

**Limitations of Damages for Breach of Contract in German
and Scots Law**
A Comparative Law Study in View of a Possible European Unification of Law

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A. Introduction

In every social system—and hence in every legal system—the question arises of the consequences which a party of a contract has to bear in the event of breach of that contract. The possibilities for the innocent party to obtain legal protection are generally manifold, whereas a claim for damages is a fundamental and effective option. This makes this question of law a core component of each legal system within Europe and worldwide.

This article will analyse on a comparative law level how the laws of Scotland and Germany limit the coverage of damages for breach of contract. The fundament of description and comparison is not to be seen in certain constructs of law, because these frequently only

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exist within the restriction of national boundaries. Rather, the law is to be regarded as the regulation of social situations¹. Therefore, the starting point of this article will be the *identical function* of rules in both legal systems within the resolution of an identical social conflict of interests: Those rules are to be examined that regulate which losses can be compensated by a claim for damages and which losses do not result in such compensation and thereby avoid extensive liability of the contract breaker. The preconditions of a claim for damages, i.e. the questions of an actual breach of a contractual duty, a requirement of fault² as well as the factual occurrence of a loss, shall not be considered. Rather, these preconditions will be assumed for the purposes of this article, and exclusively the limitations of the coverage of the damages will be explored.

German law is a codified continental European law whilst Scots law is strongly influenced by the English common law. Beyond that, the latter is exceptionally interesting as it also has influences of continental civil law systems – in particular the French – due to historical circumstances. It is often referred to as a “mixed legal system”³. The comparison of these two legal systems is therefore not least of interest for a possible unification of law in Europe. In order to deepen this aspect, the process of comparison shall additionally include the rules of the *Draft Common Frame of Reference (DCFR)*, which can be regarded as one of the most important outcomes of the work on the unification of law in Europe.

This article will first provide fundamental and essential knowledge by starting with an empirical presentation of the relevant rules in both legal systems (part B.) before moving on to the comparative process (part C.) and concluding remarks (part D.).

B. The Rules in Both Legal Systems

The following section provides a report on the relevant rules in Scots law and German law.

I. Scots Law

Scots law recognizes three major limitations of the coverage of damages for breach of contract: causation, remoteness of damage and mitigation of loss.

1. Causation

The first principle of limitation is the requirement that there must be a direct causal link between the breach of contract and the loss that has occurred⁴. If a loss is not attributable to the breach, the injuring party is not liable for that loss⁵. The test is whether “but for the

¹ K. Zweigert & H. Kötz, *Einführung in die Rechtsvergleichung*, 45.

² Cf. about the classification of the requirement of fault from an international perspective B. Markesinis, H. Unberath & A. Johnston, *The German law of Contract*, 472, as well as G. H. Treitel, ‘Remedies for Breach of Contract’, in R. David et al. (eds), *International Encyclopedia of Comparative Law*, 56, according to whom the requirement of fault can “through the eyes of a common lawyer” be regarded not only as a precondition for liability but also as an instrument of its limitation.

³ L. Macgregor, *Report on the Draft Common Frame of Reference*, 3; J. Du Plessis, ‘Comparative Law and the study of mixed legal systems’, in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 484.

⁴ W. McBryde, *The Law of Contract in Scotland*, para. 22-16.

⁵ D. M. Walker, *Principles of Scottish Private Law, Law of Obligations*, 162.

breach the loss would have occurred”⁶. However, it is only required that the breach of contract make a material contribution to the loss, not that it be the sole cause of the loss⁷.

The House of Lords dealt with causation in *A/B Karlshamns Oljefabriker v Monarch Steamship Co*⁸. In that case, a Swedish manufacturing firm purchased a cargo of soya beans. A charter-party with the Monarch Steamship Co. was entered into in order to be able to ship the goods from Manchuria to the Swedish town Karlshamn on the vessel “British Monarch”. The contract contained a clause providing that the ship should be seaworthy as well as a “war risks clause” stating that it would not be a breach of contract if the government detained the ship due to an outbreak of war. The Monarch Steamship Co. failed to provide a seaworthy ship since inter alia the evaporator and the main condenser of the “British Monarch” were out of order. This caused a great delay in the homeward voyage. When the ship reached Britain it was detained in Glasgow by the government, war having broken out. Karlshamns Oljefabriker therefore chartered three additional ships to carry the beans on to Sweden. Oljefabriker sought to recover the cost of the transshipment from the Monarch Steamship Co. The owners of the ship argued that there was no causal link between the failure to provide a seaworthy ship and the loss because the real cause of the extra cost was the act of the British government. The House of Lords however held that the dominant cause was the initial unseaworthiness. If they had not taken so unduly long a time owing to the malfunctioning ship, it would have arrived in Sweden before the outbreak of war and the hire of three additional ships would not have been necessary. Thus, a causal link was established.

It is not uncommon in the case law for causation to be difficult to establish on the factual level. This phenomenon can be observed in the recent case *Musselburgh and Fisherrow Co-operative Society Ltd. v Mowlem*⁹. This case involves a contract for the construction of a leisure centre. A loss was suffered as a consequence of three completely different major defects of a swimming pool that was to be built. All three defects contributed to the loss. The court tried to determine which cause was the dominant one but was unable to do so. Consequently, an apportionment of damages was applied, since there were three material contributions to the loss.

2. Remoteness of Damage

Secondly, one must question how far the contract breaker is responsible for the consequences of his breach¹⁰. A party is not entitled to damages for a loss which is a remote result of the breach of contract¹¹.

a) The Leading Case Hadley v Baxendale

The leading case dealing with this issue is the English case of *Hadley & Anor v Baxendale & Ors*¹², commonly referred to as *Hadley v Baxendale*. Even though *MacQueen* and *Thomson*¹³ claim that the principle of remoteness was recognized in Scots law before that case

⁶ H. MacQueen & J. Thomson, *Contract Law in Scotland*, para. 6.31.

⁷ *Ibid.*

⁸ *A/B Karlshamns Oljefabriker v Monarch Steamship Co.* (1949) S.C. (H.L.) 1.

⁹ *Musselburgh and Fisherrow Co-operative Society Ltd. v Mowlem* (2006) C.S.O.H. 39.

¹⁰ D. M. Walker, *The Law of Contracts and related obligations in Scotland*, para. 33.29.

¹¹ W. McBryde, *The Law of Contract in Scotland*, para. 22-60.

¹² *Hadley & Anor v Baxendale & Ors* (1854) 9 Exch. 341.

¹³ H. MacQueen & J. Thomson, *Contract Law in Scotland*, para. 6.33.

was decided, *Hadley v Baxendale* is frequently referred to by the Scottish courts and can be characterized as one of the most significant cases in British contract law. It was decided in 1854 by the *Court of Exchequer Chamber*¹⁴, led by *Sir Edward Hall Alderson*.

In this case Hadley and Anor owned a flour mill in Gloucester. Their mill was at a standstill because of a broken crankshaft. Therefore, they ordered a new shaft with a company in Greenwich. For that company to produce the new crankshaft, the broken shaft had to be sent to Greenwich to be used as a pattern for the replacement. Hadley and Anor entered into a contract with Baxendale and Ors, who operated as carriers, in which the latter promised to deliver the broken crankshaft at Greenwich within two days. However, the transit was delayed so that consequently the mill was out of order longer than anticipated and therefore a loss of profit was caused for the millers. Hadley claimed damages from the carrier for this loss of profit.

The court held that the plaintiff was not entitled to damages. *Sir Alderson* phrased the key rule in *Hadley v Baxendale* like this: The damages awarded must be “either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or [...] 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”¹⁵. This quotation illustrates a test of two branches. The first branch deals with the normal damage, also referred to as ordinary damages¹⁶. This describes such damages that are an ordinary consequence of the breach and a result, which involves knowledge that can be imputed to everyone. In cases of such normal damages, the loss is foreseeable and not too remote to be entitled to damages. The second branch of the test is concerned with abnormal damage, which results from exceptional circumstances. These damages are not a usual outcome of the breach but arise from certain special conditions. A party who is in breach of contract only has to pay abnormal damages if he was aware at the time he entered into the contract of the special circumstances which made the loss a probable result. In that case he ought to have foreseen that “some abnormal loss would probably result from a breach on his part”¹⁷. Awareness of the special circumstances can particularly be presumed when they were disclosed and communicated to the contractual partner.

In *Hadley v Baxendale* neither of the branches was appropriate. It was not a normal occurrence that the mill was standing still because it was common that mills carried a spare crankshaft¹⁸. Also, the special circumstances, that the mill would be out of order until a new shaft was delivered, were not communicated to Baxendale. Hence, Hadley was unable to obtain payment of damages from Baxendale.

b) Further Cases

There is further case law that must be presented to understand and get a feeling for the application and enhancements of the rule discussed above.

In “*Den of Ogil*” *Co. Ltd. v Caledonian Railway Co.*¹⁹ a big steamship of 4,000 tons and a crew of 57 people were lying at Plymouth due to a broken piston. The owners of the ship ordered a replacement, which was sent by rail from Port Glasgow to Plymouth. There was a

¹⁴ Superseded by the Court of Appeal of England and Wales.

¹⁵ *Hadley & Anor v Baxendale & Ors* (1854) 9 Exch. 341, 354.

¹⁶ W. M. Gloag & R. C. Henderson, *The Law of Scotland*, para. 13.28.

¹⁷ E. A. Marshall, *General Principles of Scots Law*, 392.

¹⁸ M. MacMillan & S. Lambie, *Scottish Business Law*, 116.

¹⁹ “*Den of Ogil*” *Co. Ltd. v Caledonian Railway Co.* (1902) 5 F. 99.

delay of three or four days in delivery, and the ship-owners sued the railway company for damages for the loss of profit caused by the detention amounting to £ 300. The railway company had been told that the transportation was urgent, so that the question for the court was not whether the contract had been breached but whether the loss was too remote. It had not been communicated that the item to be transported was a piston, nor was it known that the ship was such a large one. It was held that the £ 300 loss was due to these special circumstances, and hence the railway company would have only been liable if they had been informed of these. Nevertheless, the ship-owners were awarded damages limited to £ 50, representing normal damage. This case shows that the principles of remoteness were utilized in a strict way and that there was narrow space for claims of damages where the party in breach was not aware of certain circumstances.

One of the main cases in which the two branches of the test from *Hadley v Baxendale* were applied is *Victoria Laundry Ltd. v Newman Industries Ltd.*²⁰ In this case the laundry ordered a boiler for their business, which was delivered 20 weeks late. This delay caused a loss of profits amounting to £ 16 per week for the extra business Victoria would have generated with the possibility of using the new boiler and £ 262 per week for the loss of a highly lucrative government contract. Newman had known that the boiler was required as soon as possible and was also aware that a loss of profit might occur in case of delay of delivery. The Court of Appeal applied the rule from *Hadley v Baxendale* and advanced it, establishing the requirement of *reasonable foreseeability*. It was held that the lost profit of £ 16 per week was recoverable since such an increase in business was reasonably foreseeable and its non-appearance was a normal consequence of the breach of contract of late delivery. With respect to the loss of profit because of the loss of the government contract, however, Victoria was not entitled to damages as Newman could not reasonably have foreseen this loss unless they had had actual knowledge of these contracts. The existence of these contracts constituted an extraordinary circumstance which was not communicated to Newman.

In *Koufos v Czarnikow Ltd.*²¹, known as *The Heron II*, the delivery of a shipment of sugar was delayed. As a result, the charterers obtained a lower price for the sugar at market. The ship-owners claimed that this loss was too remote for the charterers to be entitled to damages, while the charterers argued that the loss was reasonably foreseeable. The Lordships challenged the test of reasonable foreseeability using certain different formulation. It was criticized that the use of the test of reasonable foreseeability indicated that the requirements for remoteness in the law of contract were the same as in delict. This case thereby introduced a diversity of different wordings, which “muddied the waters” rather than creating clear and settled law. *Lord Reid* discusses in depth what the proper requirement for remoteness in contract law should be. He claims that the court in *Hadley v Baxendale* was not distinguishing between foreseeable and unforeseeable results but between results which were likely and results which were unlikely. He goes on arguing that not every type of damage that was foreseeable can be regarded as either arising in the usual course of things or be supposed to have been in the contemplation of the parties in terms of *Hadley v Baxendale*. Rather, reasonable foreseeability imposes a much wider liability, which is used in delict law covering any foreseeable type of damage—even in the most unusual case. It is illustrated that there must be a difference between the test in delict and in contract law: A

²⁰ *Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd.* (1949) 2 K.B. 528.

²¹ *The Heron II (Koufos v Czarnikow Ltd.)* (1969) 1 A.C. 350.

wrongdoer in delict must reckon that he is being held liable for some unusual but nevertheless reasonably foreseeable damage because the injured party did not have the chance to communicate an unusual risk to the injuring party in advance. On the contrary, a contracting party has the possibility of drawing the other party's attention to a certain unusual risk so that he should notify it if he wants special loss to be compensated. Hence, *Lord Reid* comes to the conclusion that instead of using the test of reasonable foreseeability, the type of loss is not too remote which the contract breaker at the time of the contract has realized was "not unlikely"²² to result from the breach. This formulation implies "a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable"²³. In the same case, however, *Lord Morris of Borth-y-Gest* ascertains that "words and phrases begin to crowd in and to compete"²⁴, and he maintains that there is no need to decide which of the wordings—like "liable to result", "likely to result" or "not unlikely to result"—is the most accurate one. He rather claims that all of the expressions are useful indications of the application of the rule in *Hadley v Baxendale* and that "each one of these phrases may be of help but so may many others"²⁵. Nonetheless, *Lord Hodson* holds the view that the phrase "liable to result" is the best to describe the degree of probability required stating: "This may be a colorless expression but I do not find it possible to improve on it"²⁶. *Lord Pearce* however points out that, in his opinion, "the expressions used in the *Victoria Laundry* case were right"²⁷. Finally, *Lord Upjohn* pleads for the formulations "real danger" or "serious possibility" as the proper test, stating that "the assessment of damages is not an exact science"²⁸. At the end of the day, all of the different tests applied by the Lords had the same result, namely that the ship-owners were liable for damages. The rules to determine remoteness, however, have become somewhat ambiguous as a result of that decision. Nevertheless, the tendency of using a more restrictive test of remoteness in contract than in delict can be drawn from this case.

Lord Denning, however, tried to argue in the case *Parsons (Livestock) Ltd. v Uttley Ingham & Co. Ltd.*²⁹ that there was no difference between the tests in contract and in delict but between economic loss, for which he suggested to use the restrictive test of "reasonable contemplation", and physical damage, for which the test proposed was the wider question for "reasonable foreseeability" as in the law of delict. In this case *Parsons* bought a bulk hopper from *Uttley Ingham* to store food for his herd of pigs. After installing it *Uttley Ingham* failed to open the ventilator so that the pignuts went bad. Some of the pigs ate the mouldy nuts, which caused an infection that spread through the herd. Consequently, approximately 250 pigs died. *Lord Denning* came to the conclusion that the loss was not too remote because physical injury was reasonably foreseeable and it did not make a difference that the occurred illness was worse than could have been foreseen. At the end of the day the other two judges arrived at the same result. They agreed that—unlike the tendency from *The Heron II*—there should not, in general, be a different test in contract and delict because the amount of recoverable damages should not depend upon the pure choice of the cause of action. However, they did not agree with a distinction between the two types of loss as

²² *Ibid.*, 383.

²³ *Ibid.*

²⁴ *Ibid.*, 396.

²⁵ *Ibid.*, 397.

²⁶ *Ibid.*, 410/411.

²⁷ *Ibid.*, 415.

²⁸ *Ibid.*, 425.

²⁹ *Parsons (Livestock) Ltd. v Uttley Ingham & Co. Ltd.* (1978) 1 Q.B. 791.

suggested by *Lord Denning*. Even in other cases in Scotland and England, his suggestion has found no support³⁰.

Despite these controversies, the fairly recent case *Balfour Beatty Construction (Scotland) Ltd. v Scottish Power plc.*³¹ was decided by the House of Lords, which clearly applied the rule from *Hadley v Baxendale* without having much trouble with the holdings in *The Heron II* and *Parsons v Uttley Ingham*. Balfour Beatty was engaged in the construction of a concrete aqueduct to carry the Union Canal over a road, requiring a long continuous pour of concrete. Scottish Power undertook to supply these works with electricity. When the first stage was almost finished, the electricity supply failed so that the required continuous pour of cement was consequently no longer available. The result was that the whole first stage of the aqueduct had to be demolished and reconstructed, which led to an extra cost of approximately £ 230,000 for which Balfour Beatty claimed damages. The court held that they were not entitled to damages because the loss resulted from special circumstances that had not been within the reasonable contemplation of Scottish Power at the time of the contract, since this would have required a high degree of technical knowledge of construction that an electricity supply company need not have. Although business people are to be taken to have knowledge of their contracting partners' business, knowledge of specialist technical aspects cannot be imputed to the parties³². Hence, the second branch of the test from *Hadley v Baxendale* was not fulfilled.

There is a rather recent case showing that the application of the rule from *Hadley v Baxendale* is still controversial and highly topical. Here again one can detect the tendency to draw upon English authorities quite frequently in the context of limitation of the amount of damages³³. In *Transfield Shipping Inc. v Mercator Shipping Inc.*, also known as *The Achilles*³⁴, Transfield hired a ship from Mercator for five to seven months. Mercator entered into a contract with another company letting the same ship after expiration of this hire period. However, Transfield delayed in returning the ship because they carried out a lucrative shipment. Therefore, Mercator was unable to deliver the ship to their other customer on time, which led to the consequence that they were unable to attain a price of £ 39,500 per day but instead only £ 31,500. The third company did not agree to pay more in the renegotiations, as the market price in their cargo had decreased sharply. Mercator sued Transfield for damages because of their breach of contract. The lower courts held that the damages to be paid consisted of the loss that occurred because a lower price was achieved in the following hire contract. Therefore, the damages amounted to the difference between the sum Mercator would have reached if Transfield had returned the ship on time and the sum they actually received over the period of the new chartering contract. This type of loss had never been awarded before and amounted to more than \$ 1.3 million. It was argued that the loss was not too remote, as it fell within the first branch of the test from *Hadley v Baxendale* because it was seen as an ordinary consequence of the delay. The House of Lords, however, unanimously reversed this holding in favour of Transfield. They decided that they were only liable to pay the difference between the market rate and the charter rate for the period of the delay, which amounted to approximately \$ 150,000. The reasoning can basically be divided into the speeches of *Lord Hoffmann* – *Lord Hope* agreeing – and *Lord Rodger* –

³⁰ H. MacQueen & J. Thomson, *Contract Law in Scotland*, para. 6.34.

³¹ *Balfour Beatty Construction (Scotland) Ltd. v Scottish Power plc.* (1994) S.L.T. 807.

³² H. MacQueen & J. Thomson, *Contract Law in Scotland*, para. 6.36.

³³ Also maintained by H. MacQueen & J. Thomson, *Contract Law in Scotland*, para. 6.18.

³⁴ *The Achilles (Transfield Shipping Inc. v Mercator Shipping Inc.)* (2008) 4 All E.R. 159.

Baroness Hale agreeing. *Lord Hoffmann* argued that the question whether the owners of the ship should be able to claim damages for the loss of profit on the next hire contract was a question of law, rather than a question of fact, because the crucial point was not the foreseeability of the loss but the interpretation of the contract. He points out that the rule from *Hadley v Baxendale* is supposed to be flexible and to give effect to the presumed intentions of the parties. As all contractual liability is voluntarily undertaken, the intention of the parties is essential. His conclusion is that the parties would have reasonably considered losses arising from the following charter to be such losses for which the charterer was not responsible because there would otherwise be an unquantifiable risk and therefore a serious commercial uncertainty. *Lord Rodger* on the other hand states that the main issue is a question of fact rather than a question of law. He stresses that one has to ask whether the loss was in the reasonable contemplation of the parties at the time they entered into the contract. Foreseeability was not enough but losses had to be likely. He reaches the result that this requirement was not fulfilled since the freight market was very volatile at the time of *Transfield's* delay, causing the sharp decline in price. This was a very unusual circumstance and would not have happened in the ordinary course of things. The parties would reasonably have contemplated that a delay in returning the ship would cause a loss but the particular loss suffered occurred because of the unusual volatility of the market at that time. It can therefore not be regarded as likely. Applying the rule from *Hadley v Baxendale*, there was neither special knowledge on the side of *Transfield* in terms of the second branch of the test, nor were the losses suffered ordinary consequences of a breach of that kind in terms of the first branch. The losses could hence not be in the reasonable contemplation of the parties. Both different reasonings consequently come to the conclusion that *Mercator's* losses in the following charter were too remote to be compensated.

All in all *Hadley v Baxendale* is still the leading case, which is used as a starting point on the question of remoteness in almost all subsequent cases. Its interpretation and application is highly topical even in recent cases.

3. Mitigation of Loss³⁵

Furthermore, the party claiming damages must take reasonable steps to keep his losses down³⁶. The innocent party is expected to act like a prudent person following the dictates of common sense³⁷. In order to mitigate his loss, the aggrieved party must for example seek an alternative market³⁸, an alternative way of carriage³⁹ or a new employment⁴⁰. However, this principle does not impose a duty on the injured party in the sense that the failure to mitigate would lead to liability⁴¹. Rather, the claim for damages can be restricted to the amount not reasonably avoidable by taking steps to keep the loss as low as possible⁴². The onus of proof in this matter is on the contract breaker⁴³, which means that it is up to him to show that the other party has not mitigated his losses. The injuring party will be liable in extenso

³⁵ The law of contributory negligence shall not be considered here.

³⁶ H. MacQueen & J. Thomson, *Contract Law in Scotland*, para. 6.39.

³⁷ S. Woolman & J. Lake, *Contract*, para. 10.25.

³⁸ *Duff v Iron Buildings Co.* (1891) 19 R. 199.

³⁹ *Connal, Cotton & Co. v Fisher, Renwick & Co.* (1883) 10 R. 824.

⁴⁰ *Ross v Macfarlane* (1894) 21 R. 396.

⁴¹ W. McBryde, *The Law of Contract in Scotland*, para. 22-37.

⁴² D. M. Walker, *Principles of Scottish Private Law, Law of Obligations*, 163.

⁴³ S. Woolman & J. Lake, *Contract*, para. 10.25.

unless he can prove that the other party has not diminished his losses, the latter case resulting in a limitation of the claim for damages.

This principle of mitigation is well illustrated in *Ireland & Son v Merryton Coal Co*⁴⁴. In this case a wholesaler contracted to supply coal merchants with 3,000 tons of coal within four months. It was agreed that the coal was to be delivered in approximately equal monthly quantities. At the end of the four-month period, the sellers had supplied only about half of the total consignment. The retailers sued for damages, calculating the loss on the basis of the market price prevailing at the end of the four months. This price had risen throughout the four months. Thus, the retailers had not taken all reasonable steps to minimize their loss, as they had not tried to find replacement elsewhere. The court held that the amount of damages was therefore to be calculated on the basis of the market price prevailing at the end of each month for the quantity short-delivered during that month.

In general, a pursuer is entitled to recover expenses which are reasonable in order to mitigate loss, even if they finally increase and not decrease the loss⁴⁵. There can, however, be limitations. Particularly, not more than the actual loss can be recovered. In the case *British Westinghouse Electric and Manufacturing Co. Ltd. v Underground Electric Railways Co. of London Ltd.*⁴⁶, Westinghouse supplied the railway company with steam turbines that were deficient in power and therefore used excessive quantities of fuel. However, the turbines were not rejected. After some time the railway company bought new turbines from another company that worked much more efficiently. Underground claimed damages for the additional fuel that was used because of the malfunctioning turbines as well as for the cost of replacing the turbines. The House of Lords held that the railway company acted prudently when buying the new turbines in order to mitigate their continuing loss from the quantities of fuel which had to be used. Their damages had therefore not been reduced on this ground. However, it was held that it would have been an advantage for Underground to buy the new turbines even if the ones from Westinghouse had worked properly because the new turbines were so efficient and led to greater profits for the railway company. These benefits had to be taken into account when calculating the amount of damages, but only because they arose out of the circumstances in which the innocent party was placed by the breach of contract and in the ordinary course of business.

The innocent party is only expected to take steps that are reasonable in the circumstances⁴⁷. In *Gunter & Co. v Lauritzen*⁴⁸ Gunter & Co. bought a consignment of Danish hay from Lauritzen, which they intended to resell. When the hay arrived with the purchasers in Aberdeen it was rejected because it was admittedly not in conformity with the contract. Gunter & Co. claimed damages amounting to the loss of profits they would have made reselling the hay. Lauritzen argued that the other party had failed to minimize their loss because they could have obtained the goods elsewhere. In fact, the kind of Danish hay was not available on the open market in Aberdeen, but may have been purchased in three separate lots from private sellers in different parts of Scotland. The court held that the purchasers were entitled to the entire loss of profits, as minimization of loss did not require taking extraordinary measures, such as looking all over the country for the hay required.

⁴⁴ *Ireland & Son v Merryton Coal Co.* (1894) 21 R. 989.

⁴⁵ W. McBryde, *The Law of Contract in Scotland*, para. 22-44.

⁴⁶ *British Westinghouse Electric and Manufacturing Co. Ltd. v Underground Electric Railways Co. of London Ltd.* (1912) A.C. 673.

⁴⁷ D. M. Walker, *Principles of Scottish Private Law, Law of Obligations*, 163.

⁴⁸ *Gunter & Co. v Lauritzen* (1894) 1 S.L.T. 435.

Similarly, it cannot reasonably be expected from a captain of a ship to try to find extra cargo and thereby accept great expenses and delays⁴⁹ or from a party to a contract to risk damage to its commercial reputation in trying to mitigate the loss⁵⁰.

The rule of mitigation is summarized very unmistakably by *Viscount Haldane*, who determines that imposed on the innocent party is “the duty of taking all reasonable steps to mitigate the loss” but also that this rule does not impose “an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business”⁵¹.

II. German Law

In the event of a loss in connection with a breach of contract, the question in how far the contract breaker is responsible for this loss must obviously be raised in German law, as well.

1. Causation

First of all, a claim for damages requires that the loss has been caused by the event, which leads to liability. Thus, a causal link between the breach of contract and the loss must be established. This link is both the reason and the limitation of all liability in private law⁵².

It is argued predominantly that the German law of damages separates strictly between two parts of causation: *haftungsbegründende Kausalität* and *haftungsausfüllende Kausalität*. Generally speaking, the former deals with the causal link between the act of a wrongdoer and the violation of a legally protected good, e.g. property or life. The latter is concerned with causation between this violation of a legally protected right and a loss⁵³; hence, it covers the actual question of calculating the amount of damages to be paid⁵⁴. Therefore, only *haftungsausfüllende Kausalität* is dealt with in this article, whilst *haftungsbegründende Kausalität* is assumed. Taking a closer look at this matter, it can even be asserted that the distinction between the two parts of causation becomes relevant only in cases where a certain outcome, in terms of a violation of legally protected good, is required by a rule of law. This is particularly the case in the law of delict, where it is necessary that the act of the wrongdoer leads to a violation of a protected good and this violation leads to a loss. In cases of breach of contract on the other hand, no such violation is required. Rather, only one single causal link between the act of breach of contract and the loss occurred is imaginable.

a) Äquivalente Kausalität – Equivalent Causation

According to § 249 para. 1 BGB, the payment of damages shall put the innocent party in the situation in which he would find himself had the act that leads to liability, i.e. the breach of contract, not taken place. Hence, on a first step the breach of contract must be a neces-

⁴⁹ *Henderson & Co. v Turnbull & Co.* (1909) S.C. 510.

⁵⁰ *James Finlay & Co. Ltd. v Kwik Hoo Tong Handel Maatschappij* (1929) 1 K.B. 400.

⁵¹ *British Westinghouse Electric and Manufacturing Co. Ltd. v Underground Electric Railways Co. of London Ltd.* (1912) A.C. 673, 689.

⁵² *Palandt, Bürgerliches Gesetzbuch*, Vorb. v. § 249, para. 24.

⁵³ *Ibid.*

⁵⁴ *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, § 249, para. 105.

sary condition—a so-called *conditio sine qua non*—for the loss⁵⁵. Accordingly, a cause fulfils the qualifications of equivalent causation only if the loss had not occurred without this cause. Questions of probability are irrelevant in this respect; all possible causes have the same weight and are thus *äquivalent*. However, it is not sufficient to assert that an act has “possibly” lead to a loss. In order to establish equivalent causation, there needs to be an explicit conclusion that there would have been no loss if there had been no breach of contract⁵⁶.

b) Adäquate Kausalität – Adequate Causation

The limitation of liability by equivalent causation is not more than a first step. Exclusively considering this limitation, very remote causes would be attributed to a person⁵⁷. An absurd example would be the parents and grandparents of the wrongdoer who would be liable in the same way as the contract breaker himself, because without their contribution the contract breaker would not exist and therefore no breach of contract would occur⁵⁸. Consequently, further limitations are necessary in order to avoid unbalanced and extensive liability. If nothing else, this necessity results from the constitutional principle of proportionality⁵⁹. Such further restriction is supposed to be established by the *Adäquanztheorie*, the theory of adequate causation. Its original approach was developed in 1871 in the context of criminal law by *Carl Ludwig von Bar*⁶⁰ and in 1888 by *Johannes von Kries*⁶¹. In 1904 *Ludwig Traeger* constituted the version which proved to be most significant in shaping subsequent jurisdiction and science⁶².

In today’s jurisprudence it is used very frequently and can be regarded as a standard approach. The well-established formulation is that a wrongdoer is liable for a certain loss only if the act that leads to liability is in general, and not only in very peculiar and unlikely circumstances which must remain out of consideration in the usual course of things, capable of resulting in this loss⁶³. All in all, however, various different formulations are applied by the *Bundesgerichtshof*. Negatively phrased, the result must not be beyond an “inner relation” with the breach of contract⁶⁴, or, respectively, the possibility of the occurrence of a loss must not be beyond any experience of life⁶⁵. Worded vice versa, adequate causation is established if the act of the wrongdoer created a high risk which is in general capable of resulting in the kind of losses occurred⁶⁶ or, respectively, if the risk of the occurrence of such a loss has been substantially increased⁶⁷.

At the end of the day, all these formulations of the *Bundesgerichtshof* merely aim to exclude such causes from liability which are entirely beyond the expected course of things⁶⁸.

⁵⁵ J. Esser & E. Schmidt, *Schuldrecht*, Band I Allgemeiner Teil, Teilband 2, 224; *Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, § 249, para. 8.

⁵⁶ BGH NJW 1951, 711.

⁵⁷ K. Larenz, *Lehrbuch des Schuldrechts*, Allgemeiner Teil, 434; H. Lange & G. Schiemann, *Schadensersatz*, 81.

⁵⁸ H. Brox & W.-D. Walker, *Allgemeines Schuldrecht*, § 30, para. 7.

⁵⁹ *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, § 249, para. 104.

⁶⁰ C. L. von Bar, *Die Lehre vom Causalzusammenhang im Rechte, besonders im Strafrecht*.

⁶¹ J. von Kries, *Ueber den Begriff der objectiven Möglichkeit und einige Anwendungen desselben*.

⁶² L. Traeger, *Der Kausalbegriff im Straf- und Zivilrecht*.

⁶³ BGH NJW 1998, 138 (140); BGH NJW 2002, 2232 (2233).

⁶⁴ BGH NJW 1957, 1475 in a delict case.

⁶⁵ BGH NJW-RR 2001, 887 (888).

⁶⁶ BGH NJW 2002, 2232 (2233).

⁶⁷ BGH NJW 1972, 195 (197).

⁶⁸ BGH NJW 2002, 2232 (2233); BGH NJW 2001, 514 (515).

The crucial question is whether a certain likeliness of the occurrence of the loss can be acknowledged⁶⁹.

In answering this question it is not relevant whether the wrongdoer himself estimated the occurrence of a loss as likely. Rather, the view of an *optimaler Beobachter*⁷⁰, an ideal observer, is crucial. Using this phrase, the *Bundesgerichtshof* follows the wordings of *Traeger* and considers those circumstances in assessing the likeliness which were identifiable to an ideal observer at the time of the act, i.e. the breach of contract, and additionally those circumstances which are in fact known to the wrongdoer⁷¹.

This and additionally the multitude of formulations and their variation, combination and shortening make the limits of adequate causation diffuse and very wide⁷². Taking the knowledge of an ideal observer—i.e. almost an omniscient observer—as a basis, a certain probability will hardly ever be denied⁷³.

Results, which are covered by the wrongdoer's intent, are predominantly regarded as adequate from the outset⁷⁴.

2. *Schutzzweck der Norm* – The Aim of a Rule

A further significant approach of limiting damages is the doctrine of the *Schutzzweck der Norm*⁷⁵. Originally, it was applied in the context of claims in delict according to § 823 para. 2 BGB, which prohibits the violation of a protective law⁷⁶. *Ernst Rabel* initiated its expansion to the area of contract law, where its application is nowadays widely accepted⁷⁷.

This doctrine's basis is the investigation of the aim of a certain rule of law or a contractual obligation. Such a rule or—as in our case—obligation does not aim to protect the contractual partner from any imaginable damage. Rather, every contractual obligation aims to protect from very specific risks. According to the doctrine of the *Schutzzweck der Norm*, a contract breaker is liable for a certain loss only if this loss stems from the area of risks which were intended to be prevented by the contractual obligation that was breached⁷⁸. From a methodical point of view, this is merely a teleological interpretation of a contract identifying its purpose. From a terminological point of view, the *Schutzzweck* signifies the same as the requirement of a *Rechtswidrigkeitszusammenhang* which is partly demanded by some legal writers⁷⁹. The latter means that the occurred loss must be the realization of a risk because of

⁶⁹ H. Lange & G. Schiemann, *Schadensersatz*, 82; D. Medicus & S. Lorenz, *Schuldrecht I*, para. 638.

⁷⁰ K. Larenz, *Lehrbuch des Schuldrechts*, Allgemeiner Teil, 439 however prefers the phrase “experienced observer”.

⁷¹ BGHZ 3, 261 (266/276).

⁷² J. Esser & E. Schmidt, *Schuldrecht*, Band I Allgemeiner Teil, Teilband 2, 233.

⁷³ Cf. H. Lange & G. Schiemann, *Schadensersatz*, 91.

⁷⁴ BGH NJW 1981, 983; *Palandt, Bürgerliches Gesetzbuch*, Vorb. v. § 249, para. 27; *Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, § 249, para. 24; arguing the converse *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, § 249, para. 113.

⁷⁵ The relation between adequate causation and *Schutzzweck der Norm* will be analysed in the context of the comparative part of the present article.

⁷⁶ *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, § 249, para. 122.

⁷⁷ *Ibid.*, para. 123; BGH NJW 1990, 2057 (2058), BGH NJW 2002, 2459 (2460).

⁷⁸ BGH NJW 1997, 2946 (2947), BGH NJW 1990, 2057 (2058).

⁷⁹ H. Lange & G. Schiemann, *Schadensersatz*, 102; *Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, § 249, para. 24; *Palandt, Bürgerliches Gesetzbuch*, Vorb. v. § 249, para. 29; *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, § 249, para. 121. Regarded as a separate criterion besides the *Schutzzweck* by H. Brox & W.-D. Walker, *Allgemeines Schuldrecht*, § 30, para. 16. Differences in detail are also suggested by J. Esser & E. Schmidt, *Schuldrecht*, Band I Allgemeiner Teil, Teilband 2, 243.

which a certain act was prohibited and was therefore illegal, i.e. *rechtswidrig*. This principle, however, is inappropriate in the area of contract law since it requires an illegal act, which can usually only be found in the law of delict. At the end of the day, the construction of a *Rechtswidrigkeitszusammenhang* is therefore unnecessary, as it becomes relevant only in the law of delict but even there does not go beyond the more general doctrine of the *Schutzzweck der Norm*.

3. Mitigation of Loss⁸⁰, § 254 Para. 2, Sentence 1, Alternative 3 BGB

§ 254 BGB allows for a weighting of the contributions of the wrongdoer and the innocent party in causing the loss. In cases in which the injured party of a contract has contributed to the occurrence or the increase of a loss, the damages are split between the parties. § 254 BGB is applicable to all claims for damages, regardless of their legal ground, to the extent no special rules exist in a certain field⁸¹. Thus, its application in cases of claims for damages in the event of breach of contract is undoubted. The term “fault” mentioned in § 254 BGB does not imply the breach of a duty against another person. It rather means a “fault against himself”⁸², whereas frequently the term *Obliegenheit*, i.e. obligation, is preferred in order to stress that there can be no duty not to harm himself⁸³.

Basically, § 254 is a matter of the principle of *Treu und Glauben*, *bona fide*⁸⁴, in its specification of an interdiction of a *venire contra factum proprium*: A person who contributes to the occurrence of a loss, but yet demands the full damages to be compensated, acts in contradiction to his own previous conduct.

The cases that are dealt with in § 254 para. 2, sentence 1 BGB involve a contribution of the injured party in terms of an omission. According to a predominant opinion amongst legal writers, they illustrate special cases of the general principle from § 254 para. 1 BGB⁸⁵. According to § 254 para. 2, sentence 1, alternative 3 BGB⁸⁶, the contributory fault can be the failure of reduction of the damage. As a result the claim for damages of the injured party is decreased if it appears reasonable for him to take capable measures to keep the losses within a narrow limit⁸⁷. The claim for damages is to be reduced if the injured party has omitted measures which a faithful and sensible person would have taken in order to mitigate the loss⁸⁸. This reduction of damages is hence not carried out in any event of an omission but only in cases in which the failed action of the injured party can be regarded as reasonable considering the principles of good faith in each individual case⁸⁹.

⁸⁰ Detailed demonstration of the further rules within § 254 BGB shall not be given here, though they can conceivably become relevant in contract law as well.

⁸¹ *Beck'scher Online-Kommentar BGB*, § 254, para. 2; *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, § 254, para. 7; *Handkommentar BGB*, § 254, para. 3.

⁸² BGH NJW 1970, 946 (947).

⁸³ Cf. *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, § 254, para. 3; *Jauernig, Bürgerliches Gesetzbuch*, § 254, para. 3.

⁸⁴ BGH NJW 1978, 2024 (2025); *Jauernig, Bürgerliches Gesetzbuch*, § 254, para. 3; critical however *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, § 254, para. 4.

⁸⁵ *Palandt, Bürgerliches Gesetzbuch*, § 254, para. 36; *Beck'scher Online-Kommentar BGB*, § 254, para. 27.

⁸⁶ In parts, only 2 variants are distinguished within § 254 para. 2 sentence 1 BGB, yet inconsistent as to whether warning and averting the damage or averting and reducing the damage are to be seen as one unit. Cf. for example *Palandt, Bürgerliches Gesetzbuch*, § 254, para. 36 ff; *Handkommentar BGB*, § 254, para. 7; *Jauernig, Bürgerliches Gesetzbuch*, § 254, para. 9; *H. Brox & W.-D. Walker, Allgemeines Schuldrecht*, § 31, para. 40.

⁸⁷ *Jauernig, Bürgerliches Gesetzbuch*, § 254, para. 10.

⁸⁸ BGH NJW 1951, 797 (798).

⁸⁹ *Handkommentar BGB*, § 254, para. 8; *Palandt, Bürgerliches Gesetzbuch*, § 254, para. 36.

If the aggrieved party incurs expenses while reducing the loss, these expenses are to be compensated even if the measures remain unsuccessful⁹⁰ or even increase the loss⁹¹. The only point which remains controversial is the question whether an extensive weighting of the contributions to cause the damage and of the faults of both parties has to be performed by the judge in every single case of a failure to mitigate the loss⁹². Generally speaking, this is acknowledged in the context of § 254 BGB⁹³; in the special case of an omission to reduce the damage, however, this must be denied⁹⁴. To begin with, the wording of § 254 BGB refers mainly to the causation of the damage. An extensive weighting is furthermore not necessary because in most cases the part of the damage that was avoidable can be distinguished easily from the part that was unavoidable and, consequently, be subtracted from the complete damage. Even if this is not the case, the avoidable loss can be estimated according to § 287 ZPO. A broad consideration is therefore needed only if the avoidable part of the damage cannot be assessed. In all other cases the injured party has to bear the part that was reasonably avoidable, and the party in breach of contract has to pay the other part. This apportionment does not constitute a prohibited principle of “all or nothing”⁹⁵, since there is in fact a division of the loss which complies exactly with the interdiction of a *venire contra factum proprium* described above.

C. Comparison of the National Rules in Additional Consideration of the DCFR

In the following section similarities and differences between the examined national rules will be presented and interpreted. Additionally, the rules of the *Draft Common Frame of Reference (DCFR)*⁹⁶ shall be taken into account in order to illuminate the results in view of a possible European unification of law.

I. Causation

A first step within the limitation of damages is the requirement of a causal link.

⁹⁰ *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, § 254, para. 69; *Palandt, Bürgerliches Gesetzbuch*, § 254, para. 36.

⁹¹ BGHZ 122, 172 (179).

⁹² BGH NJW 2001, 3257 (3258).

⁹³ *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, § 254, para. 105 ff; *Handkommentar BGB*, § 254, para. 10.

⁹⁴ Arguing this *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, § 254, para. 76; *Beck'scher Online-Kommentar BGB*, § 254, para. 61.

⁹⁵ Arguing the converse however BGH NJW 2001, 3257 (3258).

⁹⁶ The DCFR can be found online: http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

In 2010 the European Commission established an Expert Group in order to conduct a feasibility study on a draft instrument of European contract law based on the DCFR but also taking into consideration other initiatives. In May 2011 the Expert Group delivered a set of contract law rules. Damages are dealt with in its Part VI, which bears resemblance to the rules of the DCFR.

On the discussion about the nature of the DCFR and its impact see H. Schulte-Nölke, NJW 2009, 2161; H. Schulte-Nölke, ‘Restatement – nicht Kodifikation’, in O. Remien (ed), *Schuldrechtsmodernisierung und Europäisches Vertragsrecht*, 26; N. Jansen & R. Zimmermann, NJW 2009, 3401.

1. Similarities and Differences

Such a link between the breach of contract and the loss is almost naturally demanded in Scots law as well as in German contract law. The *but-for test*, applied under Scots contract law to assess causation, corresponds to the formula of *conditio sine qua non* of the German equivalent causation. Both of them require that the loss has occurred because of the breach of contract, i.e. that the breach is an essential precondition of the loss. German law already implies in the name of the relevant doctrine that every cause – regardless of how insignificant it is – is regarded as equal, hence *equivalent*. This shows a slight difference to Scots Law, which requires a material contribution in order to affirm causation. In the latter absolutely inconsiderable causes are thus withdrawn immediately on the first step of the limitation of damages while German law does not carry out any valuation of the causes at this step.

There are often difficulties in assessing a causal link on the factual level rather than on the legal level. Of course, none of the different legal systems can be immune to that.

Finally, it is important to note that the German *Adäquanztheorie*, analysed functionally, does not literally deal with causation, despite the term adequate *causation*. Rather it is concerned with the imputation of a loss on a valuating basis and can consequently not be compared with the requirement of causation in Scots law. This nature of adequate causation has been established by the *Bundesgerichtshof*, as well⁹⁷.

2. The Resolutions From the Perspective of the DCFR

The rule in the Draft Common Frame of Reference, which is comparable to the above mentioned in regard to its function, is found in Article III. – 3:701 (1) DCFR. According to this article the loss must be “caused” by the non-performance⁹⁸ of an obligation⁹⁹. The *Comments* on this article approach the problem of causation exclusively from the side of a break of the chain of causation. The test to be applied adds up to a *but-for test*, as well¹⁰⁰. Consequently, the rule applied in the DCFR is in accordance with the discussed rules of the national legal systems. The question whether any cause is sufficient to assume a causal link or whether a material contribution is required remains unregulated in the DCFR and its *Comments*.

3. Reasons and Interpretation

Neither the DCFR itself nor its relevant *Comments* contain an explicit description of the test to be applied in order to assess the requirement of causation. This indicates that an undisputable European consensus exists on this point so that it can be approached without having much trouble. This is true concerning the requirement of a causal link *per se* as well as regarding an appropriate formula to assess it. In fact, the legal situation is almost identical in Scotland and Germany so that it appears simply coherent that the DCFR goes this way, as well. No critique is therefore advisable in this point of the DCFR. The universal basis of

⁹⁷ BGHZ 3, 261 (267).

⁹⁸ The meaning of the term “non-performance“ is very wide and covers any failure to perform an obligation so that any kind of breach of a contractual obligation is included, cf. Article III. – 1:102 (3) DCFR.

⁹⁹ Book III of the DCFR is applied to contractual as well as non-contractual obligations, cf. Article III. – 1:101 DCFR.

¹⁰⁰ See Article III. – 3:701 DCFR, Comments E, Illustration 6.

this first step of limitation of damages is the function of limiting responsibility to consequences which have in fact been caused by one's conduct. As such, it is capable and reasonable.

II. Imputation of a Loss to the Contract Breaker

In a next step the question of an imputation connection will be discussed. The term *imputation* is in my opinion capable of covering all legal concepts which—detached from the context of their legal system—have the same function, namely to decide whether or not a certain loss that has occurred can be attributed to the party in breach of contract on the basis of a valuating consideration.

1. Categorization of the Approaches

It deserves attention that several diverging approaches are applied in order to identify imputation. These approaches will not simply and strictly be considered separately according to their legal system. In fact, another categorization will be undertaken in due consideration of the approaches in Scots law, German law and the DCFR. These will be classified and divided into approaches with an objective tendency, respectively using an element of probability on the one hand and approaches with a subjective tendency, which are based on the interpretation of a contract, on the other hand. Certainly, such categorization can constitute merely a rough order. Despite miscellaneous existing nuances, I regard such a classification as helpful for their comprehension and for an analysis that can be carried out irrespective of national boundaries¹⁰¹.

a) Approaches With an Objective Tendency

aa) The wording “according to the usual course of things“ can be appointed the classical objective approach. According to this the imputation of damage requires that the loss has occurred in the normal course of things after the breach of contract. This formulation stems from the first branch of the case *Hadley v Baxendale* that still shapes British contract law. This first branch determines the existence of “ordinary damages”. It was furthermore applied in the cases “*Den of Ogil” Co. Ltd. v Caledonian Railway Co.* as well as *Balfour Beatty Construction (Scotland) Ltd. v Scottish Power plc.* Applying this test, only the kind of knowledge which can be attributed to every person is considered. On this basis, the usualness of the course of things is defined so that an objective standard is applied.

bb) There is an astonishing similarity between the wording “according to the usual course of things” by *Sir Alderson* and the statement by *von Kries* about the German *Adäquanztheorie*, which was published 34 years later and demanded that the consequences to be considered must be within the “regular course of things”. Accordingly, the *Bundesgerichtshof* also deems the capability of the breach of contract to result in the loss according to the normal course of things as the crucial point in one of its formulations in the context of the *Adäquanztheorie*. As remarked above, this indicates and affirms that adequate causation falls within the category of imputation and not actual causation.

All the different wordings that are used in order to identify adequate causation ultimately require the establishment of a certain degree of probability. Therefore, this doctrine repre-

¹⁰¹ This categorization will be made irrespective of the application of the various approaches in this first step. The interaction of the approaches will be examined in a second step later on.

sents an objective standard, as well. Furthermore, it adds to an objectification of this approach that, even though the concrete knowledge of the specific person in breach of contract is considered, the main point of view is an ideal observer. At the same time this distinguishes the approach of *Adäquanz* in nuances from the first branch of the rule in *Hadley v Baxendale*. The latter applies the standard of an average person by solely taking into consideration the kind of knowledge which can be attributed to any person. Hence, the limitation of the coverage of damages by adequate causation is less strict.

cc) A further approach which is to be classified in this category is the requirement of “reasonable foreseeability”. According to this, damage can be imputed to a person only if its occurrence was reasonably foreseeable. This approach is followed in Scots law in the case *Victoria Laundry Ltd. v Newman Industries Ltd.* It is supposed to be an interpretation or even advancement of the classical rule from *Hadley v Baxendale*. In the case *Parsons (Livestock) Ltd. v Uttley Ingham & Co. Ltd.*, this approach is taken up and approved¹⁰². Additionally, this resolution of the problem of imputation of a loss is chosen by one of the judges in the inhomogeneous case *The Heron II*¹⁰³.

The doctrine of reasonable foreseeability belongs to the class of objective approaches, as well. Indeed, when establishing foreseeability, the point of view of a specific party of the contract is taken, which insofar rather appears to be a subjective standard. However, the emphasis of the term “reasonable” indicates that the objectified view of a reasonable person in the position of the party to the contract is essential, and not the actual view of the specific party.

dd) Article III. – 3:703 DCFR is entitled “Foreseeability”, as well¹⁰⁴. With the reservation of an intentional, reckless or grossly negligent non-performance, this article regulates that a debtor, i.e. the contract breaker, is only liable for a loss which he foresaw or could reasonably be expected to have foreseen. The objective element of this approach is particularly observable in the second variant of this test¹⁰⁵. Again, the point of view of the specific contracting party is taken; however, the question which is raised is whether one can reasonably expect from this party to foresee the consequences. After all, this is identical with the replacement of the specific debtor with a reasonable, i.e. objectified, person. Furthermore, this second variant of the rule of the DCFR has another objective aspect. Not only the view of a *reasonable* person is essential, but also it is crucial whether such a person estimated the occurrence of the loss as *likely*. This element of probability introduces a second objective aspect into the test. However, this second element is displaced by the first element, since this stronger factor makes clear that the deciding question is not pure probability but probability from the point of view of a person.

ee) Finally, there are developments in Scots law which comprise proposals to require explicit formulations of pure probability in several different degrees. Those can be found especially in the case *The Heron II*, where some judges postulate that the loss must have

¹⁰² *Lord Denning* pleaded for the application of this approach only in cases of physical damage.

¹⁰³ The majority of judges, however, voted for a stricter test.

¹⁰⁴ The United Nations Convention on Contracts for the International Sale of Goods (CISG) acknowledges the concept of foreseeability, as well. As to the question whether Article 74 CISG is based on the common law rule from *Hadley v Baxendale* and consequently be interpreted in its light, see F. Ferrari, ‘Hadley v Baxendale v Foreseeability under Article 74 CISG’, in D. Saidov & R. Cunningham (eds), *Contract Damages*, 305.

¹⁰⁵ In contrast to the differentiated view applied in this article, *Leible* claims that the rule of foreseeability in the whole is not comparable with the *Adäquanztheorie* but with the doctrine of the *Schutzzweck der Norm*: S. Leible, ‘Rechtsbehelfe bei Nichterfüllung’, in R. Schulze, C. von Bar & H. Schulte-Nölke (eds), *Der akademische Entwurf für einen Gemeinsamen Referenzrahmen*, 110.

been likely, not unlikely, or that real danger or serious possibility of the occurrence of the damage must have been at hand. All of the wordings that regard a certain degree of probability as determinative are to be categorized as objective standards. A tendency towards this approach can also be detected in the decision *The Achilleas*, more precisely in the second view, which is represented in this case by *Lord Rodger* and *Baroness Hale*. They also argue that a loss must be likely. On the one hand this is reminiscent of the German *Adäquanztheorie*. On the other hand, however, certain parallels with the approach of reasonable foreseeability can be observed insofar as this second view within *The Achilleas* not only asks for likeliness but also puts this on par with the requirement of reasonable contemplation¹⁰⁶. As already familiar from the illustrations on reasonable foreseeability, at first the view of a specific person is decisive. Here again, however, the emphasis on the term *reasonable* objectifies this approach. If nothing else, its classification as objective can be verified with the fact that within this decision the unquestionable objective requirement of likeliness is regarded as equal.

There is, however, a difference between the resolutions presented so far and this second view within *The Achilleas*. While the former apply the point of view solely of the party in breach of contract, the latter is identified from the point of view of both contracting parties. At first glance, the prerequisites are stricter taking both views into consideration. Nevertheless, at the end of the day the distinction is only a linguistic one, which makes no—or at most a marginal—difference, because the view of the specific party or parties is in each case covered by a reasonable view. It is inconsequential whether the reasonable view of the one party, the other party or both parties is decisive. A reasonable view is always identical, no matter whose reasonable view it is¹⁰⁷.

ff) Summing up, all the approaches classified within the category of an objective tendency are connected by the requisite of a certain degree of probability. The existence of a common element of all these resolutions is also indicated by the fact that the approaches are partly mixed or used synonymously.

From a theoretical point of view, this is not completely free from discrepancy, as there are in fact subtle differences between them. Regard must be paid predominantly to the nuances which appear to make the requirement of reasonable foreseeability wider than those of the usual course of things, a certain probability or the reasonable contemplation of the parties to a contract, not least because the exact course of the causal chain and the exact amount of damages are not essential.

From a practical view, however, this proceeding is legitimate. The factual side of a legal problem is seldom clear, obvious and unambiguous enough to be able to draw a distinction between likely and not unlikely results or between reasonably foreseeable consequences and such that arise in the ordinary course of things. The common core element of a certain degree of *probability* is therefore connecting the approaches with an objective tendency in a sensible and practicable way.

Furthermore, a difference that can indeed affect the results of the various approaches with an objective tendency is the point in time which the different resolutions regard as crucial in order to assess this probability. While all other approaches take the position that the time of formation of the contract is decisive, the German *Adäquanztheorie* takes the view of the

¹⁰⁶ The approach of reasonable contemplation is also followed by *Lord Denning* in the decision *Parsons (Livestock) Ltd. v Uttley Ingham & Co. Ltd.*, yet only with regard to economic loss.

¹⁰⁷ However, as illustrated above, there is in fact a difference in cases in which a reasonable person is not crucial but instead, for example, an ideal observer.

ideal observer at the time of the breach of contract. Considering this point in time, which can possibly be a vitally later one, many more circumstances are to be taken into account in the due assessment of imputation. Consequently, according to this approach a wider variety of losses are imputed to the party in breach of contract than according to merely taking into consideration the time of conclusion of the contract.

b) Approaches With a Subjective Tendency

The other category of approaches for assessing imputation, in my opinion, covers those which place emphasis on the specific circumstances of a contract rather than on an objective element of probability. They will therefore be referred to as *subjective*.

aa) The most well-defined occurrence of such approaches can be observed in resolutions which require a teleological interpretation of the contract. The German doctrine of the *Schutzzweck der Norm* shall be mentioned first in this context. According to this, the specific contract is to be interpreted according to its spirit and purpose to determine whether the contractual obligation that was violated had been agreed upon in order to avert the concrete risk that lead to the damage.

The view held by *Lord Hoffmann* and *Lord Hope* in the decision *The Achilles* is fairly similar. They also claim that the deciding point can only be the interpretation of the contract. According to this approach the intention of the parties is essential, i.e. the question of which damages the parties intended to be covered by their contract and hence to take responsibility for. Thus, obvious as well as absurd damages can be comprised. It is therefore irrelevant whether the occurrence of a loss was likely.

bb) Article III. – 3:703 DCFR regulates in its first variant—again with the reservation of an intentional, reckless or grossly negligent non-performance of the contractual obligation—that the contract breaker is liable only for loss which he foresaw as a likely result. In this variant the view of the specific party to the contract is crucial. In contrast to the first mentioned subjective approach of interpretation of the contract and the intention of the parties, the DCFR only considers the view of one of the parties, namely the contract breaker. The element of likeliness, which is mentioned in Article III. – 3:703 DCFR, appears to be an objective aspect at first sight. However, as has already been elucidated in the context of the second variant of the same article, this element of probability is pushed aside by the specific view of a specific person. In contrast to the second variant of Article III. – 3:703 DCFR, the first variant considers the actual view of the acting party and not an objective view of a person. Thus, it can be classified as an approach with a subjective tendency.

The same thought was followed by one of the judges in the decision *The Heron II*. He regarded a probability from the view of the party in breach rather than an objective probability by postulating that damage can be imputed to a person only if this specific person realized the loss was not unlikely to result from the breach. This test is hence fairly similar to the first variant of the rule in the DCFR.

cc) Finally, the second branch of the test in *Hadley v Baxendale*¹⁰⁸ can be categorized into this group of subjective approaches, though it must be acknowledged that this is the rule which is the most difficult to allocate to one of the categories. According to this a party is liable to pay damages if it can reasonably be supposed that the loss had been in the contem-

¹⁰⁸ As well as its application in “*Den of Ogil*” *Co. Ltd. v Caledonian Railway Co. and Balfour Beatty Construction (Scotland) Ltd. v Scottish Power plc.*

plation of the parties at the time they made the contract as a likely result of the breach of contract.

There are objective elements identifiable in this test. In particular, according to the famous wording of *Sir Alderson*, it is essential whether the circumstances can *reasonably be supposed* to be in the contemplation of the parties and not whether they were in their *actual* contemplation. Insofar, on first view no difference is evident between this and the requirement of reasonable contemplation. The reasonable contemplation seems identical with the contemplation that can reasonably be expected from the parties. Going into detail, however, it becomes obvious that not exactly the same is meant. The further practical application of this rule shows that it is to be understood in a way that a person is liable for damage if he was aware of the special circumstances that made the occurrence of the loss a probable result of the breach at the time he entered into the contract. This can in particular be assumed in cases in which the other party has communicated these special circumstances to the contract breaker. This application is being undertaken in order to pay tribute to the fact that this second branch of the test is applied in cases of special circumstances and abnormal damages. Therefore, the reasonable contemplation is displaced into the background at last. In the foreground the concrete subjective knowledge of the contract breaker, which is naturally shared by the other party in most cases, is essential. This does not constitute a contradiction, as it can of course be expected that special knowledge which is communicated by the contracting partner is taken up in the contemplation.

Hence, the classification of this rule as belonging to the category of approaches with a subjective element is not unambiguous. However, taking the illustrated applications into consideration, it seems justifiable to distinguish this approach from pure reasonable contemplation.

Finally, it is interesting to note in this context that the German rule of § 254 para. 2, sentence 1, alternative 1 BGB bears resemblance to this second branch from *Hadley v Baxendale*, even though the former deals with contributory negligence and mitigation of loss and the latter deals with remoteness, respectively the imputation of losses. § 254 para. 2, sentence 1, alternative 1 BGB regulates that liability to pay damages can be limited or dispensed if the injured party has not notified the debtor of the danger of unusually extensive damage. This verifies once again how important it is in comparative law to find rules with the same *function* to be compared.

dd) Summing up, it can be established that all approaches analysed within this subjective category regard the inner life of the parties to a contract as crucial. They consider their intention, estimation, contemplation or knowledge. Losses which are covered by a certain degree of the parties' imagination can be imputed to the contract breaker. The coverage of imputation, therefore, does not depend on factual probabilities. Rather, obvious as well as absurd consequences of a breach of contract can be part of the parties' reflection.

Detached from the system of their application, all of the approaches in this category would reach similar results. Regarding the relevant point in time, all of these resolutions declare the time of formation of the contract essential. However, in this subjective category it does—in contrast to the objective category—make a difference whose view is being considered. As discussed above, an objectified standard abolishes most differences in the results. Considering specific persons and their contemplation, however, the results of imputation are wider if only the contract breaker's view is taken into account than if both parties' view is relevant. Hence, the approaches which look at both parties' intention or interpret the whole contract or certain contractual agreements have stricter requirements than those approaches which

declare the debtor's reflection as solely decisive. The conformity of several persons' contemplation is naturally narrower than a single person's contemplation.

2. Application of These Approaches

A conclusive, overall picture can be reached only by additionally looking at the application and interaction of these abstractly described approaches.

a) Scotland

Regarding the approaches found in Scots law, a variety of nuances can be observed, which is inherent in the nature of the common law. Three major streams can be distinguished.

*Hadley v Baxendale*¹⁰⁹, as the starting point of all consideration, postulates that the damage must either arise according to the usual course of things or be reasonably supposed to be within the contemplation of the parties; the latter particularly being the case if the contract breaker has been aware of special circumstances which are relevant for his estimation of the probability of the occurrence of the loss. On the basis of the categorization that has just been undertaken, it becomes apparent that the test in *Hadley v Baxendale* consists of two elements. One of these is to be classified as an objective standard and the other as a subjective component, although its categorization proved to be difficult. It suffices that, alternatively, either the objective or the subjective branch is fulfilled. In this context it is useful to note that, compared to the other objective approaches, the objective element utilized here seems to constitute a rather strict limitation. The subjective element in this test, however, forms one of the wider approaches amongst the subjective standards. All in all, the fact that the alternative fulfilment of only one of the sides is sufficient makes this test relatively far-reaching.

In the course of development, a differing shape of resolution of the problem of imputation of damage has emerged. According to this the relevant test consists solely of an objective component of probability. Depending on the specification of this resolution, it is required that the occurrence of the loss has to a certain degree been likely, reasonably foreseeable or within the reasonable contemplation of the parties. Again, depending on its specification, this procedure can result in a rather strict or a rather wide imputation of damages.

Finally, a resolution which solely applies a subjective approach exists in Scots law, albeit in a rather small number of cases. Such tendency can, for example, be detected in the decision *The Achilleas*. In its extremes this resolution becomes nearly equivalent to the German doctrine of the *Schutzzweck der Norm*, which constitutes a rather strict and narrow approach.

b) Germany

In German law the two major approaches of *Adäquanztheorie* and *Schutzzweck der Norm* stand vis-à-vis. The former concentrates on an objective element of probability; the latter demands the subjective teleological interpretation of contractual agreements. Their correlation is heavily disputed.

¹⁰⁹ As well as its application in "*Den of Ogil*" Co. Ltd. v *Caledonian Railway Co.* and *Balfour Beatty Construction (Scotland) Ltd.* v *Scottish Power plc.*

In legal writing, as well as in jurisprudence, it is predominantly supposed that both limitations of imputation are to be applied in parallel¹¹⁰. The *Adäquanzttheorie* is largely understood as a first test¹¹¹ in order to define the outermost boundaries of limitation¹¹² by merely ruling out losses that are absolutely beyond the expected course of things¹¹³. The subsequent application of the *Schutzzweck der Norm* aims to make sure that, of the remaining damages, only those which were supposed to be avoided by the breached contractual obligation have to be compensated. Hence, according to prevailing opinion, an objective as well as a subjective component must be at hand in a cumulative way. As illustrated above, the objective element applied here is a very wide approach. The subjective element can be regarded as a rather strict and narrow approach. As both components are demanded in a cumulative way by this prevailing opinion, this results in an even stricter limitation.

In contrast to this predominant view of coexistence of both approaches, the *Adäquanzttheorie* is seen very critically by some legal writers, who consequently accept the doctrine of the *Schutzzweck der Norm* as the solely accurate criterion¹¹⁴. The latter counts as a type of teleological interpretation so that it is methodically secured. Indeed, the results of the two approaches strongly resemble one another. Nevertheless, situations are imaginable in which unlikely consequences are covered by the protective aim of a rule. Conversely, there can also be situations in which likely consequences have to remain out of consideration of the doctrine of the *Schutzzweck*. The main point of critique against the *Adäquanzttheorie* is its wideness, which makes limitations very difficult. Furthermore, the significance of this criterion is doubted in general. In modern jurisprudence the tendency of attributing the greatest significance and importance to aspects of the aim of a rule or contractual obligation can be observed, as well. Hence, according to this opinion, only a strict subjective approach is relevant.

Looking at the results of both positions, the outcomes are almost identical, as the objective element applied here is so wide that it hardly leads to any limitations. Consequently, according to both views the narrow subjective element is the deciding one.

c) DCFR

In the Draft Common Frame of Reference, the application of the approaches analysed above is explicitly regulated. According to Article III. – 3:703 DCFR, either the effective foreseeing or the reasonable expectance of this foreseeing as a likely result is necessary in order to impute damages to the contract breaker. It is hence sufficient that either the subjectively shaped first element or the objectively shaped second part of the rule is fulfilled. Both of the approaches utilized here seem to belong to the rather wide elements. This wideness of the resolution of the DCFR is made even broader by the fact that the fulfilment of one of the elements is declared alternatively sufficient.

¹¹⁰ BGH NJW 2001, 514 (515); *Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, § 249, para. 19; *Palandt, Bürgerliches Gesetzbuch*, Vorb. v. § 249, para. 29; K. Larenz, *Lehrbuch des Schuldrechts*, Allgemeiner Teil, 441; H. Lange & G. Schiemann, *Schadensersatz*, 93; D. Medicus & S. Lorenz, *Schuldrecht I*, para. 640; H. Brox & W.-D. Walker, *Allgemeines Schuldrecht*, § 30, para. 12.

¹¹¹ *Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, § 249, para. 20.

¹¹² K. Larenz, *Lehrbuch des Schuldrechts*, Allgemeiner Teil, 445; *Palandt, Bürgerliches Gesetzbuch*, Vorb. v. § 249, para. 28.

¹¹³ BGH NJW 2001, 514 (515).

¹¹⁴ Cf. J. Esser & E. Schmidt, *Schuldrecht*, Band I Allgemeiner Teil, Teilband 2, 231.

3. Valuation

After categorization, analysis and comparison of the various approaches of resolution of this problem and the subsequent analysis of their application, it can be established that German law provides a strict and narrow standard, i.e. makes high demands for the imputation of damages. The spread of approaches is wider in Scots law. However, it appears that even the strictest and narrowest approach within Scots law, namely the consideration of the contents of the contract and the intention of the parties, is consistent with the widest of the resolutions in German law. All other opinions within the decisions in Scots law impute damages more generously, which is true for the various resolutions that regard only objective approaches as essential, as well as the basic rule in *Hadley v Baxendale*, which declares the alternative fulfilment of either a narrower objective element or a wider subjective element sufficient. The standard of the DCFR again seems more far-ranging than most positions in Scots law. According to it, the applied objective approach, as well as the applied subjective element, is rather wide. Additionally, the alternative fulfilment of one of the two components is enough, which even increases the extensive effect¹¹⁵. Yet, it may well be assumed that the results in practice are not as different as these very detailed and academic findings may indicate.

III. Mitigation of Loss

The limitation of the coverage of damages finally depends on the question to what extent the innocent party has kept the losses low.

1. Similarities and Differences

Scots law, as well as German law, expects that the innocent party reduce his damages by reasonable conduct. However, the duty to mitigate cannot be legally enforced. Therefore, the term *Obliegenheit*, which is widespread in Germany, perfectly fits Scots law as well, even though its use is not common there. There is also consent in regard to the extent of the behaviour to be demanded. Both national legal systems merely require such steps that are reasonable. Furthermore, the consequences of a failure to mitigate are equal in both laws. In each case the claim for damages is to be reduced insofar as the loss could have been avoided by means of reasonable conduct. As to the calculation of the reduction of damages in Scots law as well as in German law, expenses incurred in the course of due mitigation of loss can be recovered, irrespective whether they actually decreased the loss or not. The Scots law rule, according to which benefits that the innocent party has gained in the context of the breach of contract have to be taken into consideration at this point, is dealt with in German law within the more general principle that advantages which the innocent party achieved as a result of the breach of contract have to be accounted for when calculating the damages¹¹⁶.

Thus, as regards contents there are no major differences between the two legal systems in this point. However, it must be noted that the dogmatic basis differs fundamentally. Scots

¹¹⁵ In cases of intentional, reckless or grossly negligent non-performance, liability according to Article III. – 3:703 DCFR is even wider because the limitations described are not considered in these cases.

¹¹⁶ Cf. for example *Beck'scher Online-Kommentar BGB*, § 249, para. 107 ff; H. Brox & W.-D. Walker, *Allgemeines Schuldrecht*, § 31, para. 21.

law distinguishes between *mitigation* and *contributory negligence*. In contrast, German law considers the duty to mitigate loss a specification of contributory negligence. Therefore, § 254 BGB contains both concepts in one rule.

For the sake of a better overview, it shall finally be noted that the principle of mitigation of loss in German law is regulated in § 254 para. 2, sentence 1, alternative 3 BGB. The failure to avert the damage which is regulated in alternative 2 of the same sentence is partly seen as a shape of the same principle. Even though it does not play a role in the relevant decisions of Scots law that have been analysed here, it might be possible that the rules of mitigation of loss can be applied to the failure to avert the damage, as well. It might, however, also be possible to allocate this question to the concept of contributory negligence, which is not dealt with in this article. The idea of a failure to draw someone's attention to the danger of an unusually extensive damage in § 254 para. 2, sentence 1, alternative 1 is in Scots Law, as shown above, treated within the framework of remoteness, or respectively the imputation of a loss.

2. The Resolutions From the Perspective of the DCFR

In the Draft Common Frame of Reference, the rule of mitigation is found in Article III. – 3:705 (1) DCFR. As already familiar from the national rules, the debtor is not liable insofar as the creditor could have reasonably reduced the loss. This rule concurs with those in Scots law and German law. Again, only reasonable steps are expected. The denotation *Obliegenheit* fits here, as well, since again no duty of efficiency is imposed on the innocent party but it is merely regulated that his claim for damages can be reduced in case he does not keep his losses down.

While the rule that all expenses arising in the course of reasonable attempts to mitigate the loss can be recovered is established by the courts in Scots law, as well as in German law, the DCFR explicitly regulates this in Article III. – 3:705 (2).

From a dogmatic point of view, the system of rules concurs with Scots law rather than with German law, as the DCFR also distinguishes strictly between the analysed mitigation of loss according to Article III. – 3:705 and contributory negligence according to Article III. – 3:704.

3. Reasons and Interpretation

Both of the analysed national legal systems provide a rule of mitigation of loss. Therefore, it is simply consequential that the DCFR deals with this question, as well. As regards content, all of the explained constructions are identical. Only the systematic classification of the rules varies between the resolutions in Scots law and the DCFR on the one hand and German law on the other hand. It does not seem sensible to identify one of these approaches as superior, as both are logical and well explicable. In the end the contents, rather than the systematic arrangement of rules, must remain essential.

Detached from the context of their systems, all of these rules have the function of causing the creditor of a claim for damages to not rely on the certainty of an extensive payment of damages. Rather, he is to be motivated to take reasonable steps to mitigate the loss in the interest of the contract breaker and ultimately in the interest of law and order. At this point a European consensus seems to exist, at least on the basis of the legal systems that are considered in this article and the coextensive DCFR. Looking at the rules from the view of this

European standard, the existing national rules, as well as the resolution in the DCFR, can be regarded as appropriate and well balanced.

D. Concluding Remarks

Having a final look at the three categories of limitation of damages in the event of breach of contract, it remains to be established that a rather homogeneous legal position has been found concerning the questions of causation, as well as regarding the problem of mitigation of loss. To this extent, a European consensus already seems to exist.

However, differences between the analysed rules have been detected regarding the imputation of damages. In trying to find an explanation for these differences, it appears supposable that a claim for damages has further elements and requirements that can once again differ in their specification between the legal systems. Hence, the overall result can possibly be very similar, because one stricter component might be compensated by the wider application of another element and vice versa. Such a further element of a claim for damages is the question of whether a fault is necessary in order to award damages. Nevertheless, the results found remain astonishing even taking this explanation into consideration: Like Scots law¹¹⁷, the DCFR follows the principle that no element of fault of the contract breaker is required in order to award damages. German law in contrast declares fault a requirement of liability for breach of contract¹¹⁸. Thus, as German law makes higher demands on the preconditions of liability than Scots law and the DCFR, it could have been expected that the limitations of the coverage of damages are less strict in German law, as it were, to compensate for the first mentioned difference. Exactly this fact is claimed in Note III. 9 on Article III. – 3:703 DCFR. This note, however, imprecisely illustrates the wideness of the German rules on imputation of damages only on the basis of the *Adäquanztheorie*. The narrower and decisive doctrine of the *Schutzzweck der Norm* is not mentioned in this context so that the overall picture drawn there is not very accurate. Although only German law knows the requirement of fault, it additionally provides strict preconditions on the imputation of losses.

As was shown, the rules on imputation of damages found in the DCFR are rather wide. Taking into account the strict liability lacking an element of fault, this appears dissonant at first sight. A more detailed look at the rules of the DCFR, however, reveals that, according to Article III. – 3:701 (1) DCFR, the innocent party is entitled to damages only if the non-performance, i.e. the breach of contract, is not excused under Article III. – 3:104 DCFR. This rule resembles a requirement of fault¹¹⁹ so that the preconditions of liability under the DCFR are not as wide as they appear at first view. Hence, the rules of the DCFR constitute a reasonable option of dealing with the subject matter.

¹¹⁷ K. Riesenhuber, *European Review of Contract Law* 2008 (4), 119 (133).

¹¹⁸ *Ibid.*, 121.

¹¹⁹ Furthermore, Article III. – 3:703 DCFR contains an element of fault itself. It regulates that the limitations are not applied in cases of intentional, reckless or grossly negligent conduct. However, this does not constitute a requirement of liability but an extension of its coverage.