FORESEEABLE LOSSES?
THE EFFECT OF THE FORESEEABILITY RULE ON OUR CONTRACTUAL DAMAGES LAW

Abstract of doctoral thesis

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1. Summary and the main objectives of the research

The subject matter of the thesis is the so called contemplation rule, or foreseeability rule: the party in breach is obliged to compensate for those losses which were at the time of the conclusion of the contract contemplated or foreseeable. At common law if the parties do not agree otherwise by express terms of contract to exclude or limit liability for damages for breach of the contract or statutory restrictions do not order otherwise the party in breach is liable only for loss which was foreseen or could reasonably have been foreseen at the time of the conclusion of the contract as being likely to result from the breach of contract. The foreseeability rule is also known in the civil legal systems and international legal instruments, but appears at the same time in delict and tort law. The Act V of 2013 on Civil Code (hereinafter referred as Civil Code of 2013) entered into force on 15th of March, 2014, whereby the foreseeability rule became part not only our contract liability law [6:143 § (2)], but also or delict law (6:521. §) in accordance with the decision of the Codification Committee. Since the entry into force of the Act I of 2012 on Labour Law Code (1 July 2012) the foreseeability rule is also present in our labour law.

In the codification process of the Civil Code of 2013 it was proposed to codify the foreseeability rule as specific legal rule in the Civil Code of 2013. Nevertheless, the object of this thesis could have the following: the legislator did a wrong decision to introduce the foreseeability rule into our contractual damages law. My viewpoint is different. It is well known and positive opinion in the Hungarian and foreign literature that the foreseeability rule is an appropriate measure for limiting contractual damages, even with its failures and with the difficulties in its application. It is still preferred over other methods of limiting damages. However, those who support the foreseeability rule are not wholly satisfied with it, and also criticize it. There are also opinions in the common law world who denies the foreseeability rule as a method1.

The dissertation do not intend to take a stand on either by those who support the foreseeability rule or those who do not by proving the foreseeability rule is indeed a more appropriate rule or not as other rules and methods limiting contractual damages. This could be achieved if I would extend my research on the other rules and methods which limit contractual damages2 (such as the causation theories, the statutory limit, equity, fault, Schutzzweck-theorie, or those so called criteria as real and organic connection, the risk of the party is breach, the general risk of life3) carried on thoroughly.

The starting point of this thesis is that on the basis of the line of the legal development, the foreign legal solutions, the international trade law practice and also the Hungarian literature and law practice it is accepted that in case of breach of contract the foreseeability rule is an appropriate legal measure for limiting contractual damages, even with its failures. The aim of the dissertation is to give a critical analysis about the foreseeability rule (and its substantive law rule), to take a stand on its applicability, to identify the question of interpretations and difficulties that arise during its application and look for answers and alternative solutions at the same from the critical approach of the case law and literature of other legal systems. It is also analysed what is behind the rule of foreseeability that is only foreseeable damages should

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1 See e.g.: Eisenberg, Melvin Aron: The principle of Hadley v Baxendale. 80 California Law Review (1992) 563-614.
be compensated. In this research an emphasis is given for those theories and practice from the case law which framed and constituted the basis of limiting contractual damages until present and appeared in the practice such as. This approach opens the possibility to show and present how the foreseeability rule serves the aim of limiting contractual damages, and – not intended to be exhaustive – also whether the foreseeability rule correct those failures that arise by the application of other methods, rules and principle limiting contractual damages.

In this thesis liability and damages law is referred to only such extent as the subject matter and method of the thesis requires. The aim of the thesis is to present how the foreseeability is connected dogmatically to the system of the civil liability law. It is highly recommended to demonstrate how the foreseeability rule of contractual damages and its future practice determine and will determine other areas of liability law. The thesis do not detail about all rules of the liability of executive officer, employer and employees, but give an overview about the legal environment in which the foreseeability rule fits (see III.3.1 and III.3.2). In the course of the analysis of the foreseeability rule (IV) I also deal with the foreseeability rule of the labour law (167. § and 179. §), and of company law in case of the liability of the executive officer based on 3:24 § of the Civil Code of 2013 (IV.3). This will show us how the difference of these contractual relationships from the general contract law influences the application of the foreseeability rule in this area of law.

2. The description of the analysis carried on and the methodology of the research

The subject matter of the thesis determines the method of the research. For the critical analysis of the foreseeability rule the historical, the comparative law and the economic analysis of law methods are used.

The historical method assists to understand the law and practice in present. The analysis confines to the period since the Act IV of 1959 on Civil Code (hereinafter referred to as Civil Code of Hungary 1959) were in effect, and the period before that is mentioned only when it is necessary for the understanding the topic. This will give a support for the theoretical and practical question which will arise during the application of the foreseeability rule. The historical method is also used in respect of other legal systems. However, this thesis is not a comparative law work in the meaning of the method of Zweigert. It does not show what kind of methods, principles national law apply for limiting contractual damages, and does not look for the reasons which are behinds these methods and principles, and also do not explore why the foreseeability rule had a different route in the national legal systems. The analysis of the foreign legal system is reasoned for different purpose. The comparative legal method is used for practical purposes. Namely, result reached by the descriptive and critical analysis will be helpful for the future application of the foreseeability rule in Hungarian law.

The legal system which is used for the comparative law method is the English common law. The foreseeability rule of the legal unification instruments is also examined, though with less emphasis. Mainly the literature and commentary literature of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (hereinafter referred as CISG) is presented, but also other legal international and European unification instruments are studied such as the Principles of European Contract Law, the UNIDROIT Principles of International Commercial Contracts, the Draft Common Frame of Reference (DCRF), and the Proposal for Regulation on Common European Sales Law (CESL). The former are reasoned with the followings.

The study of English common law is crucial as the contemplation rule has a 160 years old practice, and this time revealed those difficulties and problems that arise during the application and interpretation of the foreseeability rule. The understanding of English
common law is also important as the contemplation rule is the general rule contract therein (opposed to the Vienna Sales Convention). The research is not eased by the fact that because of the precedent system there are no such case which would contain the whole rule; it should be collected from different legal cases. This research is supported however by different text books which determine the rule of the contemplation rule and sort the case law into different groups according to specific aspects. This inductive approach helps in the understanding of the foreseeability rule, in the identification of the problems that have arisen by the application and interpretation of the rule and the cognition of those results that has been born as solution during the application of the rule.

Though, the French Civil Code contains the foreseeability rule, the French law appears only historically in this thesis. This solution is chosen on the one hand, because the foreseeability rule has limited role in French law\(^4\), on the other hand, because the relevant damages rule has not been changed in the French Civil Code since it came into effect. It would be appropriate to do the research only along a thorough analysis of the case law and literature\(^5\).

As far as the Vienna Sales Convention is concerned, there are more reasons to carry on research in its literature. First, this Convention is part of our legal system\(^6\), second its foreseeability rule was a model for the Hungarian Civil Code. Finally, the rules of the Convention are based on a thorough comparative law work. In my view, because of the limits of its restricted territorial, personal and time scope, and its practical importance (the surveys show that the CISG is applicable only in 10% of international sales contract\(^7\)), the literature and the case law connected to the CISG do not give an entire picture about the foreseeability rule. Nevertheless, because of its exhaustive literature its analysis is important which gives useful guidelines for the application of the foreseeability rule of the Hungarian Civil Code.

The historical analysis and the study of other legal systems are not autotelic, but these serve the understanding of the foreseeability rule and its application. This approach and method accept the law as a historical growth and its cultural definiteness\(^8\).

The Hungarian Civil Code of 2013 introduced into the Hungarian legal system the so called foreseeability rule in contract damages [6:143 § (2)]. As far as the liability of the employee and the employer are concerned; the Hungarian Labour Code of 2012 did it before, however, its concept was built upon the model of the Draft Civil Code in contract damages. It should be also noted that the foreseeability rule in contract damages is not a completely new rule in the Hungarian legal system, because the Hungarian State is the contracting party of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), and the Convention is in force since 1\(^{st}\) January of 1988. Thus, for the Hungarian lawyers the concept of foreseeability is not unknown, but its application has been limited until now to the CISG.

It is known that for the foreseeability rule of the Civil Code of 2013, Article 74 of the CISG was basically used as a model. However, the Hungarian foreseeability formula became part of the general rules of contract law. This solution is present in the common law legal systems and in the French Code civil, as well. Likewise to the French Code civil, the Hungarian foreseeability formula is not applicable in case when the breach of contract was intentional. Thus, as far as the future evolution of the Hungarian foreseeability formula is concerned, it is


\(^5\) However, as far as the literature and the case law are concerned, I am not able to do this research on the basis of original documents, as I do not speak French.


\(^8\) See e.g.: Vékás Lajos: Magánjogi kodifikáció kultúrtörténeti tükörben. *Magyar Tudomány.* 2014./1. 80-89.
supposed that it will not presumably be completely identical with the legal development of the foreseeability rule in other legal systems and international legal instruments. The analysis of other legal systems and the study of a legal rule borrowed from another legal system requires from the researcher to take into consideration that for the 19th century each national legal system created its own legal concept and terminology which could be quite different from each other, also in the area of liability law. With regard to the fact that the law and its lexical world belong to the “reality” of one national legal system, as far as the different legal notions and terminology of different legal system are concerned, I think it proper not to rely on the linguistic meaning and translation of a given world, but look for its legal content (e.g. consequential damages). Namely, it is possible that the legal concept do not have the same meaning in the source and in the target language, as far as the legal system is concerned. The expression, peculiar to a legal system and culture will not be translated in case, when the equivalent target terminus established by the translation does not cover the same notion as it is present in the source language.9

The merit of the law and economics school is that it showed us that economics can contribute to the understanding how the legal rules and its change affect the members of the society10. However, the law and economics cannot be the sole factor which determines the basis of the legal systems, even if its theoretical foundations and principle are criticized, it can provide useful guidelines for the decision what legal rule to choose for a given factual situation while taking into consideration its cost-impact and economic consequences11. Therefore, the law and economics could provide for an understanding of the risk-allocation function of contracts. Eric A. Posner in his study in the beginning of the 2000 emphasized that economic analysis of contract law “has failed to produce an “economic theory” of contract law, and does not seem likely to be able to do so. By this, I mean that the economic approach does not explain the current system of contract law, nor does it provide a solid basis for criticizing and reforming contract law. This is not to say that the economic approach has not produced any wisdom, but that the nature of its accomplishment turns out to be subtle and will become clear only after an extended discussion.”12 Therefore, the economic analysis also will not be a sole method in this thesis, but rather a method which provide a basis for the criticism and the valuation of the foreseeability rule. However, the relation between law and economics cannot be narrowed to the theory of law and economics because their relation is more complex (the history of economy13, the sociology of economy14). This thesis does not have the aim to carry on research in this area, because it would overstrain this work. Moreover, beside the economic analysis, it will be also emphasized that the development of law is determined by the history and that the law cannot be separated from value judgment (the principle of fairness or justice of the contract).

The legal sociology is also present in this thesis. The research is not based only the normative concept of law, but also the sociological concept of the law. The merit of the legal sociology

13 Ránki György: Közgazdaság és történelem, a gazdaságtörténet válaszútjai. Akadémiai Kiadó, Budapest, 1977
is that for the 20th century it became accepted to look for law not only its formal appearance but more in its fountain, in the society. Today, it is well accepted that law is equivalent with legal rules + case law + practice outside courts, because this will give a real overview about the function of law in the society. Therefore, beside the literature and the case law, this thesis contain examples – intended not to be exhaustive – from the legal practice of contract law, as far as the limitation of damages are concerned (general contract terms).

The above mentioned research methods and approaches and the study of the separate legal systems (law unification instruments) is not structured according to chapters. The chosen research method and legal system (law unification instruments) is determined by the given research topic. The effort to balance the analysis of literature and case law is intended, though not always succeed in. However, the latter can be traced back to the approach of the given legal system and the topic analysed.

3. The result of the research and the possible usage of the research

3.1. The questions formulated for the research and the theoretical preliminary assumptions

1) The principle of full compensation is a well-known statutory or unwritten rule in many legal systems. However, it is limited by rules of law and also by the court practice by using different methods and techniques. The principle of full compensation is usually criticized by the literature. The question is of course, the extent of the limitation and the methods and techniques of the legislator and the courts which are used for these purposes. The Hungarian Civil Code of 1959 did not contain any separate rule how to limit contractual damages, its aspects and method was developed by the courts and the literature. During the codification process the Codification Committee decided to introduce the foreseeability rule into the Code as a normative limitation of the principle of full compensation.

2) The research topic is analysed in the context of the contract and the liability law, as the foreseeability rule of contract damages law can not be studied without the general rules of liability law and contract law.

3) It is foreseeable that with the entry into force of the Civil Code of 2013, the most difficult task will be to distinguish the foreseeability rule from the causation. Therefore, this thesis necessarily intends to deal with this question.

4) It belongs for the value judgment of the foreseeability rule that the concept of foreseeability is uncertain in many respects. According to the literature its reason is the following. The decision about the foreseeability is closely related to the concrete facts of the given case or to cases in a given abstract type, so the notion can not be generalized without not to became empty. However, it also highlighted even in the Hungarian literature that it seems to be a suitable tool to constitute case groups. On the basis of these, by acknowledging the merits of the foreseeability rule and accepting the critics at the same time, I found it worthy to analyse this rule as a subject matter of my thesis.

5) It is often emphasized that the foreseeability rule is for limiting consequential losses. The 6:143 § (2) of the Civil Code of 2013 says that the foreseeability rule is for limiting loss of

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profit and losses occurred in the other property of the aggrieved party for foreseeable damages at the time of the conclusion of the contract. It is the ministerial preamble which nominates these losses as “következménykár”.

For the interpretation of the said notion of “következménykár” of the Hungarian law it is appropriate to refer to the fact that the notion of “következménykár” is known due to the rules on damages of the Act X of 1993 on product liability. Moreover, not only the literature but also the practice uses this in notion together with the notion of “tapadó kár” in the context of defaulting performance (lack of conformity). The consequential loss is a well known notion in the common law in the context of the foreseeability rule. However, the content of “következménykár” and the consequential loss is not an identical one. For the content of the consequential loss, the comparative method provides for research possibilities.

6. The system of the liability and damages law of the Civil Code of 1959 is an elegant and simply solution, however, do not reflect those substantial differences which are between the contractual and the non-contractual liability. During the codification process of the new Civil Code it was emphasized that different rules are needed for them. The subject matter studied in this thesis may contribute for the thinking and reflection about the more general question how the separation of the contractual and non-contractual liability system influence the general theoretical thinking of liability rule. This research will also show us how differently the new rules should be viewed by the lawyer and legal entities and natural persons.

3.2 The foreseeability rule in different legal systems and in uniform law instruments of contract law

On the basis of the research carried on with regard to the historical roots of the foreseeability rule, the followings can be outlined

1) The content of the foreseeability rule can be different in different legal systems and in uniform law instruments of contract law, and it can be also different how it fits into the damages law thereof. In French law the foreseeability rule prevails together with the causation rule of immédiate et directe criteria. So, both have role in case of breach of contract in limiting contractual damages. Moreover, in case of intentional breach of contract, only the latter comes into play, because the foreseeability rule is not applicable. It is clear that in common law the foreseeability rule has a general application. On the basis of the Victoria Laundry decision which reformulated the ratio decidendi of the Hadley v Baxendale decision, only those damages should be compensated which were reasonable foreseeable at the time of the conclusion of the contract. The rationalization of the rule was possibly supported by the matter of principle that the first limb of the Hadley v Baxendale rule about usual losses is just a special case for the second limb of the Hadley v Baxendale rule. If a given type of loss is a natural, usual consequence of the breach of contract, then the party in breach always need necessarily foresee that the given type of loss is a probable result of the breach. In the uniform law instruments of contract law beside the foreseeability rule there are different rules for the substitute transaction and the current price and in case of the two latter the foreseeability rule is not applicable.

2) The legal development of the foreseeability rule in each of the legal systems is determined by legal history. It is unquestionable that the works of Pothier and the rules of Code civil had effect on the development of the English contract law in 18th and 19th centuries. However, it is also become true in case of legal concepts and institutions of the common law that the doctrines borrowed from the continent did not have the same legal development in England.
The legal concepts and institutions of civil law (such as in the case of the mistake doctrine\textsuperscript{18}) often had a peculiar and original legal developments in the common law, and its role and effect also became different as in the legal system they come from.\textsuperscript{19} Therefore, it is expected that the foreseeability rule of the Civil Code of 2013 will also find his way in the Hungarian legal system, practice of law and legal culture. For the foreseeability rule of the Civil Code of 2013 \textsuperscript{[6:143 § (2)]}, Article 74 of the CISG was used as a model one, however, the foreseeability rule of the Civil Code of 2013 contains element and reflect features from all the models mentioned above. The more characteristic features are emphasized as follows. The foreseeability rule is a general rule in the contract law (common law, Code civil), the foreseeability rule is not applicable is case of intentional breach of contract (Code civil), and besides it rules for substitute transaction and current price are established (uniform law instruments of contract law). During this adaption mentioned above the foreseeability rule of the Civil Code of 2013 will surely take on such features, on the basis of which it will have partly a different route from the models mentioned above.

3) The success of the foreseeability rule is inevitable in the common law legal systems and in the international commercial law practice. However, it is clear that it role is limited in the French law. As far as the contract law of the common law is concerned, it is often referred to that it suits better the needs of the international trade. As far as the practice of the foreseeability rule is concerned, it should be mentioned that the case law shows that most cases has commercial concern and the contracts have high value and damages claimed are also gross.\textsuperscript{20} It follows, however, from the precedent system that the inferior courts are obliged to follow the ratio decidendi of the superior courts (High Courts and the Appellate Courts) and they presumably do so and apply the case law on the foreseeability rule. During my research I did not get any answer how the foreseeability rule works in the every day business of natural persons. Therefore, the following doubts can be articulated in connection with the foreseeability rule of the Civil Code of 2013. Is the foreseeability rule of the common law or the international trade law an appropriate model for the Civil Code of 2013 which does not regulate international trade relations? In my view the content of the foreseeability rule is not different in the international trade law or in case of small and medium size enterprises or in case of natural persons, because the starting point is always the same. And that is the following what was the knowledge on the basis of which the parties concluded their contract? (This knowledge is however based on the cognition of the facts and the circumstances, and the knowledge of the business, the usage and the market, and the general understanding of the market). Necessarily, on the basis of the different factual backgrounds of each case, the results of the application of the foreseeability rule will or will possibly different.

3.3. The foreseeability rule and the liability law

In order to understand more the role of the foreseeability rule in the system of the liability law, chapter III of the thesis has its intent to show that dependent on the regulation, the dogmatic structure and the practice of a given legal system, the concept of foreseeebaility can be present in any element of the legal rule of liability (unlawfulness, causation, fault, culpability) as a kind of content criteria. This analysis is supported not only by our


preliminary assumptions, but also the historical and comparative law studies referred to that phenomenon.

1) The analysis carried on in chapter 1 revealed that culpability, the fault and the adequate causation doctrine also include a kind of foreseeability. In the frame of the intention and the carelessness the foreseeability is present as a foreseeability of the consequences of the conduct done. Thus, the culpability comprises a subjective foreseeability. Therefore, those, who connect the foreseeability rule with culpability does not stand on a right viewpoint. And in the frame of fault, the foreseeability is often interpreted as follows. The practice understands under the foreseeability the consequences of an act that cause damages, or its possibility: so, could the tortfeasor/the party in breach in a manner deemed reasonable under the given circumstances contemplate with the consequences of its act or its omission, or otherwise was the event that established the damage foreseeable? Therefore, the foreseeability rule should be also separated from the foreseeability which is present in the fault doctrine. As far as the causation is concerned, the essence of the adequate causation doctrine is often determined as follows. The causal connection can be established if, in the course of the conduct— on the basis of an objective (or is some theories subjective) decision – the possible occurrence of a result is contemplated; such (often referred to as foreseeable) results are viewed as adequate with the conduct. It is often referred to in the comparative law literature that there are considerable similarities between the two doctrines as far as its practical results are concerned. It is not only the possibility (likeness or probability) which is a common element, but also the question of knowledge (the actual and the imputed knowledge). In my view the doctrine of adequate causation is not an appropriate method in its theoretical foundation to answer and to determine what are the losses which should be compensated in case of the breach of contract. However, the common law shows that on the basis of the foreseeability rule the answer can be given why a loss is a usual one and therefore compensable and why a loss is an unusual one and therefore compensable only if it was foreseeable. For the understanding of the foreseeability rule of contractual damages and for the separation from the causation at the same time the assist is given by its aim and function.

2) The theoretical and practical analysis of the foreseeability rule from the point of contractual liability law (chapter 2) give the possibility to show its taxonomical place in contract law and in liability law. This analysis also revealed that it counts not only what the liability rules are among and under which the foreseeability rule functions, but also what the market and economic backgrounds and the business environment are in which it operates. These studies helped us to conclude not to overemphasize the significance of the foreseeability rule in damages law. It is clear that other rules such as the duty to mitigate and beside that the limitation of the damages by the parties make the role of the foreseeability rule less significant. From the analysis it is evident that the foreseeability does not only affect the system of liability law, but also the entire contract law. The relevant time in the application of the foreseeability rule is the time when the contract was concluded. Therefore, the foreseeability rule highlights the significance of the conclusion of contract and the due diligence showed by the parties not only theoretically, but practically, as well.

3) On the basis of the Civil Code of 2013 and the Labour Law Code of 2012, the rules on the exemption on liability and damages of the Civil Code of 2013 influence and determine other areas of liability law such as the liability of the executive officer and the employee and the employer. The presentation about how the foreseeability rule fits into the system of the above mentioned area of company law and labour law (Chapter 3) foreshadow how far it is expected that the foreseeability rule will have a restricted or party different role in the area of the company law and labour law.

There are critics in the literature and the practice also criticise that the contractual liability rules are extraneous among the rules of the liability on the executive officer. However, I do
not share these doubts entirely, I did not come to the opposite conclusion at the end of my research, and its result gives in my view a more complex approach about this subject matter. In my view, the solution can be criticized that the time of the conclusion of the contract which established the status of the executive officer is the relevant time whether the loss was foreseeable.

As far as the role of the foreseeability rule in labour law is concerned, the literature thereon in the last two years was helpful. It can be stated that the role of the foreseeability rule has not been clarified yet in the labour law. But, it is clear that its policy and aim is different from the foreseeability rule of contract law. Secondly, in labour the relevant time whether the loss was foreseeable is the time of the breach of contract and not the conclusion of the contract as in the contract law. Thirdly, the party in breach is obliged to prove the lack of foreseeability in order to be exempted from the liability. Because of these differences and the specific nature of the employment contract, the analysis and the conclusions made in connection with contractual liability cannot just borrowed and applied without control into the are of labour law, and the opposite is true. The labour law literature presumes that the courts will have a specific and a massive role in the interpretation of the new notions and concepts. It is also for the courts to develop the practice of the foreseeability role in the area of the labour law on the basis of and with regard to the standing and the subservient relation between the parties, and to form the damages to be compensated in the given concrete cases according to the content of the employment contracts. In this context special attention should be made to the general conduct guidelines regulated in the preamble of the Labour Law Code of 2012, to the rule about the obligation to inform the other party and the fact how the employer issued its order. The labour law literature suppose that the appearance of the foreseeability rule will change those practice according to which employees were only liable for damnum emergens losses (attached to the Labour Law Code of 1992). And besides, on the basis of the rules of the Labour Law Code of 2012 as it is also supposed by the literature the foreseeability role will have a limited role. In addition, the liability rules of the Labour Law Code of 2012 are relative non-mandatory rules, which mean that collective agreements can depart from it on the benefit of the employees. 21

3.4 The foreseeability rule – the foreseeable losses

It seems reasonable if contract law rules allocate the risk on the basis that parties at the conclusion of the contract calculate some loss, and bear the calculable consequences of its conduct 22, and the party in breach does not bear those consequences which are above these losses. It is reasonable to motivate that party who has knowledge about the risk to guard against this risk, and if he does not do that, it is reasonable to rule that this party will bear the negative consequences thereof. This may also give an explanation why the aggrieved party is obliged to bear the risk of those losses which were not foreseeable by either party, and which was not protected by insurance. 23

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The research carried on was underpinned that it is not correct to interpret the foreseeability rule only as a rule which facilitate the exchange of information. On the one hand, because according to the foreseeability rule those losses should be also bear by the aggrieved party which were not foreseeable by either party, and on the other hand because according to the foreseeability rule the usual consequences of the breach of contract as foreseeable losses are always substantially compensated by the party in breach. It should be noted that the policy role of the foreseeability rule should be the same as other contract law rules that is to allocate risk.

It is known from the literature that because of the uncertain content of the foreseeability rule it is difficult to determine when a given type loss is a foreseeable one. Its reason is that the application of the rule depends on two questions which can be easily shaped that are the knowledge and the probability. The foreseeability rule is often criticized on the ground that it is a capable rule not only for the extension but also for the limitation of liability, dependent on the question what should be foreseeable? The research carried on with respect to the factual element of the foreseeability rule helped us to identify those questions and difficulties which arise during the application of the foreseeability rule, and to give the possibility at the same time to give answers for those questions on the basis of the critical analysis of the literature and the case law. As it was already referred to it is also highlighted as a benefit that the foreseeability rule seems to be a suitable tool to constitute case groups. The common law provides evidence for it with its 160-years old case law which is presented by several textbooks (to highlight here only the Chitty on Contract, McGregor on Damages, Benjamin on Sale of Goods). The young literature of the CISG shows the same.

For the Hungarian legal practice the followings can be deducted about the operation of the foreseeability rule in practice.

1) The case law of common law gives a complex picture about the foreseeability rule in practice. It is always referred to in common law that the usual losses are compensable, those are per se foreseeable damages (however, since the case of The Achilleas it no more true that these losses are always foreseeable), and the unusual losses are only compensable if they were foreseeable. Nevertheless, the case law and the literature which comments it shows that during the application of the foreseeability rule (or after it) often other principle or test are referred to for limiting contractual damages. It follows from the case law that the courts often tends to correct the result reached by the application of the foreseeability rule; and “more” is required than the foreseeability of the loss in order to held the party in breach liable for it. And what this “more” actually means is explained by the literature as follows: the judge asks either whether the party in breach tacitly undertook liability for the given loss (the assumption of liability) or whether for a fair decision it is reasonable to oblige the party in breach to compensate for the given loss.24 It is evident that these can deteriorate the essence of the foreseeability rule that the party in breach shall give compensation for those loss which was reasonably foreseeable as liable to result from the breach, which was foreseeable or should have been foreseeable. The case law, however, shows that these corrections mentioned above are sometimes necessary as the foreseeability rule is not an omnipotent rule.

2) As far as the practice of the foreseeability rule is concerned, this rule comes closer to two legal institution of contract law that is the interpretation of the contract and the so called synallagma of the contract (the question of consideration under common law). The followings should be mentioned. In my viewpoint it is not appropriate to consider the foreseeability rule as a “contract-interpretation rule”, though there are who support this view. In the failure of a specific contractual term which rules about contract damages, the interpretation of contract is

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relied on not for the determination of the presumed intention of the contracting parties with regard to the allocation of the risk, but for the ascertainment of the content of the contract. On the basis of the foreseeability rule, the judge shall look for whether it is reasonable to assume that the party in breach or a reasonable person in a similar position as the party in breach should contemplate the likely occurrence of the loss in question. However, first, the content of the contract should be determined before the rule of foreseeability rule is applied. By the application of the foreseeability rule, the question which party should bear the risk of a loss which was not allocated could be answered by the economic analysis of contract law with specification of the present models and methods. In addition, in the idea to limit disproportionate losses the following is present: in case of breach of contract damages are viewed as an obligation to pay instead of the obligation to perform, and from this it follows that the extent of the damages should reflect the proportion of the performance and the counter-performance. This proportionality is present in 351. § (3) of the Second Restatement of Contracts (1981)\(^{25}\), this section offers the discretion to the judge to limit further foreseeable but disproportionate losses.

The foreseeability rule is often discussed in the literature of common law in connection with the concept of the fairness of the contract. The fairness of the foreseeability rule is on the one hand that in opposite with the principle of full compensation which is about all or nothing as far as damages are concerned, the foreseeability rule do not allocate the risk of the non-performance unilaterally on the one or the other party. On the other hand, that it an open and normative limitation of the principle of full compensation, and therefore makes for the parties possible to set aside this rule if they do not want it in their contractual relationship.\(^{26}\)

As it follows from the above mentioned, in Part IV of the thesis general contract law issues were also analysed in the context of the contractual liability law and the foreseeability rule. To sum up, the result of these analysis also support the view of the thesis that the features which are peculiar to the contractual liability and the non-contractual liability should be take into account in the theory of liability law and also in the practice. Namely, the contractual liability can not be torn away from the contract and the contractual relationship and also from other sanctions of the breach of contract.

For the future Hungarian case law, the 160 years old case law of the common law on foreseeable losses could provide for useful guidelines, and could support to gain an understanding how the foreseeability works in practice. This could also help to avoid those developments of the rule during its application which were cul-de-sac in the common law or which proved to be difficulties at the beginning.

2) When the elements of the foreseeability rule were analysed it was emphasized that common law only requires that the type of loss should be foreseeable, the extent or the nearby extent the loss not. With some uncertainties this is followed in the practice, and the question of the extent of the damages is usually handled as a question outside the scope of the foreseeability rule. If the loss is an unusual high one, the common law applies different methods and tools to limit contractual damages. According to Hugh Beale in such cases the common law courts tend to look after under what combinations of circumstances the loss was occurred or to consider whether the likely consequence of the occurrence of the loss was contemplated or to decide that it was not reasonable to assume that the party in breach

\(^{25}\) § 351 (3) „A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.”

undertook liability for the loss in question even if the not unlikely occurrence of the loss could be compensated. From this point of view it is also important whether the given loss is usual or an unusual one. The solution of the common law that only the given type of loss should be foreseeable is a clear rule, however, as it follows from the above mentioned, if the extent of the loss is an unusual high one, the courts apply “corrections”. The ministerial preamble of the Civil Code of 2013 – according to the mode of the CISG – answer the question what should be foreseeable as follows: not only the type of the loss, but also the order of the loss. It is evident that the order of the loss is not equivalent with the extent of the loss; the former refers only to the proximate extent of the loss, which gives some guidelines and also raises questions at the same time (the meaning of the order of loss). It should be mentioned that in some cases such as in damages arose by accidents the requirement of the foreseeability of the order of the loss could result unjust decision. On the other hand, in the latter case the following uncertainty also arises (not only when only the type of the loss should be foreseeable): it depends on the discretion of the courts how to categorize the losses. And as it is known from the case law, the distinction between the type of the loss and the extent or the order of loss can be elusive; the extent of the loss or the order of the loss can change the type of loss.

3) The 6:143 § (2) of the Civil Code of 2013 rules that in case of loss of profit and losses occurred in the other property of the aggrieved party damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract as a possible consequence of the breach of contract. It is the Act which limits in case of loss of profit and losses occurred in the other property of the aggrieved party the damages for foreseeable losses. It is the ministerial preamble (page 588 point 7.c) which label the “losses occurred in the other property of the aggrieved party” as következménykár. Thus, the következménykár is a type of loss in the meaning of the Civil Code of 2013. The ministerial preamble determine the notion of the következménykár as follows: it is separated from the notion of “tapadó kár” (the loss arose in the performed obligation)28, and it is treated as a loss (arose as a consequence of the breach) apart from the loss of profit. This categorization has its relevance as the Civil Code of 2013 rules in 6:143 § (1) that the loss arose in the performed obligation shall be compensated, and here the foreseeability rule is not applicable. In the context of the notions of “tapadó kár” and “következménykár”, as far as the Hungarian law is concerned, it is important to rely on a practice which is detailed in the point of 4.1.2.1 of the thesis. The case law on defaulting performance (lack of conformity) show that a distinction is made between the loss in the performed obligation and the losses arose due to the lack of conformity in the person and the property and assets (including loss of profit) of the aggrieved party. The former was labelled lately as “tapadó kár”, the latter as “következménykár” both in the case and the literature. It seems that the Civil Code of 2013 introduced a new terminology and notion as far as the expression of “következménykár” is concerned, which is at the same time different from the practice of Civil Code of 1959 in the area of defaulting performance as established by the practice.

As it was highlighted, the “következménykár” is a type of loss. The equivalent translation of “következménykár” is the expression consequential loss. However, consequential loss means several things under common law and in the contract practice. It is clear that the consequential loss do not have a universal notion. This notion can vary not only form legal system to legal system, but also it has several meanings under the common law. From the research done in connection with the notion and terminology of the consequential loss it is obvious that the


consequential loss is an uncertain notion, sometimes it is the equivalence of the unusual losses, and sometime it is a type of loss (e.g. loss of profit or loss in the person and the property and assets of the aggrieved party). From the point of the interpretation of the contractual terms which exclude or limit liability for the “következménykár” or – in case of contract written or translated to English - the consequential loss, it is of course not unessential for which losses the parties actually limit or exclude their liability.

3.5. The foreseeable losses and the case law

The Part V of the thesis (The foreseeable losses and the case law) shows trough examples from the case law what type of losses are deemed to be foreseeable (and therefore to be compensated). I mean the cases presented here and also elsewhere in the thesis also reflect the viewpoint of Fuglinszky about the question of the foreseeability of losses. He thinks in this matter the followings can be guidelines: (i) is it a contract of generic goods or a specific good, (ii) what is usual and unusual in a given sector of the market and in business, (iii) which party is able to guard against the risk or conclude an insurance contract against the risk. The question can be asked will the foreseeability rule as a new rule and dogmatic solution change the court of practice? In my view, it is foreseeable that the foreseeability rule will not radically change the practice of the court; the cases presented in the thesis also support this. It is worth to mention that according to Vékás as far as the practical results are concerned, the “foreseeability rule and the theory of adequate causation do not differ substantially from each other, but its theoretical background is quite different: the former makes possible the normative limitation of the principle of full compensation, the latter gives an assist only for the artificial interruption of the causal link based on the judges discretion.” As far as the Hungarian law and the common law are concerned, Menyhárd thinks that though the Civil Code of 1969 did not limit liability for foreseeable damages, the courts often come to the same conclusion with the help of the causation and the location of the burden of proof as would be in case of the application of the foreseeability rule.

I agree with these views. On the basis of my research, the conclusion can be drawn that in the future in case of loss of profit a change presumed to be take place. The foreseeability rule, especially in the case of usual losses according to the practice of common law can also appear in the future Hungarian law practice as a legal measure which extend liability as far as the usual business loss of profit are concerned. It should be however emphasized that under common law the aggrieved party in not entitled to claim the normal profit if he did not meet the requirement of the duty to mitigate.

3.6. The possible usage of the research

As far as the foreseeability is concerned, in the future practice, it will be for the courts to decide in the context of the given factual background the case whether the loss was foreseeable by the party in breach (when and under what circumstances can a loss be contemplated). Because of the abstract content of the rule, guidelines can be provided for by the case law and the literature of other legal systems and the uniform law instruments of contract law. These will support and help not only courts and lawyers, but those businessmen

who draft contracts. It should be emphasized that the question of the foreseeability of the loss will be always dependent from the content of the specific contract (together with its economical environment) concluded between given parties on a given market and business sector.

In the last part of the thesis that is the foreseeable effect of the foreseeability rule on our contractual damages law I made some observation in connection for the future application of the foreseeability rule under the Hungarian law. Here, only the followings are outlined.

As far as the effect of the foreseeability rule on the rules of contract law and its dogmatic structured is concerned, the foreseeability can have an effect on the functioning of some legal institutions such as the so called merger clause and the duty to cooperate and to inform the other party, or it is more suitable to state that these will influence each other during their functioning. The usages known and applied by the parties also have significance from the point of the foreseeability rule. The duty to cooperate and inform the other party in connection of the foreseeability rule raises interesting questions. There are no such rules under the common law. Under the Hungarian law, the duty to cooperate and inform the other party belongs to one of the general principles of contract law. It will be for the theory and the practice to find an answer the question how the aim and the policy of the foreseeability can be reconciled with the principle of the duty to cooperate and inform the other party.

As far as the future practice of the courts is concerned, it was already highlighted that the foreseeability rule seems to be a suitable tool to constitute case groups. These positive effects will appear in long run. A possibly result can also be that the case law will be more visible and predictable; on the basis of the opinion of the court a more safe conclusion will be given why the court denied or allowed the compensation of a given loss. So, the foreseeability rule can bring a bit different culture as far as the opinion of the court is concerned, which – at the same time – can also influence the culture of the so called commentary literature in Hungary.

And finally, as far as the contract practice is concerned, the effect of the foreseeability rule appears (even at present) at the time of the conclusion of the contract and the due diligence required that time. It is expected that parties will more often agree on the damages (limited by type or to an amount) to be paid if the contract is breached in case of long duration contracts. Presumably, lawyers and businessman will be more careful about the knowledge on the basis of which the contracting parties conclude a contract. And his knowledge is based on the cognition of the facts and the circumstances, and the knowledge of the business, the usage and the market, and the general understanding of the market. On the basis of the research carried on at the beginning of the thesis with the help of the lexicology, no obvious conclusion can be made whether the standard of the reasonable person (also with due diligence) of the foreseeability rule will be a more clear in its content as far as the contractual relations are concerned for the legal entity and business men. Only the future practice can answer this question.

4. Articles of the author from the field of the research topic


Csöndes Mónika: A szerződésszegési jog előreláthatósági korlátjának joggazdaságtani elemzése és annak jogi kritikája. Állam- és Jogtudomány 2014. évi 1. sz. 3-35. old.