seller of liability.

In *Czarnikow*,⁸⁷ where the contract provided for the delivery of “Polish white crystal sugar ... f.o.b. and stowed on one safe Polish port”, an express *force majeure* clause excused non-performance if delivery were prevented by “Government intervention ... or any cause of force majeure ... beyond seller’s control ...” Delivery as agreed was prevented by a govern export ban, and a majority in the House of Lords, finding that the state-agency seller could not be regarded as “an organ of the Polish state”, upheld an arbitral award in favor of the seller.⁸⁸

Although export prohibition (*eksportforbud*) is not on the express list of the KBL I § 24 “extraordinary” (*force majeure*) contingencies,⁸⁹ a proposal was made add this impediment in the revised Sales Acts.⁹⁰ Later, the decision was made to base the new KBL II rule on the open-ended CISG model.⁹¹

If Seller qualifies for an Article 79 exemption, there is no liability; there are no damages to “measure”. If he fails to pass the exemption test, the breach itself is the no-fault basis of expectation protection. And if there is no exemption, Seller is liable for all foreseeable loss, direct as well as indirect. The foreseeability of indirect loss depends on the circumstances of the concrete case; it does not depend on culpable breach.

85. *See supra*, part 6.2.3.

86. *See, e.g., supra*, part 3.2.2 (re. *Factory Fire*).

87. *Czarnikow Ltd. v. Rolimpex* [1978] 2 All ER 510: *see supra*, note 83.

88. Although the issue was not discussed, it seems reasonable to assume that the f.o.b.-seller in *Czarnikow* was not obligated to secure and deliver an alternative source of supply outside of Poland. *Compare* (re. the supplementary Scandinavian rule) *Nørager-Nielsen & Theilgaard, Købeloven* at 327-28 (“ikke artsumulighed [når] muligt at indkøbe varen i et [andet] land ...”). *Compare also supra*, parts 3.2.2 and 5.2 re. NRt 1922.31 H (*Norwegian Mine*).

89. *See supra*, part 3.2.1 at note 51.

90. *See Nørager-Nielsen & Theilgaard, Købeloven* at 327.

91. *See supra*, part 3.3.

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In *Czarnikow-Rionda*⁹² the New York Court of Appeals found that although defendant-seller knew there was “a possibility that Czarnikow might resell sugars sold to it”, it did not have reason know the “special circumstances”: the fact that the resale contracts specified “Federal” brand.⁹³ Although the plaintiff-buyer could have obtained the same *grade* of sugar, it could not cover with Federal brand, and because the loss tied to this latter contingency was held unforeseeable in the concrete case, plaintiff was denied compensation.

In a case like *Sugar Resale*, we follow the Convention matrix: we bifurcate our conceptions, dealing first with *force majeure*, then with *consequential* loss. The Convention does not link liability to fault, nor does it link the basis to the extent of contractual liability.

A Scandinavian court might find a loss like that in *Sugar Resale* to be foreseeable,⁹⁴ but the new KBL II general rule bars recovery for indirect loss absent a finding of culpable breach. In the *Sugar Resale* situation, only the Norwegian version of the new Scandinavian statute accords with the new international consensus.⁹⁵

6.3.3. Defective Delivery

As with delay, so with defect: to determine whether the goods conform to the contract, we look first to the obligation expressly incurred.

*Heat-Exchanger Pipes.*⁹⁶ Buyer and Seller have their places of business in different CISG Contracting States. Buyer orders pipes from Seller for Dkr. 100,000. As Seller knows, Buyer intends to use the pipes in 50 heat-exchangers to be installed in an off-shore drilling platform owned by TP. In its purchase order, Buyer specifies the pipe as “CE max.

92. *Czarnikow-Rionda Co. v. Federal Sugar Refining Co.*, 255 N.Y. 33, 173 N.E. 913 (1930): *see supra*, note 83.

93. *Id.*, 173 N.E. at 915 (emphasis added). Compare the House of Lords decision in *Heron II* (*supra*, part 4.4.4.3) where the “possibility” of a given loss was held sufficient pursuant the first branch of *Hadley v Baxendale*.

94. *See, e.g.*, UfR 1964.74 H (*supra*, part 4.4.4.3, text with note 459), decided pursuant to KBL I.

95. If the loss resulting from a third party contract is foreseeable by seller and *unavoidable* by buyer, the seller is liable under both the CISG and the Norwegian version of KBL II (§ 67). Regarding this latter test, *see supra*, part 4.4.5.2.

96. Inspired by UfR 1985.904 H.

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0.45". Seller delivers the pipe (to TP) with a certificate indicating a CE-value of .29, and the pipes are installed accordingly. After installation, the true CE-value is determined to be .49, and TP must redo the installation (off-shore) at a cost of 3 million Dkr. When Buyer is held liable to TP pursuant to national law, he sues Seller for reimbursement.⁹⁷

Seller has committed himself to a specific quality. At the very least, Buyer's express offer (order) to buy pipes "max. .45" has been impliedly accepted by Seller's delivery. Presumably, both Danish and American courts would go further, interpreting Seller's delivery as defective to the extent that the goods do not conform to Seller's own description (.29).

In addition to the Article 7 rule which governs interpretation of the Convention's own supplementary rules, Article 8 sets forth the interpretation standards which apply to statements and conduct of a party.⁹⁸ The unilateral language of subsection (1) notwithstanding, Article 8 is apparently meant to apply not only to a "battle of forms",⁹⁹ but also to the interpretation of clauses in a single document:¹⁰⁰ what we might call joint "statements made by the parties".¹⁰¹

In a recent American case,¹⁰² plaintiff-Buyer, an oil company operating drilling platforms in the North Sea, invited crane manufacturers to submit bids. Defend-

97. In UfR 1985.904 H, TP sued both Buyer and Seller in Denmark, alleging joint and several liability. Seller successfully challenged the territorial jurisdiction of the Danish Court.

98. Article 8 provides, *inter alia*:

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

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

(3) In determining the intent of a party or the understanding that a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations ...

99. See CISG Article 19 and (re. national law) *supra*, part 4.4.6 at note 678 *et seq.*

100. See Honnold, *Uniform Law* at 137 with note 2 (paragraph (2) not applicable when "both parties participate fully in preparing the instrument").

101. The provision, originally designed (solely) for the rules which govern Convention contract formation (Part II) came to reside in the Convention's "general" rules (Part I, Chapter 2). See Honnold, *id.* at 136, note 1.

102. Phillips Petroleum Co. v. Bucyrus-Erie Co., 131 Wis.2d 21, 388 N.W.2d 584, 1 UCC Rep. 2d 667, reconsideration denied by 132 Wis.2d 393, 394 N.W.2d 313 (1986).

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ant-seller's offer provided that seller's "liability in any event shall not exceed the replacement value", whereas buyer's standard purchase order form contained a clause objecting to any additional or different terms of the seller. The drawings later submitted by seller (and approved by buyer) stated: "All Material: ASTM A 516 Grade 70". The Supreme Court of Wisconsin affirmed a decision awarding buyer \$1,600,000 in damages for seller's breach of this express warranty, in that the contractual remedy was held to "provid[e] damages that are, under the circumstances, *unconscionably low*."¹⁰³

At the very least, the *Heat-Exchanger Buyer* is entitled to expect compliance with the stated CE maximum. Absent contrary commercial custom, "max. .45" does not mean "about .45".¹⁰⁴ Moreover, because Seller is a merchant who knows what Buyer needs and why, Buyer is entitled to *rely* on Seller's implied promise of fitness for purpose.¹⁰⁵

As it turns out, the pipes delivered do not conform. Article 35 tells us Seller is in breach, and Articles 45 and 74 tell us he is liable in damages for foreseeable loss. Seller may be at fault, but we impose liability for a different reason: because the supplementary Convention rule is (1) no-fault liability for contractual breach and (2) liability for all foreseeable loss.

In a case like *Heat-Exchanger*, some might deny Seller an Article 79-exemption, *a fortiori*, because there is no "impediment" to performance. If (*arguendo*) the defect is an impediment, it is the kind sellers ought to take into account.¹⁰⁶ And anyway, as some Scandinavians might put the problem, it lies within seller's "sphere of control".¹⁰⁷

As regards Article 74, the kind of loss suffered is surely foreseeable. The same is probably true as regards the magnitude thereof.¹⁰⁸

Express commitment is often the key to total obligation, but as at the national level, there are varying degrees of CISG commitment:

103. 388 N.W.2d 584 at 592 (emphasis added). *See also* UCC § 2-719 and *supra* part 4.4.6 with note 646. The trial court reached the same result by holding that the seller had lost the "battle of forms": re. this conception, *see supra* part 4.4.6 at note 678, and *infra*, this part (re. *Diesel Parts*).

104. *See generally supra*, part 2.4 (re. *Half-Inch Staves*) and Article 9.

105. Re. Article 35(2)(b), *see supra*, part 6.2.2.

106. *See* Honnold, *Uniform Law* 430-32.

107. *See supra*, part 3.3 and *Ot prp nr 80* at 73 ("kan sies å ligge innenfor det som i prinsipp er kontrollerbart for selgeren ... alltid ansvarlig dersom årsakene til hindringen bunner i den måten virksomheten drives på ...").

108. Regarding the problem of disproportionate compensation, *see infra*, this part (re. *Diesel Parts*).

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Barge Capacity.¹⁰⁹ English Buyer wants to purchase German Seller's Barge for the purpose of dumping large quantities of clay into the sea. When Buyer inquires about the carrying capacity of the vessel, Seller quotes from Lloyd's register, the industry "Bible": "1,600 tons". Buyer later examines the barge, but, relying on Seller's statement, makes no independent investigation regarding capacity. The parties then enter a contract which provides:

- a) a CISG choice of law clause
- b) no information regarding capacity
- c) a declaration that "Buyer has examined the Barge and found it fit in every respect"

When Buyer puts the barge to use, he discovers that the actual capacity is only 1,000 tons.¹¹⁰ Operations are delayed, Buyer's earnings are reduced, and he sues Seller for this consequential loss.

The Convention has been placed, by valid express reference, within the four corners of this contract,¹¹¹ but the capacity statement has not. The Convention remedies for breach operate with respect to this Seller's failure "to perform any of his obligations under the contract or this Convention ...".¹¹² So the first question becomes: is the Seller obligated, under the contract, to deliver a vessel with the stated carrying capacity? Are we dealing with a contractual description,¹¹³ a mere misrepresentation, or perhaps just a statement made off the record.

For present purposes we ignore (as did the English Court of Appeal in *Howard Marine*)¹¹⁴ another possible line of argument: that Seller failed to perform an ob-

109. Inspired by *Howard Marine & Dredging Co. Ltd. v. A. Ogden & Sons (Excavations) Ltd.* [1978] Q.B. 574, 2 All ER 1134.

110. See *Howard Marine* [1978] 2 All ER at 1145 ("one of Lloyd's Register's rare mistakes").

111. See re. Articles 2(e) and 6: Honnold, *Uniform Law* at 110 (in such a specialized transaction, "little reason to deny [the parties] freedom to choose").

112. Article 45.

113. Pursuant to Article 35(1): "description required by the contract".

114. *Supra* note 109.

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ligation *implied* under the contract, that the vessel delivered was not *fit for the purpose*.¹¹⁵

Because Seller's express capacity-statement pre-dates the written agreement, some Common lawyers might be tempted to think in terms of parol evidence: if the written contract constitutes a "total integration" of the agreement, then by definition, the parol statement is not part of it. But here, as in other contexts, the parol evidence rule does not solve the problem posed; it merely restates it.¹¹⁶

Article 8 of the Convention¹¹⁷ appears to be "consistent with a growing body of opinion that the 'parol evidence rule' has been an embarrassment ...",¹¹⁸ but the Convention rule does not itself solve the problem of whether Seller's statement binds as a Convention obligation.

Article 8 does tell us (a) that in interpreting the written agreement ("integration"), we may look, *inter alia*, to the prior negotiations, etc., hereunder the capacity statement, and (b) that in interpreting both the oral statement and the written "integration", we look both to Seller's intent and Buyer's reasonable understanding.

As in a national context, reasonable minds may differ as to the effect of Seller's capacity statement. We frame the Convention issue in terms of obligation "under the contract" because the Convention, like the KBL and UCC, requires an either/or solution to the question of whether the goods "conform". But although this problem may seem conceptually distinct from that of substitutionary relief, we ask promise-or-not because the barge Buyer seeks remedial relief. Promise is the Convention "linchpin":¹¹⁹ if the judge or arbitrator decides to pull it in Article 35, the dominoes fall toward the full expectation protection which Article 74 so clearly provides.

115. Regarding CISG Article 35 (2)(b), *see supra*, part 6.2.2.

Howard Marine (id.) involved a lease, not a sale. Although a sales warranty of fitness might be applied by analogy in a case like this, the Court of Appeal rejected the lessee's contractual ("collateral warranty") theory of liability altogether. The Court did, however, pay careful attention to (tort) liability for misrepresentation, where fitness for purpose and reliance are also key ingredients; *see* 2 All ER at 1143 (Lord Denning MR: "barges were not fit for the use for which they intended them") and 1148 (Shaw L.J.: "to be employed for a specific purpose known to the owners").

116. *See generally supra*, part 2.3.

117. *Supra*, note 98.

118. Honnold, *Uniform Law* at 143.

119. *Compare* Farber & Matheson, *Beyond Promissory Estoppel* at 914.

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“Courts tend to place the responsibility on the person whom they think reasonably *ought to bear* the responsibility, rather than on the person who has agreed to bear it, for the simple reason that it is not usually apparent whether anybody has agreed to bear it.”¹²⁰ Rather than engage in a purely academic exercise of conceptual reasoning, we apply the lessons of our national experience to these international operative facts. We see as key factors the nature and degree of Seller’s commitment and the nature and degree of Buyer’s reliance. The two go hand in hand. We subsume Seller’s statement as a(n un-disclaimed) contractual commitment if we feel that the statement justifies Buyer’s action in reliance.¹²¹ If we decide that this Buyer is deserving of full expectation protection, we simply subsume Seller’s statement as an Article 35 contractual description.¹²² If not, we refrain.¹²³

There is a fine line between the effect of the express disclaimer clause (“examined the Barge and found it fit”) and the supplementary rules of *caveat emptor*, hereunder the effect (if any) of Buyer’s failure to inspect (/determine the actual capacity). As under national law, these various sub-issues are all aspects of the same (Article 35) question: what is the “quality and description [of the barge] required by the contract”? Whether Buyer should have made an independent capacity-inspection is the flip side of whether he was justified in relying solely on Seller’s statement.¹²⁴

The Convention question is framed yes or no, but the remedial alternative to full expectation protection is not necessarily *caveat emptor*. National systems have not dispensed with distinctions between breach of promise and misre-

120. Atiyah, *Introduction* at 165 (emphasis added).

121. Re. English law *see, e.g.*, Dick Bentley Productions, Ltd. v. Harold Smith (Motors), Ltd. [1965] 2 All E.R. 65 (Lord Denning: representation is warranty if “intended to be acted on and ... in fact acted on”).

122. The status of the parties, hereunder whether the representor is in a “better position to know the truth”, is part and parcel of the overall liability evaluation. *See* Atiyah *Introduction* at 164 and *Howard Marine* [1978] 1 Q.B. at 600 (Shaw, L.J.: capacity question “answered by the person who was in the best position to ascertain ... could be acted upon without further inquiry”).

123. In *Howard Marine*, the Court of Appeal refused to classify Seller’s capacity statement] as a contractual warranty (promise).

Bridge L.J. seemed on the verge of dissent: at 600 (“at one time inclined to the view [the capacity statement] as part of the *description* of the subject matter ... giving rise to a warranty ...”).

124. *See supra*, part 6.2.2 at notes 34-35.

Another problem is disclaimer of liability in tort: *see infra*, this part.

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presentation,¹²⁵ and just as the Convention is “not concerned with ... validity”, it is not concerned with matters of delict. As regards misrepresentation and related torts, national solutions may still apply, serving to supplement – and complicate – international Convention law. If we find no contractual commitment, a given set of applicable national rules might still provide Buyer with (consequential) damages in tort for negligent misrepresentation, and this delictual decision – like the contractual one – is also likely to involve degrees of commitment, reliance and fault.

In *Howard Marine* the Court of Appeal, by a 2-1 majority, found that the lessor failed to carry his burden of proof on the negligence issue pursuant to the Misrepresentation Act 1967,¹²⁶ but the decision says little about the extent of damages recoverable.¹²⁷

In a case like *Barge Capacity*, an award of consequential damages for negligent misrepresentation cannot be discounted,¹²⁸ although the limited degree of supplier’s fault might arguably serve as a mitigating factor.

The “as is” disclaimer is last on the list. The *Barge* agreement purports to limit the supplementary remedies otherwise available pursuant to the Convention. It might also be read as limiting delictual liability. If we prefer to see the problem as one of incorporation or interpretation, we work within the Convention regime; if we would rather deal overtly with the validity of the clause, we apply the mandatory national rules which judge contractual freedom by a reasonableness test.¹²⁹

In *Howard Marine*, the English Court of Appeal upheld the finding of the trial judge on this issue, in that Lord Bridge applied an overt test: “If the wording of the clause is apt to exempt from responsibility for negligent misrepresentation as

125. Compare Honnold, *Uniform Law* at 251 with notes 6 and 7 (“technical distinctions ... softened by more recent case law”, citing *Howard Marine*).

126. For the text of this English provision, see *supra*, part 4.3.3, note 336.

127. See [1978] 2 All ER at 1143-44 (Lord Denning MR dissenting).

128. Regarding the measure of damages for misrepresentation in American law, see *supra*, part 4.4.3, text with note 335 and (re. Scandinavian doctrine) compare Nørgaard, *Ugyldighed* at 281.

129. Accord: Enderlein, *Rights* at 137 (equating validity and mandatory, national rules). Compare Honnold, *Uniform Law* 96-98 (i.a. re. fraud, incapacity, etc.) and 112 (discussing “mandatory” rules within the context of Article 6) and 256-62 (re. warranty disclaimers). Re. failure of essential purpose, see *supra*, part 4.4.6 and (re. same pursuant to ECE 188) and *Phillips Petroleum* (*supra* this part, text with notes 102-03); compare Hellner, *Vienna Convention* at 350-51.

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to carrying capacity, I hold that such exemption is *not fair and reasonable*” pursuant to section 3 of the Misrepresentation Act 1967.¹³⁰

The U.K. Unfair Contract Terms Act would not apply in an international case like *Barge Capacity*,¹³¹ but as illustrated by the opinion in *Howard*, the same result can be reached by covert means of *interpretation*.¹³²

A valid choice of national law may serve to tie some of the “loose ends” left by a choice of the Convention’s rules regarding substantive rights and obligations.¹³³

Sometimes the parties make no express agreement as to the quality of goods, so we must use the Convention to fill in the gap.

Diesel Parts (Revisited).¹³⁴ Buyer B and Seller S have their places of business in different CISG Contracting States. With a view to overhauling 3 diesel engines aboard the M/V Frisky, B (the vessel’s American owner) contracts with S (the engines’ Scandinavian manufacturer) for replacement engine parts. Seller’s acknowledgement form provides: “Seller shall not be liable for consequential damages”. After a multi-million dollar overhaul, the ship sets sail, but because of latent defects in a few small replacement parts (some manufactured by S, some by third parties), the ship is confined to port for 2 months (the time it takes to locate and correct the problem). B sues S for profits (charter fees) lost during the resulting delay.

The Convention regulates the rights and obligations of parties in *Diesel Parts*.

In *Maru*¹³⁵ defendant supplier first provided buyer with (defective) spare diesel parts, then with *services*: locating the problem which arose after installation. If the *Maru* parties had resided in Contracting States, and if it were determined that one contract covered both aspects of seller’s obligation, we would ask whether the

130. [1978] Q.B. at 599 (emphasis added).

131. See Honnold, *Uniform Law* at 262 and *supra* part 4.4.6 at note 656..

132. Compare Bridge in *Howard Marine* at 599 (“clause of this kind is to be narrowly construed”) and *supra*, part 4.4.6.

133. Compare (in the context of the American federal system) *Delhomme Industries, Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049 (5th Cir. 1982), *affirmed* 735 F.2d 177 (5th Cir. 1984) (courts in Louisiana, a Civil law system, would honor contractual choice of Kansas law with an express provision limiting buyer’s remedy for defective aircraft to repair or replacement; waiver of redhibitory rights not contrary to La. public policy).

134. See *supra*, part 1.4 re. *Maru Shipping Co., Inc. v. Burmeister & Wain American Corporation*, 528 F.Supp. 210 (S.D.N.Y. 1981).

135. *Id.*

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preponderant part of the compound obligation involved the supply of goods;¹³⁶ if so, the Convention would apply: arguably to the entire transaction.¹³⁷ If the preponderant part of the agreement consisted of services, then the Convention would not apply: unless a separate contract covered each element,¹³⁸ for then the Convention would cover the sales element (however negligible). When the Convention is applicable, but only in part, we need to “mix” the new supranational rules for the sale of goods with the old national rules regarding the supply of services.¹³⁹ If the service element is “governed but not expressly settled” by the Convention, we must locate the “general principles” on which this supranational statute is “based”.¹⁴⁰

The *Diesel Parts Buyer* has bargained for replacement parts, but has neither asked for nor received any express commitment as to their quality. The Convention supplies the international “boilerplate”: if Seller receives a reasonable price, Buyer is entitled to receive reasonable parts, goods fit for ordinary (replacement) purposes; when Seller fails to perform his implied Article 35 obligation, the supplementary remedy in Article 45 is damages for breach.

The Convention rule is liability for all foreseeable loss. As Holmes might have put it, Supplier’s fault (or the absence of same) “doesn’t make a particle of difference”. In American and Scandinavian courts at least, Article 79 is not likely to provide an “exemption” when a hidden defect is attributable to a third party manufacturer. Even if we strain the natural meaning of words and characterize the defect (or its creation by a third party) as an “impediment” (“beyond [seller’s] control”), such a contingency is readily foreseen. And if there is no excuse pursuant to Article 79, then there is no excuse. The Convention contains no exemption for latent defects, no analog to the “sealed container” and “state-of-the-art” exemptions of product liability.

136. See *supra*, part 6.2.1 re. Article 3(2).

137. See Honnold, *Uniform Law* at 93. Absent a “significant relationship” between the two aspects of a single contract, Honnold would *treat* the arrangement as two contracts (and apply the Convention only to the sales aspect).

138. As in *Maru*.

139. In Honnold’s view (*Uniform Law* at 93), a unified approach to these problems is “essential”, at least as regards the avoidance issue.

140. Article 7(2) deals with “matters governed by this Convention which are not expressly settled in it ...” (the gap-filler’s own gaps). According to Article 7, such matters are “to be settled in conformity with the general principles on which [the Convention] is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.” See generally Volken, *Vienna Convention*.

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We are not dealing with a “failure ... due to the failure by a third person whom [Seller] has engaged to perform the ... contract ...” pursuant to Article 79(2).¹⁴¹

Although there is some legislative history indicating that Article 79 was not designed to cover non-conformity, we can hardly deny the possibility that some Civilians may choose to read Article 79 in accordance with national notions of liability for defects based on fault. Scandinavians would not reject the theoretical applicability of Article 79 to a case involving defects merely because the Convention label for a supervening contingency is “impediment” (*/hindring*).¹⁴² But although we can conceive of *force majeure* contingencies giving rise to defects,¹⁴³ a no-fault approach to defective delivery finds clear support in the Convention text: sellers supplying goods in an international context can “reasonably be expected to take [possible defects] into account”; the non-conformity in cases like this is *foreseeable*; there should be no Article 79 exemption.¹⁴⁴ To avoid this reasonable supplementary result, sellers retain the option of limiting their liability by express agreement.

The “battle-of-forms” rule in CISG Part II¹⁴⁵ would not be applied as between a Scandinavian seller and an American buyer in a case like *Diesel Parts* because (1) the Scandinavian countries have elected to make an Article 92 reservation,¹⁴⁶ and (2) the United States has made an Article 95 reservation.¹⁴⁷ In *Maru*,¹⁴⁸ the District Court rejected defendant-supplier’s contention that a disclaimer of consequential damages on the back of its acknowledgment form became a valid term of the contract pursuant to UCC § 2-207.¹⁴⁹ Even if the purported disclaimer were deemed incorporated, the UCC implied warranty of merchantability could only be modified by a limitation of liability which meets the “conspicuous” requirement of § 2-316.¹⁵⁰ *Query*: assuming the merchantability issue (the non-conformity of

141. See Honnold, *Uniform Law* at 441 and Lookofsky, *Fault and No-Fault* at 135. Compare (re. KBL II) Sevón et. al., *Huvudpunkter* 82-84.

142. This is the KBL term, and the statute expressly provides for a *force majeure* safety valve also as regards defects: *see supra*, part 4.4.1.2.

143. *Id.*

144. *Accord* (re. KBL II) Sevón et. al., *Huvudpunkter* 124-25 (emphasizing seller’s “sphere of control”).

145. Article 19.

146. *See supra*, part 6.2.1.

147. *See supra*, part 1.4, note 82.

148. *Supra*, note 134.

149. *See* 528 F.Supp. at 216: “Since Maru is not a dealer in ship parts of the kind at issue in this case, UCC § 2-207 indicates that the terms of the acknowledgment should be taken as proposals of additional terms to the pre-existing oral contract. B&W’s contention that, despite the fact that Maru had accepted the parts before receiving the acknowledgment form, Maru’s subsequent use of the parts constituted an acceptance of the disclaimer, is unsupported by the law.”

Regarding UCC § 2-207, *see supra*, part 4.4.6, at note 678 *et seq.*

150. *See supra*, part 4.4.6.

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the diesel parts) is regulated by the Convention, does “conspicuousness” constitute a problem of “validity”?¹⁵¹

In *Maru*, defendant also maintained “that a *disclaimer* of consequential damages should be *implied* as part of its contract with Maru as a trade usage in the shipping industry.” But since “B & W presented insufficient evidence at trial of the practice, method, or regularity of observance of such provisions ...”, the Court found no such implied limitation.¹⁵²

The plaintiff in *Maru* supplemented its contractual allegations with claims that the defendant (a) “should be found liable on the theory that its service engineers were negligent in failing to isolate and correct the cause of the overheating ...” and (b) “should be liable under a theory of strict liability in tort...”¹⁵³ The Court rejected the negligence claim, finding that defendants “acted in accordance with the standard of performance of a reasonable engineer under the same circumstances.”¹⁵⁴ The Court also joined “with the majority of states in adopting the *Seely* approach of denying strict [tort] liability recovery for purely economic losses.”¹⁵⁵

Article 45 provides a strict basis of liability; article 74 provides for full expectation protection for unavoidable loss, hereunder the kind of profits lost in *Diesel Parts*. The Convention adopts the *Hadley* rule, even though *Hadley* is not always seen as an adequate limit. Does Article 74 displace the *Hadley*-adjuncts of national law: can a court limit damages if in the circumstances justice so requires?¹⁵⁶ Is the specter of disproportionate (and thus unreasonable) compensation a problem of validity?¹⁵⁷ If not, is this issue “governed by this Convention [but] not expressly settled” or just new grist for the old mill of covert techniques.¹⁵⁸ Commentators, judges, and arbitrators have just begun to breathe life into the new transnational regime. Hopefully, “Article 74 is sufficiently flexible to accommodate further wisdom ...”¹⁵⁹

151. Not in Professor Honnold’s opinion: see *Uniform law* at 257-58.

152. See *Maru* at 216 (emphasis added) and compare the CISG requirements in Article 9.

153. 528 F.Supp. at 214.

154. *Id.*

155. *Id.* at 215. Compare *supra*, part 4.4.1.3.

156. Regarding § 351 (3) of the *Restatement Second* and Scandinavian analogues, see *supra*, part 4.4.5.1.

157. See *supra*, part 6.2.1 re. CISG Article 4.

158. Compare Volken, *Vienna Convention* at 43: “Depending on one’s legal education, these general statements [in Article 7(2)] can imply rather different things ...”.

Problems of proof and certainty of loss are procedural matters which remain within the province of national law, and procedural conceptions may still serve as covert limitations on CISG consequential awards.

159. Honnold, *Uniform Law* at 411.

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In *Maru*, the U.S. District Court held defendant (B & W) liable for plaintiff's consequential loss pursuant to the *Hadley* test: "lost profits stemming from delays resulting from the breach (which were shown by [plaintiff] Maru to be reasonably computed at \$4500 per day), may confidently be considered to have been within the reasonable contemplation of the parties ...". Several of plaintiff's damage claims were rejected, however, *inter alia*, because plaintiff "contributed to the time it took to determine the cause of the bearing problem and to correct it."¹⁶⁰

Unlike other Scandinavian versions of KBL II, the new Norwegian Kjøpslov combines national and international sales law in a single, "consolidated" piece of legislation. § 70(2), which relieves a party of liability for "disproportionate loss", is, by the express terms of § 70(3) *not* to be applied in international (CISG) sales.

6.3.4. International Contracts and Product Liability

Not every instance of defective delivery is solely subsumed as a contractual question. In international as in national law: contract competes with tort in the field of product liability.

Kettle Coating.¹⁶¹ Foreign chemical company (S) supplies Danish chewing gum manufacturer (B) with a silicone compound recommended by S to sound-proof B's chewing gum coating kettles. The compound fails to do the job, and it ruins the kettles which must be replaced. B sues S, seeking compensation for its loss.

We assume that the CISG applies to this dispute and note that the Convention stakes out a claim in the borderland between contractual and delictual liability. According to Article 5:

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

The inescapable *e contrario* conclusion is that the Convention covers property damage caused by defective goods, hereunder a case like *Kettle Coating*. We look first to Article 35 to fill the contractual quality-gap. Silicone compounds are often used for a variety of sealing purposes, and the goods supplied may well be "merchantable" in this broader sense. But since this silicone Seller knows Buyer's intended purpose, and since Buyer's re-

160. 528 F.Supp. 210, 216-17 (1981).

161. Inspired by UfR 1986.922 H.K.K.

liance on Seller's skill seems reasonable, the Convention imposes a promise of fitness for this particular purpose; and when Seller delivers unfit goods, he fails to perform the law's implied obligation. While we may safely conclude that the Convention's rules on liability for product damage displace the corresponding provisions of the UCC, we may be less sure about the continued relevance of delictual rules under national law.¹⁶²

A related problem is that the *jurisdiction* of national courts in cases like these may well hinge on whether the case is conceived as contract or delict. In the Scandinavian case which inspired the *Kettle* paradigm, the silicone compound (which caused a more borderline type of "product damage" than that in *Kettle*)¹⁶³ was supplied to B by S's local agent A. B sued both A and S in Denmark, and S unsuccessfully challenged the Court's jurisdiction.¹⁶⁴

"The paradigmatic products-liability action is one where a product ... causes *bodily injury*."¹⁶⁵ In a case like *Kettle Coating*, where the product is only "dangerous" in a commercial sense, there may be reason to let the CISG contract among nations fill in all gaps in the contract between the parties to the sale. In the eyes of the international merchant, damage to a kettle is just like profits out of pocket.¹⁶⁶

In other cases, however, the subsumption seems less clear:

162. See Ziegel, *Remedial Provisions* at 9-7 (debatable whether actions in tort for negligent manufacture or supply of defective goods lie outside the scope of the Convention). But see Honnold, *Uniform Law* sec. 73.

163. In UfR 1986.922 H.K.K., the silicone compound mixed with the chewing gum, which had to be discarded. The kettles, though not ruined, had to be cleaned at additional expense.

164. See UfR 1986.922 H.K.K. and *supra*, part 6.3.3 re. UfR 1985.904 H (*Heat-Exchanger Pipes*).

Compare UfR 1983.1038 H (local contractor L agreed to build a swimming center for municipality M. L engaged F, a foreign subcontractor, to supply certain valves designed to prevent flooding in the event of power failure. The power failed, but so did the valves, causing extensive damage to the floors below pool-level. M's insurer settled with L and sued F for reimbursement. *Held*: no delictual basis of jurisdiction, cf. Rpl. § 244).

165. *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 866 (1986) (emphasis added).

166. If the merchant-buyer's cause of action does not rest on fault, there would be no commercial reason for circumventing the Convention's two-year notice rule for this particular kind of consequential loss.

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*Unguided Missile.*¹⁶⁷ Scandinavian governmental authority B buys a launching system for its ship-to-ship missiles from American manufacturer S. During B's test of the system, a missile is launched inadvertently, flies ship-to-land, and destroys certain property owned by citizens of the Scandinavian state. B seeks to hold S liable (1) for the value of the destroyed missile and (2) for sums paid by B to its citizens as compensation for the destroyed property. The agreement of sale provides (i.a.):

1. LIMITATION OF LIABILITY – Neither party shall be liable for special, indirect, incidental or consequential damages ... the liability of S with respect to any contract or sale or anything done in connection therewith, whether in contract, in tort ... or otherwise, shall not ... exceed the price of the product or part on which such liability is based.¹⁶⁸
2. Any dispute or difference arising between the parties, relating to the terms of the present contract ... shall be finally settled by an arbitral tribunal ... This contract shall be interpreted in accordance with and shall be governed by the laws of the State of New York,¹⁶⁹ hereunder the Convention on Contracts for the International Sale of Goods.

Freedom of contract means freedom to choose, and the parties to this dispute have chosen the law which applies, hereunder the rules of the CISG.

The choice of New York law might be read as relating only to contractual matters. In such event, if a tort-issue is involved, we would still have to resort to supplementary choice of law rules. In *McDonnell*, the Danish buyer alleged breach of contract,¹⁷⁰ but the American missile manufacturer described defendant's demand for arbitration as "a vehicle by which to litigate a tort claim for indemnity and contribution for third-party property damage ..."¹⁷¹ In *Salt River*,¹⁷² which also involved

167. Inspired by *McDonnell Douglas Corp. v. Kingdom of Denmark*, 607 F.Supp. 1016 (E.D.Mo. 1985) and *Salt River Project Agricultural Improvement and Power District v. Westinghouse Electric Corporation*, 143 Ariz. 368, 694 P.2d 198 (1985) (alleged malfunction of turbine controller unit supplied by seller, turbine's rotating blades destroyed, with damages amounting to 2 million dollars).

168. *Salt River, id.*, 694 P.2d 198, 203 (S's standard terms printed on the back of S's acceptance of B's order; emphasis in original).

169. *McDonnell, supra* note 167, 607 F.Supp. 1016.

170. *See id.*, 607 F.Supp. at 1018 ("breach of contract, breach of express warranty, breach of implied warranties of merchantability and of fitness for intended use ...")

171. *Id.*

172. *Supra*, text with note 167.

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property damage,¹⁷³ the UCC was not the exclusive remedy: a tort remedy was held also available.¹⁷⁴

The disclaimer purports to cover both contract and tort, but freedom of contract is a question of degree, and problems of validity are for national law. And there is no simple solution to this consequential question.

In *Salt River*, the Arizona Supreme Court held that the “party asserting the effectiveness of the disclaimer ... [must show] that the provision was a part of the bargaining and negotiating process ... an intentional relinquishment of a known right.”¹⁷⁵

Fortunately, the *Missile* contract fills more than just substantive gaps. By choosing a neutral, arbitral forum as the means of resolving this dispute, the parties have laid the groundwork for a comparative compromise which takes into account the justifiable expectations of both the American seller and the Scandinavian buyer.¹⁷⁶ An international treaty needs a *supranational* interpretation. An international arbitral tribunal is well-equipped to handle the delicate balance of the CISG compromise and the complex interface of national and Convention law.¹⁷⁷ National courts are also *bound* to rise to the international occasion. They are bound to enforce the agreement to arbitrate and to enforce the decision of the arbitral tribunal.¹⁷⁸

“[R]espect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolu-

173. Damage to the rotating blades of a gas turbine unit.

174. See 40 UCC Rep at 434.

175. *Id.* at 440.

176. Absent a contractual choice of law and forum, the case could sail in a complex contest of national rules: see *supra*, part 1.4 (re. *Diesel Parts*).

177. Compare Rosett, *Critical Reflections* at 281: “Undoubtedly, the [Convention] drafters hoped that the parties would have recourse to commercial arbitration, in which [procedural questions] tend to be blended in the arbitrator’s discretion and terms of reference.”

178. Regarding the New York (U.N.) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, see Lookofsky in *UfR B* 1985 s. 404 ff re. *McDonnell Douglas* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

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tion of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."¹⁷⁹

Hands off the award is the general rule,¹⁸⁰ but determining the scope of the arbitration agreement and the degree of permissible judicial interference in a consequential award involves a complex blend of substance and procedure, and the national conceptions need not always accord.¹⁸¹

We all need to move past a provincial view. "In the interpretation of this [CISG] Convention, regard is to be had to its international character and the need to promote uniformity in its application ..."¹⁸² Comparative study is the means to the end: "the uniform law of sales will not be and ... will not remain uniform unless we can count on a young generation of lawyers with an adequate international legal education."¹⁸³

179. *Mitsubishi, id.* at 629.

180. *See, e.g., Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F.Supp. 948 (1981) (under New York Convention no "second guessing" of arbitrators's decision to award consequential damages in apparent contravention of express contract clause).

181. *See, e.g., UFR 1971.722* ("product liability" question in a purely domestic case held outside scope of arbitration clause; consequential damages award set aside) and *Farkar Company v. R.A. Hanson Disc, Ltd.*, 583 F.2d 68 (1978) and 604 F.2d 1 (1979) (consequential damages excluded from the scope of the arbitration after arbitrators awarded over \$2 mill. in consequential damages notwithstanding express contractual limitation).

182. Article 7(1).

183. Volken, *Vienna Convention at 46*.

PART 7

Conclusion

I sought for certainty ... I found that the quest for it was futile ... principles that have served their day expire, and new principles are born.¹

Hadley remains a fixed star in the juridical firmament: symbolizing, but not quite solving, the problem of liability for the indirect consequences of contractual breach.

No single paradigm can solve the consequential problem ... the problem does not reside in a single pigeonhole. For clarity and convenience, we isolate such conceptions as the extent of liability, foreseeable loss, and *adækvans*, but systematic doctrinal presentation may tend to belie the integrated nature of a given legal system.

In both Scandinavian and American law, the story of consequential damages is often told at the end of the contractual chronology; in fact, the problem is tied inseparably to questions usually considered at the beginning: the binding nature of (bargain) promise, the scope and content of contractual commitment, etc.

We are more concerned with where we are headed than with where we have been, and if we compare national laws at the leading edge, we see, *inter alia*, that modern Scandinavian and American courts do more than just referee the process of agreement. The merger of procedural and substantive conceptions, like the regression from contract back to status, provides a more open-ended (and realistic) model of the agreement process, contractual freedom, and remedial justice: just as an unreasonable or unconscionable promise does not bind at all, not every promise (or disclaimer) need bind to the same extent. Just as binding promise is a question of degree, substitutionary relief is a function of contractual commitment: the more binding the promise, the more damages awarded; the less binding the disclaimer, the greater the gap the law needs to fill.

1. Cardozo, *Judicial Process* 166-67.

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Formal conceptions like parol evidence and implied warranty ought not be permitted to distort the reality of this contractual continuum. Even a misrepresentation, technically speaking a non-promise, sometimes gives rise to liability in damages. We all still start with the parties' expression of their private agreement, but there is much more to the total obligation. The substantive law of modern contract is best explained as a mixture of private and public factors. Comparatively speaking, American doctrine seems more concerned with the parties' intent, whereas Scandinavians place more weight on the supplementary rule, but even in American law, we find a considerable degree of public restriction on the parties' freedom to define the consequences of promise and breach. The greater the private deviation from the norm, the greater the pressure for public control. In both legal systems, the tests of incorporation and interpretation are supplemented by an increasing measure of overt censorship: all serve to assure at least a rough degree of justice, a minimum measure of transactional balance and a minimum of adequate remedial relief. In reality, there is no sharp line between promise (or condition) express and implied, between obligation *de résultat* and *de moyen*, between the public and private sides of total obligation. The merchants remain free to form their own agreement; these days, though, the agreement must be fair.

Comparative analysis can help de-dramatize superstructural distinctions and direct our attention to the more essential common core. American law conceives of *force majeure* and related contingencies as effecting a total discharge of promissory obligation, whereas the Scandinavian preference is to subsume this subject under liability headings. Shared conceptions like unforeseeable impossibility and failure of basic assumption denote similar modes of risk allocation and indicate that neither system can ignore the role of fault. Though we discharge a binding promise in the face of *force majeure*, the reasonableness of promissory reliance and compensation for consequential loss ought not be generally conditioned on culpable breach; we should, however, consider culpability as a relevant ingredient in the consequential equation: a factor which often bears on the appropriate degree of consequential relief. The emerging doctrines of partial discharge and equitable adjustment by reason of impracticability lend support to the conception of a comparative continuum of contractual liability.

Our points of departure lie at opposite ends: Scandinavians start with specific relief, whereas Americans use damages as their primary means; Scandinavian liability is grounded in fault, while Americans adhere to the no-fault idea. Upon closer comparative examination, each system's rule is revealed as the other's important exception, although the differing points of departure

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do accord with the seemingly greater willingness of American law to protect a promisor's full expectation interest. In both systems the reliance (/negative contract) interest provides an alternative, subsidiary measure of damages for breach, but the concept of foreseeable action in reliance can also be seen as a basis of expectation protection: *inter alia*, a basis of liability for consequential loss.

There is no single basis of consequential liability. We need not segregate lost income and lost property into separate doctrines of contract and tort: both burn a hole in the businesspersons's pocket. The real distinction between these types of commercial loss relates to relative degrees of certainty: a relevant (but not the only) factor as regards the appropriate measure of substitutionary relief.

There is no single degree of reliance or expectation protection: neither system compensates an avoidable, foreseeable or uncertain loss, and these limitations have central significance for the degree of compensation for consequential loss. American doctrine has paid comparatively little attention to the prevention side of the avoidability coin, perhaps because it smacks of contributory negligence and liability grounded in fault, but even the more conventional idea of post-breach mitigation illustrates that contractual liability is a two-way street. In Scandinavian law the doctrine of *adækvans* may once have been formed as a less restrictive liability limiter than that first proclaimed in the *Hadley* case, but a comparative case study indicates quite the reverse: the steady judicial expansion of the first *Hadley* branch (general foreseeability) has led to an expanded measure of liability. And though foreseeability (*påregnelighed*) provides a key to unlock the common core, a number of Scandinavian precedents seem quite in tune with what Americans have discarded as the more restrictive test of "tacit agreement".

Certainty is perhaps the most elusive of the classical limitations, sometimes used as a covert measure to plug perceived doctrinal gaps: to deny compensation where there is no clear exception to the expectation rule. In both systems, reliance interest protection serves as a surrogate for uncertain expectation, though not necessarily to the same degree. American doctrine has a broader conception of compensable reliance, but it also sees a greater need to cap reliance by an expectation ceiling (*compensatio*).

In both America and Scandinavia, newly-codified safety valves serve as supplementary limitations on consequential liability, thus adding new complexity to the traditional matrix. In America, some fear that the new discretationary justice of the *Restatement 2d* goes too far, posing a threat to commercial certainty and even to classical contract law itself. In Scan-

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dinavia, however, the reasonableness test of the Liability Act has already been judged insufficient, and the newly revised Sales Acts² limit a seller's liability for consequential loss to cases where he is guilty of culpable breach.

The new KBL II distinction between direct and indirect (consequential) loss, with liability for the latter tied to contractual fault, widens the gap between Scandinavian and American law. While there is much to be said for graduated degrees of substitutionary relief, gearing consequential damages solely to fault seems too simplistic a solution to a complex problem, an unexpected step back to a formalistic legal mode.

Though our interest lies mainly in the contract we draft today and the dispute we resolve tomorrow, it is yesterday's decision which often makes for the best prediction: both as regards the law which currently applies (*gældende ret*) and the direction the courts are likely to take. No single precedent can be our guide, but a comparative study of concrete cases helps us identify the key kinds of operative facts: the various elements which make up the relevant motivational mixture, that which leads courts to award or deny consequential compensation. These factors, many of which are reflected in the conceptual rules of classical doctrine, constitute the input of the consequential equation. The further out we move on the scale of substitutionary relief, the more factors we need to take into account.

Generalizations are difficult, not only because the exceptions sometimes overshadow the rule, but because we must account for subtle distinctions in doctrinal emphasis and judicial style. Scandinavians sometimes seem less willing to compensate for an uncertain expectation and more willing to let even a certain loss lie there where it falls. Yet, if we compare the decisions of Scandinavian and American courts we see a marked tendency to enforce clear-cut expressions of contractual commitment: when the commitment is clearly expressed or implied, it justifies action in reliance; the action is reasonable and therefore foreseeable. If the promise is breached, an award of consequential damages is likely to be the most reasonable means of contract enforcement, *i.e.*, remedial relief: the best means available to right the concrete wrong and the best way to provide judicial support for the orderly planning of commercial affairs. Given the increasingly integrated nature of society and business, our courts are hard-pressed to see broken commitment as efficient breach.

There is also a negative side to the consequential equation, the factors which work against compensation for indirect loss. A weak promissory commitment is not likely to bind to the fullest extent. A clearly communicated

2. In Finland and Norway and the proposals pending (as of August, 1988) in Sweden and Denmark.

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limitation of liability which does not deny the promisee a fair measure of remedial relief is the kind the courts are most likely to uphold. Depending on the circumstances and the particular trade, a customary allocation of the consequential risk may also prove to be part of the bargain in fact. Because the consequential decision depends on a motivational mixture, the consequential question need not always be answered by yes or no. Sometimes the parties should share the consequential risk. Like contractual commitment, substitutionary relief is a question of degree.

The existing collage of rules, standards, and judicial discretion provides as much flexibility as each national system would seem to require. To the extent that we prefer open-ended realism, risk-sharing and concrete equity to the classical model of contractual freedom, Scandinavian law maintains a comparative edge. For those who cling fast to the expectation ideal, the preference must go to American law. There are virtues (and pitfalls) in each approach, and the dominant theme in each system probably reflects each society's current scale of priorities.

At the end of the day, there is much to be said for some measure of conceptual compromise: while the well-constructed rule remains a useful guide to justice, a "comparative historical study of cases ... frees the teacher and the lawyer and the judge from the illusion of certainty ..."³ We may not yet be ready for a truly general clause, gearing the very *imposition* and *degree* of liability to the equities of the concrete case (or, if you prefer, the Chancellor's "foot"), but we prefer a realistic version of the consequential equation to a cosmetic version of commercial certainty. The commercial promisee needs to be certain that he can rely in good faith; he need not be certain about the exact degree of consequential compensation should the deal go awry. When courts allocate the risk of consequential loss, we need a realistic explanation, not a catch-all legal label. When courts take account of the degree of promissory commitment, contractual fault, justifiable reliance, and disproportionate loss, we want to *know* about the content of the motivational mix. *Vi vil vite*.⁴

The CISG frames the new international rules in terms of no-fault liability for foreseeable consequential loss. Given the complex texture of national doctrine and the obvious difficulty of reaching any broad international consensus in this complex area of the law, there is much to commend in this transnational restatement of comparative common core. To the extent that we need a simple key conception, the Convention is wise to adopt the *Hadley* rule:

3. Corbin, *Contracts* § 109 at 489.

4. Andersen, *Skadeforvoldelse* at 68.

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reasonable foreseeability and justifiable reliance go hand in hand. Given the subtle interface between national and Convention law, we can hardly expect a totally uniform application, but in the hands of the internationally minded judge or arbitrator, the CISG can serve as a starting point, a good common ground.

We end as we begin: learning from one another, in pursuit of Tunc's noble goal, the cross-fertilization of advanced legal systems. This is what we must do in our ever more complex and integrated world.

Sammenfatning på dansk

Emnet for denne afhandling er en retssammenlignende undersøgelse af de amerikanske, skandinaviske og internationale retsregler, der regulerer erstatning for kommercielle følgeskader (konsekvenstap, följdförlust): "indirekte" tab som følge af kontraktsbrud (misligholdelse).

Afhandlingen omfatter såvel reglerne om kontraktserstatningens grundlag som de klassiske kontrakts- og køberetlige grundsætninger om erstatningens omfang, herunder retsreglerne om adækvans ("foreseeability"), tabsbegrænsningspligt ("mitigation"), mv. Afhandlingen opstiller imidlertid den tese, at emnet burde ses i en større sammenhæng, omfattende bl.a. de principper, der bestemmer indholdet af den kontraktsretlige ydelse (løftet).

Undersøgelsen er opbygget omkring en række kortfattede paradigmer (case-paradigms): konkrete sagsforløb, der skal præcisere de for analysen relevante problemstillinger. Disse paradigmer, der ganske vist afspejler virkelige sager afgjort af skandinaviske og amerikanske domstole, anvendes som et retsneutralt udgangspunkt for den sammenlignende undersøgelse, hvis formål bl.a. er, at beskrive den virkelighed, der ligger bag de forskellige retssystemers ofte meget komplekse begrebsverden.

Analysen har et positivt og et normativt sigte. Den beskriver, sammenligner og vurderer de skandinaviske og amerikanske retstilstande, dels for at disse avancerede systemer kan lære om og fra hinanden, dels for at denne sammenligning af nationale retsregler kan danne et grundlag for fortolkning af den nye United Nations Convention on Contracts for the International Sale of Goods (CISG).

Undersøgelsen er opbygget i 7 dele:

I *Del 1* introduceres begrebet "consequential damages" og emnets gængse subsumtion i skandinavisk og amerikansk ret. Problemstilling belyses bl.a. med den klassiske engelske dom fra 1854, *Hadley v. Baxendale*. Dernæst skitseres dele af den større kontraktsretlige sammenhæng og nogle hovedtræk i den nyere udvikling indenfor emnet. Afhandlingens 1. del indeholder desuden en redegørelse for afhandlingens struktur og emnets afgrænsning.

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Del 2 handler om den kontraktsretlige forpligtelse og hvad det vil sige at præstere rigtig ydelse. Den klassiske kontraktsret sonder imellem kontraktens tilblivelse og løftets indhold, idet domstolene skulle kunne blande sig i det første aspekt (processen) men ikke i det sidste (ydelsens indhold). Udviklingen af generalklausulen i skandinavisk og amerikansk ret har gjort sondringen mindre holdbar, idet kun det rimelige ("conscionable") løfte kan være bindende. Den åbenlyse rimelighedscensur udøves med forsigtighed i kommerciel sammenhæng, men udviklingen synes også at have påvirket det løfte, der fortsat er gyldigt: navnlig i relation til de misligholdelsesbeføjelser, der giver løftet dets bindende kraft.

Den klassiske dommeropgave har været at finde frem til kontraktsparternes fælles vilje: at fortolke den privatretlige aftale. Også her er der sket en betydelig udvikling indenfor såvel amerikansk som skandinavisk ret, således at det, der nu skal sammenlignes er den totale kontraktsretlige forpligtelse: den udtrykkelige aftale læses bl.a. i sammenhæng med de deklaratoriske regler om karakteren af den ydelse, der skal præstere og de retsfølger, som misligholdelse kan have. Der kan ikke sondres skarpt imellem obligation *de résultat* og obligation *de moyen*. Der er ligeledes en glidende overgang fra *pdes.* de udtalelser, der fremsættes under de forudgående kontraktforhandlinger, ("parol", "misrepresentations", o.lign.) til *pdas.* de løfter og garantier, der findes i den endelige kontrakt. Forpligtelserne varierer; de binder næppe i samme grad ("degrees of commitment").

Del 3 omhandler opfyldeshindringer af "ekstraordinær" karakter: de skandinaviske og amerikanske regler om umulighed, *force majeure*, mv. De amerikanske regler drejer sig om forpligtelsens (totale) ophør; i Skandinavian handler denne doktrinære afdeling alene om retten til at kræve erstatning. Den retssammenlignende analyse afdækker imidlertid en fælles kerne ("common core"), idet de forskellige regelsæt kan sidestilles ved hjælp af konstruktionen: upåregnelig umulighed ("unforeseeable impossibility"). Også her går udviklingen væk fra skarpe sondringer, bl.a. når der er tale om økonomisk *force majeure*, offergrænsen, "equitable adjustment", mv. Denne del af afhandlingen omfatter desuden en beskrivelse af begrebet "kontrol ansvar" iht. de nye skandinaviske købelove, ligesom den sammenligner de beslægtede grundsætninger om bristede forudsætninger, "frustration of purpose", og "mistake".

Del 4 beskriver og sammenligner de misligholdelsesbeføjelser, der giver løftet dets bindende kraft. Skandinavisk ret følger den civile model, der opstiller naturalopfyldelse som den primære beføjelse; i amerikansk ret er det erstatning, der spiller denne rolle. I begge systemer er det imidlertid erstatning, der har den største praktiske betydning. Hævebeføjelsen i skandinavisk ret undersøges dels i forbindelse med den amerikanske "conditions"-doktrin, der

indeholder rester af kontraktsfrihedens højborg, og dels i forbindelse med den i begge systemer grundlæggende tanke om restitution: vederlagsgrundsætningen, mv.

I skandinavisk ret sondres der imellem kontraktserstatningens grundlag og dens omfang. I amerikansk ret finder man nærmest ingen omtale af det første element: ethvert kontraktsbrud udløser uden videre den primære beføjelse og navnlig uden krav om culpa fra løftegiverens side. Den nærmere undersøgelse viser imidlertid, at systemerne alligevel ikke er helt så langt fra hinanden: pdes. modificeres det skandinaviske udgangspunkt af den for genusforpligtelsen nærmest objektive regel; pdas. spiller culpa en bemærkelsesværdig (omend noget skjult) rolle i det amerikanske ansvar.

Når det gælder erstatningens omfang, er der tale om tre vigtige grundtanker: (1) der gives ikke kompensation for tab, som af den ikke-misligholdende part med rimelighed kunne være undgået; (2) kun det adækvate (for den misligholdende påregnelige: "foreseeable") tab erstattes; (3) der gives ikke kompensation for usikkert (/ubeviseligt) tab. Rækkevidden af disse grundtanker har stor betydning for retten til at kræve erstatning for følgeskader ("consequential loss"). Amerikansk ret taler om tabsbegrænsningspligten, men ikke om medkontrahentens egen skyld, idet tanken er svær forenelig med ansvar uden culpa. Den skandinaviske doktrin om adækvans viser sig at være en noget stærkere begrænsning end kravet i *Hadley*, idet flere skandinaviske domme minder om den strenge (og af amerikanske ret forladte) "tacit-agreement"-prøve. Retsstillingen vedr. kravet om "certainty" er svær at slå fast: når det gælder beviset for den positive interesse stiller skandinavisk ret nok de strengeste krav; men gælder det beviselige poster indenfor den negative (tillids-) interesse, går amerikansk ret længere med grundsætningen om *compensatio*: kreditor's positive interesse sætter loft over erstatningskravet.

Den nyere udviklingen viser, at begge systemer har fundet de klassiske begrænsninger utilstrækkelige. Her tales der dels om bestemmelserne i *Restatement Second* sec. 351(3) og Erstatningsansvarslovens par. 24 (mv.), dels om den retspraksis, der tjener til at forklare disse nye kodifikationer. Et andet og vigtigt led i den nyere nationale udvikling findes i de nye skandinaviske købelove, der for første gang sonderer mellem "direkte" og "indirekte" tab. Den retssammenlignende undersøgelse stiller sig kritisk overfor denne nye formalistiske konstruktion.

Del 5 sigter mod en retssammenlignende syntese, der fremhæver de konkrete momenter, som har (og burde have) størst betydning, når skandinaviske og amerikanske domstole giver (eller nægter) kompensation for "consequential" (/indirekte) tab.

Del 6 udgør et første forsøg på at arbejde med undersøgelsens retssammen-

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lignende problemstilling inden for den nye supranationale kontraktsramme: United Nations Convention on Contracts for the International Sale of Goods (CISG), som er blevet ratificeret af U.S.A. og de skandinaviske lande. Dels er der tale om en beskrivelse af konventionens misligholdelsesbeføjelser i en retssammenlignende "nøddeskal"; dels fremhæves nogle af de "consequential" problemer, som opstår i den nye internationale kontekst.

Del 7 fremhæver nogle af undersøgelsens centrale konklusioner, herunder de momenter, der er bestemmende for, hvorvidt de skandinaviske og amerikanske domstole tilkender erstatning for følgeskade i den konkrete sag, dvs. de momenter, der indgår i hvad afhandlingen benævner "the consequential equation".

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