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A Comparison of the Scope of Contract Damages in the United States and Japan†

Introduction

In the last twenty years, trade and investment between the United States and Japan have expanded immensely. Unfortunately the growing economic link between the two countries has not been accompanied by a proportionate increase in the availability of comparative legal studies. The result has been a general dearth of knowledge of Japanese law on the part of the United States attorney. A comparative analysis of United States and Japanese methods of limiting the recoverability of contract damages, therefore, will help to present some insight into a subject of increasing significance to the international businessman and his attorney.

In Japanese law, three types of remedies exist for breach of contract: specific performance,¹ damages,² and rescission.³ Of these, specific performance holds a position of primacy, being available, in contrast to American law, even where the loss is compensable in damages.⁴ Article 414(1) of the Civil Code states: "If an obligor does not voluntarily perform his obligation, the obligee may apply to the Court for specific relief thereof; however, this shall not apply to cases where the nature of an obligation does not so admit."⁵ Although specific relief holds this preeminent position, a claim for substitute or compensatory damages is permitted where: (1) specific performance itself

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¹The Civil Code of Japan art. 414 (1898).

²The Civil Code of Japan art. 415 (1898).

³The Civil Code of Japan art. 541, 543, 545 (1898).

⁴Kitagawa, *Damages in Contracts for the Sale of Goods*, 3 L. JAPAN: ANN. 43, 46 (1969).

⁵The Civil Code of Japan art. 414(1) (1898).

becomes insufficient because of excessive delay in the circumstances;⁶ (2) a formal demand is made by performance still is not carried out;⁷ or (3) performance would be impossible.⁸ On the other hand, where performance is merely delayed, substitute or compensatory damages may not be relevant: the remedy may be for delay damages alone.

The right of rescission, contrary to traditional United States law, is not an alternative remedy to damages.⁹ The exercise of this right does not necessarily extinguish a subsequent claim for damages, but merely discharges the contractual obligations of the parties. It is therefore employed by the obligee where specific performance, although available, is thought to be less desirable in the circumstances.¹⁰

Article 415 provides for the obligee's right to demand damages.¹¹ The damages under main contractual liability¹² are those stemming from delay in performance, impossibility of performance, and improper performance.¹³ Those for improper performance are analogous to those for delay and impossibility for this reason: the cure of improper performance entails a correction of the impropriety; if the correction either causes delay or is impossible, the action is for those damages.¹⁴

According to most scholars, the crucial definition of the scope of damages that a plaintiff may successfully demand, as stated in article 416, is that they be adequately caused.¹⁵ In practical application, however, the courts have tended to concern themselves primarily with the characterization of damages in a given case as being either "ordinary" or "special."¹⁶ In the end, the scope of damages in Japan is defined quite similarly to that prescribed by

⁶Arakawa v. Yonezu, 24 Minroku 615 (Gr. Ct. Cass. 1918); Endo v. Onodera, 21 Minroku 931 (Gr. Ct. Cass. 1915).

⁷Fujima v. Fukuyoshi, 12 Minshu 1437 (Gr. Ct. Cass. 1933).

⁸Nihon Seisen Tosei Kumiai v. Toyo Seisen K.K., 9 Minshu 22 (S. Ct. 1955); Kujime v. Suzuki Shoten, 19 Minshu 530 (Gr. Ct. Cass. 1940).

⁹Kitagawa, *supra* note 4, at 53.

¹⁰*Id.*

¹¹The Civil Code of Japan art. 415 (1898) states:

If the obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may demand damages; the same shall apply in cases where performance becomes impossible for any cause for which the obligor is responsible.

¹²Liability is divided into "main," which provides for losses resulting from the contract itself, and "supplemental," which are damages apart from the loss of benefits of the contract done to the persons or property of the parties, such as liability in tort based on breach of warranty. See Akamatsu & Bonneville, *Disclaimers in Warranty, Limitation of Liability, and Liquidations of Damages in Sales Transactions*, 42 WASH. L. REV. 509 (1966).

¹³See, Kitagawa, *supra* note 4; Oho, *Saikun Soron* [General principles obligations], 20 Horistugaku Zenshu 128 (1959); S. Wagatsuma, *Saikun Soron* [General principles of obligations] (1964); Yunoki, *Hanrei Saikunho Soron Jo* [Cases on general principles of obligations] (1962).

¹⁴Kitagawa, *supra* note 4.

¹⁵See sources cited in note 13, *supra*.

¹⁶Kitagawa, *supra* note 4, at 59.

foreseeability theory in United States law, with one particularly significant difference as to the time for determining the scope of damage.

To gain a better understanding of the interaction of the positions of the scholars and the courts in Japanese law, this article first will provide background on sources of law highlighting the influence of scholarly treatises. Thereafter the focus will shift to an examination of Japanese law, first in theory as propounded by scholars, and then in judicial application. Finally, to complement an understanding in this area, this work will compare the Japanese law with United States law.

Sources of Japanese Law

An understanding of the sources from which Japanese law emanates is essential to its proper evaluation. As a civil law system, the principal source of Japanese law is its codes.¹⁷ Generally speaking, the codes, statutes, and regulations demarcate the parameters of the legal framework established by the legislature within which the Japanese system operates. Article 416 of the Civil Code of Japan, the most important article in the Civil Code dealing with limitation of liability for damages¹⁸ in either tort or contract, states simply:

A demand of compensation for damage shall be for the compensation by the obligor of such damage as would ordinarily arise from the non-performance of an obligation.

2. The obligee may recover for damage which has arisen through special circumstances too, if the parties had foreseen or could have foreseen such circumstances.¹⁹

An American attorney confronted with the necessity of researching Japanese law on the subject of damage assessment, after examining this article, initially may feel comfortable in advising his client that the applicable laws of the United States and Japan are virtually indistinguishable.²⁰ His comfort

¹⁷See generally Noda, *Japan*, 1 INT'L ENCYC. COMP. L. J-11 (1971).

¹⁸Other articles deal more with quantitative limitations. The Civil Code of Japan art. 418 (1898) provides:

If there has been any fault on the part of the obligee in regard to the nonperformance of the obligation, the Court shall take it into account in determining the liability for and assessing the amount of damages.

Article 419(1) states:

The amount of damages for non-performance of a money obligation shall be determined by the legal rate of interest; however, in case the agreed rate of interest exceeds the legal rate, it shall be determined by the former.

Article 420(1) states:

The parties may determine in advance the amount of damages payable in the event of the non-performance of an obligation; in such case the Court cannot increase or reduce the amount.

¹⁹The Civil Code of Japan art. 416 (1898).

²⁰*Compare, e.g.,* RESTATEMENT OF CONTRACTS 330 (1932) which provides:

In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is

may turn to consternation should he later discover, first, that the language of this article is often thought to have been derived primarily from the Napoleonic Code,²¹ and then that the legal institutions and conceptual framework for its implementation were developed almost exclusively from scholarly interpretation of German civil law.²² In a final effort to clear up this confusing admixture, he either may turn to Japanese counsel or pursue the matter further, exhaust available English sources, and then turn to Japanese counsel. A brief look at historical development of the Civil Code should clear up some of this confusion.

Historical Development

The example of Western encroachment in neighboring China and Japan's first experience with Western imperialism in the coerced opening of its ports and signing of unequal treaties stimulated Japan after 1854 to make strenuous efforts to preserve its national identity by acquiring Western respect through quickly restructuring along Western lines.²³ Initially this program of Westernization was inhibited by its own political improvidence for the regime in power: the old Tokugawa Shogunate could not successfully cling to its declining power while advocating changes in traditional Japan that served only to erode that power. In 1868 this institutional inhibition was largely eliminated when the old government was replaced by the Meiji oligarchy. Within two years this Meiji government set out totally to restructure the Japanese legal system.²⁴

one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it. Otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.

U.C.C. 2-715 states:

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

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

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

²¹Mukai and Toshitani, *The Progress and Problems of Compiling the Civil Code in the Early Meiji Era*, 1 L. JAPAN: ANN. 25, 28 (1967).

²²Kitagawa, *Theory Reception—One Aspect of the Development of Japanese Civil Law Science*, 4 L. JAPAN: ANN. 1 (1970).

²³See generally W. BEASLEY, *THE MODERN HISTORY OF JAPAN* (1963); G. SANSOM, *THE WESTERN WORLD AND JAPAN* (1950); Mukai and Toshitani, *The Progress and Problems of Compiling the Civil Code in the Early Meiji Era*, 1 L. JAPAN: ANN. 25 (1967).

²⁴Mukai and Toshitani, *supra* note 21.

Subsequently, the controversy became not whether to adopt a Western system, but which to adopt. Because of the world power structure at the time, the most attractive legal model probably would have been that of England. The urgency of Japan's need for the international respectability of Western law, however, forestalled adoption of a common law system. Consequently, the Meiji government initially adopted the French Civil Code as a tentative model for its own law.²⁵

In 1870 Shimpei Eto, Minister of Justice, with apparent concern for the urgency of legal reform,²⁶ ordered Rinshō Mitsukuri to translate the French Civil Code directly for immediate adoption, merely substituting the word "Japanese" where the word "French" appeared.²⁷ Not surprisingly, this version encountered insurmountable difficulties in attempted adoption, not only because of translational problems,²⁸ but more importantly because French law was based on a set of moral, economic, and cultural assumptions divergent from those of the traditional life of Japan.²⁹ The sweeping changes such a code authorized in the basic institutions of society sparked extensive study and discussion of the relative virtues of French and Anglo-American systems, which gradually evolved into a lengthy debate between political factions.³⁰ Adoption of the French-inspired code was postponed, but attempts to develop an acceptable Western legal system continued.³¹

Meanwhile, the influence of an emerging Germany and German legal thought had begun to be felt.³² The authoritarian expressions of legal positivism in the German *Pandekten* and in German legal science particularly appealed to Japanese thinking and would serve as a political compromise between factions advocating French and Anglo-American systems.³³ This German alternative, however, was still in its nascent stages. Its influence is in-

²⁵The French Code was not an unlikely selection. France held a prominent position in world politics. In addition, the relationship between France and Japan had been relatively stable, beginning with a Franco-Japanese friendship treaty concluded in 1858 by the earlier Tokugawa Shogunate, and followed by a Meiji Government delegation to Paris in 1867. Mukai and Toshitani, *supra* note 21. The real attraction of the French model, however, was that it was codified; it was easily translated and studied. Takayanagi, *A Century of Innovation: The Development of Japanese Law 1868-1961*, LAW IN JAPAN 5 (A.T. von Mehren ed. 1963). One may well speculate, as did Wigmore, that had England adopted Sheldon Amos' civil code, Japan's choice would have been different. J. WIGMORE, *PANORAMA OF THE WORLD'S LEGAL SYSTEMS* (1936).

²⁶See Hattori, *The Legal Profession in Japan: Its Historical Development and Present State*, LAW IN JAPAN 111 (A. T. von Mehren ed. 1963).

²⁷Takayanagi, *supra* note 25.

²⁸Mukai and Toshitani, *supra* note 21, at 38 n.23.

²⁹Takayanagi, *supra* note 25, at 25.

³⁰*Id.*

³¹Takayanagi, *supra* note 25.

³²*Id.*

³³Stevens, *Japanese Legal System and Traditions*, CURRENT LEGAL ASPECTS OF DOING BUSINESS IN THE FAR EAST 2 (R. Allison, ed. 1972); Takayanagi, *supra* note 25.

dictated by the structure of the Civil Code along *Pandekten* lines.³⁴ Although over thirty systems were studied before a single Japanese Civil Code was synthesized and adopted in 1898,³⁵ however, French and Anglo-American thinking tended to provide most of the Code's substance.³⁶

Interpretive Sources

The adoption of a civil code marked only the beginning of legal reform in Japan. Although the Code constituted a formal source of Japanese law,³⁷ by no means did this alone provide sufficient guidelines for dealing with the myriad of situations to which it must be applied. A reliable supplemental source of code interpretation was needed. This need has been filled by judicial and scholarly interpretation, functioning as material sources of law.³⁸

Judicial decisions are crucial to the proper interpretation of the Japanese codes. Because Japan adopted a civil law system based largely on the German *Pandekten*, however, the function of judicial precedent differs dramatically from that of a common law system. In the United States, judicial decisions are a primary source of law; the system itself basically has developed from a compilation of judicial decisions.³⁹ Consequently, a doctrine of *stare decisis* is widely applicable. The development of law from the gradual accumulation of judicial pronouncements creates a significant reliance on distinctions born from factual scrutiny. Judicial analysis tends to become an attempt to match the facts of the particular case with those of earlier decisions. When the facts fail to correspond closely with those at hand, the court may develop new law by analogizing to similar cases and relying on general policy considerations.⁴⁰

Under the Japanese system, particularly as it first developed in the period up to 1910, the function of judicial precedent was much more restricted. Courts were viewed primarily as conduits of the legislative will.⁴¹ Their pronounce-

³⁴M. NAKAMURA, A COMPARATIVE STUDY OF "JUDICIAL PROCESS" (1959).

³⁵Kitagawa, *supra* note 22, at 3.

³⁶See generally Takayanagi, *supra* note 25.

³⁷Stevens, *supra* note 33, at 3.

³⁸See Noda, *supra* note 17.

³⁹Today, however, the trend seems to be towards an increasing reliance on codification in the federal government which seems to indicate a drift away from traditional common law. See, e.g., U.C.C., restatements, state codes.

⁴⁰See M. NAKAMURA, *supra* note 34. A good example of judicial development of law is presented in the tort area of product liability. Beginning with *Thomas v. Winchester*, 6 N.Y. 397 (1852) (a case of negligently mislabelling a poison), and proceeding through *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) and *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Ca. 1944), courts showed a propensity to create new law to enforce a developing public policy.

⁴¹See H. TANAKA, THE JAPANESE LEGAL SYSTEM 143 (1976), which says:

Judges were regarded as if they were priests who conveyed the oracle of the gods. What judges said had to be listened to carefully as it enunciated the god's will, not because it was the judges' own statement.

ments were not to be used to compile a separate system of law, but were to reflect directly the legislative will expressed in the codes. As a practical matter, interpretation and development of case law to some extent was inevitable, but the theoretical reliance on the code itself as the embodiment of law deliberately foreclosed the development of a common law through judicial stare decisis.⁴² Noda describes the function of case law as follows:

Japanese law does not recognize the principle of stare decisis. Every court is theoretically free not to follow the judicial decisions even of courts superior to it. But in practice, precedents have a very strong authority, especially as concerns decisions of the Supreme Court. The judge who does not follow them must expect that his judgment will be reversed. The judge is not legally bound by a judgment of a superior court except within the limits of the case with which he is concerned (Court Law art. 4). Thus, case law is not a formal source of law, but in reality it plays an extremely important role as a material source. By means of interpretation which in fact is nothing but a veiled form of legislation, judges make many legal rules. So it could be said that in Japan judge-made law is a very important source.⁴³

A judicial pronouncement, then, is binding only to the particular case. A view expressed by an appellate court *binds* the lower court only in deciding the case on remand.⁴⁴

In civil law countries the emphasis on codes rather than judicial precedent naturally has opened an avenue for a second interpretive source, scholarly treatises. In Japan, the combination of this civil law phenomenon with the peculiarities of the Japanese system itself has given scholarly works particularly extraordinary weight. Since civil law placed little emphasis on judicial precedent as a source of law, judicial analysis has tended to be more conceptualistic than Anglo-American analysis.⁴⁵ Its value as a source for interpretation of law applicable to the specific situation has been limited. This difficulty has been exacerbated by a quantitative deficiency of judicial opinions, stemming largely from the traditional Japanese hesitancy to settle disputes in court.⁴⁶ In addition, during the developmental years,⁴⁷ judgments of courts of appeals and

⁴²See Rules for Conduct of Judicial Affairs art. 4, decree no. 103 (1875), which expressly proscribed the use of court decisions as law or precedent for future cases.

⁴³Noda, *supra* note 17.

⁴⁴Code of Civil Procedure art. 407(2) (1947).

⁴⁵See Hozumi, Hashigaki, Shinzoku Ho Sozoku Ho Hanrei Hihyo (Foreword, Comments on cases in the law of domestic relations and succession), THE JAPANESE LEGAL SYSTEM 144 (Tanaka, ed. 1967); Suehiro, *Jo, Hanrei Minpo* (Case law in civil law), THE JAPANESE LEGAL SYSTEM 146, 148-49 (1976); see also M. NAKAMURA, *supra* note 40, at 18-51.

⁴⁶See Kawashima, *Dispute Resolution in Contemporary Japan*, LAW IN JAPAN 41 (A.T. von Mehren 1963); A.C. OPPLER, *LEGAL REFORM IN OCCUPIED JAPAN* (1976); Stevens, *supra* note 33. Most Japanese cases are settled out of court. Bringing a formal action against someone is frowned upon because it implies that harmony cannot be achieved by the parties themselves.

⁴⁷In 1921 Tokyo Imperial University (Tokyo University) began case law research as part of its legal curriculum. Thereafter, case law was increasingly relied upon as a source of law and judicial decisions consequently became more factually oriented. Kitagawa, *supra* note 22, at 14.

district courts were not reported except for a select number in private law reports such as the *Horitsu Shimbun*.⁴⁸ Cases decided by the Great Court of Judicature (Supreme Court) were reported,⁴⁹ but because these decisions were appellate and tended to be conceptualistic anyway, they provided few guidelines for specific fact situations. This combination of civil law influence with the dearth of judicial opinions themselves led to an emergence of scholarly analysis as a crucial source of legal interpretation.

The early adoption of code provisions based on foreign legal concepts and institutions had created a gap between the law as articulated in the Civil Code and that actually implemented by the Japanese legal system. To breach this gap and develop the infrastructure and technique of the Western legal systems after which its Code had been patterned, Japanese scholars looked to a Western legal system for guidance.⁵⁰ This time the choice was Germany.⁵¹ Thus, scholarly treatises as a material source of law have greatly influenced the development of Japanese law along German lines.

⁴⁸Suehiro, *supra* note 45.

⁴⁹*Id.*

⁵⁰See Kitagawa, *supra* note 22, at 3.

⁵¹Because of frequent points of convergence with Japanese socio-political philosophy of the time, German legal science became the nearly exclusive Japanese legal system in its developmental stages. *Id.* at 5.

Of these points of convergence, perhaps the most important in obtaining wholesale, and particularly governmental, sanction for the inculcation of German legal theory was the similarity of Japanese and German thought on the relationship of the individual to the state. A difficulty the Japanese had experienced before the Code had been adopted was in rationalizing the Japanese concept of this relationship with that of the French and Anglo-American systems.

The French and Anglo-American systems had followed a concept of "natural law," a corollary of which was that because the state was merely a product of its members, the state had only those powers which its members saw fit to bestow. See I. KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* 113 (1965); J. ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* ch.6 (1913); see generally L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940). Power itself resided in the individual members. In contrast to this, in Japan the emperor theoretically held all power and his subjects had only those "rights" which the emperor bestowed. R.H. MINEAR, *JAPANESE TRADITIONS AND WESTERN LAW* 83 (1970); see also Yasaki, *Legal Positivism Reconsidered*, 11 *OSAKA L. REV.* 1 (1963). This was a logical extension to the political realm of the traditional Japanese social system where the interests of the group or community prevailed over those of the individual; individual interests were acknowledged only when those of the group would not be adversely affected. See generally R. BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* (1946); C. NAKANE, *JAPANESE SOCIETY* (1970); compare J. Rousseau, *op. cit. supra* at ch.6. Rousseau claims that no man loses anything through the social contract, but gains an increase in force for the preservation of what he has.

Rinsho Mitsukuri's difficulties in translating the French Code illustrate the problem. He records the dispute over the translation of *droits civils* as follows:

Whereupon at that time I translated the words *droits civils* as *minken* ("people's powers" or "rights") there was an argument over what I meant by saying that the people (*min*) have power (*ken*). Although I tried as hard as I could to justify it, a furious argument ensued. Fortunately Mr. Eto, chairman, supported me and the matter was finally settled. Ostuki, Mitsukuri Rinsho Kun Den [Bibliography of Rinsho Mitsukuri] 102 (1907).

German legal scholars encountered the same problem in dealing with French and Anglo-American legal ideology. The violent excesses of the French Revolution were anathema to German scholars. The concept of natural law propounded by Rousseau was rejected. Instead, legal positivism, an attempt at objectivity which took as its "objective" basis the status quo rather than

In summary, today a Japanese attorney confronted with a legal problem would interpret the critical code provision as follows: first, he will study the code provision itself. Next, he will research the case law to determine whether the law on that point has been settled. If there is any doubt, he will consult scholarly opinion. In doing so he probably will be careful to note whether majority or minority views exist among the scholars, since a majority view may tend to be more persuasive.⁵² When the meaning of the code provision is reasonably clear, he can predict how the court will apply it.⁵³

In Japan, then, scholarly treatises are given much greater deference than in the United States. An examination of the theory propounded by scholars, therefore, is essential in obtaining a complete understanding of the law governing the scope of contract damages.

Japanese Theory

All legal systems employ some means of limiting recoverability of damages for breach of contract.⁵⁴ The purpose of limitation is occasionally disputed but it is generally accepted that some type of limitation is necessary to prevent the disincentive for entering into contractual relationships that otherwise would result from granting full recovery.⁵⁵

a concept of organic natural law, was developed. This change-resistant concept has been clarified by contrasting it with analytical jurisprudence, as follows:

The critical point of distinction between legal positivism and analytical jurisprudence is that analytical jurisprudence is not a theory about the nature of law, whereas legal positivism is precisely that. Analytical jurisprudence is rather a way of doing jurisprudence.

The analytical lawyer rationalizes and systematizes, yet he remains willing to make changes in law according to his values; the legal positivist rationalizes and systematizes with the belief that the results he obtains are objectively necessary and not open to willful [sic] change.

S. SHUMAN, *LEGAL POSITIVISM: ITS SCOPE AND LIMITATIONS* 12 (1963).

This German theory which served to protect the state and status quo at the expense of individual rights was tied to the premise similar to that in Japanese thinking that the state is superior to its individual members. As Thorstein Veblen stated:

In some potent sense, the State is a personal entity, with rights and duties superior and anterior to those of the subjects, whether these latter be taken severally or collectively, in detail or in the aggregate or average. The citizen is a subject to the State.

T. VEBLER, *IMPERIAL GERMANY AND THE INDUSTRIAL REVOLUTION* 156 (1915).

(Veblen was a professor of Yatsuka Hozumi's in Berlin. Hozumi later became one of Japan's most influential legal scholars.)

The permeation of German legal theory with this concept of sovereignty residing not in the individual, but in the state (R.H. MINEAR, *op. cit. supra* at 33, contributed substantially to the irresistible appeal the German legal system held for Japanese scholars. As Kitagawa says: "German legal science was invested with virtually absolute authority as the foundation upon which Japanese scholars raised their theories of legal interpretation." Kitagawa, *supra* note 22, at 2. Because of this reliance on German legal science in the development stages of Japanese law, its influence, particularly in the area with which this article deals which was left untouched by the American Occupation (A.C. OPPLER, *supra* note 46), continues largely unchanged.

⁵²Stevens, *supra* note 33, at 5.

⁵³Kitagawa, *supra* note 4, at 85.

⁵⁴G.H. Treitel, *Remedies for Breach of Contract*, INT'L. ENCYC. COMP. L. ch.16, 55 (1976).

⁵⁵*Id.*

Of the variety of theories extant, typically a single system will employ a mixture in order to deal with the multitude of situations that arise.⁵⁶ To some extent this has been true in Japan. Today most Japanese scholars conclude that the general rule of the scope of damages is that of adequate causation.⁵⁷ Whether the Code language itself is an explanation of this rule or is derived from the English rule of *Hadley v. Baxendale*, however, is widely disputed.⁵⁸ The extensive destruction of records of the period before 1898 in the Second World War complicates substantiation of either argument.⁵⁹ The language of article 416, with damages divided into "damage as would ordinarily arise from non-performance of an obligation" and "damage which has arisen through special circumstances" strongly suggests more than a coincidental similarity with Baron Alderson's characterization of the rule of foreseeability in *Hadley v. Baxendale*.⁶⁰ The better reasoning seems to be that although the original language of the Code itself was borrowed from *Hadley v. Baxendale*, it subsequently was so infused with German notions that today article 416 is a rule of adequate causation with an explanatory provision of the requirements for recovery of special damages in subsection 416(2).⁶¹ The ostensible contradiction of the language of foreseeability in 416(2) with a rule of adequate causation can best be explained after looking at the theory of adequate causation itself.

Adequate Causation

The German theory of adequate causation adopted by Japanese legal scholars is based on a theory of the sufficiency of the causal nexus between an act and some harm, generally applicable both to contract and tort damages.⁶² A theory attributing liability because of the sufficiency of the causal connection alone fit neatly with the earlier *Pandekten* articulation that the primary consideration in fixing damages was causation.⁶³ German thinking of the time fur-

⁵⁶See, e.g., H. L. A. HART and A.M. HONORÉ, CAUSATION IN THE LAW (1959); W. PROSSER, HANDBOOK ON THE LAW OF TORTS (1971).

⁵⁷Kitagawa, *supra* note 4, at 56; Oho, *supra* note 13; S. WAGATSUMA, *supra* note 13; YUNOKI *supra* note 13.

⁵⁸For those who say article 416 merely explains the rule of adequate causation, see Oho, *supra* note 13. For the contrary position see Okamatsu, Mukashitsu Songai Baisho Sekinin Ron [Liability without negligence to compensate damages] 1953; Suzuki, Songai Baisho Hani Ron (1957); Hirai, *Saimu Furiko Sekinin no Hani ni Kansuru Hoteiki Kosei* [Legal construction of the scope of liability for breach of obligation] 80 Hogaku Kyokai Zasshi 777 (1964) and 81 Hogaku Kyokai Zasshi 228 (1965); Kitagawa, *supra* note 2.

⁵⁹Kitagawa, *supra* note 4, at 48.

⁶⁰The Civil Code of Japan art. 416 (1898).

⁶¹See generally sources cited in note 13, *supra*.

⁶²Hellner, *The Limits of Contractual Damages in the Scandinavian Law of Sales*, 10 SCAND. STUD. L. 37, 42 (1966); G. H. Treitel, *supra* note 50.

⁶³Kitagawa, *Songai Baisho-Ron no Shiteki Hensen* [Historical change in the law of damages], 73 Hogaku Ronso 1 (1963).

ther emphasized the necessity of unitary form over a general principle,⁶⁴ occasionally at the expense of practicality of application.⁶⁵ A determination of damages based on the single principle of causation regardless of their origin in contract or tort, therefore, was found rather appealing.

The theory was first postulated by the physiologist von Kries.⁶⁶ According to his original formulation, a condition *sine qua non* is the adequate cause of harm if it is of the type which, in the ordinary course of things, significantly increases the objective probability of the harm of the type actually suffered.⁶⁷ One is liable if his breach is of the type which appreciably increases the objective probability of the harm suffered. Conversely, one is not liable if his breach was such as, in the ordinary course of things, would not significantly increase the objective probability of the harm suffered.⁶⁸ The real question for determining whether the breach falls into one category or the other is what the standard of objective probability will be: who will determine what actions would ordinarily result in the injury? The test of objective probability most commonly used is the chance of harm assessed on information available to defendant at the time of breach, disregarding his own possible subjective error in assessment, or in other words, the reasonable man.⁶⁹

The use of the reasonable man as the percipient of what significantly increases the probability of harm in the ordinary course of things is by no means a settled issue in German law. Standards used have varied from the experienced observer⁷⁰ (essentially the reasonable man although possibly more sophisticated in his knowledge), to Traeger's formulation that objective probability should be based on the knowledge available to a most prudent, or exceptionally perceptive man.⁷¹ Traeger's formulation has opened the way for development of the view, occasionally used in tort, that the defendant must be presumed to have at his disposal all knowledge available to mankind.⁷² This view has produced results which have been criticized as being injurious to the efficacy of adequate causation as a theory of limitation.⁷³ One such instance

⁶⁴See Hellner, *supra* note 62, at 41.

⁶⁵See, e.g., 105 R.G.Z. 264 (1922); 119 R.G.Z. 204 (1927) tort action in which plaintiff lost a leg in an accident for which defendant was responsible. Twenty years later plaintiff suffered an injury in a fall. (Defendant was liable.)

⁶⁶Von Kries, *Über den Begriff der Objectiver Möglichkeit*, 12 Vierteljahrschrift für Wissenschaftliche Philosophie (1888).

⁶⁷3 B.G.H.Z. 261, 267 (B.G.H. 1951); 133 R.G.Z. 126 (R.G. 22 1931); TRAEGER, *DER KAUSALBEGRIFF IM STRAF-UND ZIVILRECHT* (1904).

⁶⁸A.M. Honoré, *Causation and Remoteness of Damage*, 11 INT'L ENCYC. COMP. L. ch. 7 at 57 (1971).

⁶⁹Hellner, *supra* note 62, at 49.

⁷⁰G.H. Treitel, *supra* note 54, at 66.

⁷¹TRAEGER, *supra* note 67.

⁷²A.M. Honoré, *supra* note 68, at 52.

⁷³See, e.g., Kitagawa, *supra* note 4, at 57; G.H. Treitel, *supra* note 54, at 67.

was a case where plaintiff's decedent contracted influenza and died while hospitalized for a bullet wound caused by defendant.⁷⁴ The defendant was held liable for the death because the most prudent man would have known of the probability of the harm.

While this formulation occasionally functioned in tort to compensate injured plaintiffs more fully, its harshness precluded its widespread acceptability. In contract, such a strict formulation would have conflicted with public policy by discouraging the formation of contractual relationships. Judges would be unwilling to apply it. As Honoré says: "In truth, when the theory conflicts with a trained sense of justice, it is applied by the courts no more strictly than other theories."⁷⁵ Consequently, the rule generally accepted in both German and Japanese law is one which provides that contract recovery will be limited to those damages which occur in the ordinary course of things,⁷⁶ according to the common experience of mankind,⁷⁷ or under normal conditions of life⁷⁸ as perceived by the reasonable man. This limitation of recovery to that which would *ordinarily* occur as determined by the reasonable man in effect is the same objective standard used in foreseeability.⁷⁹ Practically speaking, with the exceptions that will be discussed later, the rules of adequate causation and foreseeability are distinguishable primarily on rhetorical bases.⁸⁰

The sufficiency of the casual connection is measured at the time of breach.⁸¹ This logically follows from the fact that measurement of the sufficiency of a non-existent causal connection before the nexus itself is brought into existence by defendant's breach is difficult, if not theoretically impossible. This means that defendant's knowledge of the probable harm connected with his breach will tend to be greater; plaintiff generally will have a better opportunity to recover.

The real difficulty confronting the use of a theory of adequate causation to determine the scope of contract damages in Japan is that it is ostensibly incongruous with the language of the Civil Code. Article 416, dividing damages

⁷⁴105 R.G.Z. 264 (1922); see also 119 R.G.Z. 204 (1927) (cited in note 65, *supra*).

⁷⁵A.M. Honoré, *supra* note 68, at 55.

⁷⁶See F. LAWSON, A. ANTON & L. N. BROWN, AMOS & WALTON'S INTRODUCTION TO FRENCH LAW 212 (1963); J.E. DE BECKER, THE PRINCIPLES AND PRACTICE OF THE CIVIL CODE OF JAPAN 269 (1921).

⁷⁷See A.M. Honoré, *supra* note 68, at 86.

⁷⁸See 38 R.G.Z. 158 (tort action where defendant's flying over plaintiff's silver fox farm damaged the health of the foxes. Flying airplanes were held not to be an adequate cause of the damage because such noise under *normal* conditions of life did not cause that kind of damage); E. COHN, MANUAL OF GERMAN LAW 105 (1968); F. LAWSON, A. ANTON & L. N. BROWN, *supra* note 76.

⁷⁹G. H. Treitel, *supra* note 54, at 66.

⁸⁰*Id.*

⁸¹A. M. Honoré, *supra* note 68; Kitagawa, *supra* note 4; Kitagawa, (Standard time for the calculation of damages), 88 Hogaku Ronso 84 (1971); G. H. Treitel, *supra* note 54.

into those ordinary and those special and injecting a test of foreseeability for recovery of the special damages hardly seems to be the embodiment of a rule of adequate causation. In the German formulation of adequate causation, the defendant need only have a knowledge of the significance of the probable nexus between his breach and the type of harm actually suffered; his knowledge of the extent of the injury is not relevant.⁸² If the type of harm is adequately caused, the extent of that harm is fully recoverable, being tied to the sufficiency of the same causal connection. The effect of this extended recoverability is best illustrated by a commonly used example:

A vendor of a house fails to convey and in consequence the purchaser is unable to accept an exceptionally big offer which a third party makes for the house. In such a case it is said that the defaulting vendor is liable for loss of the profit which the purchaser could have made on resale to the third party. Under the Anglo-American rules such exceptional "loss of profit" would probably be regarded as unforeseeable; the purchaser could at most recover in respect of an ordinary loss of profit on the transaction. The German view appears to be that, so long as the "kind" of loss suffered satisfies the "adequate causation" test the defendant is liable to the full extent of the loss.⁸³

Because adequate causation in German law provides this extensive recoverability once the causative element is shown to be sufficient, it is commonly referred to as a principle of full compensation.⁸⁴

On the other hand, foreseeability is spoken of as a theory of limitation.⁸⁵ This is because foreseeability extends beyond a mere limitation on the type of harm for which damages are recoverable to the extent of the harm; both type and extent of plaintiff's recovery are limited to what was reasonably foreseeability.⁸⁶ This basic difference is rationalized by saying that article 416 merely recognizes and articulates the principle of adequate causation.⁸⁷ A brief explanation should help clarify this point.

The German rule attributes to the objective observer the knowledge of the reasonable man in the circumstances of defendant, as well as any particular knowledge which the defendant actually had.⁸⁸ With this additional knowl-

⁸²H. L. A. HART & A. M. HONORÉ, *supra* note 56, A. M. HONORÉ, *supra* note 68; G. H. TREITEL, *supra* note 54, at 68.

⁸³G. H. Treitel, *supra* note 54, at 68.

⁸⁴See Kitagawa, *supra* note 4.

⁸⁵*Id.*

⁸⁶G. H. Treitel, *supra* note 54, at 61, 68; see *Cory v. Thames Ironworks & Shipbuilding Co.*, 3 Q.B. 181 (1868) (A buyer purchases a chattel for a special purpose where seller intends a different purpose. Seller held liable for an amount equal to that which he contemplated would result from his own intended purpose, regardless of the actual extent of damage.) Compare A. M. Honore, *supra* note 68, at 56, describing the law applicable to tort in common law, states that foreseeability requires only objective contemplation of the type of harm, not its extent; see also *Smith v. Leech Grain, Ltd.*, 2 Q.B. 405, 414-15 (1962) (tort case in which foreseeability of precise extent of damages held unnecessary); G. H. Treitel, *supra* note 54, at 62.

⁸⁷See generally sources cited in note 13, *supra*.

⁸⁸G. H. Treitel, *supra* note 54, at 66.

edge, the observer's perspicacity is heightened to a level above that of the reasonable man, making him liable for damages not objectively known but known because of his special knowledge. The Japanese were able to make use of this dual attribution of knowledge to defendant in rationalizing the language of article 416 to a theory of adequate causation. Article 416(1), which describes ordinary damages, was said to be merely a restatement of the general rule of adequate causation with the reasonable man as the percipient of what constitutes ordinary damages.⁸⁹ Article 16(2), describing foreseeability, was said to be a rule of determining the recoverability of special damages adequately caused, with the particular knowledge of defendant beyond that of the reasonable man as the determinative factor. If defendant had particular knowledge of the special circumstances which would permit his foreseeability of the damage, plaintiff could recover. In essence, the Japanese reconciled their Code provision to the theory of adequate causation by a rather procrustean bifurcation of the German formulation along the lines dictated by the Code language.

Since the meaning of the Code is interpreted along lines of adequate causation, Japanese law in theory at least follows a principle of full compensation. In practice, however, this may not be the case. An examination of the actual practice of courts in specific fact situations will shed important light on Japanese law in this area.

Japanese Cases

Although the concept of adequate causation in principle occasionally has been accepted by courts,⁹⁰ Japanese case law has not yet advanced to a determination of the scope of damages based on relations of adequate causation.⁹¹ Rather, courts have tended to confine themselves to more pragmatic determinations of whether the damages are "ordinary" or "special" in accordance with article 416.⁹² Certainly the law in many fact situations remains to be settled by the courts, particularly since, as mentioned before, specific incidences in case law are not so developed in Japan. The cases that have been decided in certain areas, however, have been sufficient to give the researching attorney direction as to the outcome of his particular case. The area where the division into ordinary and special damages is particularly germane for the businessman is in contracts for the sale of chattels. To clarify the case law in this area we

⁸⁹See sources cited in note 13, *supra*.

⁹⁰*Kumagaya v. Yamaguchi*, 2475 Shinbun 9 (Gr. Ct. Cass. 1925); *Iseda v. Emoto*, 26 Minroku 1298 (Gr. Ct. Cass. 1920); *Suwa v. Aoki*, 24 Minroku 2169 (Gr. Ct. Cass. 1918). These were cases where the courts actually characterized the damages as adequately caused.

⁹¹*Kitagawa*, *supra* note 4, at 59.

⁹²*Id.*

will divide this investigation between delay and substitute or compensatory damages, first for the buyer and then for the seller.

Delay Damages

1. BUYER'S DAMAGES

Where the purchaser has entered into no collateral resale agreement with a third party, the buyer may obtain as ordinary damages the difference between the contract price and market price at the time of delayed delivery.⁹³ In *Kasuya K.K. v. Yuryo Sato Haikyukodan*,⁹⁴ the seller belatedly delivered soy bean oil after the market price had dropped: the purchaser incurred a loss in resale. The Supreme Court held that the purchaser's loss from this downward price fluctuation as measured by the difference in the contract price and the market price at the time of the delivery constituted ordinary damages. Where the purchaser has entered into a collateral resale agreement, *Tokyo Kaiun K.K. v. Hashimoto* held that easily quantifiable profits lost because of the delay would be recoverable as ordinary damages.⁹⁵ In that case a shipbuilder delivered an ordered ship late. The Court held that although profits that could have been lost through a collateral contract with a charter party could be recovered as ordinary damages, where the collateral contract was one for *resale*, the purchaser forfeited such potential profits.⁹⁶ The cases in this area would seem to indicate a conclusion that where the seller's actual delayed delivery is worth less to the buyer than the contracted delivery, the buyer may recover the increment of loss he suffers. Where he enters a collateral resale contract, however, his loss recoverable as ordinary damages in an action for delay damages is largely nullified by the fact that the resale contract is unaffected: the delay did him no harm. The harm it may have done probably would be recoverable as special damages.⁹⁷ This assumes, of course, that the purchaser's resale contract is unaffected and that seller's performance will satisfy the purchaser's needs. Should this not be the case, purchaser's proper claim would be for substitute or compensatory damages, as will be explained later.

2. SELLER'S DAMAGES

The determination of the damages a seller may recover for a buyer's breach of his obligation to pay is relatively simple. Civil Code Article 419(1) provides:

⁹³See *Kasuya K. K. v. Yuryo Sato Haikyukodan*, 15 Minshu 2706 (S.Ct. 1916).

⁹⁴*Id.*

⁹⁵6 Minshu 464 (Gr. Ct. Cass. 1927).

⁹⁶*Id.*

⁹⁷In *Yusa v. Ono*, 14 Minroku 1073 (Gr. Ct. Cass. 1908), the Court held that where a purchaser incurs costs in retaining a resale contract because of a seller's delay, the additional costs were recoverable as special damages.

The amount of damages for non-performance of money obligation shall be determined by the legal rate of interest; however, in case the agreed rate of interest exceeds the legal rate, it shall be determined by the former.⁹⁸

A seller may recover either the legal interest⁹⁹ or the conventional interest for the delay, whichever is greater regardless of what is proven in the facts. The generally accepted view is that even if a seller proves damages exceeding the delay interest, he cannot recover them.¹⁰⁰

Compensatory Damages

As mentioned in the introduction, substitute or compensatory damages may be recovered where specific performance is untenable because: (1) delayed performance no longer would be of any benefit to obligee; (2) formal demand is made for performance within a fixed reasonable time but is not carried out; or (3) performance is impossible.

1. BUYER'S DAMAGES

Originally, where the buyer has no collateral contract with a third party, a buyer could recover as ordinary damages the difference between contract price and market price.¹⁰¹ The reasoning for this was that the purchaser was thought to deserve the benefit of market fluctuations of which he could have taken advantage had the seller performed as contracted.¹⁰² The trend of decisions today as well seems to be toward treating damages from market fluctuations as ordinary.¹⁰³ On the other hand, the loss of resale profits, and therefore potential resale profit, is regarded as a special damage. The crucial determination for the courts in this area, then, is whether damages were essentially from potential resale profits or merely due to market fluctuations.¹⁰⁴ Where the facts of the case indicate that purchaser's purpose was to resell, as a purchase of securi-

⁹⁸The Civil Code of Japan art. 419(1) (1898).

⁹⁹The legal interest rate set by the Civil Code art. 404 (1898) prescribes a five percent interest rate. The Commercial Code of Japan art. 514 prescribes a six percent rate, the Commercial Code being applicable to sales between merchants.

¹⁰⁰See sources cited in note 13, *supra*.

¹⁰¹See *Muto v. Shimomura*, 11 Minroku 1607 (Gr. Ct. Cass. 1905); *Sakamoto v. Yutani*, 10 Minroku 1404 (Gr. Ct. Cass. 1904).

¹⁰²*Naoki v. Hattori*, 14 Minroku 290 (Gr. Ct. Cass. 1908); *Watanabe v. Mizuumi*, 12 Minroku 1358 (Gr. Ct. Cass. 1906).

¹⁰³*Tsurutani Shokai v. Kimura Shoten*, 15 Minshu 1105 (S.Ct. 1961) (Contract to sell dried noodles. Purchaser recovered as ordinary damages the difference between the price at the time of expected performance and the contract price); *Osumi v. Asahikawa Kyoryoku Seni Kogyo*, 7 Minshu 1446 (S.Ct. 1953) (Contract for sale of wood. Court measured as ordinary damages the difference between the inflated market price at this time of rescission and the contract price); *Osugi v. Mabuchi*, 1 Minshu 283 (Gr. Ct. Cass. 1922) (Court said price fluctuations created ordinary damages.)

¹⁰⁴*Kurohara v. M. N. A. Nawara*, 24 Minroku 1658 (Gr. Ct. Cass. 1918); *Kawai v. Yoshizawa*, 1106 Shimbun 25 (Tokyo Dist. Ct. 1915); *Ogasa Ginko v. Doi*, 4 Hyoron-Mimpo 154 (Tokyo Dist. Ct. 1915).

ties would be, for example, losses are special, and the burden is on the purchaser to show seller's foreseeability of the damages;¹⁰⁵ where the facts indicate otherwise, losses are ordinary. For example, in *Yamazaki Shoten Goshigaisha v. Sakogawa*, the purchaser, a broker of rice, incurred a loss because of the seller's breach.¹⁰⁶ The court held that the loss was a special damage because essentially it was from a loss of resale profit as indicated by the purchaser's status as a rice broker. The buyer in this case, however, was able to recover his loss by meeting the burden of proof in showing that the seller knew he was a rice broker and that the resale profits, therefore, were foreseeable.

When the purchaser has entered into a collateral contract with a third party, damages suffered from seller's breach are typically characterized as special.¹⁰⁷ Consequently, the purchaser has the burden of showing their foreseeability by seller. If the subject matter of the sale is timber or land, the limitations imposed by foreseeability are even greater. Not only must the resale contract be foreseeable but the resale price, or the extent of damages, must be foreseeable as well.¹⁰⁸ This is an interesting development that seems incongruous with the German rule of adequate causation as a theory of full compensation, as discussed above. In contrast to the German principle, here the rule of foreseeability is applied not only to the type of damages, but to their extent.

Although some cases treat damages which a purchaser must pay a third party for breach of their contract because of the seller's breach of the original contract as ordinary,¹⁰⁹ it seems more reasonable to treat them as special damages, as other cases have.¹¹⁰ The decisions as to purchaser's cover for collateral resale are similarly split over their characterization as "ordinary" or "special," although the distinguishing facts are not entirely clear.¹¹¹

2. SELLER'S DAMAGES

The cases dealing with a seller's recovery in this area where no collateral contract existed are too few to establish any distinguishable pattern. Where a

¹⁰⁵*Ikeda v. Uchimura*, 4 *Hanketsu Zenshu* 6 (Gr. Ct. Cass. 1937) (purchase of stocks by broker held to be for resale and therefore special damage would be incurred); *Arakawa v. Taki*, 3266 *Shimbun* 15 (Gr. Ct. Cass. 1931); *Kadomatsu v. Kasuga*, 3 *Minshu* 232 (Gr. Ct. Cass. 1924) (purchase of trees has no presumption of resale); *Yamazaki Shoten Goshigaisha v. Sakogawa*, 21 *Hyoron-Mimpo* 1134 (Tokyo Dist.Ct. 1932).

¹⁰⁶21 *Hyoron-Mimpo* 1134 (Tokyo Dist.Ct. 1932).

¹⁰⁷*Nakamasu v. Yuasa Boeki K. K.*, 10 *Hyoron-Shoho* 31 (Tokyo Dist.Ct. 1920); *Takiura v. Gomeigaisha Shibakawashoten*, 3 *Hyoron-Mimpo* 730 (Tokyo Dist.Ct. 1914)

¹⁰⁸*Taniguchi v. Miasa Shogi K. K.*, 4543 *Shimbun* 7 (Gr. Ct. Cass. 1940) (seller must compensate when he knew the resale price); *Enomoto v. Sagaki*, 3341 *Shimbun* 14 (Gr. Ct. Cass. 1929).

¹⁰⁹*See Honolulu Junk Shokai v. Yamasawa*, 2133 *Shimbun* 18 (Tokyo App. Ch. 1922).

¹¹⁰*See Fushinaga v. Hara*, 1298 *Shimbun* 29 (Osaka Dist.Ct. 1917).

¹¹¹For those characterizing such damages as ordinary, *see Suwa v. Aoki*, 24 *Minroku* 2169 (Gr. Ct. Cass. 1918); *Hirouchi v. Inugai*, 1800 *Shimbun* 13 (Kobe Dist. Ct., 1920); *but see Saiwai Bussan K.K. v. Daido Koshi Yugen Kaisha*, 9 *Tokyo Ko-Min Jiho* 172 (Tokyo High Ct. 1958) (cover damages held to be special but recoverable because foreseen).

seller resells under a contract with a third party, however, the buyer generally has been held liable for the ordinary damages of the difference between the contract price and the resale price.¹¹² In one such case,¹¹³ a seller rescinded a contract after buyer's breach and resold to a second buyer at a lower price. The court held that the seller could recover as ordinary damage the difference in the contract price and the retail price.¹¹⁴

As a final point in this general area, although the right to damages accrues at the time of breach, the court is left with considerable discretion in determining the time for measuring the damages. The court has variously fixed the time at: (1) the time of breach; (2) the time for performance; (3) the time of rescission of the contract; (4) the time of institution of the suit; (5) the time of the conclusion of oral arguments; (6) the time of the highest intermediate price; and (7) the time of substitute acts of cover or resale.¹¹⁵

United States Law

Unlike law in Japan, law in the United States is primarily a judicial development. The theory of foreseeability underlying a determination of the scope of contract damages evolved from attempts by courts to resolve factual situations. As a result, the separation of theory from judicial practice is not as distinct. The basic difference in approach between the two systems amplifies the difficulty of defining strictly parallel areas for the purposes of comparison. Recognizing that difficulty, this section will analyze United States law along the separate lines of theory and judicial practice purely as an accommodation for effective comparative analysis.

Foreseeability

Whereas in Japan foreseeability is used only as a test for determining when special damages which are adequately caused are recoverable, in the United States, foreseeability is used almost exclusively as the theory for determining the entire scope of damages recoverable for breach of contract. As Corbin says: "Our only test of causation . . . is foreseeability."¹¹⁶

Foreseeability frequently is said not to be a theory of causation.¹¹⁷ The better reasoning, however, seems to be that stated impliedly by Corbin: although courts will not bother themselves with problems of determining the sufficiency

¹¹²Jiedo v. Fumashoten K.K., 17 Hyoron-Mimpo 135 (Gr. Ct. Cass. 1927); Kumadoriya v. Nakayama, 17 Hyoron-Shoho 63 (Tokyo App.Ch. 1927).

¹¹³Nishiyoshi v. Chin, 22 Minroku 1991 (Gr. Ct. Cass. 1916).

¹¹⁴*Id.*

¹¹⁵See Kitagawa, *supra* note 4, at 71-78.

¹¹⁶A.L. CORBIN, CORBIN ON CONTRACTS 1006 (1950).

¹¹⁷A.M. Honoré, *supra* note 68.

of causation in ascertaining the extent of liability in contract,¹¹⁸ foreseeability still is a determination of causation, albeit one's objective perception of the causal nexus between his actions and the harm. Stated simply, the theory of foreseeability is that a defendant is liable only for those damages foreseeable by the reasonable man with defendant's knowledge at the time of contract formation.¹¹⁹ Conversely, a claim for those damages not reasonably foreseeable—not within the objective contemplation of defendant—is not allowed.

This formulation of a limitation on compensation for the harm incurred from the breach of a contract was postulated similarly as early as the seventeenth century by Molineaux and gradually found its way through Pothier into the French Civil Code.¹²⁰ The belated move in English common law toward establishing a more viable theory for limiting compensation in claims for money damages based on a breach of contract was inspired both by considerations from within the judicial system and by those from without. Within the system, judges were becoming concerned with the discretion allowed juries in assessing money damages. Until the rule was finally articulated in *Hadley v. Baxendale*¹²¹ and adopted throughout the common law systems,¹²² although juries were informed that only natural damages were recoverable, they were effectively given total discretion in determining damages.¹²³ Gradually judges began to subject this discretion to their control through developing evidentiary rulings, granting new trials where awards were excessive or inadequate, and finally through formulating rules and doctrinal limitations to liability.¹²⁴ Outside the system, but very much affecting it, were the beginnings of the brisk economic conditions of Victorian England.¹²⁵ Businessmen wanted some kind

¹¹⁸G.H. Treitel, *supra* note 54, at 61.

¹¹⁹A.L. CORBIN, *supra* note 116, at § 1011; J. MURRAY, MURRAY ON CONTRACTS § 224 (1974); S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1356 (1968).

¹²⁰Washington, *Damages in Contract at Common Law*, 48 L.Q.REV. 90 (1932). The Code Napoleon (1804) states:

A debtor is only liable for the damages which have been foreseen or which could have been foreseen at the time of contract, when it is not owing to fraud on his part that the obligation is not fulfilled.

CIVIL CODE BOOK 3, tit. 3, para. 1150; see Pothier, *Obligations* pt. 1, cl. 2, art. 3, §§ 159-172.

Significantly the rule adopted in common law jurisdictions differed from the French rule in that no provision was made for liability based on fraud, thereby tending to indicate that the adoption of a rule of foreseeability may have been a product of influences other than French. For a more extensive discussion of this possibility, see G.H. Treitel, *supra* note 54, at 60-61.

¹²¹9 Exch. 341 (1854).

¹²²See *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1920); RESTATEMENT OF CONTRACTS § 330 (1932); McCormick, *The Contemplation Rule as a Limitation upon Damages for Breach of Contract*, 19 MINN. L. REV. 497 (1935); Washington, *supra* note 57.

¹²³See, e.g., *Waters v. Towers*, 8 Exch. 401 (1853); *Black v. Baxendale*, 1 Exch. 410 (1846); Washington, *supra* note 120.

¹²⁴McCormick, *supra* note 122, at 504.

¹²⁵See Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975); McCormick, *supra* note 122, at 499, 504.

of assurance that their actions in forming a contract would not create a liability greater than they contemplated would be created by the agreement at the time they agreed.

That the imputable liability be determined by the parties themselves as part of the contract appealed to a judicial sense of fairness.¹²⁶ A rule based on defendant's foreseeability would impose liability only where he had so intended; where he had intended not to incur the foreseeable liability, he would have modified his terms or withdrawn from the contract. Baron Alderson stated the reasoning: "For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."¹²⁷ The logical appeal of this argument coupled with the judicial necessity and economic conditions of the times soon led to the widespread adoption of the foreseeability rule.

Hadley v. Baxendale itself was based on an action brought by the owner of a steam grist-mill against a carrier for delay in shipment. The broken pieces of the old shaft of the grist-mill were sent to a manufacturer as a model for a new one. The carrier was informed that the mill was stopped but was not told that the stoppage of the mill was attributable solely to the broken shaft. Plaintiff claimed as damages for delay the idleness of the mill and the jury allowed the claim. On appeal, Alderson, B., disallowed the claim for "special damage," stating:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, would only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.¹²⁸

Thereafter the rule was quickly adopted in other common law jurisdictions. In the United States, the Supreme Court, per Mr. Justice Holmes, later mir-

¹²⁶A.M. Honoré, *supra* note 68, at 58.

¹²⁷*Hadley v. Baxendale*, 9 Exch. 341, 355 (1854).

¹²⁸*Id.*

rored the objective foreseeability rule of *Hadley v. Baxendale* in these words:

It is true that as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. The extent of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind.¹²⁹

Thus the rule of foreseeability defines two types of damages: those "arising naturally," which any reasonable person might have foreseen, and those reasonably within "the contemplation of both parties," which the reasonable person with the same knowledge of special circumstances as defendant would have contemplated.¹³⁰ The rule is one of limitation: "liability will not attach for damage which was not 'in the contemplation' of the parties 'at the time they made the contract.'"¹³¹

The time affixed for determining the contemplation of defendant is the time of contract formation. Anglo-American law consistently has rejected any other time.¹³² This formulation comports nicely with foreseeability's underlying policy of restricting liability to that which the parties intended within their contractual arrangement. The long-standing theory of contract is that rights and obligations are set at the time of formation, the "meeting of the minds." Affixing a time other than that of contract formation would be a departure from this surprisingly change-resistant policy of permitting the parties contrac-

¹²⁹*Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1902).

¹³⁰G. GRISMORE, *PRINCIPLES OF THE LAW OF CONTRACTS* 303 (1965). It is interesting to note that although Alderson's formulation was in terms of the contemplation of both parties, the rule applied today is one of the contemplation of defendant. The contemplation of plaintiff is assumed. See, e.g., U.C.C. § 2-715(2)(a); Restatement of Contracts § 330 and comment (a) (1932); A.L. CORBIN, *supra* note 116, at § 1011; J. MURRAY, *supra* note 119, at 453.

¹³¹McCormick, *supra* note 122, at 501; see F. LAWSON, A. ANTON & L. BROWN AMOS & WALTON'S INTRODUCTION TO FRENCH LAW 212 (1963); J. MURRAY, *supra* note 119; but see S. WILLISTON, *supra* note 119, wherein the view is expressed that the purpose of the additional rule for special damages is to *expand* liability to those damages foreseeable. Williston's view complies with neither history nor theory. Rather, it seems to be a consequence of his own heuristic methodology: the law is described as it exists, beginning with ordinary and proceeding to special damages, moving from a theoretical point of no recovery to the extent of recovery provided by law. Apparently he attributes to foreseeability the purpose evidenced by his own methodology, rather than that shown by historical or theoretical analysis.

¹³²"The suggestion thrown out by Bramwell, B., in *Gee v. Lancashire & Y. R. Co.*, 6 Hurlst. & N. 211, 218, that perhaps notice after the contract was made and before the breach would be enough, is not accepted by later decisions. . . . The consequences must be contemplated at the time of the making of the contract." Holmes, J., in *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544 (1903); see also *Eastern Advertising Co. v. Shapiro*, 161 N.E. 240 (Mass. 1928); U.C.C. § 2-715 (2)(a); RESTATEMENT OF CONTRACTS § 330 (1932); A.L. CORBIN, *supra* note 116, at § 1008.

tually to establish their liabilities.¹³³ Corbin has suggested a determination of foreseeability at the time of breach when the breach was wilful, but this has not been accepted.¹³⁴ Since ordinary or general¹³⁵ damages are defined in terms of their reasonability in the circumstances, by definition they are within the objective contemplation of a defendant.¹³⁶ Evidence of contemplation is unimportant here, except perhaps that presented by defendant in rebuttal of a presumption established that the harm was of the type that one would expect in the usual course of events to flow from the breach.

The area where contemplation is crucial is the determination of special damages.¹³⁷ If the harm would not occur in the usual course of events, plaintiff's recovery is contingent upon defendant's objective contemplation of the harm.

The objective criterion for determining liability is the foreseeability of the reasonable man. Courts ask retrospectively whether a fictional reasonable man would have foreseen that the harm that did occur was such as was likely to occur in the event of breach. If the court finds that the harm was thereby foreseen, liability is imposed. For the sake of convenience, characteristics of unreasonability often may be imputed to this fictional standard of reasonability. For example, the usual contracting party typically does not contemplate all his potential liabilities for injury in case of breach.¹³⁸ To apply a standard of objective foreseeability, however, the court must assume that the reasonable man would contemplate those liabilities. The result of this type of reliance upon what Vinding Kruse calls "fictions of foreseeability"¹³⁹ is that foreseeability theory in application tends to be criticized as being somewhat divorced from its *raison d'être* of limiting liability to what the parties actually intended to incur.¹⁴⁰ The transcendent virtue of the use of these fictions,

¹³³See *Patterson v. Ill. Cent. Ry. Co.*, 97 S.W. 423 (Ky. 1906) where it was suggested that any other time for determining foreseeability would be unjust.

¹³⁴A. L. CORBIN, *supra* note 116, at § 1008.

¹³⁵The terms "ordinary" and "general" are interchangeable. RESTATEMENT OF CONTRACTS § 330 (1932); S. WILLISTON, *supra* note 119, at § 1344 A.

¹³⁶In *Victoria Laundry, Ltd. v. Newman Indus., Ltd.*, 2 K.B. 528 (1949) the court stated: "Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course." J. MURRAY, *supra* note 119, says that the way to look at the rule of *Hadley v. Baxendale* is to treat the first part as to usual damages as one of "imputed foreseeability or contemplation—that which any reasonable man should have foreseen—and the 'second rule' as actual foreseeability or contemplation—what the reasonable man with the particular knowledge should have foreseen." See A. L. CORBIN, *supra* note 116, at §§ 997, 1007.

¹³⁷See generally sources cited in notes 116, 119, 122, *supra*.

¹³⁸22 AM. JUR. 2d § 56.

¹³⁹Kruse, *The Foreseeability Test in Relation to Negligence, Strict Liability, Remoteness of Damage, and Insurance Law*, 9 SCAND. STUD. L. 93 (1965).

¹⁴⁰A.M. Honoré, *supra* note 68, at 58. Since foreseeability was developed to limit liability to what the parties contemplated, it does some violence to theoretical consistency to allow recovery where the liability was not actually contemplated. If recovery were based on some notion of fault,

however, is that the court acquires greater flexibility in producing more satisfactory results.¹⁴¹

This component of judicial discretion inherent in the theory of foreseeability is an important source of limitation on recoverability. The use of legal fictions of reasonability to ascertain defendant's foreseeability results in considerable practical imprecision in the law.¹⁴² Again, Corbin says: "The rules of law governing the recovery of damages for breach of contract are very flexible."¹⁴³ This imprecision relegates to courts tremendous discretion in determining whether liability should be imputed or would prove unduly burdensome. Where the court feels recovery for plaintiff's loss is justified, the foreseeability requirement may be liberally interpreted. Thus, although actual notice may not have existed, courts have been free to find the situation so colored by circumstances such as disproportionate gain to defendant,¹⁴⁴ or fault on the part of defendant,¹⁴⁵ that justice requires a finding for plaintiff. The reasoning used does not depart from foreseeability's formulation: the reasonable man would have foreseen the damage.¹⁴⁶ The court may conversely manipulate the standard of the reasonable man to more strictly limit plaintiff's recovery by requiring actual notice: the reasonable man otherwise would not have contemplated the damage.¹⁴⁷ Thus the flexibility inherent in the imprecision of the

where defendant would be found liable because of his negligence, instead of foreseeability, this would not be so. Common law, however, has consistently rejected an imposition of contract liability based on fault. G. H. Treitel, *supra* note 54, at 58, 59.

¹⁴¹A.M. Honoré, *supra* note 68, at 58.

¹⁴²RESTATEMENT OF CONTRACTS § 329 comment (a) (1932).

¹⁴³A. L. CORBIN, *supra* note 116, at § 1002.

¹⁴⁴See McCORMICK, *supra* note 122, at 511, which stresses that where the contract places considerable burden in proportion to benefits on one party, that party is more likely to recover, but the plaintiff with the lighter burden will be less likely to recover. *Hooks Smelting Co. v. Planter's Compress Co.*, 79 S.W. 1052, 1056 (Ark. 1904) (plaintiff had recovered \$5,450 in lower court judgment for suspension of plant operations because of delay in repair involving only \$100 to \$200 profit for defendant. That judgment was here reversed, the court holding:

Now where the damages arise from special circumstances, and are so large as to be out of proportion to the consideration agreed to be paid for the services rendered under the contract, it raises a doubt at once as to whether the party would have assented to such a liability, had it been called to his attention at the making of the contract, unless the consideration to be paid was also raised so as to correspond in some respect to the liability assumed.

¹⁴⁵Fault is not normally thought to be a theory applicable to contract damages at common law, but as a practical matter, courts often permit recovery where defendant's breach is wilful. G. H. Treitel, *supra* note 54, at 56-59. See California Civil Code 3306 (1959), which provides vendee's recovery of expectation interest in the sale of land where vendor wilfully failed to convey.

¹⁴⁶See *Adams Express Co. v. Allen*, 100 S.E. 473 (Va. 1919) (defendant express company had accepted a shipment of hog cholera serum with notice that prompt delivery was important. The company was held liable for the death of a large number of plaintiff's hogs from cholera because of an unreasonable delay in delivery, even though it had no notice that plaintiff's business was in hogs and not in drug serum); *Missouri Dist. Telegraph Co. v. Morris & Co.*, 243 F. 481 (8th Cir. 1917), *cert. denied*, 245 U.S. 651 (1917) (defense of no notice not accepted where defendant's fire alarm system failed to operate, causing loss to plaintiff).

¹⁴⁷See, e.g., *McMillain Lumber Co. v. First Nat'l Bank*, 110 S. 602 (Ala. 1927); *Bixby-Thierson Lumber Co. v. Evans*, 57 S. 39 (Ala. 1911); *Hadley v. Baxendale*, 9 Exch. 341 (1854).

rule of foreseeability provides courts with discretion sufficient to promote results desired by society.

One difference between foreseeability and adequate causation has already been discussed: foreseeability limits both the type and extent of damage recoverable, whereas adequate causation limits only the type recoverable. This difference in theory between the United States and Japan is minimized in application by the Japanese courts.¹⁴⁸ With one exception, further differences in the two theories are most pronounced only in rhetoric.¹⁴⁹ That single exception is in the time prescribed for applying the tests.

The foreseeability test is applied as of the time of contract formation: the foreseeability of the reasonable man at the time of the contract determines the limitation of damages. Applying the test at this point theoretically permits the parties in effect to determine by the contract the limits to potential liability. If contemplated liability is excessive, the parties need not enter into the agreement. On the other hand, the test for adequate causation is applied at the time of the breach: the defendant as a reasonable man (in most contract circumstances) must be able to perceive that his breach in the ordinary course of things was such as would significantly increase the probability of harm of the type which was suffered. Since defendant's perceptibility of probable injury may conceivably appreciate in the interim between formation and breach, plaintiff's potential recovery may be enhanced in comparison with his recovery under the foreseeability tests.

This potential advantage can be illustrated by a single example. Suppose a seller agrees to supply a buyer with a specified amount of coal in six months. Since the buyer operates several electrical power generating plants, at the time of formation, the seller has no reason to foresee anything but the buyer's own consumption. After three months, the buyer finds himself with an oversupply of coal; he enters into a potentially profitable agreement with a third party to resell the coal seller will deliver. Meanwhile the seller learns of the buyer's collateral resale agreement and, since the price of coal is inflating, decides to sell his coal on the open market instead. In the buyer's subsequent action against the seller for damages, the buyer would be able to recover his losses from the resale agreement. The court in Japan probably would reason that since (1) the action was for substitute damages for non-performance and (2) the buyer stood in a contractual relationship to a third party, the damages were special. Although special, because they (presumably) could be shown to have been foreseeable by the seller, they would be recoverable. In the United States a similar result would be unlikely since at the time of contract formation, the

¹⁴⁸See, e.g., cases cited in note 108, *supra*, which characterize the extent of losses in land resale contracts as special damages requiring proof of foreseeability as well.

¹⁴⁹G. H. Treitel, *supra* note 54, at 66-68.

seller was not objectively able to foresee the harm from the loss of the collateral resale agreement.¹⁵⁰

Case Law Compared

In the United States, the Uniform Commercial Code (UCC) is widely applied to contracts between merchants. The rule of *Hadley v. Baxendale* lives on in the UCC under the guise of section 2-715 which provides for recovery first of incidental damages which are essentially ordinary damages and consequential damages if "the seller at the time of contracting had reason to know" of them.¹⁵¹ Where the UCC would not be applicable, courts apply the general rule of *Hadley v. Baxendale*, obtaining similar results. The following section will compare the judicial case law in Japan as set out above with that in the United States as provided by the common law rule and the UCC.

1. DELAY DAMAGES

A. BUYER'S DAMAGES

Section 2-715 of the UCC permits recovery of expenses due to delay and any consequential damages of which the seller had reason to know.¹⁵² Thus the limitation of *Hadley v. Baxendale* applies and recoverable damages are restricted to those losses caused by the delay that there within the contemplation of the parties. For example, in *Oliver Electrical Manufacturing Co. v. I.O. Teiyen Construction Co.*,¹⁵³ the seller delayed delivery of "spacers" from July until September, causing the buyer to extend his construction time into the winter months. The court held that damages for delay were within the contemplation of the parties, but that winter construction was not. Hence the buyer could recover for increased overhead caused by the delay and labor costs connected with loading of defective spacers, but not for the increased costs of winter construction.

Functionally this American practice differs little from the Japanese decisions. In Japan, where the buyer had no contract for resale, he could recover delay damages as ordinary damages. This is true in the United States as well. In fact, delay damages by definition are ordinary and therefore recoverable without a further showing of foreseeability. Foreseeability is required only

¹⁵⁰See *Setton v. Eberle-Albrecht Flour Co.*, 258 F. 905 (8th Cir. 1919) (circumstances at time of contract formation must indicate the damages for which a seller will be held liable for breach of contract where buyer subsequently formed a collateral resale agreement); see also *Czarnikow-Rionde Co. v. Federal Sugar Refining Co.*, 173 N.E. 913 (N.Y. 1930) (buyer formed a collateral resale contract with a third party; seller breached. Held, seller not liable; seller at time of contract formation had to know that buyer purchased for the purpose of reselling in order to be held liable).

¹⁵¹U.C.C. § 2-715 (1972), however, also provides that the common law provision for tacit agreement be abolished.

¹⁵²*Id.*

¹⁵³177 F. Supp. 572 (Minn. 1959).

when the damages are consequential. In Japan where a contract for resale exists, the buyer's damages for delay must be shown to have been foreseeable. This again coincides with American law. Assuming that the existence of a subsequent resale eliminated any delay damages themselves, as was the situation with the Japanese case on this point, a buyer in the United States would be left only to a recovery of consequential damages, just as would his Japanese counterpart.

B. SELLER'S DAMAGES

In Japan, a seller's damages for buyer's delay in paying the purchase price is limited to interest, as determined by law or by convention, whichever is less. While a seller's remedy for delay in the United States is also limited to interest, the interest rate is affixed solely by the courts.¹⁵⁴ The principle is the same although the actual interest rates applied may vary.

2. COMPENSATORY DAMAGES

A. BUYER'S DAMAGES

In American law, where the seller fails to make delivery or repudiates the contract, the buyer may recover damages measured by the difference in the contract price and market price at the time when the buyer learned of the breach, together with any incidental or consequential damages.¹⁵⁵ Most commonly, lost profits from a collateral contract are considered as special damages, unless the facts are such that the reasonable man would contemplate such lost profits.¹⁵⁶ This means that the usual inquiry is whether the reasonable man would have foreseen that lost profits were likely.¹⁵⁷ This is the same inquiry that Japanese courts have undertaken in attempting to clarify the situations wherein a buyer without a collateral contract may recover losses from price fluctuations without a further showing of foreseeability. Consequently, results are similar.

Where the buyer has a resale contract, his lost profits in Japan are said to be special. There was the Japanese case, however, which held that although a resale contract is a special circumstance, it is foreseeable by a merchant in commercial sales situations.¹⁵⁸ In effect, this is the same as the rule applied in America: a resale contract is usually a special circumstance, but its

¹⁵⁴A. MUELLER & A. ROSETT, *CONTRACT LAW AND ITS APPLICATION* 367 (1971).

¹⁵⁵*Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists*, 14 Cal. App. 3d 209 (1971); U.C.C. §§ 2-711, 2-713 (1972).

¹⁵⁶*See Gilmore v. Cohen*, 386 P.2d 81 (Ariz. 1963); S. WILLISTON, *supra* note 119, at § 1345; *see generally* notation in 11 A.L.R. 3d 719.

¹⁵⁷*Id.*

¹⁵⁸*Nakamasu v. Yuasa Boeki K. K.*, 10 Hyoron-Shoho 31 (Tokyo Dist. Ct. 1920); *Takiura v. Gomeigaisha Shibakawashoten*, 3 Hyoron-Mimpo 730 (Tokyo Dist. Ct. 1914).

foreseeability may be shown based on the circumstances of the situation.¹⁵⁹

B. SELLER'S DAMAGES

In the United States under the UCC, the seller may recover damages for buyer's nonacceptance or repudiation based on the difference in the market price and the unpaid contract price, together with incidental damages. Where the buyer breaches, the seller also has a right under the UCC to resell the goods and recover the difference between the resale price and the contract price, together with any incidental damages.¹⁶⁰ Again, this is the same as the Japanese law in this area.

Whereas Japanese case law was split on the question of profits lost through cover, American law under the UCC section 2-175 seems settled on this point: lost profits through cover are consequential damages which require compliance with the test of *Hadley v. Baxendale* for recoverability.¹⁶¹

While the time for measuring damages under Japanese law fluctuates with judicial discretion, the law in the United States tends to measure damages from the time buyer or seller learns of the breach. This occasionally may produce a different result, but generally will operate similarly. In summary, it appears that the results in case law in the United States and Japan are virtually indistinguishable. Certainly the methodology differs, American case law being much more settled on specific factual situations than Japanese case law. A comparison of the few cases in this area that have come down, however, leads one to the conclusion that the Japanese decisions and their American counterparts as a practical matter provide similar recovery in similar situations.

Conclusion

Japanese law is based on its codes. The codes are interpreted primarily by scholars in theory and by courts in practice. The scholars explain the language of Civil Code Article 416 by saying that it is a statement of the test for determining damages under a principle of adequate causation. The courts, on the other hand, tend to focus on a practical characterization of damages as being either ordinary or special, depending on certain facts, particularly on whether a resale occurred, or would have occurred without the breach.

In contrast, United States law is based on judicial development. The rule used in determining the scope of damages recoverable is that of foreseeability. As a practical matter, this rule functions differently from that of adequate causation only in its time for application: it is applied at the time of contract

¹⁵⁹U.C.C. § 2-708(1) (1972).

¹⁶⁰U.C.C. § 2-706 (1972).

¹⁶¹See generally U.C.C. § 2-715 (1972); J. MURRAY, *supra* note 119.

formation whereas adequate causation is applied at the time of breach. The judicial division of damages as either ordinary or special, incidental or consequential, has depended on factual distinctions analogous to those made in Japan, again with the same tendency to characterize as "special" the circumstances of a resale.

The examination in this article has been focused on the rather confined area of scope of damages recoverable in an action for breach of contract. Practically speaking, the differences in judicial results are nominal. The possible exception may be the situation hypothesized where a breaching party, subsequent to formation, learns of facts which indicate that damages that will be incurred through the breach will be greater than anticipated at the time of formation. Otherwise, the results are closely analogous. While this comparison of law should be useful for the practicing attorney representing a client dealing with Japanese trade, much more extensive comparative research in the areas of mitigation, liquidated damages, and the entire area of tort law is also needed to provide the American attorney with accessible materials useful in advising the international businessman.