Causation and foreseeability are intertwined and can give rise to the same results. As pointed out above, any court or tribunal, whether openly or by implication, can make a connection between the damage and the breach. In other words, causality is implied as a minimum standard. The theory of adequate causation is arguably more favorable to the plaintiff than the theory of foreseeability because "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.'"²⁴²

[...]

Chapter 7 - Calculation of Losses under Article 74

Overview
This chapter explains how losses pursuant to article 74 are to be calculated.

Specifically, it will be demonstrated that

• the aim of article 74 is to put the aggrieved party in the position he would have been in had the contract been performed

• the tone of article 74 suggests that losses must be concrete ones but that an abstract calculation of losses is not totally rejected

• a distinction must be made between notional losses and losses that are based on an abstract calculation

• loss of profit includes future profits as well as loss of chance.

II. THE CONCEPTS OF FORCE MAJEURE AND HARDSHIP

Force majeure has its origins in the Code Napoleon and was adopted in different forms into municipal law. In Matsoukis v. Priestman, the court argued that the term force majeure has a more extensive meaning than just an "act of god." In Brauer & Co. v. James Clark, restrictions on the content of force majeure were explicitly stated. The party was not relieved from liability by the force majeure clause, "as there was no prohibition or embargo or physical or legal prevention of export." The exporter claimed protection under the clause, as an export license was not granted because the price was too low. The court held that the license could have been granted if the seller had been prepared to pay a higher price and hence suffer a loss. Lord Denning pointed out: "It would be a strange thing if a seller could insist on the contract if the price fell, and could escape his own obligations if it rose."

Force majeure exists when "the performance of a contract is impossible due to unforeseen events beyond the control of the parties." The UNIDROIT Principles in general are very similar to article 79; force majeure is covered by article 7.1.7.

Hardship is frequently incorporated into contracts as an express clause. It normally includes matters in the execution of a contract that are thought to be detrimental but not impossible. These circumstances must be of a fundamental nature and beyond the control of either party. Most important, these occurrences must be unanticipated and unforeseeable. Hardship has not found its expression in the CISG, despite some attempts to include such provisions. The UNIDROIT Principles have defined hardship in article 6.2.2, which states:

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
c) the events are beyond the control of the disadvantaged party; and
d) the risk of the events was not assumed by the disadvantaged party.

This is one of the situations where the CISG and the UNIDROIT Principles do not have the same skeleton. Therefore, hardship is not a term or principle that can be imported into the CISG via the Principles.

In sum, it can be argued that hardship occurs when the circumstances alter the contract in such a way that a new and different contract would, in effect, come into existence.

The concepts of hardship and force majeure are similar, as both intend to regulate the effects of changed circumstances. However, there are differences:

[H]ardship is at stake where the performance of the disadvantaged party has become much more burdensome, but not impossible, while force majeure means that the performance... [of] the party concerned has become impossible, at least temporarily. 708

Chapter 14 - Conclusion and Observation

IV. ARTICLE 74

As far as the burden of proof is concerned, the CISG does not provide a direct rule. However, jurisprudence and academic writing seem to be unanimous that the burden of proof is a general principle contained within the four corners of the CISG. As the Federal Supreme Court of Germany noted:

[T]he CISG regulates the burden of proof explicitly (e.g. in Art. 79(1)) or tacitly (Art. 2(a)), so that consequently, recourse to national law is blocked to that extent, and that the CISG follows the rule/exception principle. 987

The rule that can be extrapolated is that "the party who invokes a right bears the burden of proof to the establishment of that right and, on the other hand, the other party must prove any facts that exclude the invoked claim." 988 The conclusion is that the burden of proof can shift within the dictates of a single article. 989

242 Treitel above, note 5,165.
702 (1915), 1 K.B. 681.
703 (1952) 2 All E.R. 497.
Referring Principles:

- VI.3 - Force majeure
- VII.2 - Principle of foreseeability of loss