COMPARATIVE AND NORMATIVE ANALYSIS OF DAMAGES UNDER THE SGA AND THE CESL

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INTRODUCTION

This article strives to analyze the rules concerning monetary damages under two different legal regimes for the sale of goods: the Sale of Goods Act of 1979[1] ("SGA") and the Proposal for a Common European Sales Law in 2011 ("CESL").[2] It is not the purpose of this article to provide an exhaustive exposition of the doctrines of either regime. Instead, the focus will be on the central aspects of monetary damages, such as the aim of damages and general rules governing the measure of damages. It should be noted that inevitably there will be some references to the commentaries on the United Nations Convention on Contracts for the International Sale of Goods of 1980[3] ("CISG"), as there is only a limited (though growing) body of literature concerning the CESL. Moreover, the CESL has textual uniformity with the CISG; this fact can particularly be seen on the rules governing damages.[4] As Loss and Schelhaas have stated: "[t]he right to

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1. Sale of Goods Act 1979, c. 54, §§ 1–54 (U.K.) [hereinafter SGA].

2. *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, Brussels, COM (2011) 635 final (Nov. 10, 2011), http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf, [http://perma.cc/9RVV-9BHH], [hereinafter CESL].

3. United Nations Convention on Contracts for the International Sale of Goods Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668, http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf, [http://perma.cc/5UYB-ATJT], [hereinafter CISG].

4. *Compare* CESL, *supra* note 2, art. 161 (describing the rule governing the foreseeability test), *with* CISG, *supra* note 3, art. 74 (describing the rule governing the foreseeability test); *compare* CESL, *supra* note 2, art. 164 (describing the rules governing the quantification of damages), *with* CISG, *supra* note 3, art. 75 (describing the rules governing the quantification of damages). Under CESL art. 161, "[t]he debtor is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance." CESL, *supra*, art. 161. Pursuant to CISG art. 74,

> 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.

CISG, *supra*, art. 74. Under CESL art. 164, claim damages is regulated in a similar way in both instruments, which means that CESL does not provide commercial contracts with any better opportunities than does CISG in this regard."[5] This might be seen a rational reason for applying the CISG to cases where the parties have chosen the CESL as the governing legal regime.

Damages are examined in the context of international sales of "manufactured goods." Manufactured goods can be broadly classified in two groups: first, similar manufactured goods produced in large volumes; second, manufactured goods conforming to the special orders of buyers (reflected in contract terms), i.e. unique or bespoke goods. The former group constitutes the larger part of manufactured goods, and this will be taken into account in this article.[6] Manufactured goods produced in large volumes are strictly neither "fungible goods" nor "unique goods." These goods are something between these two categories of goods. In other words, they have characteristics of both fungible and unique goods, but in nature they are different. Their difference arises from the fact that they have been manufactured on the basis of the special orders and that their equivalent could also be found in the market. They are similar to unique goods, as they have been produced on the basis of special orders reflected in the contract terms. They are similar to fungible goods, as their equivalents can be found in the market. They can therefore be called "innominate goods." A helpful example of these sorts of goods are cars.

Additionally, this article will attempt to explore those aspects of the law of damages that shed light on the degree to which the criteria of an evaluative framework are satisfied. This novel evaluative framework

> [a] creditor who has terminated a contract in whole or in part and has made a substitute transaction within a reasonable time and in a reasonable manner may, in so far as it is entitled to damages, recover the difference between the value of what would have been payable under the terminated contract and the value of what is payable under the substitute transaction, as well as damages for any further loss.

CESL, *supra* , art. 164. CISG art. 75 states,

> [i]f the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

CISG, *supra*, art. 75.

5. Marco B.M. Loos & Harriet Schelhaas, *Commercial Sales: The Common European Sales Law Compared to the Vienna Sales Convention*, 21 EUR. REV. PRIVATE L. 105, 128 (2013).

6. *See* WORLD TRADE ORG., INTERNATIONAL TRADE STATISTICS 2011 61 (2011), http://www.wto.org/english/res_e/statis_e/its2011_e/its2011_e.pdf, [http://perma.cc/3VFK-7ZT8]. According to the WTO Website, the value of international sales of manufactured goods is 67% of the international trade; these goods include iron and steel, automotive products, textiles, etc. *Id.* at 57–58, 61.

consists of tests of certainty, performance interest, efficiency, and the norms of relational theory of contract. These criteria will be explained later.[7] The existing differences between the rules governing damages under these two legal regimes are compared on the basis of this evaluative framework in order to identify which system has adopted the better approach for compensating buyers of "innominate goods." In the following section, the law of damages under the SGA and the CESL will be outlined, with the central aspects being identified and explained in the context of those two legal regimes.[8] In the second substantive part of this article, the major differences between the laws of damages under these two legal regimes will be compared and evaluated.[9]

I. DAMAGES UNDER THE SGA

A. RIGHT TO DAMAGES

Damages are the standard remedy in English law and "[t]he action for damages is always available, as of right, when a contract has been broken."[10] Damages must be awarded for any breach of contract that causes loss to the buyer.[11] Loss includes (1) "any injury to . . . [a party's] present economic rights . . .; [(2)] any diminution [to a party's] previous financial position . . .; [or (3) a party's] failure to obtain the use of a physical object or an economic or other non-physical advantage . . . ."[12] Loss can be generally classified in two groups: pecuniary loss and non-pecuniary loss. Pecuniary loss contains two main forms. The first form, normal pecuniary loss, occurs because of breach, such as loss of bargain.[13] The second form deals with consequential loss: "expenditure or loss of profit over and above the loss of or diminution in the value of the

7. *See infra* Part III.A.
8. *See infra* Parts I–II.
9. *See infra* Part III.
10. EDWIN PEEL, THE LAW OF CONTRACTS 988 (13th ed. 2011); *see* SGA, *supra* note 1, § 51 (1); 1 CHITTY ON CONTRACTS ¶ 26-001 (Hugh G. Beale ed., 31st ed. 2012); GOODE ON COMMERCIAL LAW 393 (Ewan McKendrick ed., 4th ed. 2010); EWAN MCKENDRICK, CONTRACT LAW: TEXT, CASES, AND MATERIALS 813 (5th ed. 2012).
11. *See* SGA, *supra* note 1,§ 51(1); *see also* Robinson v. Harman, (1948) 154 Eng. Rep. 383, 855–56; Johnson v. Agnew [1980] A.C. 367 (H.L.) 387 (appeal taken from Eng.); Wertheim v. Chicoutimi Pulp Co., [1911] A.C. 301 (P.C.) 301 (appeal taken from Que.); ROBERT BRADGATE, COMMERCIAL LAW 326 (3d ed. 2000).
12. DONALD HARRIS ET AL., REMEDIES IN CONTRACT AND TORT 75 (2d ed. 2002).
13. HARVEY MCGREGOR, MCGREGOR ON DAMAGES ¶ 2-002 (18th ed, 2009); *see also* H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co., Ltd. [1978] Q.B. 791, 802 (Eng.). Also, Lord Denning stated in *H. Parsons (Livestock) Ltd.* that economic loss includes "loss of profit or loss of opportunities for gain in some future transaction." *H. Parsons (Livestock) Ltd.,* 1 Q.B. at 802.

immediate subject matter of the contract."[14] Non-pecuniary loss includes, but is not limited to, "pain and suffering, physical inconvenience, loss of enjoyment, and mental distress."[15] As this article addresses international commercial sales of goods, the focus will be on remedies corresponding with the pecuniary losses because commercial actors normally make contracts in order to make profits and maximize their wealth. In other words, they will seek to achieve a remedy that will put them in the same financial position they would be in if the expected benefit had flown from the contract, which was breached by other party. Therefore, commercial actors are mainly concerned with available remedies that can compensate their pecuniary losses and they might ignore the ways for compensating their non-pecuniary losses.

B. AIM OF AWARDING DAMAGES

Burrows has asserted that: "[a]t a high level of generality, one can say that there are six main purposes that might be pursued by judicial remedies for breach of contract: compensation, specific enforcement, prevention, declaring rights, restitution and punishment. Of these six, English law pursues the first four but not the last two."[16] The aim of an award of damages for breach of contract is to compensate the injured party for his loss that occurred as a result of the breach.[17] In *Alfred McAlpine Construction v. Panatown*[18] the court explained that the general rule is that "damages for breach of contract are compensatory . . . ."[19] The basis of an award of damages for breach of contract under the English contract law has been expressed in the dictum of Parke, B. in *Robinson v. Harman*: "[t]he rule of the common law is, that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."[20]

14. *See* GOODE ON COMMERCIAL LAW, *supra* note 10, at 133.

15. *Id.* at 132.

16. Andrew Burrows, *Legislative Reform of Remedies for Breach of Contract: The English Perspective*, 1 EDINBURGH L. REV. 155, 157 (1997); *see also* MCGREGOR, *supra* note 13, ¶ 1-021; 1 CHITTY ON CONTRACTS, *supra* note 10, at ¶ 26-001.

17. *See* Attorney General v. Blake, [1997] Ch. 439 (C.A.) 447 (appeal taken from Eng.); MCGREGOR, *supra* note 13, ¶ 1-002. McGregor has stated: "Damages are dominated by the idea of compensation in money; such compensation is the rule. Day after day, in case after case, damages are awarded to claimants to compensate them for loss and damage." MCGREGOR, *supra.*

18. Alfred McAlpine Constr. Ltd. v. Panatown Ltd., [2000] C.L.C. 1604 (H.L.) (appeal taken from Eng.).

19. *Id.* at 1640.

20. Robinson v. Harman, [1843-60] All E.R. 383, (1848) 1 Ex. 850 at 855; *see also* Golden Strait Corp. v. Nippon Yusen Kubishika Kaisha (The Golden Victory), [2007] C.L.C. 352 (H.L.) 358 (appeal taken from Eng.); 1 CHITTY ON CONTRACTS, *supra* note 10, ¶ 26-002.

Also, Fuller and Perdue have noted that the "object [of damages] is to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise."[21]

Damages give the claimant the money equivalent to his entitlement under the contract.[22] However, Vernon has offered a more precise and clearer exposition of the aim of damages: "to place the aggrieved party in the financial position that party would have occupied had the contract been performed . . . ."[23] This exposition is more accurate, as it has clarified that the money awarded seeks to put the injured party in "the [financial] position" he would be in if the contract was performed. The aim is therefore to protect the claimant's "expectation interest."[24] The reason for protecting the expectation interest might be the fact that "the function of exchange is to realise [sic] a surplus, the central concept of 'loss' following a breach of contract is [the claimant's] failure to obtain the future expected surplus."[25] In other words, damages seek to "achieve the *post*-performance situation, which is to be contrasted with the attempt in the law of tort [] to restore the *pre*-accident situation."[26] However, the injured party may also have a "'reliance interest,' which should be protected by the award of damages . . . ."[27] Reliance interest relates to the expense or loss which has occurred to the claimant on the basis of the expected performance of the promise made by the defendant "which is wasted by the breach."[28] Therefore, the claimant is entirely free to elect between a claim for his lost benefits (expectation interest) and one for wasted expenditure (reliance interest). As stated in *Anglia Television v. Reed*,[29] "[the plaintiff] can either claim for loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both."[30]

21. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 54 (1937); *see also* GOODE ON COMMERCIAL LAW, *supra* note 10, at 128; MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS 461 (2d ed. 2007).

22. *See* GOODE ON COMMERCIAL LAW, *supra* note 10, at 124.

23. David H. Vernon, *Expectancy Damages for Breach of Contract: A Primer and Critique,* 1976 WASH.U.L.Q. 179, 180 (1977).

24. *See* Fuller & Perdue, *supra* note 21, at 54.

25. See HARRIS ET AL., *supra* note 12, at 74.

26. *Id.*

27. BENJAMIN'S SALE OF GOODS (Michael G. Bridge ed., 8th ed. 2010) ¶ 16–031.

28. *Id.*

29. Anglia Television Ltd. v. Reed, [1972] 1 Q.B. 60 (C.A.) (appeal taken from Eng.).

30. *Id.* at 63–64; *see also* Cullinane v. British "Rema" Mfg. Co., Ltd (1954) 1 Q.B. 292 (C.A.) 301 (Eng.).

C. GENERAL MEASURE OF DAMAGES

The general measure of damages is reflected in SGA § 51(2): "The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract."[31] This rule applies where there is no available market for the contract goods. Although, this rule provides the way of quantifying damages, it also deals with one rule that limits damages. This limitation rule is called "forseeability test" or "'remoteness of damages" and will be considered below.

Where there is an available market for the goods in question, the measure of damages is the difference between: (a) the market price of the relevant goods at the time fixed for delivery and at the place fixed for delivery, and (b) the contract price.[32] This method of calculation is called the "abstract method."[33] This doctrine requires the buyer to take reasonable steps in finding a seller in the available market. This duty imposed by law is called the "duty to mitigate" that aims to protect the "expectation interest" of the buyer. The duty to mitigate requires the buyer to go to the market and buy immediately the goods similar to the contract goods and, accordingly, put himself in a financial situation as if the contract was performed. The aim of protecting the expectation interest has been reflected in SGA § 51(3). This section provides: "[w]here there is an available market for the goods in question[,] the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods . . . ."[34] This section highlights the market price rule, in which with the difference between the contract price and market price, the buyer is enabled to buy from a substitute seller and his expectation interest can, therefore, be satisfied.

D. FORESEEABILITY OF LOSS

The buyer must show that his loss was directly caused by the breach and was not too remote or unforeseeable for the seller.[35] In other words,

31. SGA, *supra* note 1, § 51(2).
32. *Id.* § 51(3).
33. G. H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT 111 (1988).
34. SGA, *supra* note 1,§ 51(3).
35. *See, e.g.*, Hadley v. Baxendale, [1854] 156 Eng. Rep. 145, 145, [1854] 9 Ex. 341, 341 (Eng.); *see also* SGA, *supra* note 1, at § 51(2); Boys v. Chaplin, [1971] A.C. 356 (H.L.) 372 (Eng.); Transfield Shipping Inc. of Panama v. Mercator Shipping Inc. of Monrovia, [2006]

the losses are recoverable by damages that arise in the usual course of events and fall within the reasonable contemplation of the parties at the date of formation of contract.[36] The rule of remoteness, stated in the leading case of *Hadley v. Baxendale*,[37] consists of two limbs. The first limb states:

> 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. . . . .[38]

This limb has been reflected in SGA § 51(2) by allowing the plaintiff to recover in respect of losses arising in the usual course of things.[39] The second limb of the case states:

> [I]f the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.[40]

The second limb is "designed for more unusual losses present to the minds of the particular contracting parties."[41] This limb encourages the parties to exchange information regarding the particular needs or vulnerabilities of the parties at the time of the contract.[42] In other words, the recoverability of damages depends upon the knowledge of the parties, particularly the party in breach, at the time of entry into the contract. The second limb has not been expressly adopted in the SGA. However, it is impliedly accepted by the wording of SGA § 54: "Nothing in this Act affects the right of the buyer or the seller to recover . . . special damages in any case where by law . . . special damages may be recoverable."[43]

Nevertheless, the two rules of *Hadley v. Baxendale* can be considered "as comprising a single rule, [focusing] on reasonable contemplation or . . .

EWHC (Comm) 3030, [2006] Q.B.1069, 1096 (Eng.).
36. BRIDGE, *supra* note 21, at 462.
37. *See Hadley*, 9 Ex. at 346.
38. *Id.* at 342.
39. *See* SGA, *supra* note 1,§ 51(2).
40. *Hadley*, 9 Ex. at 355–56.
41. BRIDGE, *supra* note 21, at 462.
42. *See* HARRIS ET AL., *supra* note 12, at 91 (explaining the test for remoteness).
43. SGA, *supra* note 1, § 54.

reasonable foreseeability."[44] In other words, the two limbs overlap and do not act as separate rules. This idea is reflected in later case law. In *Kpohraror v. Woolwich Building Society*,[45] it is stated that:

> [T]he starting point for any application of Hadley v Baxendale is the extent of the shared knowledge of both parties when the contract was made. When that is established, it may often be the case that the first and the second [limb] of the rule overlap or at least that it is unnecessary to draw a clear line of demarcation between them.[46]

Also, in *Victoria Laundry Ltd*, Asquith, L.J. indicated that the meaning of something arising naturally is something that should have been reasonably contemplated by the defendant if he had thought about the breach.[47] Therefore, the foreseeability rule under the SGA relies mainly on the knowledge of parties at the time of formation of contract; the SGA has therefore adopted an objective approach toward this matter

The foreseeability of damages is based on the view that "it is unfair to a defendant, and imposes too great a burden, to hold responsible for losses that it could not have reasonably contemplated or foreseen."[48] Moreover, it has been argued that the foreseeability test makes explicit what is implicitly accepted as a responsibility by the party in breach for the usual or normal consequences of a breach.[49] In other words, the party in breach does not accept responsibility for unusual consequences of the breach unless such consequences were contemplated by the parties at the time of formation of the contract.

E. THE DUTY TO MITIGATE

The buyer should take reasonable steps in mitigating his loss; this duty is called "the duty to mitigate." This duty implies that "the claimant cannot recover for loss caused by the defendant's breach of contract where the claimant could have avoided or minimised [sic] the loss by taking reasonable steps," such as buying substitute goods in the market.[50] If the buyer declined to do so, he should bear the risk of any increase in the

44. ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 84 (3d ed. 2004).
45. Kpohraror v. Woolwich Bldg. Soc'y, [1996] C.L.C. 510 (A.C.) (appeal taken from Eng.).
46. *Id.* at 517 (citation omitted).
47. *See* Victoria Laundry (Windsor) LD. v. Newman Indus. LD.,[1949] 2 K.B. 528 at 539 (Eng.).
48. *See* BURROWS, *supra* note 44, at 76.
49. *See* HARRIS ET AL., *supra* note 12, at 90.
50. *See* BENJAMIN'S SALE OF GOODS, *supra* note 27, ¶ 16–052; GOODE ON COMMERCIAL LAW, *supra* note 10, at 399.

market price. The rules of mitigation are related to the "market price" rules.[51] The normal rule for the measure of damages requires the innocent party to mitigate by buying or selling immediately in an available market, if one exists.[52] In other words, the buyer satisfies his duty to mitigate the loss, when he immediately goes to the available market and buys the goods similar to the goods contracted for. It has been stated that "the market price rule in contracts for the sale of goods represents a major departure from the ordinary rules of contract law relating to mitigation of loss."[53] Thus, the concept of "available market" relates exclusively to contracts for sale of goods and it therefore deserves an in-depth analysis.

F. Market Price Rule Reflecting The Duty to Mitigate

SGA § 51(3) states:

> where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver.[54]

English law has extensively used the concept of "market price" for measuring damages, which is "not characteristic of other legal systems."[55] The "market price" rule reflects the buyer's duty to mitigate his loss by "buying substitute goods in the open market."[56] Where there is an available market, the market price rule is utilized for measuring the damages. The vague concept of "available market" needs clarification. Bridge has said that market means "a physical place where goods are bought and sold."[57]

Goode has adopted a more stringent approach by defining an available market "as a market to which the buyer has reasonable access and in which he can procure goods of a description and quality comparable to those he has contracted to buy and at a price governed primarily by the market forces of supply and demand."[58] Goode then provides three criteria that, in co-existence, constitute the available market. First, the test of fungibility: "goods of which any one unit is considered in the locality or trade in question to be the exact equivalent of any other unit of the same

51. *See* BENJAMIN'S SALE OF GOODS, *supra* note 27, ¶ 16–052.
52. *Id.*
53. GOODE ON COMMERCIAL LAW, *supra* note 10, at 398.
54. S.G.A., *supra* note 1, § 51(3).
55. *See* BRIDGE, *supra* note 21, at 464.
56. *See* GOODE ON COMMERCIAL LAW, *supra* note 10, at 399.
57. BRIDGE, *supra* note 21, at 467.
58. GOODE ON COMMERCIAL LAW, *supra* note 10, at 398.

grade, sample or description . . . ."[59] Thus, manufactured goods made to the buyer's special order are likely not to satisfy this test.[60] However, Goode has stated that the buyer must still mitigate his loss if there is a "nearest" equivalent to the goods contracted for, even if the nearest equivalent does not constitute the available market.[61] Second, the test of sufficient quantity: "[t]he equivalent units must be available in sufficient quantities to meet all demands by would-be purchasers."[62] This is obviously problematic with transactions involving unique goods which have no exact equivalent. Third, the test of fluctuation of price: "the price must be one which fluctuates with supply and demand . . . ."[63] If the goods are unique then it is highly unlikely that price fluctuates according to supply and demand in the normal sense (*i.e.* in an abnormal sense, there will be price fluctuations in that there is no price without demand for unique goods, and a demand for such goods will necessitate the creation of a price). However, it has been submitted that if the contract goods are to be manufactured according to the specifications of the contract, there might be "an available market in which [the buyer] could buy suitable substitute goods."[64] But, it is likely that there will be no available market for unique manufactured goods, since "the chance of [buying] such goods within a reasonable time after the breach is too limited and fortuitous."[65]

The case law reflects an early view that an available market is some place (*e.g.* an exchange) where the goods in question can be sold.[66] Upjohn J., in *Thompson (WL) Ltd. v Robinson*,[67] stated that an available market means "[a] situation in the particular trade in the particular area . . . such that the particular goods [can] freely be sold . . . ."[68] He then stated that an available market in the subsection is not limited to a market, such as the Baltic or Stock Exchange, but an available market means trade in the area that the goods can freely be sold if a purchaser defaults.[69] Another view is that an available market means a situation where the current price for the

59. *Id.* at 415.
60. *See, e.g.*, Lazenby Garages Ltd. v. Wright, [1976] 1 W.L.R. 459, (C.A.) 462–63 (Eng.); *see also* M&J Marine Eng'g Servs. Co. Ltd. v. Shipshore Ltd., [2009] EWHC 2031 (Comm) [¶ 28] (Eng.).
61. *See* GOODE ON COMMERCIAL LAW, *supra* note 10, at 415 n.170.
62. *Id.* at 415.
63. *Id.*
64. *See* BENJAMIN'S SALE OF GOODS, *supra* note 27, ¶ 17-006.
65. *Id.* ¶ 16–067.
66. *See* Dunkirk Colliery Co. v. Lever, [1878] 9 Ch. 20, (C.A.) 25 (Eng,).
67. Thompson (W.L.) Ld. v. Robinson, [1954] 1 Ch. 177 (Eng.).
68. *Id.* at 187.
69. *Id.* at 185, 187.

goods may fluctuate according to supply and demand.[70] The case law is inconsistent in dealing with the notion of available market for manufactured goods. For instance, in a recent case concerning second-hand goods, the court held that:

> [N]ew equipment cannot be regarded as . . . being equivalent to "the goods in question", which were second-hand goods . . . [and, although the] availability of equivalent second-hand goods . . . [would have] constitute[d] an available market[,] [it would have taken] three months [to source a similar console, which fell] short of constituting an available market within the meaning of section 51(3).[71]

In this case, the court confirmed that there is an available market for the second-hand goods, although those goods have special characteristics conforming to the contract terms. In another case, the court rejected the available market for the contract goods by stating that an available market "involves a reasonably available supply of the contract goods and a reasonably available source of demand for such goods, and there was no such market for the goods to be supplied by [the seller]."[72]

II. DAMAGES UNDER THE CESL

A. RIGHT TO DAMAGES

The right to damages is considered as the last remedy that the buyer can refer to under the CESL.[73] As article 155 provides:

> In the case of non-performance of an obligation by the service provider, the customer has, with the adaptations set out in this Article, the same remedies as are provided for the buyer in Chapter 11, namely: (a) to require specific performance; (b) to withhold the customer's own performance; (c) to terminate the contract; (d) to reduce the price; and (e) to claim damages.[74]

The CESL has recognized this right for the aggrieved party in article 159, which states: "[a] creditor is entitled to damages for loss caused by the non-performance of an obligation by the debtor, unless the non-

70. *See* Charter v. Sullivan, [1957] 2 Q.B. 117 (C.A.) 128 (Eng.).

71. Air Studios (Lyndhurst) Ltd. v. Lombard North Cent. PLC, [2012] EWHC (QB) 3162, [¶¶ 92–93, 96].

72. M&J Marine Eng'g Servs. Co. Ltd. v. Shipshore Ltd., [2009] EWHC (Comm) 2031, [¶ 30] (Eng.).

73. *See* CESL, *supra* note 2, art. 157. The CESL has used extensively the words "creditor" and "debtor." *See generally id.* (using the terms "creditor" and "debtor" in various articles). In parts dealing with buyer's remedies the word "creditor" means "buyer." *See id.* art. 2 (w)–(x).

74. *Id.* art. 155.

performance is excused."[75] The loss includes the loss "caused by the non-performance" and the "future loss which the debtor could expect to occur."[76] There should be a causal link between the non-performance of obligation and the loss incurred to the buyer. In other words, the seller needs to prove that the non-performance was the result of circumstances beyond his control in order to escape from the liability. Moreover, the right to damages arises where "there is no lawful justification for non-performance, i.e., it was not caused by circumstances beyond one's control and therefore may be ascribed to the party who was in breach."[77]

B. AIM OF AWARDING DAMAGES

The aim of awarding damages is to compensate the buyer for loss which occurred as a result of the breach.[78] In addition, damages seek to protect and satisfy the "expectation interest" of the buyer.[79] Damages give the buyer the money equivalent to his entitlement under the contract in order to put him as nearly as possible in the financial position as if the contract was performed. Also, the "reliance interest" of the buyer is protected under the CESL, as it has been stated: "[s]uch damages cover loss which the creditor has suffered."[80] Thus, damages under the CESL are designed to protect and satisfy both the "expectation interest" and the "reliance interest."

C. GENERAL MEASURE OF DAMAGES

CESL article 160 provides:

> The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor into the position in which the creditor would have been if the obligation had been duly performed, or, where that is not possible, as nearly as possible into that

75. *Id.* art. 159(1); CISG, *supra* note 3, art. 74. CISG article 74 is equivalent to this article. CISG article 74 states: "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." CISG, *supra.*

76. CESL, *supra* note 2, art. 159.

77. Loos & Schelhaas, *supra* note 5, at 128.

78. CESL, supra note 2, art. 160.

79. *Id.* ("The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor into the position in which the creditor would have been if the obligation had been duly performed, or, where that is not possible, as nearly as possible into that position").

80. *Id.*

> position. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.[81]

This general rule is limited by the "foreseeability test" and the "duty to mitigate," which will be described below. Damages are prima facie quantified on the basis of the substitute transaction that has been made by the buyer following the breach of contract.[82] This manner of calculating damages is called the "concrete method." In other words, the buyer has the duty to mitigate his loss by making a substitute transaction. The difference between the price under the original contract and the substitute contract constitutes the loss that can be recovered by damages. If the buyer did not succeed in making a substitute transaction, he can recover "the difference between the contract price and the price current at the time of termination . . ." of the contract.[83]

D. FORESEEABILITY OF LOSS

The CESL has adopted a dual subjective/objective approach for its foreseeability test: "The debtor [seller] is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance."[84] The subjective test is satisfied when the seller has actually foreseen the loss, whereas the objective test is satisfied when a reasonable person in the situation of seller could be expected to foresee the loss. CISG article 74 is equivalent to article 161 of the CESL, and it is therefore useful to use the commentaries of CISG Art 74 for interpreting the CESL article more effectively.[85] The foreseeability test has been widely used in almost every legal regime as a method for limiting damages.[86] It seems that generally,

81. *Id.*

82. *See id* art. 164.

83. *Id.* art. 165.

84. CESL, *supra* note 2, art. 161.

85. CISG, *supra* note 3, art. 74:

> [D]amages 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.

Id.

86. *See* Alexander Komarov, *The Limitation of Contract Damages in Domestic Legal Systems and International Instruments, in* CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES 245, 250−52 (Djakhongir Saidov & Ralph Cunnington eds., 2008).

the underlying aim of a foreseeability test is "to make it possible for the parties to calculate the risks and their potential liability."[87]

E. THE DUTY TO MITIGATE

The CESL requires the creditor (buyer) to mitigate his losses by taking reasonable steps in minimizing the loss resulting from the seller's breach of contract. "The central idea underlying the principle of [the duty to mitigate the] loss is that the aggrieved party cannot recover damages, with respect to loss, that he reasonably could have avoided."[88] In other words, this principle seeks to prevent the injured party from waiting passively for the loss to take place, expecting the party in breach, to compensate the loss that could have been minimized by taking reasonable steps. If he performs this duty to mitigate the loss, "[he] is entitled to recover any expenses reasonably incurred in attempting to reduce the loss."[89] In other words, the costs incurred by the buyer in taking reasonable steps for mitigating his loss should be compensated by the seller.

F. MAKE A SUBSTITUTE TRANSACTION

CESL art. 164 states:

> A creditor who has terminated a contract in whole or in part and has made a substitute transaction within a reasonable time and in a reasonable manner may, in so far as it is entitled to damages, recover the difference between the value of what would have been payable under the terminated contract and the value of what is payable under the substitute transaction, as well as damages for any further loss.[90]

The buyer might make a substitute transaction and buy the similar goods in order to mitigate his loss, where the main contract has been terminated by the buyer in whole or in part. This illustrates that the buyer has reasonably taken steps in minimizing the loss. This form of mitigation of loss is reflected in CESL art. 164. CISG art. 75 is the equivalent to this article.[91] It has been stated that "[m]aking (and identifying) a substitute

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87. DJAKHONGIR SAIDOV, THE LAW OF DAMAGES IN INTERNATIONAL SALES: THE CISG AND OTHER INTERNATIONAL INSTRUMENTS 102 (2008) [hereinafter SAIDOV 2008].

88. Djakhongir Saidov, *Methods of Limiting Damages Under the Vienna Convention on Contracts for the International Sale of Goods*, 14 PACE. INT'L L. REV. 307, 350 (2002).

89. CESL, *supra* note 2, art. 163(2).

90. CESL, *supra* note 2, art. 164.

91. CISG, *supra* note 3, art. 75. CSIG article 75 provides:

> If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract

transaction will be especially important when the goods have been specially manufactured or for some other reason are so unique that it will be difficult to establish a "current" price . . . ."[92] The substitute transaction should have been made in "a reasonable time and in a reasonable manner."[93] However, the CESL has not explained the meaning of "reasonable time" and "reasonable manner." It seems that the buyer's substitute transaction should make "a cover purchase at the lowest price reasonably possible."[94] Thus, if "the buyer makes a cover purchase at more than the market price . . . , he will have difficulty in showing that he has acted reasonably."[95]

G. CURRENT PRICE RULE

Alternatively, the buyer may recover the difference between the terminated contract and the current price for the contract goods, if he has not made a substitute transaction.[96] As CESL art. 165 states:

> Where the creditor has terminated the contract and has not made a substitute transaction but there is a current price for the performance, the creditor may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss.[97]

The provision is, as the wording clearly shows, only applicable where a substitute transaction has not actually been made. So, where a substitute transaction has been made, concrete calculation of damages under article 164 takes precedence.[98] The concept of "current price" is vague and it has not been defined by the drafters. However, this notion has been defined under the CISG's commentaries.

> price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Id.

92. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 584 (Harry M. Flechtner ed., 4th ed. 2009).

93. CESL, *supra* note 2, art. 164.

94. *Guide to CISG Art. 75*, SECRETARIAT COMMENTARY, http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-75.html, [http://perma.cc/5VFF-UYPZ] (last visited July 25, 2013) ("closest counterpart to an Official Commentary").

95. Barry Nicholas, *The Vienna Convention on International Sales Law*, 105 L. Q. Rev. 201, 230 (1989).

96. CESL, *supra* note 2, art. 165.

97. *Id.*

98. *See* SCHLECHTREIM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1036 (Ingeborg Schwenzer, ed., 3d ed. 2010); *see also* CESL, *supra* note 2, art. 164. ; CISL, *supra* note 3, art. 76. CISG Art 76 is equivalent to CESL article 164.

> The current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at the place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.[99]

The market price rule is called the "abstract method" of calculating damages, as the buyer does not actually need to make a new contract.

III. EVALUATING THE EXISTING DIFFERENCES BETWEEN THE SGA & THE CESL

The central aspects of the law of damages that could correspond to the evaluation are thus two different rules: doctrines regarding the calculation of damages and doctrines regarding limitation of damages (foreseeability of loss and the duty to mitigate the loss). The rules governing quantification of damages under the SGA and the CESL are different; they will be evaluated on the basis of the evaluative framework. The methods dealing with calculation of damages involve the rules governing the duty to mitigate and thus they do not need to be analyzed separately. Moreover, the foreseeability test under the CESL and the SGA has discrepancies that deserve analysis. Before evaluating these differences, the evaluative framework will be introduced and explained.

A. EVALUATIVE FRAMEWORK

The evaluative framework employed in this article draws on the insights of general analyses of remedies for breach of contract in order to develop criteria that are specifically designed in light of the commercial realities and needs of international sales transactions and can be applied to the full range of buyers' remedies made available by the two main governing regimes. This evaluative framework consists of four criteria that will be introduced and justified in this part. The first criterion is "certainty." Rules need to be clear in order to avoid costly dispute resolution. Also, in the context of buyer's remedies, "certainty" also implies that a buyer should know where he will stand in the event of breach.[100] In other words, the buyer needs to be able to predict what will

99. SCHLECHTREIM & SCHWENZER, *supra* note 98, at 1035.

100. *See, e.g.*, IAN F. FLETCHER ET AL., FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW ¶ 20-005, at 291 (2001) (explaining that similar rules and regulations will enable a certain predictability in contractual relationships); *see also* John Fitzgerald, *Recent Development Relating to CISG: CISG, Specific Performance, and the Civil Law of Louisiana and Quebec*, 16 J.L. & COM. 291, 292 (1997) (discussing the importance of "uniformity" and its correlation with "certainty" and "predictability").

happen if the seller does not perform his contractual obligation and what options will be available to him. The second criterion is "performance interest." "[A] [buyer] enters into a contract because he is interested in getting that which the other party has to offer and because he places a higher value on the other party's performance than on the cost and trouble he will incur to obtain it."[101] This interest is called "performance interest"; its importance must be acknowledged, for it has been called "the only pure contractual interest."[102] This criterion is used to identify to what degrees a remedy can satisfy this interest.

The third criterion is 'efficiency.' An efficient remedy can be determined by examining the transaction costs facing the disputants.[103] In other words, the level of transaction costs affects what remedy would be efficient in the particular circumstances. The fourth criterion consists of the norms of "relational theory." Relational theory is considered in order to clarify to what extent damages can satisfy the norms of this theory. This theory is particularly suitable for assessing buyers' remedies in international sales of manufactured goods.[104] Where manufactured goods are specific goods, they need to be made to the buyer's special requirements reflected in the contract terms. This compliance is achieved by regular negotiation and communication of parties before the ultimate

101. Daniel Friedmann, *The Performance Interest In Contract Damages*, 111 L.Q. Rev. 628, 629 (1995).

102. *Id.*; *see also* SOLENE ROWAN, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ANALYSIS OF THE PROTECTION OF PERFORMANCE 2 (2012). Also, Rowan has stated, "the 'performance interest' therefore refers to the interest of the promisee in obtaining the performance to which he is entitled under the contract." ***Id.***

103. Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 366–67 (1984) (discussing the relevance of transaction costs in determining the efficient remedy); *see also* R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA (n.s.) 386, 395-96 (1937) (discussing the ways of minimizing transaction costs within a firm and open market); Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV 683, 708–09 (1986) (introducing transaction costs and comparing the remedy of damages and specific performance from the perspective of transaction costs).

104. *See generally* Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV 340, 344–45 (1983) (discussing, *inter alia,* the relational characteristics present in the contracts of modern industrial societies); *see also* Yehuda Adar & Moshe Gelbard, *The Role of Remedies in the Relational Theory of Contract: A Preliminary Inquiry*, 7 EUR. REV. CONT. L. 399, 412 (2011);(explaining that a theory is needed to allow the court ordering a remedy to take into consideration the characteristic of the relationship between the disputing parties); David Campbell, Symposium, *The Common Law of Contracts as a World Force in Two Ages of Revolution: A Conference Celebrating the 150th Anniversary of* Hadley v. Baxendale*: Foreseeability and Damages: The Relational Constitution of Remedy: Co-Operation as the Implicit Second Principle of Remedies for Breach of Contract*, 11 TEX. WESLEYAN L. REV. 455, 455–56 (2005); Dori Kimel, *The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model*, 27 O.J.L.S. 233, 236 (2007).

performance of the contract. For this reason the norms of relational theory are utilized to analyze to what extent the law of damages has been formulated to be responsive to ongoing relations of parties in this type of transaction. Macneil has presented ten norms of relational contracts.[105] Recently, Richard Austen-Baker has shortened these ten norms to only four universal norms of contract.[106] These four norms are: (1) preservation of relation; (2) harmonization with social matrix; (3) satisfying performance expectations; and (4) substantial fairness.[107] This version of relational theory builds on Macneil's relational norms; the simplicity of this version makes it more applicable and pragmatic. Therefore, these four norms presented by Austen-Baker will be utilized for assessing the discrepancies of damages in the SGA and the CESL.

B. QUANTIFICATION OF DAMAGES UNDER THE SGA & THE CESL & THE DUTY TO MITIGATE

The rules governing the duty to mitigate are almost the same in these two legal regimes.[108] The SGA has adopted a market price rule, which requires the buyer to go to the market and buy the goods similar to contract goods.[109] The CESL requires the buyer to make a substitute transaction and recover the difference between the contract price and the price under the substitute transaction.[110] These are also the two methods for calculating damages. The SGA has adopted the "abstract" way of calculating damages and the CESL has adopted the "concrete" way for calculating damages, however these two methods are practically the same. Under the SGA, the buyer needs to go to the market, find a seller and buy the similar goods, so he ultimately makes a substitute transaction.[111] The CESL requires the buyer to make a substitute contract in the first step and if he is unsuccessful in making a new contract, then he will be protected by the market price

105. *See* Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV 877, 879–80 (2000).

106. *See* Richard Austen-Baker, *Comprehensive Contract Theory: a Four Norm Model of Contract Relations*, 25 J. CONT. L. 216, 221–22 (2009).

107. *Id.* It should be noted that the norm of "satisfying expectation interest" is similar to "performance interest" that has already been adopted as a criterion in this evaluative framework and there is no need to consider the remedies on the basis of this norm.

108. *See* SAIDOV 2008, *supra* note 87, at 128.

109. *See* SGA, *supra* note 1, § 51(3) (explaining the measure of damages when there is an available market for the goods that a seller fails to deliver).

110. *See* CESL, *supra* note 2, art. 164,

111. *See* SGA, *supra* note 1, art. 51(3) (explaining the amount of damages will be assessed depending on the difference between the price set in the contract and the current price of the goods in an available market).

rule.[112] These two methods reflect the fact that the rules governing the duty to mitigate are almost the same; both methods require the buyer to minimize the loss by either making a substitute transaction or referring to the market and making a contract in order to protect and satisfy the performance interest of the buyer.

There is one significant difference regarding calculating damages under these two legal regimes, which deserves analysis on the basis of the evaluative framework. Under the SGA, the "market price" rule is preferred over the rule governing "making a substitute transaction." Where there is a market price for the contract goods, "a higher or lower price at which the buyer has resold the goods to a sub-buyer is generally irrelevant to the assessment of damages . . . ."[113] Also, Bridge has asserted "Damages for non-delivery by the seller and for non-acceptance by the buyer are presumptively based upon the market price of the goods supplied and not upon any sub-sale or resale price."[114] Thus the prima facie rule in measuring damages in the SGA system is the abstract method. Conversely, under the CESL, the "market price" rule for calculation of damages is subsidiary, even if the "market price" rule would have been more advantageous for the buyer. So the loss cannot be calculated abstractly if a substitute transaction has actually been made. One system relies heavily on market price rule and the other relies on the substitute transaction. This discrepancy is significant especially where there is a market for the goods in question and also the substitute transaction has actually been made by the buyer.

C. CERTAINTY

It seems that the abstract market price rule under the SGA provides greater certainty than the concrete method of the CESL. As Bridge states, "The market rule . . . has a strong appeal for those who relish commercial certainty."[115] Also, Zeller claims "The English system developed a method whereby the loss of profit is calculated on the basis of the market value on the day of the breach. This method has its problems, but it at least is

112. *See* CESL, *supra* note 2, art. 164.

113. *See* BENJAMIN'S SALE OF GOODS, *supra* note 27, at ¶ 17-028; *see also* PEEL, *supra* note 10, at 1016–17; TREITEL, *supra* note 33, at 111–12.

114. Michael G. Bridge, *Defective Goods and Sub-sales*, 3 J. BUS. L. 259, 259 (1998) [hereinafter Bridge 1998] .

115. Michael G. Bridge, *The Market Rule of Damages Assessment*, *in* CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES 431, 439 (Djakhongir Saidov & Ralph Cunnington eds., 2008); *see also* GOODE ON COMMERCIAL LAW, *supra* note 10, at 420.

certain."[116] The market price rule is concerned with "the ready capacity of willing sellers to supply quickly goods of the relevant category."[117] The available market for the goods in question is usually governed by the reasonable price of those kinds of goods, and the buyer under the SGA can be ensured that the contract made in the market is reasonable. Therefore, the courts will most likely award damages. Under the CESL, there is always the risk of unreasonableness of the price paid in the substitute transaction by the buyer, as the buyer does not need to refer to the market and research the price of the goods in question. Thus, the reasonableness of the substitute contract made in an available market can be more effectively demonstrated under the SGA and therefore, the courts are more likely to award damages.

Also, "[t]he market-price rule is not concerned with the price the buyer actually paid for the substitute goods but with the price he would have paid if he had purchased them on the contractual date of the original goods."[118] This implies that the buyer is effectively protected and damages are awarded, even if he does not actually make a contract by going to the available market. Under the SGA, the "abstract method" presupposes the buyer's reference to the market paying the reasonable price. This presupposition can satisfy the certainty interest of a buyer to a large extent, as he will be protected by the law even if he does not try to make a substitute transaction. However, the CESL requires the buyer to actually mitigate his loss by making a substitute transaction. The buyer cannot ensure that he will succeed in making a substitute transaction when the original contract is breached. Thus, the abstract method enables the buyer to predict his future situation more effectively when the breach happens.

D. PERFORMANCE INTEREST

The SGA market price rule is more likely to put the buyer in the same financial situation as if the contract was performed. This rule assesses the value of conforming goods and, this fact, increases the extent of satisfaction of the performance interest of the buyer. As with the different amount between the contract price and the market price, the buyer is able to

116. BRUNO ZELLER, DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 121 (2d. ed. 2009).

117. *See* BENJAMIN'S SALE OF GOODS, *supra* note 27 at ¶ 17-005; *see also* GOODE ON COMMERCIAL LAW, *supra* note 10, at 414 (explaining the meaning of "available market" as allowing the buyer to have "immediate recourse to it . . . if the seller fails to tender the contract goods on the due delivery date").

118. *See* GOODE ON COMMERCIAL LAW, *supra* note 10, at 419.

buy from a substitute seller the goods equivalent to the contract goods.[119] The available market is a place where there must be sufficient traders, who are in touch with each other.[120]

The large number of traders in a market can genuinely and reasonably determine the price of the equivalent goods that might reflect the actual value of the goods. Hence, the buyer should refer to the market in order to be placed in the same financial position he would be if the contract was performed. The concrete method, by which the buyer has to make a contract with a seller, is unlikely to ensure that the buyer pays the price representing the actual value of goods as opposed to the situation where there are large numbers of traders who are able to determine the price more accurately.

Although the abstract method can more accurately represent the actual value of the goods, it does not fully satisfy the performance interest. One might argue that requiring the buyer to actually make a new contract and recover the different price can grant the buyer "the very performance promised to him" under the original contract.[121] In other words, a new contract gives the buyer the equivalent goods that can actually put him in a good position, disregarding whether the price he paid is higher or lower than the market price. Whilst, the market price rule does not warrant the accessibility to the equivalent goods in the first instance, it only covers the different prices. In addition, the concrete method can satisfy this interest more rapidly, this rapid satisfaction is of high significance when the buyer has already sold the contract goods and the sub-buyer is waiting for the goods. Also, when the buyer intends to use the goods in his business, the concrete method is more beneficial for him. The market price rule does not oblige the buyer to actually make a new contract; it only needs the buyer to identify the available market, by which the different price will be covered later when damages are awarded by courts.

E. EFFICIENCY

The market price rule minimizes transaction costs at the stage of litigation of the dispute and can reduce the court's costs. Normally, a commercial buyer makes regular purchases after the non-performance of

119. *See* HARRIS ET AL., *supra* note 112, at 114.
120. *See generally* ABD (Metals and Waste), Ltd v. Anglo-Chemical Ore Co., Ltd. [1955] 2 Lloyd's Rep. 456 (finding that an available market existed); *see also* Heskell v. Cont'l Express Ltd., (1950) 1 ALL E.R. 1033, at 1045; Aercap Partners 1 Ltd. v. Avia Asset Mgmt. AB, [2010] EWHC (Comm) 2431, [2010] 2 C.L.C. 578, [612]–[13] (Eng.).
121. *See* Friedmann *supra* note 101, at 629.

the seller in the original contract and it could be extremely difficult for the courts to determine which contract was intended as a substitute for the original contract.[122] On the other hand, the market price rule looks only at the market price at the time of breach and the courts do not need to take into account the several purchases that have been made after the breach of the main contract. This would lead to minimizing the costs related to litigation, specifically those costs of investigating potential substitute transactions.

Additionally, it is hard and costly for the buyer to show that the price paid in the substitute transaction was reasonable. In other words, the buyer needs to prove that he has mitigated the loss in reasonable manner. If he has only made a single substitute transaction and wishes to cover the different price, he needs to be able to show its reasonableness, which would increase the costs of enforcement. It is also costly for the courts to determine whether the substitute contract was made in a reasonable time and reasonable manner. In other words, the court needs to understand whether the price paid in the new contract was reasonable. This would make the process of litigation lengthy and hence expensive, as the courts need to take into account all the subjective circumstances involving the substitute transaction. While the market price rule exempts the courts from investigating the reasonableness of the price paid in the market, the market price to a high extent reflects the actual and, therefore, reasonable price of the goods. Accordingly, the market price is much more efficient than the concrete method and can minimize the costs of litigation in awarding damages.

IV. THE NORMS OF RELATIONAL THEORY OF CONTRACT

A. PRESERVATION OF RELATIONS

It is almost evident that neither the abstract method nor the concrete method can induce parties to maintain their contractual relations. These two methods do not take into account the effect of parties' cooperation in settling their disputes; probably because damages, in principle, are awarded by the courts and therefore, the parties' contractual relations might not be counted. However, it could be argued that the abstract rule does not explicitly entail breaking the original contractual relationship; instead, the buyer is required to investigate the market price and recover the difference. Under the abstract method, "there is no requirement, as a condition of

122. *See* GOODE ON COMMERCIAL LAW, *supra* note 10, at 420.

recovering damages, that the plaintiff enters into a substitute transaction after terminating the contract."[123] Whilst, the concrete model requires the buyer to make a new transaction in order to gain the equivalent goods. This method clearly involves breaking the contractual relations. In other words, this method not only ignores encouraging the parties to have cooperation in order to preserve the relations, it also requires the buyer to make a new contract, which would lead to termination of the relations with the original seller. But, it is possible under the abstract method to preserve the original contract and quantify the loss on the basis of the market price. This method, at least, does not induce the buyer to end the original contractual relations. Thus, the abstract method can maintain the preservation of relations to a greater extent than the concrete method.

B. SUBSTANTIAL FAIRNESS

The abstract method can to a greater extent fulfill the requirement of substantial fairness. Substantial fairness should not be only limited to implication of the adequacy of reciprocity in quality-price relations, as it can have wider implication to cover the parties' investment in making contractual relations. Adar and Gelbard have explained, "the most important feature of relational contracts concerns the nature and extent of the investment the contract requires from each of the parties. . . ."[124] In these kinds of contracts, the parties not only expect to receive the promised performance, but also they expect to have further cooperation with each other in order to continue their contractual relation. Adequacy of reciprocity can be protected to a higher extent by implying indirectly to preserve the relations (the implied approach taken by the abstract method) than by requiring the buyer to actually enter into a new contract. The commercial parties to a contract for sale of manufactured goods normally invest in their relations and they reasonably expect to continue their relations. Part of the price paid by the buyer can be viewed as consideration for preserving the relations, as the buyer needs to have this relation in order to be ensured the goods conforming the contract terms. Substantial fairness cannot be protected under the concrete method, in which the buyer is more likely to break the original contract and waste the investment made by the parties to the transaction.

123. *See* Bridge 1998 *supra* note 114, at 259.
124. Adar & Moshe, *supra* note 104, at 414.

C. FORESEEABILITY OF LOSS UNDER THE SGA & THE CESL

The SGA's foreseeability test is objective: the seller is held liable for the losses that could be reasonably foreseen by parties at the time of formation of contract.[125] However, the CESL requires either the subjective or objective understanding for predicting the loss by seller only.[126] Under the SGA, the objective test can be satisfied by communication of parties at the time of formation of contract, in which the buyer exchanges the relevant information regarding the characteristic of his business. The SGA therefore encourages parties to share the necessary information regarding each other's business.[127] Thus the difference is that under the SGA the loss should be in the contemplation of both parties at the time of formation of contract, whereas the CESL relies only on the knowledge of the seller to the extent that he has actually foreseen the loss or is expected to have foreseen the loss.

D. CERTAINTY

Bridge has said the rule in *Hadley v. Baxendale* is widely understood as encouraging the pre-contractual disclosure of information.[128] The seller should be able to predict the loss by knowing the relevant information conveyed to him at the time of formation of contract. This shows that the SGA enables the buyer to easily predict his position in the event of breach, as he has provided the relevant knowledge about his business, thus enabling the seller to reasonably predict the losses concerned with the buyer's business. When the loss is objectively foreseeable, damages are awarded. Accordingly, the buyer is reasonably clear about his position after the breach of contract, when damages are going to be awarded with certainty. The CESL does not satisfy the certainty interest of the buyer to the extent that the SGA can. The buyer needs to show that the seller could have reasonably foreseen the loss. The buyer is uncertain about whether damages will be awarded, as he cannot easily show that the seller could have predicted the loss. This stems from the fact that the parties may not

125. *See* SGA, *supra* note 1, § 51(2); *see also* Satef-Huttenes Albertus S.p.A. v. Paloma Tercera Shipping Co. S.A. (The "Pegase") [1981] 1 Lloyd's Rep. 175 (Q.B.D.) at 182 (Eng.).

126. *See* CESL, *supra* note 2, art. 161.

127. *See* GOODE ON COMMERCIAL LAW, *supra* note 10, at 420 (explaining the rigidity of the market-price rule and potential harm to the buyer in the event of breach, which could be prevented by communication by the parties).

128. Bridge, *supra* note 21, at 462–63; *see also* Victoria Laundry (Windsor) LD. V. Newman Indus. LD.,[1949] 2 K.B. 528 at 53 (Eng.).

have knowledge about their businesses at the formation stage of the contract. The buyer therefore needs to determine the seller's knowledge from other unidentified sources.

E. PERFORMANCE INTEREST

Under the SGA, the buyer is motivated to make known to the seller the particular position and special losses that might occur, due to the requirement under the SGA that the loss should be in the contemplation of both parties. Lord Reid in *Koufos v. C Czarnikow Ltd*.[129] stated:

> The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised [sic] that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.[130]

Also, it has been stated in *Kpohraror v. Woolwich Building Society*[131] that "the starting point for any application of *Hadley v Baxendale* is the extent of the shared knowledge of both parties when the contract was made."[132] These cases strongly encourage the buyer to negotiate and communicate adequately in a way that the relevant facts are known and the information related to the goods transfer to the seller. The buyer can ensure that his performance interest will be satisfied by an award of damages where communications have effectively transferred the relevant information. A higher degree of knowledge as the result of negotiations will lead to a higher degree of foreseeability: as the parties become more knowledgeable about each other's businesses, they can more easily predict the loss.[133] If the loss becomes predictable, damages are awarded to put the buyer in a situation as if the contract was performed. Thus, the SGA protects and satisfies the performance interest to a greater extent than the CESL. Under the CESL, the buyer does not have such motive to negotiate with the seller; and the loss is not required to be in the contemplation of both parties. This fact discourages the buyer from actively taking part in the negotiation stage of the contract, and so he will not necessarily communicate effectively with the seller to transfer the necessary information. Consequently, the parties are unable to predict the loss on the

129. *Koufos v. C. Czarnikow Ltd.*, [1969] 1 A.C. 350 (H.L.) 381(appeal taken from England).
130. *Id.* at 385.
131. Kpohraror v. Woolwich Bldg. Soc'y, [1996] C.L.C. 510 (C.A.) (Eng.).
132. *Id.* at 517.
133. *See* TREITEL, *supra* note 33, at 158.

basis of their knowledge. Therefore, damages, which protect and satisfy the performance interest, are unlikely to be easily awarded under the CESL.

F. EFFICIENCY

The reasonable contemplation of loss under the SGA necessitates the perfect negotiation of parties at the stage of formation of contract in which the parties would try to reach the satisfactory terms. The buyer needs to provide adequate information to the seller, so that he becomes familiar with the special circumstances which make the loss a "not unlikely" consequence of the breach in question.[134] As shown in *Hadley v. Baxendale*, the buyer should have disclosed information about the use of the shaft in the mill, so that the loss could become predictable for the seller and the buyer would have been awarded damages. Disclosing all the relevant information about specifications of the buyer's business at the formation stage of the contract increases transaction costs under the SGA and is inefficient, as it needs a perfect negotiation clarifying the buyer's unknown circumstances for the seller. Under the CESL, there is no need for perfect negotiations disclosing the relevant information, since there is no need for the loss to be in the contemplation of both parties. Instead, it suffices that the seller foresaw or could be expected to have foreseen a loss at the time of formation of the contract. Thus, transaction costs are minimized at the stage of formation of contract. The CESL is therefore more efficient than the SGA at the negotiation stage of contract terms.

The loss needs to be in the contemplation of both parties in order to be compensated for by an award of damages. This fact requires the parties to communicate the specific information at the stage of formation of the contract. This would minimize the costs of resolving the dispute, which is effective for both buyers and courts.[135] If the buyer has communicated the special conditions of his business to the seller at the time of formation of the contract, he only needs to prove that he has exchanged the relevant information and accordingly the seller should have been able to predict the loss, on the grounds of the provided information. Providing information is regarded as a strong clue showing that the seller could have predicted the loss. Under the CESL, the buyer is required to prove that the seller actually

134. *See Koufos*, 1 A.C. at 388.

135. *See generally* Kornhauser, *supra* note 103, at 708–09 (explaining the complexity of transaction costs); Ulen, *supra* note 103, at 366. The cost of resolving the dispute has not been considered as a separate stage constituting transaction costs under the well-known Calabresi's popularization of transaction costs. This stage has been mentioned in the other law and economics scholar's articles, such as Thomas S. Ulen. *See* Ulen, *supra*, at 366.

foresaw or was expected to foresee the loss.[136] The buyer does not have such incentive to convey the relevant information, as provided under the SGA. The buyer therefore needs to investigate the seller's knowledge and his business in order to show the extent of his reasonable prediction and his ability to anticipate the loss. This is expensive for the buyer because it costs him time and money. However, the buyer might have general information about the seller's business, if they have had some communications before making a contract. The buyer under the SGA has an easier task than under the CESL. The SGA would minimize transaction costs in this regard and hence lead to efficiency. The communications between the parties at the formation stage of a contract is also beneficial for the courts. The court needs to be informed about all the relevant terms of the contract in order to resolve the disputes and award damages. For this purpose, the court can consider the parties' communications and the information exchanged at that time as useful elements guiding the court to decide the reasonable prediction of the seller about the loss. Under the CESL, the courts do not have the option of using the parties' negotiations. The court therefore needs to survey other factors constituting the seller's knowledge; this is expensive for the courts and increases the costs of resolution of the dispute.

V. THE NORMS OF RELATIONAL THEORY OF CONTRACT

A. PRESERVATION OF RELATIONS

Under the SGA, the communication of parties at the stage of formation of contract is of high significance. The court in *Kpohraror v. Woolwich Society*[137] stated that "the starting point for any application of *Hadley v Baxendale* is the extent of the shared knowledge of both parties when the contract was made."[138] In other words, the SGA encourages parties to have communications in order to familiarize themselves with the special circumstances affecting the occurrence of future loss. This encouragement under the SGA can satisfy the norm of preservation of relations to a higher degree than under the CESL; as the parties' communication enables the parties to recognize each other's interests and specialties and this might lead to more contractual relations in future. Under the CESL, there is no such encouragement for the parties negotiating at the stage of formation of contract. Motivating the parties to

136. *See* CESL, *supra* note 2, art.161.
137. *See* Kpohraror v. Woolwich Bldg. Soc'y, [1996] C.L.C. 510 (C.A.) (Eng.).
138. *Kpohraror*, [1996] C.L.C. at 517.

communicate is particularly significant in the sale of manufactured goods. These kinds of goods are to be manufactured on the basis of special orders of the buyer that is reflected in contract terms. The SGA provides the opportunity for the parties to negotiate about the terms and conditions dealing with manufactured goods whereas, the CESL has not taken into account the role of parties' negotiations, at least for satisfying the foreseeability test. The other norm of relational theory of contract, which is harmonization of relational conflict, seeks to achieve almost the same result as the norm of preservation of relation. So it is not necessary to analyze the differences of the SGA and the CESL on the basis of this norm.

B. SUBSTANTIAL FAIRNESS

The adequacy of reciprocity might be satisfied to a higher extent where the parties have had negotiations at the time of formation of the contract. At the negotiations stage, the buyer informs the seller about his special business and expects him to take responsibility over the special losses that might occur. Under the SGA, the buyer is encouraged to provide the information, because under *Hadley v. Baxendale*, the buyer has the responsibility to disclose information.[139] The buyer needs to pay a higher price than when he does not inform the seller about the particular losses since the seller charges the buyer for taking a greater than usual risk-taking. "A higher than usual price for a particular promise may be a pointer to acceptance of a greater than usual risk-taking by [the seller]."[140] The buyer, therefore, expects that the seller foresees those losses and if they occur, damages are awarded, as the foreseeability test is satisfied. The higher price the buyer pays, the more losses are recoverable by the seller; this is the application of quality-price relations in the foreseeability test. Accordingly, the SGA, by providing the opportunity for the parties to exchange the relevant information, satisfies the adequacy of reciprocity to a higher extent than the CESL, which does not require parties to have communications at the time of formation of the contract.

VI. CONCLUSION

This article analyzed the buyer's remedy of damages under the SGA and the CESL. This analysis involved an evaluation of significant differences laid down in central aspects of the law of damages between

139. *See Kpohraror*, [1996] C.L.C. at 516–17 (explaining the two prongs of *Hadley* and the importance of communication between the parties of a contract).
140. *See* HARRIS ET AL., *supra* note 12, at 92.

these two legal regimes. The major differences are on the rules concerning quantification of damages and the foreseeability test. These existing differences were examined against an evaluative framework consisting of the criteria of certainty, performance interest, efficiency, and the norms of relational theory of contract. This framework is universal in character, as its goal is to assist judges and arbitrators in applying the rules governing damages in a manner that can best satisfy the particular needs of commercial buyers in sales transactions of manufactured goods. The evaluation of these existing differences shows that the SGA can to a greater degree satisfy the criteria used in this evaluative framework; therefore, monetary damages under the SGA more effectively protect the particular needs of the buyer in sales of manufactured goods. However, the CESL satisfies the performance interest of a buyer to a higher degree by adopting the concrete method in calculating damages. Also, the CESL minimizes transaction costs at the formation stage of a contract under its rules of foreseeability.

Under the SGA, the loss is solely calculated on the basis of market price, even if a substitute transaction has actually been made. The CESL's quantification rules are in contrast with this approach; the focus is only on the substitute transaction, even if there is an available market for the contract goods. The abstract method can satisfy the "certainty interest" of a buyer to a larger extent than the concrete method in two respects. First, the buyer is ensured about the reasonableness of the contract he made in the market, as the price he pays can more accurately represent the actual value of the goods. So, there will be higher probability of awarding damages by courts. Second, the buyer is not required to actually make a contract as a condition for recovering damages: this enables the buyer to predict his situation after the breach by the seller. The buyer will be protected by the law because damages are awarded even if the buyer does not enter into a substitute transaction after terminating the contract.[141] However, the "performance interest" is protected more effectively under the CESL. The concrete method can give the buyer the very performance promised to him under the original contract, in which he can achieve goods very similar to the contract goods. On the other hand, the market price rule does not entail providing the similar goods in first instance. Also, the concrete method can satisfy this interest more quickly. This is essentially important for manufactured goods: when the goods have been already re-sold or the

141. Bridge 1998, *supra* note 114, at 259 (stating "there is no requirement, as a condition of recovering damages, that the plaintiff enter into a substitute transaction after terminating the contract").

goods are to be used in buyer's premises. Nevertheless, the abstract method is more efficient than the concrete method. Transaction costs are minimized at the stage of litigation of the dispute, which can be illustrated in two respects. First, the courts are exempted from considering the several purchases that have been made by the buyer after the breach of the main contract. The courts take into account only the market price at the time the breach occurred by the seller. Second, the courts do not need to investigate the reasonableness of the contract made in the market, since the price paid in the market is most likely an accurate indication of the actual value of the goods. Also, the abstract method can satisfy the norms of relational theory of contract to a larger extent. In terms of preservation of relations, this method does not explicitly encourage the buyer to make a substitute transaction and merely requires him to investigate about the market price. This requirement might be seen as an implicit encouragement to cooperate with the original seller and maintain his original contractual relations. In terms of substantial fairness, the abstract method protects to a higher degree the adequacy of reciprocity by implying indirectly to preserve relations, as part of the price paid by the buyer under the transaction for manufactured goods, to be seen as a consideration for maintaining the relations. Both parties need to continue their relations in order to be ensured proper performance of the contractual obligations will occur.

Another major difference between these two legal regimes is evident in the rules governing the foreseeability test. Under the SGA the loss should be in contemplation of both parties at the formation stage of the contract, whereas the CESL relies only on the knowledge of the seller to the extent that he has actually foreseen the loss or is expected to have foreseen the loss. Certainty is more effectively satisfied under the SGA, as the buyer is motivated to make the seller know about his particularities. So, the seller will be capable of predicting the loss: the predicted loss results in awarding damages by the courts. Therefore, the SGA enables the buyer to easily predict his position after the breach of contract. Under the CESL, the buyer cannot easily demonstrate the seller's knowledge, as they are not being encouraged to share the knowledge about their businesses at the formation stage of the contract. Moreover, the performance interest is more satisfied under the SGA. The SGA facilitates loss-prediction by the seller by encouraging the parties to communicate at the formation stage of the contract. When the loss is predicted by the seller damages are awarded, whereby the buyer is put in as good a position as he would have been in if the contract was performed. Under the CESL, the buyer is not motivated to provide the relevant information, as the loss is not required to be in the contemplation of both parties: this fact might disable the seller from predicting the loss and damages might not be adequate. However, the foreseeability test under the CESL can minimize transaction costs at the stage of formation of contract and hence appears more efficient than the SGA in this regard. Under the CESL, there is no need for perfect negotiations disclosing the relevant information, since there is no need for the loss to be in the contemplation of both parties. This can minimize the costs at the stage of negotiation about contract terms. But, at the stage of resolution of the dispute, the SGA is more efficient than the CESL. The buyer under the SGA does not need to spend money and time researching the extent of seller's knowledge to identify whether he could predict the loss, as informing the seller about his business can exempt him from researching. The buyer under the CESL needs to investigate about the seller's knowledge in order to show the extent of his anticipation about the loss. Additionally, the foreseeability test under the SGA is more in line with the norms of relational theory than under the CESL. In terms of preservation of relations, the parties are required to cooperate at the formation stage of the contract; by which the contractual relations are more likely to be preserved than when there is no encouragement for the parties to communicate before the conclusion of the contract. In terms of substantial fairness, the adequacy of reciprocity is satisfied to a higher degree under the SGA. The seller charges the buyer a higher price for taking a greater than usual responsibility over the losses by disclosing the relevant information by the buyer. The buyer expects that the losses become predictable by the seller and hence recoverable as damages. This is the implementation of quality-price relations under the SGA's rules governing the foreseeability test.