

EXEMPTIONS FOR THE NON-PERFORMANCE OF CONTRACTUAL  
OBLIGATIONS IN CISG ARTICLE 79  
AND THE QUEST FOR UNIFORMITY IN INTERNATIONAL SALES LAW

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## Abstract

The premise of this dissertation is that Article 79 of the UN Convention on Contracts for the International Sale of Goods—which concerns exemptions for contractual non-performance due to an “impediment” beyond a party’s control—should be interpreted autonomously, that is, as an international norm, without reference to domestic legal concepts and principles. To this end, this dissertation considers the application of Article 79 by courts and arbitral tribunals across a number of signatory states. By studying the treatment of Article 79 by the courts and arbitral tribunals of various states, differences in doctrine and case law have been discerned. The extent of conceptual differences towards the doctrine of excuses for nonperformance also helps to determine whether the CISG’s goal of uniformity is achievable. This research concludes that there has been a convergence in the treatment of Article 79, and this supports the premise that a legal doctrine—in this case, the excuse for non-performance—germinating in various legal systems, ultimately evolved into an autonomous principle, towards a conceptual goal of uniformity in a body of international commercial law, regardless of its unique development in separate and distinct legal jurisdictions.

## TABLE OF CONTENTS

CHAPTER ONE .....	1
THE QUEST FOR A UNIFORM INTERNATIONAL SALES LAW .....	1
A.    The Quest for Uniformity .....	1
A.i.   Dissertation Structure .....	4
A.ii.  The Importance of Uniformity .....	6
A.iii. The CISG's Quest to Promote Uniformity .....	8
A.iv.  Uniformity and CISG Article 79 .....	11
A.v.   Article 79 and the Problem of Pacta Sunt Servanda .....	12
B.    Critical Scholarly Perspectives on the CISG .....	17
C.    Research Problem .....	55
D.    Methodology .....	59
Figure 1 .....	64
Figure 2 .....	66
CHAPTER TWO .....	71
BACKGROUND TO THE CISG .....	71
A.    The Ancient Lex Mercatoria as Autonomous Law .....	71
B.    The Modern Lex Mercatoria .....	78
C.    The History of the CISG .....	80
CHAPTER THREE .....	91
EXCUSES FOR NON-PERFORMANCE: .....	91
DEVELOPMENT OF AN AUTONOMOUS CONCEPT .....	91
A.    The Creation of an Autonomous International Commercial Concept .....	91
B.    Roman Origins .....	92
C.    The Rise of Pacta Sunt Servanda .....	97
D.    Legal Abstraction and the Introduction of Rebus Sic Stantibus .....	98
E.    Medieval Origins of the Principle of Excuse for Non-Performance .....	100
F.    Origins of the Principle of Excuse for Non-Performance in Common Law .....	106
G.    Frustration .....	115
H.    Hardship and Impracticability .....	133
I.    Origins of the Principle of Excuse for Non-Performance in Civil Law .....	145
J.    CISG Article 79 and Hardship .....	161
K.    CISG Article 79 as an Autonomous Legal Principle .....	164
CHAPTER FOUR .....	174
GETTING IT RIGHT: RELATIVE UNIFORMITY IN THE TREATMENT OF ARTICLE 79 IN	
DOMESTIC COURTS AND ARBITRATIONS .....	174
A.    Article 79 Jurisprudence in Domestic Courts and Arbitrations: Civil Law Dominance .....	174
B.    Austria: The Supreme Court Gets It Right—Almost .....	177
C.    Bulgaria: Avoiding the Domestic Law Bias .....	184
D.    China: Early Concerns of the Homeward Trend Ill-Founded .....	186
D.i.   Force Majeure in China .....	191
D.ii.  Article 79 Jurisprudence under CIETAC .....	195
D.iii. Article 79(1) Impediments and Non-conforming Goods .....	198
D.iv.  The Impediment Requirement under Article 79(1) .....	200
D.v.   Particular Impediments: Breach by Third-Party Suppliers .....	210
E.    Finland: A Small Contribution Towards Relative Uniformity .....	213
F.    Germany: Mastery of CISG Jurisprudence .....	216
F.i.   The Evolution of Excuses for Non-performance: from Wegfall der Geschäftsgrundlage to an International Standard in Article 79 .....	216

F.ii.	Article 79 in Germany: General Observations .....	219
F.iii.	The Pre-Eminent Treatment of Article 79 in Germany .....	221
F.vi.	Article 79(1) Impediments and Non-conforming Goods.....	226
F.vii.	Product Non-Conformity as an Impediment?: The Vine Wax Case.....	235
F.viii.	Product Non-Conformity as an Impediment?: The Powdered Milk Case .....	239
F.ix.	The Strict Impediment Requirement under Article 79(1).....	244
F.x.	Miscellaneous Article 79 Issues in German Case Law: Additions to the Quest for Relative Uniformity .....	248
F.xi.	Sophisticated Understanding of Article 79 in German Case Law .....	259
G.	Greece: Autonomous Interpretation as the Rule.....	260
H.	Hungary: A Small Contribution to Relative Uniformity .....	262
I.	International Chamber of Commerce: International Expertise on Article 79 .....	265
I.i.	Article 79 Jurisprudence in Arbitrations: Complementing Procedure and Substance .....	266
I.ii.	The ICC Cases: A Nuanced Understanding of Article 79 .....	267
J.	Italy: “Enlightened” Article 79 Case Law .....	278
K.	The Netherlands: A Favourable Reception of the CISG .....	284
L.	Russian Arbitrations and CISG Article 79: The Cases Promoting Uniformity .....	290
L.i.	Article 79(1): The High Standard for Impediments .....	292
L.ii.	Particular Impediments: Non-conforming Goods .....	295
L.iii.	Particular Impediments: Foreign Currency Controls.....	298
M.	Slovak Republic: Right Outcome; Wrong Reference.....	300
M.	Switzerland: Paying Heed to the International Character of the CISG .....	302
N.	Conclusion.....	312
	CHAPTER FIVE.....	314
	GETTING IT WRONG: DIVERGENCE IN ARTICLE 79 CASE LAW IN DOMESTIC COURTS AND ARBITRATIONS .....	314
A.	Threats to Autonomous Interpretations .....	314
A.i.	Blips on the Road to Autonomous Interpretations: Austria and CIETAC.....	315
A.ii.	Blips on the Road to Autonomous Interpretations: ICC Case 8790 .....	317
A.iii.	Blips on the Road to Autonomous Interpretations: Slovak Frozen Peas Case .....	319
B.	Belgium: Similar Issue; Mixed Results .....	321
B.i.	Circumventing Article 79: The Supreme Court Upholds the “Hardship” Principle.....	323
C.	France: Flawed Article 79 Jurisprudence .....	327
D.	Russian Arbitrations and CISG Article 79: The Problematic Cases.....	331
D.i.	A High Standard to “Impediments” but Imperfect Decisions .....	336
E.	United States of America: The Homeward Trend Revisited .....	338
F.	Conclusion.....	347
	CHAPTER SEVEN.....	349
	CONCLUSION .....	349
A.	Article 79: Heeding to the Interpretive Provision of Article 7 .....	349
B.	Article 79: The Appropriate Standard in International Commerce .....	352
	TABLE OF AUTHORITIES .....	355

## CHAPTER ONE

### THE QUEST FOR A UNIFORM INTERNATIONAL SALES LAW

#### A. The Quest for Uniformity

The objective of this dissertation is to determine the extent to which a problematic legal doctrine—the excuse for nonperformance, as embodied in Article 79 of the 1980 *United Nations Convention on Contracts for the International Sale of Goods* (“CISG” or “Convention”)<sup>1</sup>—is an autonomous<sup>2</sup> international norm, and capable of relative uniformity within the context of the CISG’s goal for a sales law that is transnational in design. A premise that will be explored is that while excuses for non-performance in Article 79 may have developed out of an amalgamation of similar national conceptions, it ultimately stands alone as an autonomous international doctrine under the CISG. This development plays a crucial role for uniformity in international sales law. It supports the idea that individual domestic or national legal doctrines may ultimately coalesce into autonomous international principles, regardless of their distinctive development in independent legal jurisdictions.

The CISG was created with the intention to unify through harmonization the commercial sale of goods law throughout the world. In the development of the CISG by the United Nations Commission on International Trade Law (“UNCITRAL”), and its

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<sup>1</sup> *United Nations Convention on Contracts for the International Sale of Goods*, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, hereinafter cited as the “CISG” or “Convention.”

<sup>2</sup> “Autonomous” comes from the Greek words *auto* meaning “independent” and *nomos* meaning “law”. In this paper “autonomous” refers to a concept or action that is self-contained and undertaken or conducted without outside control—it exists and develops independently of the whole, and lives outside the environment of state-based law.

subsequent adoption at a Diplomatic Conference in Vienna—which was attended by legal experts from across the world—the CISG managed to survive the typical regional and political divisions that frequently divide UN bodies. In effect since 1988, the CISG prescribes a uniform law for the international sale of goods for all signatory states. It seeks to replace the numerous domestic laws that govern this area in each country with a single law that transcends<sup>3</sup> a variety of legal systems and national borders. It is the most ambitious attempt thus far to create an international sale of goods law that is relatively uniform across the signatory states.

As of May 1, 2012, the CISG has been adopted by 78 countries,<sup>4</sup> making it the world's preeminent sales law. It is estimated that the signatory states to the CISG now represent over 70 percent<sup>5</sup> of all world trade, and it is, arguably, one of the most successful international conventions to date.<sup>6</sup> Given the unprecedented growth of global

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<sup>3</sup> In strict terms, no international law is able to “transcend” a national border. The term “transcend” as used here means to cross multiple state boundaries and to have a law apply within a variety of legal jurisdictions.

<sup>4</sup> According to the Pace Law School CISG website at

<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>. The signatory states, in alphabetical order are: Albania, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China (PRC), Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Macedonia, Mauritania, Mexico, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Peru, Poland, Republic of Korea, Moldova, Romania, Russian Federation, Saint Vincent & the Grenadines, San Marino, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Turkey, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, and Zambia. Significant exceptions include Brazil, Indonesia, India, Malaysia, and the United Kingdom.

<sup>5</sup> Franco Ferrari, “Forward” in Franco Ferrari, ed., *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences* (Munich: Sellier European Law Publishers, 2003) at v.

<sup>6</sup> See Monica Kilian, “CISG and the Problems with Common Law Jurisdictions,” (2001) 10 J. Transnat'l L. & Pol'y 217 at 217 who states: “[g]enerally applauded as the most successful international treaty so far”. See also Camilla Baasch Andersen, who notes that the CISG “is constantly gaining more success as more countries choose to ratify it” in “Furthering the Uniform Application of the CISG: Sources of Law on the Internet,” (1998) 10 Pace Int'l L. Rev. 403 at <http://cisgw3.law.pace.edu/cisg/biblio/andersen1.html> [hereinafter Andersen, “Uniform Application”] and Clayton P. Gillette and Robert E. Scott, who state “the CISG has become the most successful of efforts to create uniform commercial law” in “The Political

trade in the last few decades, and the importance of the CISG in international transactions, an examination of the extent to which the CISG has succeeded in its stated objective to “promote uniformity”<sup>7</sup> in international sales law requires further study. Such an analysis is driven, in part, by critics of the CISG who maintain that the benefits of uniform international sales law is minimal, and that domestic courts are invariably guilty of the homeward trend<sup>8</sup> or domestic gloss<sup>9</sup> analysis. Such a nationalistic approach tends to view and interpret the CISG through the lens of domestic legal concepts, contrary to the ideals of uniformity. As J.S. Hobhouse noted, international conventions “lack coherence and consistency. They create problems about their scope. They introduce uncertainty where no uncertainty existed before. They probably deprive the law of those very features [that make it] an effective tool for the use of international commerce”.<sup>10</sup>

But such a perspective is misguided. Having domestic courts interpret an international instrument will always raise concerns about the degree and extent of ethnocentricity in their decisions. Added to this concern is the fact that international conventions, such as the CISG, are not comprehensive legal codes. Gaps will exist, but this does not mean that the law will be made “in a piecemeal fashion”.<sup>11</sup> Being an

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Economy of International Sales Law,” (2005) NYU, Law and Economics Research Paper No. 05-02 at 1 at SSRN: <<http://ssrn.com/abstract=709242>>.

<sup>7</sup> Article 7(1).

<sup>8</sup> The terms “homeward trend” and “domestic gloss” are discussed in Larry A. DiMatteo *et al.*, *International Sales Law: A Critical Analysis of CISG Jurisprudence* (New York: Cambridge University Press, 2005). See also Harry M. Flechtner, “The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)” (1998) 17 J. L. & Com. 187.

<sup>9</sup> See DiMatteo *ibid.*

<sup>10</sup> J.S. Hobhouse, “International Conventions and Commercial Law: The Pursuit of Uniformity” (1990) 106 Law Q. Rev. 530 at 533.

<sup>11</sup> *Ibid.* at 532.

incomplete law can also be a positive feature of a convention.<sup>12</sup> As Louis Marquis noted: “contrary to appearances, expanded and fragmented uniform law appears to be eminently practical. It is capable of identifying the true issues, the actual problematic and most likely components of a solution”.<sup>13</sup> Gaps in uniform laws provide for minor variation (i.e. relative uniformity) in the application of the Convention in domestic courts, but there is no substantial alteration of the law from jurisdiction to jurisdiction. If there were, choice of law rules would significantly alter the legal outcomes of disputes, and would render attempts at harmonization and unification as superfluous. Thus, uniformity is not just a “Utopian ideal”, and international conventions, which are the results of “multi-cultural compromises between different schemes of law”, are able to produce uniform results.<sup>14</sup>

#### *A.i. Dissertation Structure*

Chapter One provides an introduction to the problem of the quest for uniformity in international sales law, and considers the role of Article 79 within this broader framework. It also situates this dissertation within the scholarly debates regarding uniform sales law efforts generally.

Uniformity in international sales law facilitates global trade by reducing legal barriers and, hence, making the trading process more efficient for market participants. This will be highlighted in the next section of this Chapter. In the chapter sections that

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<sup>12</sup> Bruno Zeller makes this important point in his *CISG and the Unification of International Trade Law* (New York: Routledge-Cavendish, 2007) at 9-11. In his words: “Being incomplete—a quality!”

<sup>13</sup> Louis Marquis, *International Uniform Commercial Law: Towards a Progressive Consciousness* (Burlington, VT: Ashgate Publishing Co., 2005) at 236.

<sup>14</sup> *Ibid.* at 533.

follow, it will also be demonstrated how the CISG came to be the most ambitious legal convention to date that has attempted to create an international legal environment for commercial sales that is relatively uniform in character (section A.iii.): The focus will be on the CISG as a whole. Next (sections A.iv. and A.v.), the role of Article 79 as a specific example of the quest for relative uniformity in international sales law will be examined in more detail. As an exception to the principle of *pacta sunt servanda*, Article 79 is of considerable importance. It is also a provision within the CISG that bears *prima facie* semblance to similar domestic legal concepts. This makes it uniquely suitable for a scholarly examination to consider the extent to which it diverges or converges with similar domestic conceptions in the quest for uniformity in international sales law.

That uniformity in international sales law is even possible has been the subject of much scholarly debate. This discussion, which has been passionate at times, is reviewed in some detail in section B. The Research Problem is detailed in section C and the Methodology follows in section D.

Chapter Two provides a background to the CISG, and it includes a discussion of the ancient and modern *lex mercatoria*. The chapter concludes with a section on the history of the CISG, demonstrating the effort of the drafters to create a transnational sales law with neutral legal terminology, hence, the development of an autonomous provision in Article 79.

Chapter Three details the development of *force majeure*-type legal principles from their ancient origins to the rise of *pacta sunt servanda* and its counterpart *rebus sic stantibus*. It also surveys the development of frustration and impossibility in the common

law, and *force majeure* in civil law jurisdictions. It concludes by demonstrating how Article 79 developed as an autonomous legal principle as it bridged the gap between these common law and civil law conceptions of excuse for non-performance.

Chapter Four analyses a large body of Article 79 case law. These court and arbitral decisions, while not always perfect, have made a significant contribution to a growing convergence on Article 79. The conclusion is that these decisions have been rendered, for the most part, without reference to domestic legal concepts. In other words, they are relatively uniform, autonomous interpretations of Article 79. By contrast, Chapter Five considers a much smaller body of Article 79 case law that has been influenced by the homeward trend. These decisions have led to divergent interpretations of that provision. In spite of a number of disappointing decisions, this dissertation concludes by noting that courts are becoming more serious in applying the CISG's interpretive methodology. Such a development will only lead to more relatively uniform decisions on Article 79 in the future.

*A.ii. The Importance of Uniformity*

Uniform sales law facilitates international trade. It does so by creating the legal conditions that are favourable to this commercial activity.<sup>15</sup> Domestic law is still relevant, and must work in conjunction with the CISG. The two types of law are not mutually exclusive, but have a symbiotic relationship. International commerce is best served and supported by domestic legal regimes that are sensitive to the needs of merchants who frequently cross national borders. This requires a sales law that is

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<sup>15</sup> This point is argued in Marquis, *ibid.* at 13ff.

universally applicable and unrestricted by national boundaries. Globalization and international commerce eschew national borders.

Within this context, the terms “unify” and “harmonization” have been subject to some academic scrutiny.<sup>16</sup> While the terms are related, there is an important distinction to be made. “Harmonization” is the first step towards “unification”. To harmonize international sales law is to make this body of law similar; to unify this body of law is to make it identical across borders. In this study, the term “unify” (and its variants) is not to be interpreted narrowly. Rather, it is used to denote a form of “*relative* uniformity,” which must be differentiated from “absolute” or “strict uniformity.” It is closer to the concept of “functional uniformity” and “harmonization” in that the goal is to lessen the legal impediments to international trade through a sales law that is common to all trading parties.<sup>17</sup>

In spite of the desire to create uniform law, my previous research<sup>18</sup> on the CISG revealed that problems still exist with efforts to implement uniform international sales law—at least in certain jurisdictions. This research examined Canadian jurisprudence and the CISG across a variety of substantive law issues. In exploring six key Canadian

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<sup>16</sup> See e.g. Larry A. DiMatteo *et al.*, (2004) “The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence,” 34 *Nw. J. Int’l L. & Bus. J.* 299, at 309-10. See also Charles Sukurs, “Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods,” (2001) 34 *Vand. J. of Transnat’l L.* 1481, at 1500-503 (Sukurs utilizes the term “vertical uniformity,” which is similar to the concepts of “relative uniformity,” “functional uniformity,” and “harmonization”).

<sup>17</sup> Sukurs, *ibid.*

<sup>18</sup> Peter J. Mazzacano, “Canadian Jurisprudence and the Uniform Application of the U.N. Convention on Contracts for the International Sale of Goods” *Pace Int’l L. Rev.* (ed.), *Pace Review of the Convention on Contracts for the International Sale of Goods (2005-2006)* (Munich: Sellier European Law Publishers, 2006) at 85-151 [*Canadian Jurisprudence*] and Peter J. Mazzacano, “*Brown & Root Services v. Aerotech Herman Nelson*: The Continuing Plight of the U.N. Sales Convention in Canada” in *Pace Int’l L. Rev.* (ed.), *Pace Review of the Convention on Contracts for the International Sale of Goods (2004-2005)* (Munich: Sellier European Law Publishers, 2006) at 169-178 [*Brown & Root*].

CISG cases within the context of the quest for uniformity in international sales law, it found that Canadian courts had failed to utilize the interpretative methodology embedded within the CISG. Instead of recognizing the Convention's "international character" and "the need to promote uniformity in its application," Canadian courts typically invoked parochial common law language and concepts, and domestic case law.<sup>19</sup> At the international level, this contributes to conflicting and diverging interpretations of the Convention's rules. These interpretations are also antithetical to the purposes and general principles of the CISG, and the effort to create, in the words of some scholars, a new *lex mercatoria*.<sup>20</sup> Should such a trend continue on a broader scale among the Convention's signatory states, the goal of the CISG—to create a uniform international sales law—might ultimately fail.

*A.iii. The CISG's Quest to Promote Uniformity*

A primary objective of the CISG is to standardize international sales law across national boundaries. To this end, the preamble of the CISG introduces the concept of uniformity. It states, *inter alia*, the desire to remove "legal barriers in international trade" and to promote "the development of international trade".<sup>21</sup> The objective of uniformity further permeates the CISG by way of Article 7(1), which states, "in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity [...] in international trade".<sup>22</sup> Although the goal of uniformity may

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<sup>19</sup> Article 7(1).

<sup>20</sup> See *e.g.* Bernardo M. Cremades and Colin Kaufman, "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions" (1984) 2 B.U. Int'l L.J. 317.

<sup>21</sup> Preamble.

<sup>22</sup> Article 7(1).

be commendable, in practice, has this objective been elusive? Considering that the CISG is practiced in about 50 different languages, with signatory nations having diverse social, economic; and cultural environments, the goal of uniformity would appear to be ambitious.<sup>23</sup> To create further difficulties in the quest of a uniform international law, there are great differences in the legal systems of each signatory state as, for example, between common law and civil law regimes. Even within a major legal system, there is a variable state of law as, for example, nuances in the treatment of the common law in Canada, compared to its handling in England and the United States. Additional complications arise in states with federal systems of law or with hybrid legal systems.<sup>24</sup> In the quest for uniform international law there are also linguistic or translation complexities. The CISG is officially published in six different languages, with each version being “equally authentic”.<sup>25</sup> Against this variegated background is Article 79. Unless national courts and arbitral tribunals have an advanced or sophisticated understanding of the CISG, recourse to local law and domestic legal concepts would seem to be inevitable.

To reduce the effects of the homeward trend, Article 7(1) suggests that the goal of uniformity should impart an obligation upon legal practitioners, tribunals, and courts to look to standards of international practice in an interpretation or a determination of provisions of the Convention. As Michael J. Bonell noted, courts are to be sensitive to

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<sup>23</sup> Andersen, “Uniform Application”, *supra* note 6 at 406.

<sup>24</sup> Canada, the United States, and Mexico are examples of countries with federal systems of law. Canada and the United States can also be described as nations with hybrid legal systems. The province of Quebec in Canada is a civil law jurisdiction, as is the state of Louisiana in the United States. Both of these jurisdictions exist within the broader framework of federal common law legal systems.

<sup>25</sup> Following Article 101. The six official languages are Arabic, Chinese, English, French, Russian and Spanish.

the international character of the Convention. This “implies the necessity of interpreting its terms and concepts autonomously, i.e., in the context of the Convention itself and not by referring to the meaning which might traditionally be attached to them within a particular domestic law”.<sup>26</sup> To extrapolate from Bonell’s comment, the courts of all signatory nations are obliged to consider the practice and judgments of other countries, a form of *ipso facto stare decisis*.<sup>27</sup> Tribunals and courts should not reflexively resort to domestic law, unless they are specifically directed to do so under the CISG. As Antonio Boggiano notes, “[u]niform law requires [...] a new common law” in which “[f]oreign precedents would not be precedents of a *foreign* law, but of *uniform* law”.<sup>28</sup> This statement appears to be in harmony with Lord Scarman’s assertion that, “[c]ourts [...] have to develop their jurisprudence in company with the courts of other countries”.<sup>29</sup> Thus, when a court or tribunal examines an excuse for non-performance in an international sales contract under CISG Article 79, international case law should also be considered. The corollary is that in the spirit of international uniformity, courts need not follow international precedent if it is incorrect or inapplicable. However, there is a minimal duty to consider similar cases from international practice if courts are to honour the mandate of CISG Article 7(1) and reduce the risk of diverging interpretations of the

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<sup>26</sup> M.J. Bonell in C.M. Bianca and M.J. Bonell (eds.), *Commentary on the International Sales Law: The 1980*

*Vienna Sales Convention* (Milan: Giuffr , 1987) at 74.

<sup>27</sup> This term has been coined by Rene Henschel in “Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and as a Competing Set of Rules” (2004) 1 Nordic J. Com. L. article 2 at 9. The term “*supranational stare decisis*” has also been used. See Larry A. Dimatteo, “The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings” (1997) 22 Yale J. Int’l L. 111 at 133.

<sup>28</sup> Antonio Boggiano, “The Experience of Latin American States,” *International Uniform Law in Practice*, (New York: Oceana, 1988) 47. Italics are in the original.

<sup>29</sup> *Fothergill v. Monarch Airlines Ltd.* (1980), 2 All E.R. 696 at 715 (H.L.). The quote is also available online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cisg/text/introduction.html#note1>>.

CISG. As Viscount Simonds stated on behalf of the House of Lords, “it would be deplorable if the nations should, after protracted negotiations, reach agreement [...] and that their several courts should then disagree as to the meaning of what they appeared to agree upon”.<sup>30</sup> If this were to be the case, it would result in diverging interpretations and a homeward trend. The problem with this is that it “deprives the collective signatories of the predictability and reliability of law which the CISG was meant to create. In order for the CISG to truly live up to the purpose for which it was created, interpreting courts must stay within the strict boundaries of Article 7”.<sup>31</sup>

*A.iv. Uniformity and CISG Article 79*

In any domestic legal regime, it often proves difficult to provide coherent answers to problems that arise when, for example, unforeseen supervening events prevent the performance of a contract. Instances of war, embargo, acts of terrorism, strikes, or the bankruptcy of a supplier all represent various degrees of difficulty and unpredictability. Domestic legal regimes may label these events differently—impossibility, hardship, an act of God, frustration, *force majeure*, failure of presupposed conditions, *Wegfall der Geschäftsgrundlage*, *Unmöglichkeit*, etc. More importantly, not only are these supervening events labeled differently in domestic legal regimes, the conceptual scope of each is different. As A.H. Puelinckx noted, “[f]rustration is not the equivalent of *force*

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<sup>30</sup> *Scruttons Ltd. v. Midland Silicones Ltd.* (1961), [1962] A.C. 446 at 471 (U.K.).

<sup>31</sup> Marcus G. Larson, “Applying Uniform Sales Law to International Software Transactions: The Use of the CISG, its Shortcomings, and a Comparative Look at How the Proposed U.C.C. Article 2B Would Remedy Them”, (1996) 5 Tul. J. Int’l & Comp. L. 445 at 459.

*majeure* or *Unmöglichkeit*, nor is *force majeure Unmöglichkeit*; even *force majeure* under Belgian law is not *force majeure* under French law”.<sup>32</sup>

The legal issue that this terminological difficulty raises is narrow in scope: what type of unforeseen supervening event excuses a party from contractual performance? The answer is fraught with complexities in any domestic legal realm. At the international level, the challenge is even greater, particularly for the CISG, which aims to provide for the uniform treatment of sales law across national boundaries. Such uniform treatment of sales law is crucial to the facilitation of international trade. Non-uniform sales laws and differing judicial interpretations lead to forum shopping by litigants. This forces parties to first dispute jurisdictional questions of law rather than the merits of the dispute. The result is not only an economic inefficiency, but also legal uncertainty. Uniform law solves this problem by creating a legal environment that has greater predictability and certainty.

*A.v. Article 79 and the Problem of Pacta Sunt Servanda*

The homeward trend presents a particular problem for CISG Article 79. The article is of considerable theoretical and practical importance, as it is an exception to the basic common law principle of *pacta sunt servanda*. However, variations of the concept of *pacta sunt servanda* also exist in other legal systems, primarily in the form of the general principle that contractual obligations must be honoured.<sup>33</sup> For example, in the arbitral award in *LIAMCO v. Libya* the court stated that “[t]he principle of the sanctity of

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<sup>32</sup> A.H. Puelinckx, “Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances” (1986) 3:2 J. Int’l Arb. 47 at 47.

<sup>33</sup> *Libyan American Oil Company (LIAMCO) v. Libya* (1981), 20 I.L.M. 1.

contracts [...] has always constituted an integral part of most legal systems. These include those systems that are based [on] Roman law, the Napoleonic Code (e.g. article 1134) and other European civil codes, as well as Anglo-Saxon Common Law and Islamic Jurisprudence ‘Shari’a’<sup>34</sup>. As an exception to this principle, Article 79(1) states: “A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”<sup>35</sup>.

A cursory reading of Article 79(1) reveals that it bears a general resemblance to similar contractual performance exemption provisions in various legal regimes.<sup>36</sup> For example, the words in the article mimic French civil law, which accepts justification or excuse for non-performance in the case of a *force majeure* event, to the extent that the event is unforeseen and insurmountable.<sup>37</sup> There is also a related French principle of *imprevision* that allows for contract modification in situations of changed circumstances.<sup>38</sup> Similarly, under English law the doctrines of frustration and impossibility of performance discharge a contract, as well as both parties from contractual obligations, by means of the common law and the *Law Reform (Frustrated*

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<sup>34</sup> *Ibid.*

<sup>35</sup> CISG Article 79(1).

<sup>36</sup> See generally Barry Nicholas, “*Force Majeure* and Frustration” (1979) 27 Am. J. Comp. L. 231.

<sup>37</sup> Dionysios P. Flambouras, “The Doctrines of Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis” (2001) 13 Pace Int’l L. Rev. 261 at 265. The rule of *force majeure* is established in Article 1148 of the French Civil Code.

<sup>38</sup> Ingeborg Schwenzer, “Force Majeure and Hardship in International Sales Contracts” (2008) 39 V.U.W.L.R. 709 at 710.

*Contracts Act*.<sup>39</sup> In Canada the equivalent corresponds to provincial common law and statutory rules, as for example, ss. 7-8 of Ontario's *Sale of Goods Act*, and the various provincial frustrated contracts acts.<sup>40</sup> However, in Barry Nicholas' pre-Convention comparative study of *force majeure* and frustration of contract, he warns of a "superficial harmony which merely mutes a deeper discord".<sup>41</sup> Similarly, Liu Chengwei makes the important point that "the concept that a party's contractual obligations can be excused because of changes in surrounding circumstances takes a different form in each national legal system".<sup>42</sup> On this note, John Honnold reminds us that when reading this article we "purge our minds of presuppositions derived from domestic traditions and, with innocent eyes, read the language of Article 79 in the light of the practices and needs of international trade."<sup>43</sup> The Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) made an analogous point, and emphasized that the drafters of the CISG "took special care in avoiding the use of legal concepts typical of a given legal tradition [...] that would not be easy to transplant in different legal

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<sup>39</sup> *Law Reform (Frustrated Contracts) Act, 1943*, 6 & 7 Geo. VI, c. 40, § 1 (U.K.).

<sup>40</sup> *The Sale of Goods Act*, R.S.O. 1970, c. 461. According to the Uniform Law Conference of Canada, standardized versions of its *Frustrated Contracts Act* have been enacted by six provinces (Alberta, British Columbia, New Brunswick, Newfoundland, Nunavut, and Ontario), plus the Yukon. See Uniform Law Conference of Canada, online at <http://www.ulcc.ca/en/us/index.cfm?sec=3>. See e.g. Ontario's *Frustrated Contracts Act*, R.S.O. 1990, c. F-34.

<sup>41</sup> Nicholas, *supra* note 36 at 231.

<sup>42</sup> Liu Chengwei, "Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL" (September, 2003) at s. 19.3.2, online: Pace Law School CISG Database <<http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html>>.

<sup>43</sup> John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th ed., Harry Flechtner, ed., (The Netherlands: Kluwer Law International, 2009) at 425 [Honnold & Flechtner, ed.].

cultures”.<sup>44</sup> The Secretariat elaborated further, and cited Article 79 as a prime example of the drafting style embodied in the CISG. It notes that Article 79 “does not refer to terms typical of the various domestic systems such as ‘hardship’, ‘force majeure’ or ‘Act of God’”.<sup>45</sup> Rather, Article 79 “provides instead a factual description of the circumstances that may excuse failure to perform”.<sup>46</sup> For this reason, it is imperative that Article 79 be treated autonomously.

The focus on Article 79’s excuse for non-performance is of paramount importance to our understanding of contract law. The article strikes at the core of contract theory and practice as it is an exception to the performance of contractual obligations, the *pacta* principle. At the theoretical level, to compel the performance of a promise is a basic and universally accepted principle in all legal systems. That a promise should be binding also satisfies our ethical and moral expectations. In many respects, *pacta sunt servanda* is so self-evident and such a basic legal norm that it requires little justification or explanation. As Christoph Brunner stated, “the value of the contract as a social institution for encouraging economic activity would become meaningless if a party’s obligation could be avoided any time a contract does not turn out as favourably as the party hoped”.<sup>47</sup> But with a change of events, Article 79 assists in distinguishing between those cases where a party has simply made a poor bargain from those where there has been such a fundamental change in supervening circumstances that the aggrieved party should be

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<sup>44</sup> United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL: Digest of Case Law on the United Nations Convention on the International Sale of Goods* (New York: UN, 2008) at ix para. 4 [UNCITRAL Digest].

<sup>45</sup> *Ibid.* at para. 5.

<sup>46</sup> *Ibid.*

<sup>47</sup> Christoph Brunner, *Force Majeure and Hardship under General Contract Principles* (The Netherlands: Wolters Kluwer, 2009) at 9.

exempt from liability for contractual non-performance. Such a determination is a fundamental question of contract law. To address this question, a greater understanding of Article 79 can assist parties in defining the border between *pacta sunt servanda* and *rebus sic stantibus*. In other words, it helps to delineate a true *force majeure* event. By recognizing this boundary, informed contractors will be able to adjust their affairs, and will know in advance which party is better equipped to bear the risk of a supervening event. This enhances the predictability of otherwise potentially uncertain legal outcomes in international business transactions.

Article 79 is an ambitious attempt to enhance legal predictability in cases of supervening events. Indeed, this dissertation will argue that the excuse for contractual non-performance embodied in Article 79 goes beyond a generic, factual description of the circumstances that excuse performance: it represents an autonomous, international standard that is different to related domestic legal doctrines. It is more comprehensive in scope than similar concepts in national laws. For example, in some legal systems laws on “impossibility” or “impracticability” coexist with those on “frustration”.<sup>48</sup> Article 79 goes beyond the scope of associated domestic legal concepts to embrace a wide range of excuses for non-performance.<sup>49</sup> In Article 79 there is no enumerated restriction in the type of excuse that may be utilized. It is a unitary concept of exemption that bridges the

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<sup>48</sup> For example, in certain common law jurisdictions, “impossibility”, “frustration of purpose”, and “commercial impracticability” exist side-by-side as contemporaneous legal principles. These principles also fall under the broader heading of “frustration”. See generally John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 566-611. See also Sonja A. Kruisinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?* (Antwerp: Intersentia, 2004) at 148 where she notes that in the Dutch legal system, the theory of “impossibility”, or *force majeure*, co-exists with the theory of “changed circumstances”.

<sup>49</sup> See e.g. Brunner, *supra* note 47 at 233: “The terms of Article 79 CISG do not include any restriction with regard to the scope of application of the *force majeure* excuse”.

gap between various civil law and common law conceptions of supervening events. Thus, the problem is that when considering an issue under Article 79, important legal doctrines, which are more restrictive in scope, such as the common law's concept of frustration of contract, changed circumstances, or impossibility, and the civil law's rough equivalent, *force majeure*, *imprevision*, or *cause étrangère*, might be subject to divergent treatment that is full of domestic gloss. In addition, some domestic laws, such as the German civil code, allow the courts to make contract revisions in cases of a supervening event, rather than suspending or discharging the contract.<sup>50</sup> Islamic law adds to this complexity by introducing various doctrines of excuse for non-performance that are based on religious teachings.<sup>51</sup> In the interpretation of Article 79, any reference to these divergent foundations of domestic law would likely undermine the purpose of the CISG to create a uniform body of international sales law. As Peter Schlechtriem stated, it is "imperative [...] to treat radically changed circumstances as 'impediments' under Article 79 in exceptional cases in order to avoid the danger that courts will find a gap in the Convention and invoke domestic laws with their widely divergent solutions".<sup>52</sup>

#### B. *Critical Scholarly Perspectives on the CISG*

The question of whether uniformity of international sales law is achievable has been at the heart of considerable scholarly debate. The question is also at the heart of this

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<sup>50</sup> Bürgerliches Gesetzbuch s. 313 ["BGB"]. See also Hannes Rosler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law" (2007) 15 E.R.P.L. 483 at 485.

<sup>51</sup> David R. Rivkin, "Lex Mercatoria and Force Majeure", in Emmanuel Gaillard (ed.), *Transnational Rules in International Commercial Arbitration* (Paris: ICC Publ. No. 480, 4, 1993) 161 at 193.

<sup>52</sup> Peter Schlechtriem, *Uniform Sales Law – The UN Convention on Contracts for the International Sale of Goods* (Vienna: Manz, 1986) at 102 footnote 422a.

dissertation because an analysis of Article 79 case law should show that there is a growing body of relatively uniform jurisprudence on that provision. This debate generally falls into three broader areas of inquiry: i) excuses for the non-performance of contractual obligations within the context of the CISG and international commercial law; ii) the quest for uniformity in CISG jurisprudence generally; and, iii) Article 79 and its contribution towards to goal of uniformity in international sales law.

Academic literature on the latter two categories will focus on the relative success or failure that the CISG has experienced in general, and more specifically with Article 79, in the development and implementation of a uniform international sales law. A review of scholarly commentary on the former area will demonstrate that the concept of excuses for non-performance embodied in Article 79 is influenced by similar conceptions in various legal systems. A premise of this dissertation, however, is that while excuses for non-performance in Article 79 may have developed out of an amalgamation of similar national conceptions, it ultimately stands alone as an autonomous international doctrine under the CISG. This development plays a crucial role for uniformity in international sales law. It supports the premise that individual domestic legal doctrines may ultimately coalesce into autonomous international principles, regardless of their distinctive development in independent legal jurisdictions.

*i) The Quest for Uniformity in CISG Jurisprudence Generally*

The broadest question to be addressed in this dissertation is whether the CISG's goal of uniformity is achievable. While this question will be specifically addressed through a close examination of Article 79 case law, there has been a lively scholarly

debate on the relative success, or failure, of the CISG to promote uniformity in international sales law. Generally, this criticism appeared to be particularly strong in the early years of the Convention. In words that appear to foretell the debate on the quest for uniformity, R.J.C. Munday in an early 1978 article, noted long before the CISG became effective that, “even when outward uniformity [is] achieved [...] uniform application of the agreed rules [is] by no means guaranteed, as in practice different countries almost inevitably [...] put different interpretations upon the same enacted words”.<sup>53</sup> The open-textured nature of the CISG, combined with its attempt to strike a balance among different legal systems, and a variety of competing national interests, led some academics to charge that the Convention was too ambiguous to be of practical use. As Munday’s article foreshadows, much of this debate surrounds the wording within the Convention itself.

While Munday is skeptical of the ability of the CISG to make a significant impact on uniform international sales law, Arthur Rosett, writing in 1984, initially views the CISG as a product, not only as a “monumental achievement” for uniform law, but also as a document that makes a positive political statement, benefiting humankind.<sup>54</sup> It does this by “giving concrete form to hopes for one peaceful family of nations living under a compatible legal order”.<sup>55</sup> In his article<sup>56</sup> Rosett begins by suggesting that the CISG may be a beacon of hope for the unification effort. He tells us that it is the product of more

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<sup>53</sup> R.J.C. Munday, “The Uniform Interpretation of International Conventions”, (1978) 27 Int’l & Comp. L.Q. 450 at 450.

<sup>54</sup> Arthur Rosett, “Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods” (1984) 45 Ohio St. L.J. 265 at 265-266.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* at 267.

than 50 years of international negotiation, “which has produced a document unanimously approved by delegations representing sixty-two national legal systems”.<sup>57</sup> Since its adoption, the CISG has also received “the approval of groups of lawyers all over the world. Little opposition has arisen to its ratification by the United States, and from all indications the reaction in other nations also has been very positive”.<sup>58</sup>

The optimistic introduction quickly dissipates. Despite the lofty goals of the CISG, “the impressive talent of the drafters, the long period of gestation, and the universal acclaim with which the Convention has been met”, Rosett maintains that the fundamental strategy of attempting to create an exclusive and comprehensive statement of international sales law is poorly conceived. He argues that international sales law harmonization and international sales law codification are not identical, hence, the goal of harmonizing the legal treatment of international sales transactions is not advanced by the adoption of the CISG.<sup>59</sup>

In the fifty-year period of negotiations leading to the CISG, Rosett believes that the nature of the problem changed. In the early years of negotiations, it seemed a worthy idea to promote trade through a unifying codification of national sales laws. During the intervening period economic integration proceeded rapidly and supported a number of important harmonization efforts. These reduced the substantive anomalies that concerned the early proponents of the CISG. The need for a unified doctrinal statement of contract principles, thus, became less important than it appeared at the outset. As Rosett notes,

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<sup>57</sup> *Ibid.* at 265.

<sup>58</sup> *Ibid.* at 266.

<sup>59</sup> *Ibid.* at 267.

“[t]his diminished urgency is reflected in the slightly outdated character of some of the issues that most concerned the drafters”.<sup>60</sup> For example, the CISG does not deal with many contemporary issues of commercial law that are considered important in the U.S. and abroad. For instance, it does not directly address the issues of product liability that are related to other doctrinal rules announced by the Convention.<sup>61</sup> Rosett’s list of imperfections with the CISG continues. In conclusion, he believes the Convention provides “no unifying guidance on the host of issues”, and predicts that some of the ambiguous provisions within the CISG will continue to divide scholars, including those academics who participated in the drafting process.<sup>62</sup> The implication is that a body of case law will develop that will be permeated with domestic legal concepts. Should Rosett be correct, the homeward trend should be evident in Article 79 jurisprudence.

Writing in 1988, the same year that the Convention became effective, John Honnold notes that uniform words in themselves will not guarantee uniform results.<sup>63</sup> Honnold boldly states that the realists are “dead right” with their perspective regarding the quest for uniform laws that are designed to cross national borders.<sup>64</sup> As legal practitioners are required to use unreliable and imperfect tools—words—they will never be able to craft the perfect law, treaty, or convention. He notes that even a simple phrase, such as “Home Sweet Home”, presents the French translator with a challenge.<sup>65</sup> At the international level these difficulties with words are raised to a higher level. For example,

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<sup>60</sup> *Ibid.* at 302.

<sup>61</sup> *Ibid.* at 303.

<sup>62</sup> *Ibid.*

<sup>63</sup> John Honnold, “The Sales Convention in Action—Uniform International Words: Uniform Application?” (1988) 8 *J.L. & Com.* 207.

<sup>64</sup> *Ibid.* at 207.

<sup>65</sup> *Ibid.*

common law legal concepts, such as “consideration”, “trust”, and “tort”, are almost impossible to translate in civil law jurisdictions. Honnold is not a critic of the CISG, but he provides a valuable survey of the difficulties and criticisms that are encountered in requests for the international unification of law. To Honnold, like confirmed bachelors or spinsters who have built their lives in search of the perfect spouse, realists have been searching for the perfect uniform law. This quest is misguided. He states that he could simply conclude “[a]s our sad-faced realists predicted, international unification *is* impossible”.<sup>66</sup> Instead, he ends the article on an optimistic note: “We cannot expect perfect uniformity in applying the [C]onvention—or for that matter, any other statute. But we can look forward to international commercial law that is more helpful and predictable than the present Babel of competing systems”.<sup>67</sup> What uniform laws in general, and the CISG in particular, provide for is international acceptance of the same rules and a common medium for communication—a “*lingua franca*”.<sup>68</sup>

Words that are unique to specific jurisdictions are charged with legal meaning. To address this problem the CISG requires the displacement of domestic legal concepts. In its place is autonomous terminology. This explains why the CISG uses generic words and neutral terms that describe certain events, results, or practices that are typical in an international transaction, and not technically charged legal terms specific to a legal system. This is perhaps why Honnold dubbed the Convention the new *lingua franca*.<sup>69</sup>

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<sup>66</sup> *Ibid.* Emphasis in the original.

<sup>67</sup> *Ibid.* at 212.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

However, Amy Kastely, also writing in 1988, was critical of the attempt to create a new *lingua franca*, and felt that because of the open-textured wording within the CISG there was a very real possibility that it would fail. Utilizing rhetorical analysis on the text of the CISG, Kastely uncovers many of the contextual problems and weaknesses within the Convention. She states: “To unify the law among nations means to subject people around the world to a single set of rules and principles and to have them understand and conform to these rules and principles as they would to the laws of their own communities”.<sup>70</sup> The problem, as Kasteley understands it, is that while “human communities are natural, organic, or inevitable [...] [t]he community created and promoted by the Convention [...] is thoroughly consensual and artificial”.<sup>71</sup> This artificial community is precarious, and “vulnerable to the whim of human choice and self-interest”.<sup>72</sup> The bonds keeping it together are no stronger than the paper on which the Convention is printed. Kasteley, thus, predicts the failure of the CISG. By implication, the homeward trend should prevail. She concludes by stating the possibility that it will “only be ratified by a few states or in only a limited part of the world”.<sup>73</sup> Even if the CISG is widely accepted, “it is possible that the system of unified law will be short-lived, with states denouncing the Convention after a trial period, or by domestic courts interpreting the Convention in mechanical or isolated ways”.<sup>74</sup> While her prediction

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<sup>70</sup> Amy H. Kastely, “Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention” (1988) 8 *Nw. J. Int’l L. & Bus.* 574.

<sup>71</sup> *Ibid.* at 588.

<sup>72</sup> *Ibid.* at 589.

<sup>73</sup> *Ibid.* at 621.

<sup>74</sup> *Ibid.*

generally appears to be wrong, she was correct to the extent that there would be problems with the CISG, at least initially.

Interpretational problems will always arise with uniform laws. Critics of the CISG have often focused on this problem, without fully acknowledging that national laws also face problems of interpretation. Fortunately, the interpretational challenge was recognized during the drafting of the Convention. In Gyula Eörsi's 1984 article<sup>75</sup> she notes that, unlike many other conventions, the CISG contains two articles (Arts. 7(1) and 8) specifically devoted to proper interpretation. Article 7 in particular specifically urges tribunals and courts not to make recourse to domestic law unless specifically directed by the Convention itself.

Acknowledging that because language frequently tends to be vague or provides multiple meanings, Eörsi's article predicts the problems the CISG might encounter: "It could be argued that the [interpretive] provisions of Article 7(1) [of the CISG] are but pious wishes: the paragraph is necessarily vague and therefore open to surprising results".<sup>76</sup> Eörsi was likely ahead of her time in predicting that the interpretive articles within the CISG would play an important role in its ultimate success, particularly with regard to the unification of international sales law. She states: "the elements of regard to the international character of the Convention and uniformity in its application were well

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<sup>75</sup> Gyula Eörsi, "General Provisions", in Nima M. Galston & Hans Smit, eds., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods 2-1*, (Huntington, NY: Juris Publishing, 1984) 2-1 online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cisg/biblio/eorsi1.html>>.

<sup>76</sup> *Ibid.* at 2-3.

chosen. The first, as we have seen, was devised to check the homeward trend, and the second is an admonition to follow precedents on the international plane”.<sup>77</sup>

V. Susanne Cook’s 1997 article<sup>78</sup> logically follows Eörsi’s and Kasteley’s predictions that national courts might have a difficult time interpreting the CISG. In it, Cook discusses the interpretive difficulty encountered in the first U.S. Circuit Court decision interpreting the CISG.<sup>79</sup> She begins by noting that only two cases interpreting the CISG have appeared in U.S. courts, and remarks how this is a “stunning result considering the broad scope of the Convention’s application”.<sup>80</sup> She suspects that the reason for this development is the apparent reluctance of the U.S. international business community and American legal practitioners to embrace the CISG. This “ethnocentrism” appears to be due to a certain lack of familiarity with the Convention, or because of a preference for known domestic sales legislation, i.e., the UCC.<sup>81</sup> Cook notes that the establishment of a case law database, wherever the CISG is adjudicated, could increase the likelihood of its adoption by U.S. legal practitioners. However, at this formative stage of U.S. jurisprudence on the Convention, courts must pay particular attention to developing a method of interpretation that takes into account the CISG’s international character. Yet in the case that Cook discusses, she notes how the court’s “decision is encouragingly insightful, yet ultimately disappointing at the same time”.<sup>82</sup> She remarks how the “court carefully set the stage by pointing out that the case ‘is governed by the

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<sup>77</sup> *Ibid.* at 2-5.

<sup>78</sup> V. Susanne Cook, “The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity” (1997) 16 *J.L. & Com.* 257.

<sup>79</sup> *Delchi Carrier SpA v. Rotorex Corporation*, 71 F.3d 1024 (2<sup>nd</sup> Cir. 1995).

<sup>80</sup> Cook, *supra* note 78 at 257.

<sup>81</sup> UCC is the acronym for the Uniform Commercial Code (1995).

<sup>82</sup> Cook, *supra* note 78 at 258.

CISG', an international agreement that requires 'that its interpretation be informed by its international character and [. . .] the need to promote uniformity in its application and the observance of good faith in international trade'".<sup>83</sup> While the court succeeded in correctly identifying the international character of the CISG as the starting point of its analysis, it missed the mark when it referred exclusively to domestic jurisprudence and U.S. commentary.

Cook's article is illustrative of a pattern that was to be repeated by a number of courts in various jurisdictions. CISG critics have used these errors to advance their position that the CISG is inherently flawed, and will ultimately fail. What is overlooked is that, as with many new laws, courts have initially overlooked or struggled with the CISG's interpretive methodology, but tend to improve their judicial decision-making as the jurisprudence develops. For this reason, it is important to note the historical context of Cook's article. At the time the article was written, there was no centralized database for CISG case law, and the Convention was less than ten years old in the U.S. Furthermore, of all the signatory states to the CISG, common law jurisdictions appear to have the greatest difficulty in looking beyond the confines of domestic law when interpreting the CISG. Since Cook published her article, CISG case law from virtually all signatory states is available on the Internet, and the Convention has developed to the extent that it has been deemed one of the most successful international commercial law conventions.<sup>84</sup>

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<sup>83</sup> *Ibid.*

<sup>84</sup> See e.g. Michael P. Van Alstine, "Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law" (1996) 37 Va. J. Int'l L. 1 at 6: "It can be said with little risk of overstatement that the United Nations Convention on Contracts for the International Sale of Goods

The issue of the uniform interpretation of the CISG is a recurring theme in the academic literature. Franco Ferrari is one of the more prominent figures in the debate on whether uniform interpretation is possible, and being realized, in international CISG jurisprudence. Writing in 1994,<sup>85</sup> Ferrari reviews the challenges of interpretation specifically with the CISG, and he addresses these same problems in international conventions generally. Ferrari acknowledges that international conventions by their very nature are never definitive sources of the subject-matter, but deliberately govern only certain issues, while excluding others. This approach is not perfect, and can lead to problems concerning the precise meaning of certain provisions, and to problems concerning the necessity of filling the “gaps” with external law. Ferrari’s conclusion is that “ultimately, it is the interpreter’s task to decide whether the 1980 [CISG] is really a uniform law, i.e., whether universalism prevails over nationalism, whether any progress has been made since the enactment of the national codes”.<sup>86</sup>

Ferrari returns to the important issue of interpretation in a 1999 article.<sup>87</sup> For Ferrari, and a host of other CISG commentators, a new problem arose with the growing body of international case law on the Convention: where was the proper place for this jurisprudence within the CISG’s interpretive framework? To Ferrari, in order to achieve the CISG’s ultimate goal of uniform application, it is necessary that other signatory states consider the case law of other, i.e., foreign jurisdictions, when deciding cases on the

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represents one of history’s most successful efforts at the unification of law governing international transactions”.

<sup>85</sup> Franco Ferrari, “Uniform Interpretation of the 1980 Uniform Sales Law” (1994) 24 Ga. J. Int’l & Comp. L. 183.

<sup>86</sup> *Ibid.* at 228.

<sup>87</sup> Franco Ferrari, “CISG Case Law: A New Challenge for Interpreters?” (1999) 17 J. L. & Com. 245.

CISG. In other words, recourse to foreign judicial decisions “should always be considered” as it is a source for legal practitioners to draw either arguments or counter-arguments.<sup>88</sup> As Ferrari’s article notes, this result is, in essence, what CISG Article 7(1) dictates when it provides that “regard is to be had [ . . . ] to the need to promote uniformity in its application”.

While Ferrari’s article views the interpretive provisions of the CISG as contributing towards uniformity, some critics, have viewed these same provisions in a negative light. The arguments of the critics of uniform laws generally, and of the CISG specifically, cannot be ignored in this dissertation. In fact, their arguments will be challenged, demonstrating how critics have missed the point with their rigid perspective regarding the purpose of uniform laws. Typical of this realist critique is the work of James E. Bailey. In his 1999 article,<sup>89</sup> Bailey challenges the belief that the CISG accomplishes its goal of uniformity. Rather, he contends that the CISG is actually an obstacle to uniformity in the law of international sales.

According to Bailey, the failure of the Convention to create uniformity is the result of the CISG’s misguided goal, its character as a multinational treaty, its specific provisions, and its incorporation into many national jurisdictions (i.e., the U.S.) as a self-executing treaty. The combination of these elements results in several specific problems that prevent uniformity in both the interpretation and application of the CISG. Bailey argues, first, that as a self-executing treaty under U.S. law, the CISG is virtually unknown

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<sup>88</sup> *Ibid.* at 260.

<sup>89</sup> James E. Bailey, “Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales” (1999) 32 *Cornell Int’l L.J.* 273.

to American courts and practitioners. In his words, “it is frequently ignored by both U.S. attorneys and courts”.<sup>90</sup> The implication is that if the CISG has not been embraced by legal practitioners in America, it is likely receiving the same treatment elsewhere, and hence, failing as a uniform international convention. Second, the CISG’s rules on interpretation are so “obscure” that the Convention’s own rules for producing consistent interpretations fail to promote uniformity.<sup>91</sup> To Bailey, the interpretive provisions of the CISG are somehow defective. Third, the CISG’s provisions regarding contractual freedom lead to bewildering and potentially contradictory results that prevent uniformity in the application of the Convention.<sup>92</sup> It would appear to Bailey that the rights and obligations of buyers and sellers are not in balance, but instead overlap and somehow conflict. That almost all laws have provisions that, when isolated, contain conflicting terms is not addressed by the author. Fourth, the CISG’s failure to define its subject matter prevents uniform application.<sup>93</sup> That is, because legal or technical terms are not defined within the CISG (i.e., it does not contain a “definitions” section), this will somehow lead to inconsistent case law. Finally, the CISG’s allowance for certain reservations by nations ratifying the Convention insidiously undermines its goal of uniformity.<sup>94</sup> Nevertheless, few states have invoked these reservations, and for those that have, their significance in the context of uniformity is minimal. Furthermore, many international treaties and conventions contain reservations, yet the reservation provisions within the CISG are somehow problematic to Bailey.

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<sup>90</sup> *Ibid.* at 276.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

Fortunately, Bailey's article contains a kernel of hope for the CISG. He acknowledges that many of the problems he enumerates can be eliminated, or at least ameliorated by changes to domestic (i.e., U.S. federal) legislation, or through an UNCITRAL<sup>95</sup> review of all court decisions involving the CISG, and by a broad interpretive approach by courts when applying the CISG.<sup>96</sup>

Writing in a similar vein to Bailey is an article by Paul B. Stephan.<sup>97</sup> The Bailey and Stephan articles are important in that they are prominent articulations of the critical approaches to the CISG and uniform law. This dissertation will emphasize that the true purpose of uniformity in international sales law is to achieve, not strict but *relative* uniformity. Like Bailey, in Stephan's piece, he too notes that the effort directed at unifying international sales law, particularly the CISG, "is unnecessary, and some produces rules that hinder rather than promote international business".<sup>98</sup> While not as critical as Bailey, Stephan draws from Law and Economics theory and argues that the CISG's deficiencies are due to inherent limitations in the *process* that generates international agreements for national implementation.<sup>99</sup> The blame lies primarily with academics that have exacerbated the problem by mistakenly focusing on what uniform sales law should produce. To Stephan, less time should be spent on drafting rules to govern the substantive rights and duties of persons engaged in a transaction. Rather, more effort is needed on broader goals, such as devising ways to encourage states to

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<sup>95</sup> UNCITRAL is the acronym for the U.N. Commission on International Trade Law.

<sup>96</sup> Bailey, *supra* note 89 at 276.

<sup>97</sup> Paul B. Stephan, "The Futility of Unification and Harmonization in International Commercial Law" (1998-1999) 39 Va. J. Int'l L. 743.

<sup>98</sup> *Ibid.* at 744.

<sup>99</sup> *Ibid.*

facilitate contractual choices made by parties in the course of transactions, and in encouraging states to divulge how they plan to deal with private disputes that arise in international transactions.<sup>100</sup>

Stephan attempts to uncover the true benefits that unification and harmonization achieve. He finds that there are three primary benefits: i) the reduction of legal risk associated with international commerce; ii) law improvement or law reform; and, iii) enhancement of the role of legal intermediaries.<sup>101</sup> Considering these advantages, Stephan then examines the process that generates international conventions and model laws. He finds that the political economy of this process results too often either in rules written for the benefit of particular industries and other interest groups, or in the suppression of conflict that increases legal risk. With this approach, Stephan has shifted the focus from the substantive law of the CISG to the lawmaking process, in an attempt to “disrupt our complacency about the unification project”.<sup>102</sup> Unlike the detractors of uniform law, Stephan believes in “the nobility of the [unification] project’s aspirations”, and does not think it is a futile exercise.<sup>103</sup> Rather, the uniform law effort deserves constructive criticism precisely because it is at the heart of a sustained and practical effort to improve international commercial law.

Martin Gebauer’s article<sup>104</sup> covers issues that move beyond general rules of interpretation. This dissertation will argue that CISG Article 79 requires an autonomous

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<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.* at 746 to 752.

<sup>102</sup> *Ibid.* at 797

<sup>103</sup> *Ibid.*

<sup>104</sup> Martin Gebauer, “Uniform Law, General Principles and Autonomous Interpretation” (2000) 4 *Unif. L. Rev.* 683.

interpretation. This requires that Article 79 be interpreted with reference to the CISG's own terms, objectives, and principles, that is, within the Convention's interpretative system. The Gebauer article is important in that it notes that international uniform law needs to be explained in a manner that differs from our usual understanding of other legal instruments, such as national law.

Gebauer delves deeper into the CISG's interpretive framework, and considers the methodology of autonomous interpretation. He illustrates that autonomous interpretation, like any other form of legal interpretation, is a kind of argumentation. It may be inspired by "general principles", but autonomous interpretation of uniform law differs from other kinds of interpretation in that arguments are based on specific systematic and teleological elements.<sup>105</sup> It also differs somewhat from uniform interpretation in that it transcends the uniform application of a range of unified rules. In other words, autonomous interpretation "sorts out" arguments by utilizing a "rule of preference" in favour of specific arguments: it gives preference to certain interpretive results, but also discards other possible outcomes.<sup>106</sup> Most importantly for the purposes of this dissertation is Gebauer's argument that the CISG contains a built-in interpretive rule, i.e., Article 7(1). This compels national courts and arbitral tribunals to make decisions in harmony with the Convention's international character, and its specific aim to promote uniformity in sales law across national borders.

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<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.* at 702-704.

Monica Kilian's 2001 article<sup>107</sup> demonstrates the difficulty that certain common law jurisdictions have had in paying heed to the interpretive rule of CISG Article 7(1). She notes that out of the more than 600 worldwide CISG court cases (as documented in the CISG database at Pace University Law School), only twenty-one are from common law jurisdictions.<sup>108</sup> Killian, thus, explores the question of why it is that common law jurisdictions have not fully accepted the CISG, especially when considering their prominent position in world trade. Kilian's answer is that courts of law in common law countries remain acutely attuned to their own legal history and traditions. These courts appear to be loath to apply law that has not been created from within and, moreover, that may conflict with more familiar domestic laws. She notes how American legal practitioners are suspicious about, or even fear the CISG, and therefore advise their clients to exclude it from their contracts.<sup>109</sup>

In reviewing U.S. case law, Kilian finds that as of 1998, there are only three significant court cases on the CISG.<sup>110</sup> This is an astonishing small number considering that the U.S. conducts most of its trade with contracting states, and that it was one of the first nations to adopt the Convention as law (in 1988). In reviewing American court cases, Kilian finds that these provide glaring examples of how the U.S. legal system manages to ignore or even circumvent the CISG. Unfortunately, the Article 79 cases from the U.S. support her conclusion. She notes that U.S. "courts are bending over

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<sup>107</sup> Monica Kilian, "CISG and the Problems with Common Law Jurisdictions" (2001) 10 J. Transnat'l L. & Pol'y 217.

<sup>108</sup> *Ibid.* at 218.

<sup>109</sup> *Ibid.* at 227.

<sup>110</sup> *Ibid.*

backwards to avoid having to take into account foreign precedents in a not so subtle bid to ensure that authority regarding CISG is not established”.<sup>111</sup>

Because of the reluctant acceptance of the CISG in U.S. jurisdictions, Kilian does not believe that it best serves the interests of international merchants and the international legal community. Furthermore, the vast majority of CISG cases concern European jurisdictions that appear to indicate a propensity towards regionalization, rather than the internationalization envisaged by the CISG. Near the conclusion, Kilian’s article suggests that an international commercial code like the CISG may be best housed in the realm of non-legally binding harmonizing agreements, such as the UNIDROIT Principles, rather than in the comparatively intractable arena of statute law. However, Killian ends on a positive note, stating “the more recent U.S. cases give room for cautious optimism” and that it “appears that CISG has broader acceptance than one might imply judging from case law alone”.<sup>112</sup>

Bruno Zeller argues that if common law courts tend to treat the CISG as an interloper that is because they have not used the proper methodology when interpreting the individual articles in the Convention.<sup>113</sup> Zeller’s 2003 doctoral thesis<sup>114</sup> highlights the importance of reading the CISG within its “Four Corners”, that is, within the context of the entire CISG as an autonomous and comprehensive international sales code. In Zeller’s view, the individual articles of the CISG cannot be read and interpreted in

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<sup>111</sup> *Ibid.* at 242.

<sup>112</sup> *Ibid.* at 242-243.

<sup>113</sup> Bruno Zeller, *Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods* (Ph.D. Thesis, Victoria University, 2003 [unpublished] online: Pace Law School CISG Database <<http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>>.

<sup>114</sup> *Ibid.*

isolation; they are connected through the general principles on which the Convention is based.<sup>115</sup> To Zeller, the CISG must be interpreted uniformly to promote the “international character” of the Convention, as enunciated in Article 7. Recourse to domestic principles is not allowed. In addition, the autonomous method of interpretation is to be developed with the aid of case law and trade practices. Article 7 also points to the application of the concept of “good faith” in international trade.<sup>116</sup> Good faith as a principle is not only to be applied to the interpretation of the CISG as a whole, but it also regulates the behavior of the contracting parties.

Zeller further argues that Article 7(2) recognizes that the CISG was never intended to be a complete statement of sales laws.<sup>117</sup> The members of the diplomatic conference in Vienna could not agree on the inclusion of several important principles of contract law into the Convention as, for example, the principle of validity. As a consequence, Article 7 also delineates between the application of the CISG and domestic law through the process of gap-filling. Zeller’s thesis develops the principles and tools needed to implement Article 7(2), as gaps need to be filled in conformity with the general principles on which the CISG is based. It is also contended that restatements of contract law, such as the UNIDROIT Principles, if adopted by contractual parties will minimize references to domestic law. This is also a point noted by Kilian.<sup>118</sup>

In response to the mandate of Article 7, Zeller argues that tribunals and courts will look for a solution within the “Four Corners” of the CISG in a manner contemplated by

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<sup>115</sup> *Ibid.* at Chap. 1.

<sup>116</sup> *Ibid.* at Chap. 4.

<sup>117</sup> *Ibid.*

<sup>118</sup> Kilian, *supra* note 107.

those who drafted the CISG, rather than by taking recourse to domestic law. He further argues that the failure to apply the rules contained within the “Four Corners” does not indicate an unwillingness to depart from domestic laws. Rather it reveals that courts and legal practitioners have not yet achieved a sophisticated grasp of the provisions of the CISG.

In the early years of the CISG criticism of the Convention was relatively strong. It has now been more than 25 years since the CISG has come into force. As case law on the CISG developed with increasing momentum, and as legal practitioners and the international commercial community have become more familiar with the Convention, criticism of the Convention has subsided. However, it has not disappeared. One of the strongest articulations of the apparent flaws of the CISG is the 2005 article by Clayton P. Gillette and Robert E. Scott.<sup>119</sup> Gillette and Scott argue that the effort to create uniform international sales law fails to supply the contracting parties (i.e., the international commercial community) with the default terms that they prefer. This violates the normative criterion that justifies the law-making process for commercial actors in the first instance. Their argument rests on three propositions: i) that the process by which uniform international sales law is drafted dictates the form that many provisions take; ii) that the legal form dictated by the drafting process has significant, but flawed, substantive consequences, particularly for the policy objectives of uniform international sales law.<sup>120</sup> This leads to their final claim: iii), that in order to achieve a uniform international sales

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<sup>119</sup> Clayton P. Gillette & Robert E. Scott, “The Political Economy of International Sales Law” (April 22, 2005) NYU, Law and Economics Research Paper No. 05-02 online: SSRN <<http://ssrn.com/abstract=709242>>.

<sup>120</sup> *Ibid.* at 2-3.

law that is widely adopted, those involved in the drafting process will systematically promulgate many vague, open-textured standards that contracting parties would not ordinarily select for themselves. For Gillette and Scott, these default standards cannot be justified on the basis that this is the cost of achieving an optimal level of uniformity. If the products of a uniform international sales law are default terms that parties do not want, then the underlying justification for the law-making function, which are reduced contracting and transaction costs, disappears.

Gillette and Scott begin their article by noting that the CISG “has become the most successful of efforts to create uniform commercial law”.<sup>121</sup> The overall goal of their analysis is “to determine the extent to which [international sales law] as it is actually promulgated coincides with the provisions that would apply if drafters acted in a manner consistent with the normative goal of drafting legislation that optimally reduces contracting costs”.<sup>122</sup> They find that a correlation exists between their propositions about the drafting of uniform international sales law and the CISG. More specifically, they claim that the CISG was drafted by parties whose objectives did not necessarily coincide with those of the international commercial actors whose conduct the treaty was intended to regulate. Gillette and Scott find this result somewhat surprising, as it might be expected that international sales law generally, and the CISG specifically, would reveal a positive relationship between goals and practice.

As the literature in political economy explains, typically, any deviation from normative goals in the legislative process is likely due to the presence of interest groups

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<sup>121</sup> *Ibid.* at 3.

<sup>122</sup> *Ibid.*

that are able to gain disproportionate influence.<sup>123</sup> But the authors do not find this to be quite the case with the CISG. Rather, the problem lies “in the unique processes by which uniform international sales law is generated”.<sup>124</sup> These processes must simultaneously deal with incompatible political and commercial concerns. Political interests arise from the fact that uniform international sales law must combine different legal, governmental, and economic interests. The end result is an effort to accommodate a number of diverse political—as opposed to commercial—interests. Because of this vacuum, they argue that the product created is shaped entirely by the motivations and incentives of the drafters themselves. Unfortunately, this causes the law “to be drafted at a high level of abstraction, explicitly to authorize numerous exceptions to the law’s uniform application, and implicitly to tolerate significant variation in the interpretation of the (formally) uniform law”.<sup>125</sup>

For Gillette and Scott, the result is a variety of vague standards and compromises that appear to be inconsistent with the true needs of the international business community. They conclude by suggesting that, because of the inherent flaws within the text of the CISG, members of the international business community would prefer to choose their governing law from among the numerous domestic legal regimes that compete with the CISG, and supply parties with more attractive substantive terms. In conclusion, Gillette and Scott predict the CISG is “likely to become less and less useful as time goes on [and] will lose out in competition with alternative legal regimes”.<sup>126</sup>

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<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.* at 4.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.* at 63.

One of the most influential articles on the CISG appeared in 2004 by Larry DiMatteo *et al.*<sup>127</sup> The focus of the DiMatteo monograph is not on whether the CISG mandates, or should mandate, absolute uniformity of application. Rather, the work recognizes that many CISG provisions are the product of compromise and, thus, the authors ask whether these compromises have proven to be effective, or have resulted in a chaotic jurisprudence in the courts of the signatory states. In a broad survey of international CISG case law, the authors attempt to determine how each of the articles of the CISG have actually been interpreted and applied by various national courts.

DiMatteo begins by examining the special characteristics of the CISG as an international code including its importance as an international convention and legal code meant for uniform application. The importance of defining a standard for measuring uniformity of application is discussed along a continuum between absolute and relative standards of uniformity. This dissertation will also take a similar approach when evaluating the degree of uniformity required in the interpretation of Article 79 of the Convention across national boundaries. They believe that “the success of the CISG should be measured using a standard of relative uniformity or a standard of the lessening of legal impediments to trade. Thus, a relative or useful level of uniformity should be the benchmark to measure the success of the CISG”.<sup>128</sup> The discussion then focuses on the importance of autonomous interpretation, as intended by the drafters of the CISG, to the

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<sup>127</sup> Larry A. DiMatteo *et al.*, “The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence” (2004) 34 *Nw. J. Int’l L. & Bus.* 299. This article became such a popular article that the piece was subsequently published in monograph form in 2005 under a different title, Larry A. DiMatteo *et al.*, *International Sales Law: A Critical Analysis of CISG Jurisprudence* (New York: Cambridge University Press, 2005). All references are to the latter work.

<sup>128</sup> *Ibid.* at 11.

goal of relative uniformity in the application of the Convention. It is their hope “that such autonomous interpretations, divorced from the idiosyncrasies of domestic jurisprudence, will result in more truly supranational law”.<sup>129</sup> The introductory section of their monograph concludes with a discussion of the more expansive use of the CISG as “soft law”.<sup>130</sup> This use of the CISG as evidence of customary international law offers a way for courts and arbitral tribunals to deal with differences between various legal regimes.

The review of CISG jurisprudence throughout the monograph highlights the problems of the non-uniform application of the CISG. The survey covers almost each one of the Convention’s 101 articles, and discusses poorly reasoned judicial opinions, as well as those court decisions that are products of better reasoning. DiMatteo finds that the poorly reasoned judicial opinions are generally characterized by decisions that merely apply the legal concepts of the court’s domestic legal system. In contrast, the exemplary opinions are characterized by the application of the CISG’s interpretive methodology, in pursuit of autonomous interpretations that recognizes the Convention’s international character.<sup>131</sup>

DiMatteo also provides an overview of the CISG in actual practice. In essence, this is a descriptive review of the jurisprudence that has developed around the major articles of the CISG, and includes a discussion of the “raw material” necessary to judge the CISG’s functionality in lowering the legal impediments in the international sale of

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<sup>129</sup> *Ibid.* at 12.

<sup>130</sup> *Ibid.* at 13-15.

<sup>131</sup> *Ibid.* at 12-13.

goods.<sup>132</sup> This review illustrates the types of issues and interpretational problems encountered by national courts and arbitration tribunals over a 15-year period since the CISG's adoption. The discussion demonstrates how courts have used (or misused) the CISG's interpretive methodology, and have developed specific default rules to make the CISG more functional.

The DiMatteo monograph also reviews CISG jurisprudence according to the main substantive areas of the Convention, including, for example, contract formation,<sup>133</sup> the obligations of buyers and sellers,<sup>134</sup> and the common obligations of the parties.<sup>135</sup> In each of these sections, the provisions with the largest volume of case and arbitral law are given the most coverage. The consequences of breach of contract,<sup>136</sup> the calculation of damages,<sup>137</sup> doctrines limiting damages recovery,<sup>138</sup> and excuses for non-performance due to "impediments" found in Article 79,<sup>139</sup> which is the focus of this dissertation, are analyzed. Through this examination, divergent judicial interpretations, CISG interpretive methodology, and the development of specific default rules of the CISG are highlighted. DiMatteo concludes with the premise that the CISG is an evolving legal code. Consequently, its jurisprudence reflects courts' confusion and methodology to contend with the CISG's perceived shortcomings through gap-filling measures. Because case law commonly brings necessary depth and clarity to statutory acts, the authors offer a number

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<sup>132</sup> *Ibid.* at 6.

<sup>133</sup> *Ibid.* at 32-75.

<sup>134</sup> *Ibid.* at 76-120.

<sup>135</sup> *Ibid.* at 121-131.

<sup>136</sup> *Ibid.* at 132-150.

<sup>137</sup> *Ibid.* at 150-162.

<sup>138</sup> *Ibid.* at 153-158.

<sup>139</sup> *Ibid.* at 158-160.

of examples of such developing jurisprudence and the persistence of homeward trend reasoning in CISG judicial opinions. A brief passage highlights their primary finding:

At one extreme, some courts have largely ignored the CISG's mandate that interpretations are to be formulated with an eye toward the international character of the transaction and the need for uniformity of application. At the other extreme are courts, and more often arbitral panels, that have taken the above mandates seriously and have resisted the temptation of homeward trend interpretations. In the middle, are the majority of cases that have attempted to provide autonomous interpretations with various degrees of success.<sup>140</sup>

Finally, the monograph concludes by noting that the level of disharmony associated with divergent national judicial interpretations of CISG is acceptable because national interpretations impact the effectiveness or functionality of the Convention itself. Some divergence in interpretation is to be expected, and is acceptable considering the difference in national legal systems and in the very nature of legal codes. This divergence is to be expected not only because codes have multi-jurisdictional applications, but also because the CISG is an evolving, living law. As such, it provides for the contextual input of the "reasonable person", including the recognition of evolving trade usage, in the re-formulation and application of its rules. The benefit of such a dynamic, contextual interpretive methodology is that the code consistently updates its provisions in response to novel cases and new trade usages. This process should ultimately overcome many of the initial divergent judicial interpretations of the CISG, and ultimately result in an effective and functional international sales law. But the success of the living, contextual nature of the CISG is dependent upon courts balancing

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<sup>140</sup> *Ibid.* at 178.

the need for flexibility in application against the need to minimize divergent interpretations to ensure that the CISG remains attentive to its mandate of uniformity.

ii) *Excuses for Contractual Non-performance in Domestic and International Commercial Law*

Much has been written on the various doctrines concerning excuses for non-performance of contractual obligations within the context of domestic legal systems.<sup>141</sup>

These writings often focus on specific countries and distinguish between the various incarnations of excuses for non-performance as encountered in different legal systems and jurisdictions. What is usually offered is a conceptual framework identifying the general characteristics of the excuse for non-performance, discussions that highlight case law, or details of problematic issues that are related to the doctrine in a specific jurisdiction. Typical of this approach, one post-World War II law journal ran a series of articles on excuses for non-performance that covered a range of countries and legal systems.<sup>142</sup> While some of this material is helpful in providing some context to the study

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<sup>141</sup> A representative—but far from exhaustive—list of literature on the topic in various domestic jurisdictions can be found. See e.g. ‘Abd El-Wahab Ahmed El-Hassan, “Freedom of Contract, The Doctrine of Frustration, and Sanctity of Contracts in Sudan Law and Islamic Law” (1985) 1 Arab L.Q. 51; Herve Leclercq, “Notes and Comments: Force Majeure in Chinese Commercial Law” (1989) 7 J. Energy, Nat’l Res. L. 238; Robert Lombardi, “Force Majeure in European Union Law” (1997) 3 Int’l Trade & Bus. L. Ann. 81; J. Denson Smith, “Some Practical Aspects of the Doctrine of Impossibility” (1937) Ill. R. Rev. 672; John D. Wladis, “Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law” (1986) 75 Geo. L.J. 1575; Pan. J. Zepos, “Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946” (1948) 11 Mod. L. Rev. 36.

<sup>142</sup> See J.P. Azevedo, “Frustration of Contract in Latin America and Particularly Brazil” (1946) 29 J. Comp. Legis. & Int’l L. 15; E.J. Cohn, “Frustration of Contract in German Law” (1946) 28 J. Comp. Legis. & Int’l L. 15; Rt. Hon. Lord Cooper, “Frustration of Contract in Scots Law” (1946) 28 J. Comp. Legis. & Int’l L. 1; Arthur L. Corbin, “Frustration of Contract in the United States of America” (1947) 29 J. Comp. Legis. & Int’l L. 1; Rene Davis, “Frustration of Contract in French Law” (1946) 28 J. Comp. Legis. & Int’l L. 11.

of the development and judicial treatment of CISG Article 79, the usefulness of some of this material is limited.

One of the most prominent treatise on contractual excuses for non-performance is *Frustration and Force Majeure* by Guenter H. Treitel.<sup>143</sup> The Treitel monograph provides a broad, but thorough examination of the principles governing the conflict between *pacta sunt servanda* and the discharge of contractual obligations in response to supervening events. Treitel discusses a host of supervening events that may be encountered in any commercial transaction, setting out the statutory principles involved, together with judicial interpretations from a number of common law jurisdictions. While the book deals primarily with English law, it does adopt a comparative approach. Without attempting to provide a comprehensive account of excuses for contractual non-performance in foreign legal systems, it does refer to the rules and principles in some foreign jurisdictions to aid in the understanding and evaluation of the doctrine in English law.

More recently, Christoph Brunner has expanded the scope of Treitel's study beyond the domestic realm, and considered the role of *force majeure* and hardship specifically in the context of international commercial transactions.<sup>144</sup> Brunner's work does cover many of the Article 79 cases discussed in this dissertation. However, his quest is entirely different. Brunner comprehensively analyzes contemporary approaches to the principles of exemption for non-performance, which are he notes are commonly referred to as *force majeure* and hardship. Brunner believes that the best way to address

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<sup>143</sup> Guenter H. Treitel, *Frustration and Force Majeure*, 2d ed. (London: Sweet & Maxwell, 2004).

<sup>144</sup> Brunner, *supra* note 47.

the problem of excuses for non-performance is to use a general principle of law approach. To him, this approach encompasses principles of international commercial contracts derived from a variety of legal codes, making it a comparative law approach to a certain extent. The most important iterations of general contract principles is found in the CISG, as well as in two soft law codifications of international commercial contract law: the UNIDROIT Principles of International Commercial Contracts<sup>145</sup> and the European Principles of Contract Law (PECL).<sup>146</sup>

In many jurisdictions, the excuse for contractual non-performance is a relatively recent phenomenon, having been developed only in the last two centuries. As Michael Aubrey explains in his 1963 article,<sup>147</sup> in England, for example, until the seventeenth century, *pacta sunt servanda* was such an entrenched principle of contract law that the excuse for contractual non-performance was unknown. Courts required the fulfillment of obligations even though physical performance might be impossible.<sup>148</sup> Excuses for non-performance began to develop in England in the 1863 case of *Taylor v. Caldwell*,<sup>149</sup> and initially came to be known in common law jurisdictions as the doctrine of frustration or impossibility.<sup>150</sup> Aubrey explains that the doctrine was initially too narrowly interpreted by the courts, and as cases developed, courts became more liberal with their application of the doctrine. Eventually, English law and European law developed along similar lines

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<sup>145</sup> UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2004*, (Rome: International Institute for the Unification of Private Law, 2004).

<sup>146</sup> Commission on European Contract Law, *Principles of European Contract Law*, Ole Lando & Hugo Beale eds., (The Hague: Kluwer Law International, 2000).

<sup>147</sup> Michael D. Aubrey, "Frustration Reconsidered—Some Comparative Aspects" (1963) 12 Int'l & Comp. L.Q. 1165.

<sup>148</sup> *Ibid.* at 1165.

<sup>149</sup> (1863) 3 B. & S. 826.

<sup>150</sup> Aubrey, *supra* note 147 at 1165.

by denying efficacy to contracts that had become legally or physically impossible to perform. Although the theoretical foundation of the doctrine may be different in each European country, there came a need to limit the effect of contract performance in certain circumstances. Aubrey, thus, concludes with the prediction that “with increasing international trade we shall soon be able to perceive a European concept of frustration”.<sup>151</sup>

Aubrey hints at a comparative approach to the doctrine of frustration. A number of scholars have used this method. A comparative law approach is an important tool of interpretation, particularly those that involve questions of uniformity. By liberating the researcher from the narrow confines of a single legal system, it helps to discern universally accepted legal principles and transcendent values concerning the law. For example, Leo M. Drachsler, in his 1957 article,<sup>152</sup> reviews the remedial modalities of the doctrine of frustration across a number of representative legal systems.

Drachsler attempts to find how, and under what circumstances, courts in common law and civil law systems, when handling cases of sales transactions that have been aborted by a supervening event, allocate the risks and split the losses among the parties. In other words, he tries to determine the nature and scope of “judicial revision” in applying remedies in cases where the transaction has been frustrated, particularly those involving an illegal government decree.<sup>153</sup> Drachsler finds “observance in all legal

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<sup>151</sup> *Ibid.* at 1188.

<sup>152</sup> Leo M. Drachsler, “Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality” (1957) 3 N.Y.L.F. 50.

<sup>153</sup> *Ibid.* at 52.

systems of the underlying principle of impossibility of performance”.<sup>154</sup> In the international cases he reviews, both common law and civil law systems reach virtually the same result.

However, a major divergence has developed in terms of the judicial policymaking in frustrated contracts cases. Due to wars and economic disasters that have plagued Europe, there has been a drastic enlargement of judicial power in the civil law nations of the Continent. “The judicial process in those countries, under the strain of post-war economic reconstruction, is empowered as an instrument of public policy in the quasi-administrative readjustment of private contract obligations whose performance had become legally impossible or economically ruinous”.<sup>155</sup> In contrast, in common law jurisdictions the principle of judicial policymaking, at least in this area, is “piously denied”.<sup>156</sup> Interestingly, Drachsler notes that at the international level, there is the possibility for the synthesis of the common law and civil law conceptions of frustration of contract. This is found in the precursor convention to the CISG, the *Uniform Law on the International Sale of Goods* (“ULIS”),<sup>157</sup> which was in draft form at the time the Drachsler article was published. In commenting on the difficulty of reconciling the different perspectives on frustration of contract, Drachsler concludes by suggesting that these diverse doctrines may ultimately become integrated at the international level.<sup>158</sup>

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<sup>154</sup> *Ibid.* at 81.

<sup>155</sup> *Ibid.* at 82.

<sup>156</sup> *Ibid.* at 83.

<sup>157</sup> *Convention Relating to a Uniform Law on the International Sale of Goods*, 834 U.N.T.S 107 (July 1, 1964).

<sup>158</sup> Drachsler, *supra* note 152 at 83-84.

There is an abundance of scholarly commentary on the various doctrines concerning excuses for non-performance of contractual obligations within the context of international transactions generally. These articles tend to take a comparative approach. Their usefulness lies in illustrating how the substantive law of excuses for contractual non-performance in one country may be similar or different from that of another jurisdiction. By examining the law in foreign jurisdictions, the legal researcher is, thus, better able to see how various legal systems approach and resolve common problems.

Typical of the comparative approach is a 1963 article by Harold J. Berman.<sup>159</sup> Berman discusses how the problem of excuses for contractual non-performance has vexed legal scholars of many countries for generations. While components of the doctrine vary slightly from one country to another, Berman's major finding is that "the great upheavals of recent decades [...] have created the tendency toward liberalization of excuse [for non-performance]".<sup>160</sup> Thus, in Berman's view the doctrine of excuse for non-performance appears to be converging across legal systems.

Michael G. Rapsomanikis, writing in 1979, also provides a historical comparative survey of the doctrine of excuses for contractual non-performance, but he reaches an entirely different conclusion to Berman. Rapsomanikis' article<sup>161</sup> is a thorough review of law and contract theory across a variety of nations and legal systems. However, Rapsomanikis states that "one can unhesitatingly conclude that a uniform standard, apt to resolve the problem of [the doctrine of] frustration in international trade universally, can

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<sup>159</sup> Harold J. Berman, "Excuse for Non-performance in the Light of Contract Practices in International Trade", (1963) 63 Colum. L. Rev. 1413.

<sup>160</sup> *Ibid.* at 1438.

<sup>161</sup> Michael G. Rapsomanikis, "Frustration of Contract in International Trade Law and Comparative Law" (1979) 18 Duq. L. Rev. 551.

hardly be found”.<sup>162</sup> To Rapsomanikis, for parties in an international commercial transaction, there is no homogeneous or universal principle that governs this area of law. Differences in the doctrine of excuse for non-performance are too pronounced for the practical application of a worldwide standard. The implication of this conclusion for this dissertation is that it might be difficult to interpret Article 79 of the CISG autonomously, that is, as an international norm, without reference to domestic legal concepts and principles. However, it is important to note that Rapsomanikis was also writing before the CISG was formulated.

Theo Rauh takes a similar position as Rapsomanikis in his 1996 article.<sup>163</sup> Rauh examines the effects of *force majeure*<sup>164</sup> clauses across a number of states, and considers how they differ in each jurisdiction. He finds that the legal effects of a *force majeure* event can vary greatly, depending on the governing law. He notes that “[e]ven within a particular national legal system, the outcome of a Force Majeure event cannot be determined with certainty, and with the exception of English law the options for the courts are broad”.<sup>165</sup>

iii) *Article 79 and Uniform International Sales Law*

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<sup>162</sup> *Ibid.* at 600.

<sup>163</sup> Theo Rauh, “Legal Consequences of Force Majeure Under German, Swiss, English and United States’ Law” (1996) 25 Denv. J.L. & Pol’y 151.

<sup>164</sup> *Force majeure* is a variation of the term “excuses for non-performance”, “impossibility”, or “frustration”.

<sup>165</sup> Rauh, *supra* note 113 at 171.

Academic commentary is limited on the subject of whether Article 79 is contributing to or detracting from the quest for uniformity of international sales law.<sup>166</sup> As noted above,<sup>167</sup> Larry DiMatteo *et al.* have recently reviewed a large body of CISG case law covering many of the Convention's 101 articles, but this survey is selective and is aimed at uncovering the broader interpretive trends in court and arbitral decisions.<sup>168</sup> The authors state that the work is not comprehensive, but is designed as an introductory general reference of CISG jurisprudence. In this vane, the coverage in the DiMatteo *et al.* monograph on Article 79 contains a mere four paragraphs and references only thirteen cases.<sup>169</sup> The only firm conclusion provided by these cases is that "a high standard is set for a party to successfully claim excuse due to impediment".<sup>170</sup>

Harry Flechtner has also recently written an important article on Article 79.<sup>171</sup> In it, Flechtner discusses Article 79 within the context of the homeward trend. More specifically, he considers whether the homeward trend might be responsible for the view of certain academics who believe that Article 79 may provide an exemption to a seller for delivering non-conforming goods. This seems to be the view of scholars from the civil

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<sup>166</sup> An array of academic literature exists that focuses specifically on CISG Article 79. However, in this abundance of academic commentary on Article 79, the quality, breadth, and depth of topics vary. Much of this literature is not directly relevant to this research.

<sup>167</sup> At 21-25.

<sup>168</sup> *Supra* note 4. Larry DiMatteo *et al.* state at 19, n. 1: "The selectivity is due to a number of considerations including the increasing number of reported cases, especially in countries like Germany, the unavailability of English translations, and the clustering of cases among a number of issues [...] Some provisions of the CISG have yet to develop critical mass of cases." Although "CISG jurisprudence has become more comprehensive [since] 1998 a deeper jurisprudence still needs to be developed in numerous areas of CISG coverage."

<sup>169</sup> *Ibid.* at 158-160.

<sup>170</sup> *Ibid.* at 160.

<sup>171</sup> Harry M. Flechtner, "Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods" (2007) 19 *Pace Int'l L. Rev.* 29.

law tradition, such as Hans Stoll and Georg Gruber.<sup>172</sup> Their view is derived from the German legal system, where a seller is liable in damages only if it fails to perform in matters that are within its control. If the seller is not at fault, it will be exempt from damages. In contrast, John Honnold takes the “no-fault” or strict liability perspective from the common law tradition. This appears to be the more plausible perspective, as per Article 79, a party is liable for all events within its control irrespective of its negligence. As an American, Honnold believes that Article 79 is entirely inapplicable where a seller delivers non-conforming goods, regardless of “fault”. These two incompatible views of the application of Article 79 illustrate the Rorschach-test nature of Article 79 and the CISG. Flechtner’s article thus highlights the tendency to interpret the CISG with the assumptions and conceptions that the interpreter brings to the task based on the training from a particular domestic legal system.

With the exception of Flechtner’s article, to date there has been no comprehensive scholarly study exclusively on Article 79 (and the relevant case law) to determine the extent to which that provision has been interpreted autonomously. However, Dennis Tallon’s 1987 analysis entitled “Article 79”<sup>173</sup> does come close. He provides an overview on the origins and development of the provision, but this material is somewhat dated. For example, Tallon notes that “East European legal systems [...] rarely permit the discharge of the promisor because it jeopardizes with official planning”.<sup>174</sup> This is hardly a problem today. More importantly is the context that Tallon provides relating to

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<sup>172</sup> Stoll and Gruber, “Article 79” in Schlechtriem & Schwenger, *infra* note 599 at 806 to 837.

<sup>173</sup> Dennis Tallon, “Article 79” in Bianca-Bonell, eds., *Commentary on the International Sales Law* (Milan: Giuffrè, 1987).

<sup>174</sup> *Ibid.* at 573.

the development of Article 79. We learn that the doctrine of excuses for contractual non-performance as embodied in Article 79 was developed “on a variegated background”.<sup>175</sup> While the concept is widely accepted throughout the world, it does not apply similarly everywhere. It is subject to various interpretations in the domestic laws of each country. Most importantly, the CISG avoided reference to these domestic theories and, instead, developed its own, novel approach. Thus, when interpreting Article 79, reference to similar legal concepts becomes “difficult because one cannot resort to these laws as a guide”.<sup>176</sup> This opens the door to an autonomous interpretation of Article 79, which this dissertation explores in detail.

Barry Nicholas provides a critical analysis of Article 79.<sup>177</sup> Nicholas begins his 1984 article by noting that in some respects, Article 79 is one of the most “unsatisfactory provisions” in the CISG.<sup>178</sup> He states that critics would likely conclude that the wording in Article 79 “has yielded a formula which is so vague that there are bound to be differences of interpretation in different jurisdictions and the prime purpose of any uniform law will in consequence be defeated”.<sup>179</sup> Acknowledging that there are defects with the CISG, Nicholas finds that Article 79 does provide a unique but adequate framework for the principle of excuses for contractual non-performance. What remains to be determined, however, is how national courts will read the Article in the context of,

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<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.* at 574.

<sup>177</sup> Barry Nicholas, “Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods” in Galston & Smit, eds., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, (Huntington, NY: Juris Publishing, 1984).

<sup>178</sup> *Ibid.* at 5-1.

<sup>179</sup> *Ibid.* at 5-2.

not only the individual contract itself, but also with reference to the distinctive practices of international trade.

The key question that many authors attempt to address is under what circumstances will a party be exempted from its obligations under an international sale of goods contract in the case of supervening events. This dissertation will not attempt to answer that question directly. Rather, it will aim to compare the case law on Article 79 across signatory states to determine the degree of relative uniformity in this area of law.

Tom Sutherland's 2001 article<sup>180</sup> is a survey of the role of impossibility of performance in a number of legal systems. Sutherland's aim is to compare the solutions that different national rules provide in the case of a supervening event. Such an approach is only of limited value to this dissertation. However, he discusses how Article 79 fails to follow any national law. In Sutherland's words, Article 79 "does not use terms like force majeure, frustration or the like, and it forms a system of its own autonomous from the national systems".<sup>181</sup> The autonomous conception of excuse for non-performance in Article 79, thus, may "find [its] way back into national systems which in part harmonizes the law".<sup>182</sup>

A number of articles also compare CISG Article 79 to similar provisions in other international instruments, such as the UNIDROIT Principles<sup>183</sup> and the Principles of

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<sup>180</sup> Tom Sutherland, "Impossibility of Performance and Other Excuses in International Trade" (2001) Faculty of Law of the University of Turku, Private Law Publication Series B:55 online Pace Law School CISG Database: <<http://www.cisg.law.pace.edu/cisg/biblio/southerington.html>>.

<sup>181</sup> *Ibid.* at s. 1.1.

<sup>182</sup> *Ibid.*

<sup>183</sup> UNIDROIT, *supra* note 145.

European Contract Law (“PECL”).<sup>184</sup> This material is comprehensively covered in three articles by Dionysios P. Flambouras,<sup>185</sup> Chengwei Liu,<sup>186</sup> and Niklas Lindstrom.<sup>187</sup> All three articles focus on specific rules dealing with excuses for contractual non-performance under similar international instruments. This material is not crucial for this dissertation, but it helps to place CISG Article 79 within a broader, international context.

Dionysios P. Flambouras approaches the topic of Article 79 with reference to the relevant rules of the CISG, and provides parallel references to the application of the appropriate provisions under the PECL and the UNIDROIT Principles. Throughout, there is a discussion of how these international instruments compare in their treatment of supervening events. Liu’s article takes a similar approach, but adds to the discussion with a section on the evolution of the concept of *force majeure* as an autonomous principle internationally. Liu stresses at the outset of his article “that the term ‘*force majeure*’, ‘has evolved progressively in international trade practice by assuming many original and autonomous features distinct from similar legal concepts’”.<sup>188</sup> This dissertation will make a similar, but much more thorough argument. Lindstrom discusses a breaching party’s exemption from liability under the CISG due to changed circumstances. His article contemplates the relationship between the doctrine of hardship and an exemption from liability under the CISG, with frequent comparisons with the

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<sup>184</sup> Commission on European Contract Law, *supra* note 146.

<sup>185</sup> Flambouras, *supra* note 37.

<sup>186</sup> Chengwei Liu, “Force Majeure: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law”, 2d ed., (April, 2005) online Pace Law School CISG Database: <<http://www.cisg.law.pace.edu/cisg/biblio/liu6.html>>.

<sup>187</sup> Niklas Lindstrom, “Changed Circumstances and Hardship in the International Sale of Goods” (2006) 1 Nordic J. Com. L. 1 online: <[http://www.njcl.utu.fi/1\\_2006/commentary1.pdf](http://www.njcl.utu.fi/1_2006/commentary1.pdf)>.

<sup>188</sup> Liu, *supra* note 133 at s. I.

UNIDROIT Principles and PECL. Lindstrom views Article 79 as a flexible provision, which might leave considerable room for judicial appraisal and divergent case law. The author is of the opinion that “hardship”, which is a variation of an excuse for non-performance, is governed by the CISG, and that there is no room allowing for the application of national laws.<sup>189</sup> The approach appears to be correct.

C. *Research Problem*

The premise of this dissertation is that Article 79—which concerns exemptions for contractual non-performance due to an “impediment” beyond a party’s control—requires an autonomous interpretation, that is, as an international norm, without reference to domestic legal concepts and principles. Put in slightly different terms, the objective of this dissertation is to determine the extent to which a problematic legal doctrine—the excuse for non-performance, as embodied in Article 79—is an autonomous international norm, and capable of relative uniformity within the context of the CISG’s goal for a sales law that is transnational in design. While Article 79 may have developed out of an amalgamation of similar national conceptions, it ultimately stands alone as an autonomous international doctrine under the CISG. To this end, this dissertation will consider the application of Article 79 by courts and arbitral tribunals across a number of signatory states.

The focus on Article 79 and excuses for non-performance of a contractual obligation, involves one of the most important principles in contract law: *pacta sunt*

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<sup>189</sup> Lindstrom, *supra* note 134 at 24.

*servanda*.<sup>190</sup> This is a basic animating principle of the law of contacts, which demands that promises must be performed.<sup>191</sup> Thus, while the principle of party autonomy allows parties to contract in any manner permissible under law, *pacta sunt servanda* dictates that parties are rigidly bound by their agreements. In a case of changed circumstances, the extent to which a party may be exempted from contractual obligations is, thus, of fundamental significance at both the domestic and international levels. In the latter case, contractual obligations take on an additional element of risk due to changing political and economic events in foreign countries. With globalization, and the involvement of more countries in the procurement, production, and sales process, there are greater imponderables for commercial parties. Cultural differences and the greater geographical distances frequently encountered in international trade only serve to augment the risk of a changed circumstance in a transaction of goods.

The examination of Article 79 will provide focus and the depth of analysis necessary to draw firm conclusions regarding the development and treatment of an important, but problematic, legal doctrine.<sup>192</sup> This doctrine is common, in various guises, to all the major legal regimes of the world. By studying the treatment of Article 79 by the courts and arbitral tribunals of various states, differences in doctrine and case law will be discerned. Disparities in the national treatment of Article 79 will also be examined

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<sup>190</sup> Although the doctrine of *absolute* obligation was revised in the common law by *Taylor v. Caldwell*, [1863] 3 Best & S. 826 (Q.B.), *pacta sunt servanda* nonetheless survives as a general principle in common and civil law systems.

<sup>191</sup> McCamus, *supra* note 48 at 14.

<sup>192</sup> Jacob S. Ziegel notes that Article 79 “is probably one of the most difficult in the whole convention”. See Jacob S. Ziegel, “Analysis from a Provincial Common Law Perspective” in Ziegel and Claude Samson, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, (Toronto: Uniform Law Conference, 1981) at Section IV - Exemptions.

within the context of globalization and the advent of international trade. The extent of conceptual differences towards the doctrine of excuses for non-performance will also help to determine whether the CISG's goal of uniformity is achievable: Should there be a convergence in the treatment of Article 79, this would support the premise that a legal doctrine—in this case, the excuse for non-performance—germinating in various legal systems may ultimately evolve into an autonomous principle, and towards a conceptual goal of uniformity in a body of international commercial law, regardless of its unique development in separate and distinct legal jurisdictions. Such a development would play a crucial role for uniformity in international sales law. It would support the premise that individual domestic legal doctrines may ultimately coalesce into autonomous international principles, regardless of their distinctive development in independent legal jurisdictions. This is important for the development of uniform law in that it would demonstrate to international business and legal communities that conceptual barriers to various national legal backgrounds and doctrines can be overcome. Furthermore, with uniform laws, such as the CISG, common solutions are available to typical problems for businesses in international sales, negating any potential jurisdictional advantage by litigants through forum shopping.

Evidence in support of the proposition that Article 79 stands alone as an autonomous international doctrine will indicate that since the CISG has come into force, there has developed a generally cohesive body of case law exemplifying a relatively uniform and autonomous doctrine of excuses for non-performance. This should be substantiated by a consistency in the application of excuses for non-performance, as well

as by judicial deference to international case law and scholarly opinion when courts decide cases under the CISG in general, and Article 79 in particular. A variation of this proposition may find that any dissension associated with divergent domestic interpretations of Article 79 can be viewed as a minor discrepancy within the CISG's broader mandate of uniformity.

Alternatively, diverging doctrine and case law on Article 79 may support the competing premise that the courts and tribunals of particular countries remain acutely attuned to their own legal traditions. This will be evident in Article 79 cases where CISG jurisprudence is typically permeated with domestic legal concepts. In such cases, domestic court decisions regarding excuses for non-performance in the CISG will be compared with those of other national jurisdictions. An examination will also be made to determine whether the treatment of Article 79 cases differs between legal systems. Furthermore, a comparison will be made between the decisions of arbitral tribunals and those of the traditional judiciary. As my previous research on Canadian CISG jurisprudence<sup>193</sup> illustrated, certain national courts appear reluctant to apply law that has not been created internally and, moreover, that is not in harmony with established domestic law. But perhaps the Canadian experience has been an exception. A recent study of worldwide CISG jurisprudence by Larry DiMatteo *et al.* noted, "despite the problem of diverging interpretations, there are signs that courts are taking more seriously their role in applying CISG interpretive methodology."<sup>194</sup> However, my previous research of Canadian CISG jurisprudence failed to provide evidence of converging

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<sup>193</sup> Mazzacano, *supra* note 18.

<sup>194</sup> *Supra* note 8 at xi-xii.

uniformity emanating from that nation.<sup>195</sup> Should a detailed analysis of Article 79 across various states reach a similar conclusion, it may suggest that the CISG, and the attempt to create a new *lex mercatoria*, may be more suitable as part of a non-legally binding harmonizing agreement, such as the *UNIDROIT Principles of International Commercial Contract* (“UNIDROIT Principles”)<sup>196</sup> or the *Principles of European Contract Law*,<sup>197</sup> rather than in the intractable realm of treaty and statute law.

#### D. Methodology

The methodology utilized in this dissertation is diverse. It uses some quantitative data and empirical research, but it relies more heavily on qualitative information. As part of its qualitative analysis, it is comparative in its approach to law and legal systems. As part of the empirical research, relevant cases and the national law on excuses for contractual non-performance are analyzed. The countries included are Austria, Belgium, Bulgaria, China, Finland, France, Germany, Greece, Hungary, Israel, Italy, Netherlands, Russia, Slovak Republic, Spain, Switzerland, and the United States. In addition, Article 79 cases are reported from a number of arbitral institutions. These include the American Arbitration Association (AAA),<sup>198</sup> Bulgarian Chamber of Commerce, China International Economic & Trade Arbitration Commission (CIETAC), Hamburg Chamber of Commerce, Arbitration Court of the Chamber of Commerce and Industry of Budapest,

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<sup>195</sup> Mazzacano, *supra* note 18.

<sup>196</sup> UNIDROIT (ed.), *UNIDROIT Principles of International Commercial Contracts 2004*, 2d ed. (Rome: UNIDROIT, 2004).

<sup>197</sup> Commission on European Contract Law, *The Principles Of European Contract Law, Parts I & II*, (Hague, The Netherlands: Kluwer Law International, 1999).

<sup>198</sup> The arbitral award was subsequently challenged in U.S. courts, thus, this case is listed in this dissertation as one belonging to the domestic courts of the U.S. See *Macromex Srl. v. Globex International Inc.*, *infra*, footnote 205.

Court of Arbitration of the International Chamber of Commerce (ICC), High Arbitration Court of the Russian Federation, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, and the Tribunal of International Commercial Arbitration at the Ukrainian Chamber of Commerce and Trade.

In examining each Article 79 case in the relevant jurisdiction, an attempt is made to determine the extent to which the court or arbitral panel correctly interpreted Article 79 in light of the CISG's mandate to promote uniformity in the area of international sales law. This approach is based on the assumption that an analysis of the case law is able to spot variations and discrepancies in judgments that consider Article 79, particularly in those decisions that deviate markedly from the interpretive standard imposed under CISG Article 7. In this manner, differences in the details and nuances in a wide range of case law concerning excuses for non-performance can be discerned. In addition, any interpretive errors are uncovered by utilizing this approach. The result is research that more accurately reflects the understanding and treatment of excuses for non-performance in CISG jurisprudence, particularly within the context of the national legal systems of each jurisdiction covered in this study.

Similarly, a comparative law approach is an important tool of interpretation, particularly those that involve questions of uniformity. By liberating the researcher from the narrow confines of a single legal system, it helps to discern universally accepted legal principles and transcendent values concerning the law.

This study also involves questions of statutory interpretation and contract theory within the context of the internationalization of sales law. However, statutory

interpretation and contract theory are not discussed in detail. In addition, domestic legal practices are analyzed only to the extent that they assist in the understanding of the development of Article 79 as an autonomous, international norm. The competing interests of various groups, factions, and states in the drafting of the CISG are also addressed. In addition, attention is given to determining whether any of the case law tends to favour or protect certain jurisdictions or industrial sectors.

In the thirty years since the adoption of the CISG, there has developed a critical mass of case law, which provides the basis for this dissertation. However, it would be impractical to study the entire body of CISG jurisprudence within the confines of a single study. With over 2,500 cases reported worldwide on the CISG (plus 10,000 case annotations),<sup>199</sup> a review of all CISG jurisprudence would only point to broad trends and general conclusions. Similarly, it would also be impractical to study in-depth each one of the Convention's 101 articles. Such a task would fail to uncover the nuances and detail important to a focused scholarly inquiry concerned with autonomy and uniformity in the application of an international sales convention.

To arrive at a better understanding of the development of CISG case law, this dissertation will concentrate only on court and arbitral cases concerning a single CISG article involving excuses for non-performance, Article 79. Thus, the research method includes the utilization of primary sources covering a rich body of Article 79 case law. Many of these cases have become available in the last few years. Until recently, only a few cases on Article 79 could be located. For example, in his 1997 article on contractual

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<sup>199</sup> As of September 4, 2012, according to the Pace Law School CISG Database. See <<http://www.cisg.law.pace.edu/cisg/text/caseschedule.html>>.

excuses in the Convention, Todd Weitzmann discusses only one Article 79 case.<sup>200</sup> Scott D. Slater, writing in the following year, notes, “[a]n exhaustive review of international case law unearthed only two [Article 79] cases worth considering”.<sup>201</sup> Similarly, Joern Rimke found that “[v]ery little case law on Article 79 exists,” mentioning only three cases.<sup>202</sup> It appears, however, that cases on Article 79 have existed as far back as 1989.<sup>203</sup> Until more recently, most CISG cases remained unreported, and were thus, unknown to most legal researchers. Of the cases that were known, translations—particularly from the German, Russian, and Chinese languages—into English were lacking. Fortunately, in the last few years there has been a veritable flood of case law on Article 79.

This accomplishment is largely due to the efforts of the joint Pace Law School and Queen Mary Case Translation Programme,<sup>204</sup> which has added a large body of previously unreported or inaccessible CISG cases to the Pace Law School CISG databank. Through the efforts of an international network of volunteers, most (but not all) of the foreign language cases have been translated into English. As of June 10, 2010, the Pace Law School CISG Database reported 128 separate Article 79 cases<sup>205</sup> from a

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<sup>200</sup> Todd Weitzmann, “Validity and Excuse in the U.N. Sales Convention” (1997) 16 J. L. & Com. 265 at 286-289.

<sup>201</sup> Scott D. Slater, “Overcome by Hardship: The Inapplicability of the UNIDROIT Principles’ Hardship Provisions to CISG” (1998) 12 Fla. J. Int’l L. 231 at 255.

<sup>202</sup> Joern Rimke, “Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts,” in Pace Int’l L. Rev. (ed.), *Pace Review of the Convention on Contracts for the International Sale of Goods (1999-2000)*, (New York: Kluwer Law International, 2000) 197 at 225.

<sup>203</sup> According to the Pace Law School CISG Database at <http://www.cisg.law.pace.edu/cisg/text/queenmary.html>

<sup>204</sup> According to the Pace Law School CISG Database, *ibid*.

<sup>205</sup> For a list of these cases see the Table of Authorities, *infra*. The list of 128 cases has been consolidated. That is, the search on the Pace Law School CISG Database originally listed 136 Article 79 cases, however, some of these were duplicate cases or related proceedings and appeals (e.g., trial level cases listed separately from the appeal case). One case, *Macromex Srl. v. Globex International, Inc.*, began as an arbitral proceeding at the American Arbitration Association, but the award was subsequently appealed to

variety of signatory states and international arbitral panels.<sup>206</sup> Of these, 28 cases are cross-referenced to the UNCITRAL *Digest* on Article 79.<sup>207</sup> The UNCITRAL collection

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the Federal District Court, and then the Circuit Court of Appeals. This case has been listed, not as an arbitral case, but as one under the domestic courts of the U.S. See *Macromex Srl. v. Globex International Inc.* at the Pace Law School CISG Database at <<http://cisgw3.law.pace.edu/cases/071023a5.html>>.

<sup>206</sup> According to the Pace CISG website at <http://www.cisg.law.pace.edu/cisg/text/anno-art-79.html>.

<sup>207</sup> *Supra* note 44 at 251-261. The UNCITRAL *Digest* on Article 79 actually lists 29 cases. However, one of those cases (the Vine wax case from Germany) contains a duplicate proceeding, i.e. separate listing of the lower level court decisions.

The UNCITRAL *Digest* cases are: *Vital Berry Marketing v. Dira-Frost*, Rechtbank van Koophandel [District Court] Hasselt 2 May 1995, A.R. 1849/94, 4205/94 (Belgium), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950502b1.html>>; Bulgaria Chamber of Commerce Arbitration Award, 12 February 1998, Case 11/1996 [*Steel ropes case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980212bu.html>>; Bulgaria Chamber of Commerce Arbitration Award, 24 April 1996, Case 56/1995 [*Coal case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960424bu.html>>; Cour d'appel [CA] Colmar, 12 June 2001, *Société Romay AG v. SARL Behr* (France), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/010612f1.html>>; Tribunal de commercial [Trib. com.] Besançon, 19 January 1998, *Flippe Christian v. Douet Sport Collections* (France), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980119f1.html>>; Oberlandesgericht [OLG] [Appellate Court] Zweibrücken, 2 February 2004, 7 U 4/03 (Germany) [*Milling equipment case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040202g1.html>>; Bundesgerichtshof [BGH] [Federal Supreme Court], 9 January 2002, VIII ZR 304/00 (Germany) [*Powdered milk case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020109g1.html>>; Bundesgerichtshof [BGH] [Federal Supreme Court], 24 March 1999, VIII ZR 121/98 (Germany) [*Vine wax case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/990324g1.html>>; Oberlandesgericht [OLG] [Appellate Court] Hamburg, 4 July 1997, 1 U 143/95 and 410 O 21/95 (Germany) [*Tomato concentrate case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970704g1.html>>; Oberlandesgericht [OLG] [Appellate Court] Hamburg, 28 February 1997, 1 U 167/95 (Germany) [*Iron molybdenum case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970228g1.html>>; Hamburg Arbitration Award, 21 March 1996 (Germany) [*Chinese goods case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960321g1.html>>; Landgericht [LG] [District Court] Ellwangen, 21 August 1995, 1 KfH O 32/95 (Germany) [*Spanish paprika case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950821g2.html>>; Amtsgericht [AG] [Lower Court] Alsfeld, 12 May 1995, 31 C 534/94 (Germany) [*Flagstone tiles case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950512g1.html>>; Landgericht [LG] [District Court] Berlin, 15 September 1994, 52 S 247/94 (Germany) [*Shoes case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950512g1.html>>; Landgericht [LG] [District Court] Aachen, 14 May 1993, 43 O 136/92 (Germany) [*Electronic hearing aid case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/930514g1.html>>; Budapest Arbitration Award, 10 December 1996, Vb 96074 (Hungary) [*Caviar case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/961210h1.html>>; ICC Court of Arbitration, 1995, Case 8128 [*Chemical fertilizer case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/958128i1.html>>; ICC Court of Arbitration, 1992, Case 7197 [*Failure to open letter of credit and penalty clause case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/927197i1.html>>; ICC Court of Arbitration, 28 August 1989, Case 6281 [*Steel bars case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/896281i1.html>>; Tribunale [District Court] Vigevano, 12 July 2000 n.

of case law contains far fewer cases on Article 79 than does the Pace Law School CISG database, but its advantage is that the UNCITRAL *Digest* also omits cases that refer to Article 79 in an insignificant way. While some of the cases from the Pace CISG databank touch on Article 79 in a peripheral manner, and a small number of these cases remain un-translated, such a large body of case law yields invaluable information about the treatment of Article 79 from a cross-section of signatory states and international tribunals. Indeed, there now exists a critical mass of interpretive jurisprudence on Article 79. As an online service that is frequently updated, the Pace CISG databank remains very current. The number of reported Article 79 cases on the Pace CISG databank, with a jurisdictional break-down of public court cases and arbitrations, is as follows:

Figure 1	
<b>Article 79 Court and Arbitral Cases</b> <sup>208</sup>	

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405 (*Rheinland Versicherungen v. Atlarex*) (Italy), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/000712i3.html>>; Tribunale [District Court] Pavia, 29 December 1999 (*Tessile v. Ixela*) (Italy), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/991229i3.html>>; Tribunale [District Court] Monza, 14 January 1993 n. R.G. 4267/88 (*Nuova Fucinati v. Fondmetall International*) (Italy), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/930114i3.html>>; *Malaysia Dairy Industries v. Dairex Holland*, Arrondissementsrechtbank [Rb] [District Court] 's-Hertogenbosch, 2 October 1998 (Netherlands), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/981002n1.html>>; High Arbitration Court of the Russian Federation, 16 February 1998, [Information Letter No. 29] [*Onions case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980216r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 22 January 1997, Award 155/1996 [*Butter case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970122r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 17 October 1995, Award 123/1992 [*Automatic diffractometer equipment case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/951017r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 16 March 1995, Award 155/1994 [*Metallic sodium case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950316r1.html>>; Handelsgericht [HG] [Commercial Court] Zürich, 10 February 1999, HG 970238.1 (Switzerland) [*Art books case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/990210s1.html>>.

<sup>208</sup> According to an entire search of the Pace CISG databank (as of June 10, 2010).

<b>Court Cases</b>	<b>Number</b>
Austria	5
Belgium	3
China	1
Finland	2
France	3
Germany	18
Greece	2
Hungary	1
Israel	1
Italy	4
Netherlands	4
Russia	1
Slovak Republic	2
Spain	1
Switzerland	9
United States of America	4
<b>Court Cases Sub-Total</b>	<b>61</b>
<b>Arbitral Cases</b>	<b>Number</b>
Bulgaria – Arbitration	3
China – Arbitration	26
Germany – Arbitration	1
Hungary – Arbitration	2
ICC – International Court of Arbitration	9
Russia – Arbitration	25
Ukraine – Arbitration	1
<b>Arbitral Cases Sub-Total</b>	<b>67</b>
<b>Total</b>	<b>128</b>

In certain jurisdictions, commercial disputes involving the CISG are arbitrated rather than litigated in public courts. While there are numerous reasons why parties might choose arbitration over litigation, in some countries, such as China, Bulgaria, and Russia, commercial disputants are prevented from adjudicating their claims in public courts. Thus, arbitration is the only option. In addition, as access to the court system is blocked in these jurisdictions, the treatment of Article 79 needs to be assessed against

competing domestic laws on *force majeure* and similar legal concepts. In this way, whether through the courts or arbitrations, an assessment can be made of the extent to which a particular legal systems' legal culture either supports or impedes international uniformity in the approach to the interpretation of Article 79. For these reasons, Figure 2 (below) illustrates the combined Article 79 public court and arbitral cases from the same jurisdiction (to the extent possible<sup>209</sup>).

Figure 2			
Article 79 Court and Arbitral Cases <sup>210</sup>			
	Court Cases	Arbitral Cases	Totals
Austria	5		5
Belgium	3		3
Bulgaria		3	3
China	26	1	27
Finland	2		2
France	3		3
Germany	18	1	19
Greece	2		2
Hungary	1	2	3
ICC – International Court of Arbitration		9	9
Israel	1		1
Italy	4		4
Netherlands	4		4
Russia	25	1	26
Slovak Republic	2		2
Spain	1		1
Switzerland	9		9
Ukraine		1	1
United States of America	4		4
<b>Court and Arbitral Cases Totals</b>	<b>61</b>	<b>67</b>	<b>128</b>

<sup>209</sup> For obvious reasons, cases from the International Chamber of Commerce's International Court of Arbitration are not assigned to specific jurisdictions.

<sup>210</sup> According to an entire search of the Pace CISG databank (as of June 10, 2010).

As Figure 2 illustrates, the number of arbitrations (at 67) slightly outnumber the number of court cases (at 61) involving Article 79 issues. Furthermore, China, Russia, and Germany are the most prolific Article 79 adjudicating jurisdictions (with 27, 26, and 19 cases respectively). Also of note is that these countries are civil law jurisdictions. By contrast, only one common law jurisdiction, the United States, reports any case law on Article 79. Considering its status as one of the world's largest trading nations, the number of Article 79 cases from that country, at four, appears to be relatively low.

It is to be noted that there are no reported cases on Article 79 in Canada, even though the country is one of the world's most active traders in goods.<sup>211</sup> Indeed, the lack of Canadian jurisprudence on the CISG generally has been the subject of much commentary among academics<sup>212</sup> and legal practitioners.<sup>213</sup> Anecdotal evidence also suggests that it is often excluded by contracting commercial parties located in common law states.<sup>214</sup> As noted above,<sup>215</sup> research has thus far indicated that Canadian courts have been insensitive to the interpretative methodology embedded within the CISG.<sup>216</sup> They have typically invoked domestic legal concepts and case law when interpreting the

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<sup>211</sup> World Trade Organization, *International Trade Statistics 2009* (Geneva: World Trade Organization, 2009) at 12. According to the World Trade Organization, *ibid.*, for the year 2008, Canada holds eleventh place as the world's importer and exporter of merchandise, accounting for 5.3 percent of global trade in goods.

<sup>212</sup> See e.g. Mazzacano, "Canadian Jurisprudence" and "Brown & Root", *supra* note 18.

<sup>213</sup> At a recent Ontario Bar Association-International Law Section conference "Convention on Contracts of the International Sale of Goods (CISG)" a number of lawyers expressed a reluctance to incorporate the CISG into their clients' contracts. See James Klotz, Peter J. Mazzacano, and Antonin I. Pribetic, "Convention on Contracts of the International Sale of Goods (CISG)" (Toronto: International Law Section, Ontario Bar Association Conference, 10 March, 2009).

<sup>214</sup> *Ibid.*

<sup>215</sup> See e.g. Mazzacano, "Canadian Jurisprudence" and "Brown & Root", *supra* note 18.

<sup>216</sup> Under CISG Article 7(1).

Convention. Unfortunately, a more recent case study confirmed this same approach.<sup>217</sup> This apathy towards the CISG is not limited to Canadian courts. In terms of the broader effect of the CISG on the Canadian legal profession, John McEnvoy recently concluded that “the record of court and administrative tribunal decisions during the fifteen year period (1992-2007) does not reflect a significant CISG impact in Canadian legal practice”.<sup>218</sup> At the international level, this parochial approach contributes to conflicting and diverging interpretations of the Convention’s rules and presents a challenge to the quest to develop relative uniformity in international sales law.

The CISG received a similarly indifferent response in the United States. This may assist in explaining why there are only four reported American Article 79 cases on the Pace Law School CISG website. This lack of case law is all the more striking considering that the United States is the world’s largest trader of goods, accounting for over 21 percent of merchandise imports and exports in 2008.<sup>219</sup> By way of comparison, Germany is the world’s second largest trader in goods, and there are 19 reported Article 79 cases from that country on the Pace website.<sup>220</sup> Similarly, the Pace website records that China heard 27 cases to date on Article 79, while the country placed third as a leading trader of world goods.<sup>221</sup> Thus, although there seems to be a correlation between the extent of trade in goods and litigation or arbitration in cross-border trade, Canada and

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<sup>217</sup> James M. Klotz, Peter Mazzacano & Antonin I. Pribetic, “All Quiet on the CISG Front: *Guiliani v. Invar Manufacturing*, the Battle of the Forms, and the Elusive Concept of *Terminus Fixus*”, Case Comment, (2008) 46 Can. Bus. L.J. 430 [“Guiliani”].

<sup>218</sup> John P. McEvoy, “Canada” in Franco Ferrari, ed., *The CISG and its Impact on National Legal Systems* (Munich: Sellier European Law Publishers, 2008) at 33-70.

<sup>219</sup> World Trade Organization, *supra*, note 211 at 12. The U.S. accounted for 8 percent of world merchandise exports and 13.2 percent of imports.

<sup>220</sup> *Ibid.* Germany is responsible for 16.4 percent of the world’s imports and exports.

<sup>221</sup> *Ibid.* China accounts for 15.8 percent of the world’s imports and exports.

the United States appear to be exceptions to this trend—at least in cases involving CISG Article 79. However, as this study will indicate, the unfortunate state of affairs for the CISG in Canada and the U.S. does not appear to be shared in many other signatory states.

As this dissertation reveals, most of the courts and arbitral panels that have had an opportunity to interpret Article 79 have generally been sensitive to the provision as an autonomous, neutral international standard and norm that is different to related domestic legal doctrines. Of course, there are some exceptions: some courts and arbitral panels have resorted to domestic legal concepts when they should have conducted their legal analysis under the exclusive purview of the CISG and Article 79. In other words, the homeward trend is discernable in some of the Article 79 cases. However, although the record is not perfect, most courts, especially those in civil law countries, have paid heed to the interpretive mandate of CISG Article 7, and have treated Article 79 as being more comprehensive in scope than similar concepts in national laws.

Based on this analysis, which is admittedly not comprehensive, it appears that the courts of certain countries, particularly the common law jurisdiction of the United States, remains acutely attuned to its own legal tradition and eschews unification efforts. By contrast, civil law jurisdictions, particularly those of continental Europe, are seemingly more receptive to uniform laws, such as the CISG. What accounts for this difference? Why does it appear that the civilian legal tradition is more attuned to the nuances and intricacies of the CISG? This dissertation will suggest a number of answers.

Based on the analysis of case law and arbitral decisions, the evidence suggests that CISG jurisprudence from civil law countries is in harmony with the interpretive

mandate of the Convention to promote uniformity in its application, and pay heed to its international character. By contrast, common law countries, particularly the United States and Canada, appear to have demonstrated a reluctance to embrace the CISG's international character, and have tended to treat it as an interloper.<sup>222</sup> In its place, domestic sales law is preferred, even though it is ill-equipped for international transactions. As a result, the development of sophisticated CISG case law and scholarly writings in common law jurisdictions has paled in comparison to the growth of CISG jurisprudence in civilian states.

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<sup>222</sup> This trend has been documented by Mazzacano, "Canadian Jurisprudence" and "Brown & Root" *supra* note 18. See also Klotz, Mazzacano & Pribetic, "Guiliani" *supra* note 217.

## CHAPTER TWO

## BACKGROUND TO THE CISG

A. *The Ancient Lex Mercatoria as Autonomous Law*

For the last millennium, the European merchant class has been interested in engaging in business transactions across jurisdictions with relative autonomy outside the confines of local state authority.<sup>223</sup> With this interest—at times a preoccupation—European merchants essentially rejected the political and legal authority of individuals or institutions that were not members of this class. In essence, these merchants believed that only members from their own class had the authority to make and enforce the rules that governed their lives. The principle of legal autonomy eventually evolved into a body of rules, known as the *lex mercatoria* or the Law Merchant. At the core of the *lex mercatoria* is a set of autonomous commercial customs, which materialize in the form of trade usages and practices.

The term *lex mercatoria* has been described as “a uniform system of law to regulate international commercial transactions, avoiding the vagaries of differing national systems”.<sup>224</sup> As Julian Lew notes, “[t]his system of law [the *lex mercatoria*] comprises the rules which have been developed to regulate and facilitate international trade relations

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<sup>223</sup> See generally A. Claire Cutler, *Private Power and Global Authority* (Cambridge: Cambridge University Press, 2003) at 104-107.

<sup>224</sup> Alan Redfern & Martin Hunter, *Law & Practice of International Commercial Arbitration*, 2<sup>nd</sup> ed., (London: Sweet & Maxwell, 1991) at 117.

and the customs and practices which have attained universal (or at least very extensive) recognition in international trade”.<sup>225</sup>

Thus, the quest for predictability and uniformity in the rules of international trade is not a modern phenomenon. Indeed, the roots of the CISG can be traced back more than 900 years to the beginning of the eleventh century when medieval Europe experienced a commercial resurgence that required a need for a special law to govern its commercial activities.<sup>226</sup> The earliest known version, entitled *Lex Mercatoria*, has been dated *circa* 1280.<sup>227</sup> This legal code is inextricably tied to the marketplace. The law itself appears to be a creation of the market, as the first sentence in the treatise notes: “Mercantile law is thought to come from the market, and thus we first need to know where markets are held from which such laws derive”.<sup>228</sup> From this statement is the notion that mercantile law evolved from the merchant community, and by extension it is independent of local law and authority. However, it is not made explicit in the English medieval record until the fifteenth century that the *lex mercatoria* is considered to be positive law in the international community.

A 1473 case involving the seizure of goods from a foreign merchant records the notion that the *lex mercatoria* is transnational in its application.<sup>229</sup> The Chancellor of the

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<sup>225</sup> Julian D.M. Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry, N.Y.: Oceana Publications, 1978) at 436.

<sup>226</sup> See Errol P. Mendes, “The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World’s Largest Trading Bloc to Do Business Under a Global Sales Law” (1988) 8 J.L. & Com. 109 available at <http://cisgw3.law.pace.edu/cisg/biblio/mendes.html>.

<sup>227</sup> Mary Elizabeth Basile *et al.*, eds. & trans., *Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and its Afterlife* (Cambridge: The Ames Foundation, 1998) at 107. This treatise, written in Latin, formed part of a collection of material compiled by William de Colford, the recorder of Bristol in the 1340s. It is sometimes also referred to as *The Little Red Book of Bristol*.

<sup>228</sup> *Ibid.* at Ch. 1, p. 1.

<sup>229</sup> *Ibid.* at 128.

Star Chamber asserted that foreign merchants must not be judged according to English law, but rather according to “the law of nature which by some is called the law merchant, which is law universal throughout the world”.<sup>230</sup> Gerard Malynes, writing in 1622, traces the existence of uniform merchant customs back to ancient Greek and biblical times, “[s]o that it plainly appeareth, that the Law Merchant, may well be as ancient as any humane Law, and more ancient than any written Law”.<sup>231</sup> Its precursor may have also been the Sea Law of Rhodes<sup>232</sup> from ancient Greece, and the Roman *jus gentium*, which was the body of law that governed trade between foreigners and Roman citizens.<sup>233</sup> Eventually, the *jus gentium* proved to be so universal in its application that Gaius and Justinian could speak of it as “the common law of mankind” and “the law in use among all nations”.<sup>234</sup> However, even in Malynes’ time, the *lex mercatoria* had gained such a foothold in the commercial routes of Europe and the Mediterranean that he could declare, “[f]or albeit that the government of the said kingdoms and common-weales doth differ one from another: [...] In the making of lawes and ordinances for their owne government [...] yet the *Law-Merchant* hath always beene found *semper eadem*, that is, constant and permanent without abrogation, according to her most auncient customes, concurring with

<sup>230</sup> *Ibid.* at 128-129. The case is *Anon. v. Sheriff of London* (The Carrier’s Case), YB Eas. 13 Edw. 4, fol. 9, pl. 5, in *Exchequer Chamber Cases*, 2:32.

<sup>231</sup> Gerard Malynes, *The Merchant’s Almanac of 1622 or Lex Mercatoria, the Ancient Law-Merchant* (Metheglin Press ed., 1996) (1622). Malynes provides numerous references to ancient commercial laws and customs as being uniform among all trading states, from the time of Solon in ancient Greece to the publication of his *Lex Mercatoria*. He also refers to the trade endeavors of Jacob, Joseph, and Moses, as well as Minos, Lycurgus, Phalcas, and others.

<sup>232</sup> Cutler, *supra* note 223 at 113.

<sup>233</sup> Ana Mercedes Lopez Rodriguez, *Lex Mercatoria*, RETTID (2002) 46 available at <http://www.rettid.dk/artikler/20020046>.

<sup>234</sup> Andrew Stephenson, *A History of Roman Law* (Boston: Little, Brown, & Co., 1912) at 197.

the law of nations in all countries”.<sup>235</sup> Indeed, one of Malynes’ themes throughout his work is that ancient customs grew into an autonomous and unique body of transnational law, and this law deals most effectively with merchants’ disputes.

With the Middle Ages came the rise of independent city-states, flourishing seaports, town markets, and boroughs that led to the flow of goods across new national borders.<sup>236</sup> The merchants not only brought goods across borders; they also transported their unique customs and practices into foreign markets. The impetus to create or crystallize rules for merchants came from a “desire to overcome the fragmentary and obsolete rules of feudal and Roman law”, which were unsuited to the needs of international commerce.<sup>237</sup> Thus, trading centers began to “reduce local practices into regulatory codes” and the laws of particular towns eventually “grew into dominant codes of custom” with an international flavor.<sup>238</sup> Stimulated by the maritime trade of burgeoning seaport towns throughout Europe, the *lex mercatoria* soon acquired its “cosmopolitan character and reflected [a retreat] from local law to a universal system of law” that transcended sovereigns and national boundaries.<sup>239</sup> The end result was autonomy, or a new legal order, free from burdensome local laws and local legislators.<sup>240</sup> In other words, the *lex mercatoria* became not only an autonomous body of commercial law, but also the embodiment of commercial practices as reflected in merchant customs.

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<sup>235</sup> Malynes, *supra* note 58 at 5 (grammar, spelling, and italics in the original).

<sup>236</sup> Mendes, *supra* note 53.

<sup>237</sup> Rodriguez, *supra* note 60.

<sup>238</sup> Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?* at <http://www.cisg.law.pace.edu/cisg/biblio/baron.html>.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

A unique feature of the *lex mercatoria* was that it incorporated the customs of commerce, trade fairs, markets, and maritime customs relating to trade into a single law.<sup>241</sup> It also had additional features, some of which were not unlike the principles adopted by its modern incarnation, the CISG: it was a transnational law; cross-border disputes could be administered by the market tribunals of various trade centers, rather than by professional judges and state courts; justice was quick and informal; and the law stressed equity and fairness, hence, some decisions were made on the basis of *ex aequo et bono*.<sup>242</sup> The principle of *pacta sunt servanda* also became the cornerstone of the *lex mercatoria*.<sup>243</sup> These features speak in favour of the importance of norms and values regarding merchant conduct in trade, and override the importance of adherence to a rigid code of state-made law to govern international sales transactions.

The *lex mercatoria* governed international commerce for an extremely long period, until the early seventeenth century. At this point the autonomous mercantile courts began to decline in relative importance and the *lex mercatoria* began to merge with common law.<sup>244</sup> The reason for this wane is attributed to the rising influence of nationalism and the quest for state sovereignty.<sup>245</sup> The pace accelerated under the influence of Sir Edward Coke, who initiated a comprehensive common law for England and the British Empire.<sup>246</sup> “During this period, the common law courts were given the

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<sup>241</sup> Louise Hertwig Hayes, “A Modern Lex Mercatoria: Political Rhetoric or Substantive Progress?” (1976-1977) 3 *Brook. J. Int’l L.* 210 at 212-214.

<sup>242</sup> Baron, *supra* note 64.

<sup>243</sup> “I.C.C. Award No. 3383 (1979)”, *Yb. Comm. Arb.*, 1982, 119 at 129; “I.C.C. Award No. 5485 (1987)”, *Yb. Comm. Arb.*, 1989, 156 at 168.

<sup>244</sup> Baron, *supra* note 64.

<sup>245</sup> See e.g. Rodriguez, *supra* note 60 at 46-47.

<sup>246</sup> Mendes, *supra* note 53.

power to override any decision[s] in the mercantile courts”.<sup>247</sup> Thus, in the case of a dispute, merchants would initiate an action with the common law courts and bypass the mercantile courts altogether. Eventually, the mercantile courts became superfluous and fell into disuse. Those that remained were ultimately abolished by national laws.<sup>248</sup>

“The customs and usages of the merchants, while still relevant, were deemed not binding in the common law courts”.<sup>249</sup> Instead, “they were treated as ordinary questions of fact, which had to be proved [in each] case to the satisfaction of twelve [civilian] jurors”.<sup>250</sup> With the blending of the *lex mercatoria* with the peculiarities of national law, the former began to lose much of its uniform and cosmopolitan character. It likely would have faded into oblivion had it not been recognized in the mid-eighteenth century by Lord Mansfield, the Chief Justice of the King’s Bench. In the famous case of *Pillans v. Mierop*,<sup>251</sup> Mansfield held that the rules of the *lex mercatoria* were questions of law to be decided by the courts, not issues of fact to be proved by the disputing parties.<sup>252</sup> With this ruling, the *lex mercatoria* became “an integral part of the common law”.<sup>253</sup>

The nationalization of mercantile law, including international sales law, occurred in the nineteenth century. During this period, states began to codify commercial common law rules into national legislation. They decided to take full control over international trade and developed new laws to regulate all aspects of economic relations between

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<sup>247</sup> *Ibid.*

<sup>248</sup> See *ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*

<sup>251</sup> *Pillans v. Mierop*, 3 Burr. 1663, 97 E.R. 1035 (1765).

<sup>252</sup> Baron, *supra* note 64.

<sup>253</sup> *Ibid.*

commercial parties.<sup>254</sup> Furthermore, disputes between domestic and foreign parties were to be resolved in state courts by referring to private international law.<sup>255</sup> The emergence of these national laws, and the exclusive state court jurisdiction over commercial disputes, marked the demise of the ancient *lex mercatoria*. By the end of this era, it had dissolved into an array of domestic legal regimes. With nationalization and codification, a universal, developing, cosmopolitan, commercial law ceased to exist.<sup>256</sup>

But by the 1900s, there were already signs that the international trade community felt unduly restricted by the array of national legal systems governing their cross-border transactions. As W. Mitchell remarks, “whenever the private law is splintered into many jurisdictional fragments, the need for uniformity shows up most strongly in the field of commercial law”.<sup>257</sup> The complexity of the rules of private international law, and the obsolete character of domestic laws, failed to satisfy the business community’s need for simplicity and predictability in cross-border trade. In particular, conflict of law rules often produced results that appeared arbitrary and impractical. It also became recognized that national laws were primarily enacted to govern domestic transactions and often failed to address the unique requirements of international transactions.<sup>258</sup> The end result was the impairment of global trade. As Lord Justice Kennedy wrote in 1909:

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<sup>254</sup> Imtyaz M. Sattar, “The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention: Competing or Completing ‘Lex Mercatoria’?”, (1999) 4 Int’l Trade & Bus. L. Ann. 13 at 14.

<sup>255</sup> Friedrich K. Juenger, “The Lex Mercatoria and Private International Law”, (2000) 60 La. L. Rev. 1133 at 1136.

<sup>256</sup> Baron, *supra* note 64.

<sup>257</sup> Mendes, *supra* note 53, citing W. Mitchell, *Essay on the Early History of the Law Merchant* (1st ed. 1969) at 90.

<sup>258</sup> See e.g. Rodriguez, *supra* note 60 at 51.

The certainty of enormous gain to civilised [sic] mankind from the unification of law needs no exposition. Conceive the security and the peace of mind of the shipowner [sic], the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable property, and of civil wrongs is practically identical with that of his own country.<sup>259</sup>

States soon became aware of the negative impact on international commerce by a world divided into so many legal systems. Non-governmental institutions, such as the International Chamber of Commerce (“ICC”) and its International Court of Arbitration were established to address some of the flaws inherent in the national regulation of global commerce.<sup>260</sup> In 1926, the International Institute for the Unification of Private Law (“UNIDROIT”), an independent intergovernmental organization, was also founded as an auxiliary organ of the League of Nations. Its objective was to find methods for modernizing and harmonizing private international law between states or groups of states.<sup>261</sup> Following the demise of the League of Nations, UNIDROIT was re-established in 1940 and continues to work towards preparation of modern, harmonized uniform rules of private law.<sup>262</sup>

#### *B. The Modern Lex Mercatoria*

The establishment of the ICC and UNIDROIT reflected the renewed interest in—and rediscovery of—the historical, cosmopolitan character of commercial law and the desire on the part of international merchants to free themselves from the restrictions of

<sup>259</sup> Lord Justice Kennedy, “The Unification of Law”, (1909) 10 J. Soc’y of Comp. Legis. 21, 214-15 reprinted in Kastely, *supra* note 38.

<sup>260</sup> International Chamber of Commerce, *Merchants of Peace, The ICC Story* available at <http://www.iccwbo.org/id6167/index.html>.

<sup>261</sup> International Institute for the Unification of Private Law (UNIDROIT), *About UNIDROIT*, <http://www.unidroit.org/english/presentation/main.htm>.

<sup>262</sup> *See ibid.*

national law.<sup>263</sup> States began to address this dissatisfaction by introducing international conventions and model laws in the effort to harmonize private international law across borders.<sup>264</sup> Considering the various economic, social, political, and legal systems of numerous participating states, the process was—and continues to be—difficult and time-consuming. However, considerable progress has been made, especially in the fields of arbitration, factoring, leasing, letters of credit, sale of goods, and contracts. In the 1960s, academics also began to question the effectiveness of national law in international transactions, and they also noted the revitalization of the *lex mercatoria*.<sup>265</sup>

As Ana Rodriguez notes, “[j]ust as the medieval merchants overcame feudal law, present time traders were adopting alternative solutions to avoid the application of national law to their transactions”.<sup>266</sup> With the use of standardized contract clauses, self-governing contracts, trade term usages, and recourse to international commercial arbitration, merchants began to introduce their own regulatory regime, which operated autonomously, as an addendum of national law.<sup>267</sup> Indeed, some academics have suggested that the new law merchant is simply de-nationalized law.<sup>268</sup> This development

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<sup>263</sup> Mendes, *supra* note 53.

<sup>264</sup> See *ibid.*

<sup>265</sup> Rodriguez, *supra* note 60 at 47.

<sup>266</sup> *Ibid.*

<sup>267</sup> See *ibid.*

<sup>268</sup> See e.g. Barton S. Selden, “*Lex Mercatoria* in European and U.S. Trade Practice: Time to Take a Closer Look” (1995) 2 Ann. Surv. Int’l & Comp. L. 111. Barton provides an interesting contemporary example of de-nationalized (or internationalized) law. He notes a remarkable clause in the agreement to construct the English Channel Tunnel between Eurotunnel (the owner and operator) and Transmanche Link (the group of English and French construction companies). The clause provides that the agreement shall “be governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals”. Selden, *ibid.* at 116.

has since become known as the new *lex mercatoria*.<sup>269</sup> It is within the context of this dissatisfaction with national legal regimes, and the renaissance of the *lex mercatoria*, that the CISG came into being.<sup>270</sup>

### C. *The History of the CISG*

The CISG was established, in part, due to a dissatisfaction with national legal regimes and a resurgence of the *lex mercatoria*.<sup>271</sup> However, the CISG was not the first modern attempt to codify a uniform international sales law. In the 1930s, a group of European scholars, led by the Austrian scholar Ernst Rabel, met to work towards the unification of international sales law under the auspices of UNIDROIT.<sup>272</sup> Rabel laid the foundation of this initiative through his treatise *Das Recht des Warenkaufs* (Vol. 1, 1936). Work on this initiative was suspended, with the outbreak of World War II, until 1951. With the support of 21 nations, UNIDROIT eventually produced two draft conventions, the final versions of which were adopted by a diplomatic conference at The Hague in 1964.<sup>273</sup> These were the *Uniform Law on the International Sale of Goods* (“ULIS”)<sup>274</sup> and the *Uniform Law on the Formation of Contracts for the International Sale of Goods*

<sup>269</sup> On the new *lex mercatoria* see note 18, *supra*.

<sup>270</sup> John Felemegas, “The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation”, (2001-2002) *Pace Rev. of CISG* 115, 130-140. See also Bernardo M. Cremades & Steven L. Plehn, “The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions” (1983-1984) *B.U. Int’l L.J.* 317 at 319-323.

<sup>271</sup> John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, *PACE REV. OF CISG* 115, 130-140 (2000-2001). See also Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, *B.U. INT’L L.J.* (1983-1984) 317, at 319-323.

<sup>272</sup> See Mendes, *supra* note 31.

<sup>273</sup> See *Ibid.*

<sup>274</sup> Convention Relating to a Uniform Law on the International Sale of Goods, 834 U.N.T.S 107 (July 1, 1964).

(“ULF”).<sup>275</sup> ULIS and ULF became the first modern attempts to eliminate the problems stemming from variations in national laws, particularly those rules relating to the sale of goods and conflicts of laws rules.<sup>276</sup> Despite this admirable objective, neither of these two conventions received widespread acceptance. The common complaint with ULIS and ULF is that they reflected the parochial legal and social traditions of the Western European countries that were primarily responsible for their creation.<sup>277</sup> Without the input from nations worldwide, and participation from states with divergent social and legal systems, a universal contract and sale of goods convention would never receive extensive support from the international commercial community.

Credit for the drive to create a truly international version of ULIS and ULF may be given to the state of Hungary at the United Nations. While work on ULIS and ULF was being completed by UNIDROIT, the Hungarian Delegation proposed to the Nineteenth Session of the UN General Assembly the following: “consideration of steps to be taken for progressive development in the field of private international law with a particular view toward promoting international trade.”<sup>278</sup> The Hungarians were concerned that the conflicts inherent in private international law, arising from divergent national legal systems—and the resulting uncertainties and complications—were creating barriers to the development of global trade.<sup>279</sup> They spoke convincingly, and at length, in

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<sup>275</sup> Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 U.N.T.S 169 (July 1, 1964).

<sup>276</sup> Felemegas, *supra* note 70, at 140.

<sup>277</sup> See Mendes, *supra* note 31.

<sup>278</sup> UNCITRAL, Report on the First Session, *reprinted in* U.N. COMM. INT’L TRADE L., at 5-12, U.N. Doc. A/CN.9/SER.A/1970 (1971); *see also* Mendes, *supra* note 31.

<sup>279</sup> In the words of the Hungarian Delegation: “[t]he diversity of the rules of private international law applied by different States is a disturbing element, which leads to ‘limping marriages,’ to mutually

support of their argument. At one point, they quoted a passage from a 1962 colloquium on the law of international trade, held in London, which summarized their position:

[T]he main defect which this examination of the sources of the law of international trade has revealed is the lack of purposeful co-operation between the formulating international agencies [...] [T]he law of international trade, by its nature, is universal and for that reason, a progressive liaison and co-operation between the formulating agencies should be the next step in the development of an autonomous law of international trade.<sup>280</sup>

The UN decided to take up the matter and the Secretary-General approved the production of a preliminary study based on the Hungarian recommendation.<sup>281</sup>

Considering the concurrent work of UNIDROIT and other bodies, the preliminary study acknowledged that there were inefficiencies with the duplication of unification efforts by competing organizations. The Hungarians similarly complained that “this diversified activity, for all its usefulness, is lacking in direction, uniform organization and synthesis”.<sup>282</sup> The remedy for this apparent state of affairs would lie in the establishment of a central organ based at the UN, which would co-ordinate and supervise activities for the harmonization of private international law.<sup>283</sup>

Thus, the Secretary General proposed the creation of the United Nations Commission on International Trade Law (“UNCITRAL”) to lead the global effort on the unification front. This recommendation was adopted by the General Assembly in

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contradictory judgments in different countries and makes the establishment of international relations complicated and difficult in the field of economic and commercial activities.” *Ibid.* at 9.

<sup>280</sup> UNCITRAL, *supra* note, at 12.

<sup>281</sup> See G.A. Res. 2085 (XX), U.N. Doc. A/Res/2085 (XX) (Dec. 20, 1965).

<sup>282</sup> UNCITRAL, *supra* note 77 at 12.

<sup>283</sup> Mendes, *supra* note 31.

1966.<sup>284</sup> The mandate of UNCITRAL is to provide for the “progressive unification and harmonization of the law of international trade”.<sup>285</sup> In keeping with the international character of the UN, the organ is to “have due regard to adequate representation of the principal economic and legal systems of the world, and of developed and developing countries”.<sup>286</sup> A number of representatives further expressed the hope “that out of the co-operative endeavours of the Commission and other bodies active in the field, a new *lex mercatoria* would in time evolve reflecting the interest of the entire international community”.<sup>287</sup>

At the first meeting of UNCITRAL in 1966, it was decided that priority was to be given to the development of a unified international sales law. Members of the UN were circulated copies of ULIS and ULF to solicit opinions on their acceptability as the basis for a new unified international law. However, neither of these two conventions were found to be adequate. The basic problem stemmed from the lack of participation from representatives of countries with different legal regimes in the creation of these conventions. In simple terms, ULIS and ULF were too Western European in orientation. Even one of the world’s largest traders, the United States, had little to do with the creation of ULIS and ULF and never adopted the conventions.<sup>288</sup> Thus, UNCITRAL proposed the preparation of a new international sales convention that would more accurately reflect a cross-section of the organ’s world-wide composition. By taking a pluralistic approach, UNCITRAL was confident that a universal international sales

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<sup>284</sup> See G.A. Res. 2205 (XXI), U.N. Doc. A/Res/2205 (XXI) (Dec. 17, 1966).

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

<sup>287</sup> UNCITRAL, *supra* note 77 at 77 (emphasis in the original).

<sup>288</sup> Nor did Canada adopt these conventions.

convention would win “wider acceptance by countries of different social, legal, and economic backgrounds”.<sup>289</sup>

In 1978, the UNCITRAL draft of what was to become the CISG was completed.<sup>290</sup> It clearly attempted to improve upon its less successful antecedents, not just by incorporating a collection of various rules from common, civil, and socialist law traditions, but by aiming for a true synthesis of the best features available from all modern sales law regimes. As Errol Mendes was to later state, “[i]t must be vigorously stressed that the Sales Convention is not simply a collection of rules supplanted from a multitude of common law, civilian and other sources. Rather, the drafters have aimed for a synthesis of the best features that modern sale systems have to offer”.<sup>291</sup> In the process of drafting the CISG, an array of cross-border legal traditions were reconciled to create new approaches to existing problems, and an innovative convention was produced that is truly global in scope.<sup>292</sup>

In 1980, a U.N. Conference was held in Vienna to consider UNCITRAL’s draft convention. True to its international roots, the delegates at the conference came from 62 states: 22 were from European or other developed Western states, 11 came from socialist countries, and the remaining 29 were from third world nations.<sup>293</sup> After only five weeks of deliberations, the CISG was unanimously approved and, as Mendes notes, “the

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<sup>289</sup> Mendes, *supra* note 31, quoted in Honnold, *The Draft Convention on Contracts for the International Sale of Goods: an Overview*, 27 Am. J. Comp. L. 223, 225 (1979).

<sup>290</sup> Felemegas, *supra* note 70, at 142.

<sup>291</sup> Errol P. Mendes, “The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World’s Largest Trading Bloc to Do Business Under a Global Sales Law” (1988) 8 J.L. & Com. 109 at s. IV, para. 1.

<sup>292</sup> *Ibid.* at 143-144.

<sup>293</sup> See Andersen, *Uniform International Sales Law*, *supra* note 8 at 161.

historical cycle of international sales law which began in the 11<sup>th</sup> & 12<sup>th</sup> centuries” was completed.<sup>294</sup> In this respect, perhaps the most significant aspect of the Vienna Conference was that it represented a truly global effort by balancing representation from all regions of the world. It also took into account diverse social, economic, and legal systems. In keeping with its international character, the CISG was adopted in six different languages. The result is a sales convention that attempts to both de-politicize international trade law and to escape the ethnocentric perspectives and biases of a single legal system. With the implementation of the CISG, as T.C. Drucker remarked, “[i]t is hoped that at least in the area of international sales Voltaire’s complaint, when crossing Europe in the 18<sup>th</sup> century, will soon no longer hold true, namely, that he had to change laws as often as he changed horses”.<sup>295</sup>

Berthold Goldman in the 1960s, and Lord Mustill in the 1980s, spearheaded the modern revitalization of the *lex mercatoria*.<sup>296</sup> This movement ultimately led to the creation of the CISG and related uniform conventions, such as the *UNCITRAL Model Law on International Commercial Arbitration*,<sup>297</sup> and the UNIDROIT Principles,<sup>298</sup> to

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<sup>294</sup> Mendes, *supra* note 31.

<sup>295</sup> *Ibid.*, citing T.C. Drucker, “A Common Law Perspective on International Sales Contracts” in *Meredith Memorial Lectures* 58, 66 (1982).

<sup>296</sup> Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford: Oxford University Press, 2005) at 194. The sources referred to in Tweeddale & Tweeddale include: Bertold Goldman, “La Compagnie de Suez, societe internationale” (4 October 1956) *Le Monde* at 3; *Frontieres du droit et lex mercatoria* (1964) *Archives de philosophie du Droit* at 177; *La lex mercatoria dans les contrats et l’arbitrage internationaux: realite et perspectives* (Clunet, 1979) at 475. Lord Mustill, “The New Lex Mercatoria: The First Twenty-five years” (1987) in *Liber Amicorum for Lord Wilberforce*.

<sup>297</sup> *UNCITRAL Model Law on International Commercial Arbitration*, United National Commission on International Trade Law (“UNCITRAL”), (United Nations document A/40/17, Annex I, 21 June 1985).

<sup>298</sup> UNIDROIT Principles, *supra* note 196. Note that the Preamble states:

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed

name a few. Lord Mustill analyzed the principles of the *lex mercatoria* and defined this body of law and custom as follows:

In the first place, the *lex mercatoria* is ‘anational.’<sup>299</sup> This concept has two facets. First, the rules governing an international commercial contract are not, at least in the absence of an express choice of law, directly derived from any one national body of substantive law. Second, the rules of the *lex mercatoria* have a normative value which is independent of any one legal system. The *lex mercatoria* constitutes an autonomous legal order.<sup>299</sup>

The *lex mercatoria* is, thus, a set of principles and norms from which merchants, courts, and arbitral panels can seek guidance to settle disputes. A difficult issue, however, is to determine which principles constitute the *lex mercatoria*. This imperfection allows critics to charge that the *lex mercatoria*—and by implication, its modern incarnation, the CISG—is a vague set of rules, or perhaps a “non-subject”.<sup>300</sup> Even Lord Mustill had to consider the usefulness of the *lex mercatoria* and ask “whether it can and does exist as a viable system”.<sup>301</sup>

A main point that critics charge is that the *lex mercatoria* is not a “law”, or it is, at most, “soft law”, that is, it is a guide that sets a standard of conduct, but it is not legally binding.<sup>302</sup> This criticism has similarly been made of the CISG.<sup>303</sup> However, courts and arbitral panels have used soft law rules as evidence of international customary law in

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by general principles of law, the *lex mercatoria* or the like.

<sup>299</sup> Lord Mustill, quoted in Tweeddale & Tweeddale, *supra* note 96 at 194.

<sup>300</sup> *Ibid.* at 194-195.

<sup>301</sup> *Ibid.* at 195.

<sup>302</sup> See e.g. Ralf Michaels, “The True Lex Mercatoria: Law Beyond the State” (2007) 14 *Ind. J. Global Legal Stud.* 447.

<sup>303</sup> For an example of the use of CISG as “soft law”, see Larry A. DiMatteo, “Resolving International Contract Disputes” (1998) 53 *Disp. Resol. J.* 75, at 79. DiMatteo states: “The CISG, along with the UNIDROIT Principles, provide arbitrators a suitable framework for deciding international contract disputes by the application of the general principles that underlie [these] documents”. See also e.g. Rosett, *supra* note 21 and Kastley, *supra* note 38.

order to oust national laws.<sup>304</sup> Critics may argue that the *lex mercatoria* lacks both a methodological base, and a legal system supporting it, and is dependent on national legal systems to work efficiently. Moreover, it does not have any state authority from which it can derive its binding force. As such, it is typically argued, it cannot govern a contract, because a contract concluded between private parties must be based on the municipal law of some state. Law is made exclusively by nation-states. Hence, a contract intended to be subject to the *lex mercatoria* would be a stateless contract, one floating in a legal vacuum. A state-free contract, thus, presents a logical impossibility, and is an intellectual solecism. Furthermore, trade practices, usages, and customs of international trade acquire the character of law only to the extent that they are incorporated into national legal systems, either expressly or impliedly.

Implicit in a critical perspective of the *lex mercatoria* is the notion that, as an autonomous body of law, it is incomplete, vague, and somewhat incoherent. In other words, it is indeterminate. It can be challenging to uncover what constitutes this alleged body of law, or try to locate where its corpus can be found. The general principles, rules which are reflected in the law of all trading nations and which are said to constitute the core of the *lex mercatoria*, are to be distilled by means of a comparative analysis of representative national laws. However, uncovering rules and principles that are common to most nations is a daunting task. Considering the diversity of national legal systems and the vast number of states, there are very few principles that are truly common to a representative number of legal systems. In addition, it is important to note that “common

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<sup>304</sup> Larry A. DiMatteo, “Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law” (2002) 43 Harv. Int’l L.J. 569 at 571.

principles” are often too general and too broad to solve any but the simplest problem, let alone a complex commercial dispute. The often-cited principles of, for example, good faith, or *pacta sunt servanda*, are, as such, abstract principles. They gain meaning only through the supplementary rules, court decisions, and the enforcement mechanisms in the various national legal systems. However, these interpretive devices can be viewed as leading to doctrinal inconsistency. As Clare Dalton notes, “doctrinal inconsistency necessarily undermines the force of any conventional legal argument, and [...] opposing arguments can be made with equal force [...] [L]egal argumentation disguises its own inherent indeterminacy [...] [L]egal doctrine is unable to provide determinate answers to particular disputes”.<sup>305</sup> Dalton’s focus on doctrinal inconsistency, and by extension, the indeterminacy of law, is misplaced. While she was addressing issues in contracts, and not the *lex mercatoria* or the CISG, Dalton fails to appreciate that an international commercial code can provide for the acceptance of similar norms, and a common medium for communication—a *lingua franca*.

The *lex mercatoria* evolved independently of local political authorities or institutions. It comprised a de-territorialized legal order, “that did not derive its normative claims from treaties amongst sovereign states”.<sup>306</sup> As a private commercial order, it existed outside the local political economy. This gave rise to a dualistic system of governance in commerce: laws and regulations for local commerce and the *lex mercatoria* for transnational commerce. It was essentially a self-regulatory merchant

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<sup>305</sup> Clare Dalton, “An Essay in the Deconstruction of Contract Doctrine” (1985) 94 Yale L. J. 997 at 1007.

<sup>306</sup> Boaventura de Sousa Santos, quoted in Cutler, *supra* note 223 at 109.

community in the creation of laws, and in dispute resolution.<sup>307</sup> This community also created property rights and entitlements that were entirely inconsistent with traditional medieval concepts of property.<sup>308</sup> The conception of equity in merchant courts also differed considerably from the canonical view of equity.<sup>309</sup> Although there existed normative and institutional pluralism in medieval society, including canon law, feudal law, manorial law, urban law, and local merchant law, local authorities were unable to enforce the *lex mercatoria*, and deferred to merchant courts.<sup>310</sup>

The *lex mercatoria*, as an autonomous body of law, evolved contrary to the jurisprudence of positivism. Positivism is based on the theory that all law is derived from the will of sovereign states, and that international law is derived from the combined wills of many sovereign states. Hence, legislation is seen as the heart of law, and, contrarily, critics would tend to downplay the importance of the role of commercial customs, norms and values as guiding behaviour. As Ole Lando states, “the binding force of the *lex mercatoria* does not depend on the fact that it is made and promulgated by State authorities but that it is recognized as an autonomous norm system by the business community and by State authorities”.<sup>311</sup> As such, the *lex mercatoria*, as a code of legal-commercial norms is different to the traditional concept of “law” as the law to be found in legal texts, codes, and case law. It is, moreover, an evolving, “living law” which is the

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<sup>307</sup> Cutler, *supra* note 223 at 110.

<sup>308</sup> *Ibid.* at 111.

<sup>309</sup> *Ibid.* at 116-117.

<sup>310</sup> *Ibid.* at 109.

<sup>311</sup> Ole Lando, “The *Lex Mercatoria* and International Commercial Arbitration” (1985) 34 I.C.L.Q. 747 at 754.

product of the adaptability and inventiveness of commercial merchants and which, therefore, concentrates on those legal norms that can be enforced in practice.

CHAPTER THREE  
EXCUSES FOR NON-PERFORMANCE:  
DEVELOPMENT OF AN AUTONOMOUS CONCEPT

A. *The Creation of an Autonomous International Commercial Concept*

It is a premise of this dissertation that a problematic legal doctrine—commonly known as *force majeure*, an Act of God, impossibility, frustration, the German *wegfall der geschäftsgrundlage*, the French *imprevision*, and the like, but embodied in Article 79 of the 1980 *United Nations Convention on Contracts for the International Sale of Goods* (“CISG” or “Convention”)<sup>312</sup> under the neutral wording of “excuse for nonperformance”—is an autonomous international commercial norm, and capable of relative uniformity within the context of the CISG’s goal for a sales law that is transnational in design. A related consideration is that while excuses for non-performance in CISG Article 79 may have developed out of an amalgamation of similar national conceptions which, in turn, grew from the conflicting Roman maxims *pacta sunt servanda* and *rebus sic stantibus*, Article 79’s “excuse for non-performance” ultimately stands alone as an autonomous international doctrine under the CISG in private international law. It belongs to a private legal order and is part of the non-state commercial lexicon of the new *lex mercatoria*.

This development plays a crucial role for uniformity in private international law generally, and specifically for international sales law. It supports the idea that in certain cases, particularly in international commercial transactions, individual domestic legal

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<sup>312</sup> *United Nations Convention on Contracts for the International Sale of Goods*, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, hereinafter cited as the “CISG” or “Convention.”

doctrines and norms—some of which evolved out of Roman maxims— can transcend state-based law making, and may ultimately coalesce into autonomous international principles, regardless of their distinctive legal development in state-based jurisdictions.

### B. *Roman Origins*

The concept of a legal excuse for the non-performance of an obligation due to an unforeseen event did not fully develop until trade began to flourish in the medieval Mediterranean world. In many respects, it arose to meet the needs of a vibrant—and increasingly international—mercantile community. The principle was not explicitly recognized in the laws of ancient Rome.<sup>313</sup> The Roman Republic did not know the word *impossibilis*; the idea could be expressed, but only in Greek.<sup>314</sup> This is not surprising as early Roman law did not have a comprehensive body of contract law.<sup>315</sup> Rather, Roman law embodied various classifications of liability, but no comprehensive system of contractual responsibility.<sup>316</sup> In many respects the laws of Rome also failed to adequately address the needs of commerce. There was no separate court for the trial of mercantile disputes, and its commercial and maritime law was part of the general law.<sup>317</sup> In the early

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<sup>313</sup> J. Toshio Sawada, *Subsequent Conduct and Supervening Events* (Tokyo: University of Tokyo Press, 1968) at 114.

<sup>314</sup> W.W. Buckland, “*Casus* and Frustration in Roman and Common Law” (1932) 46 Harv. L. Rev. 1281 at 1281. See also D. 28.7.1.20. pr.

<sup>315</sup> Anthony Jeremy, “*Pacta Sunt Servanda*: The Influence of Canon Law Upon the Development of Contractual Obligations” (2000) 144 Law & Just. Christian L. Rev. 4 at 4.

<sup>316</sup> Malcolm P. Sharp, “*Pacta Sunt Servanda*” (1941) 41 Colum. L. Rev. 783 at 785.

<sup>317</sup> Frederick Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* (New York: The Century Co., 1930) at 8. Here, Sanborn describes Roman law, by way of contrast to other legal systems, as being unitary and much more “abstract” and “sharply defined” in nature. He concurs with Francois Morel and Levin Goldschmidt that such a separate mercantile law would have been “contrary to the centralizing genius of the Roman law, and [...] contrary to their tradition of its unity”. *Op. cit.* See also

days of the Latin language there were no words to express sea terms, even though the commercial Sea Code of Rhodes, a Greek creation, came into existence in the second or third century B.C.E.<sup>318</sup> Even the term *contractus* retained a very restricted meaning, denoting lawful conduct that could give rise to liability.<sup>319</sup> Gaius does not even define the term in his commentaries.<sup>320</sup> It was far removed from the modern concept of “contract”. Only certain types of transactions were recognized, leaving many types of agreements to exist without legal validity. In the classical period,<sup>321</sup> *parol* contracts did not create a binding legal obligation, and the term *nuda pacta* (“bare pacts”) initially represented this array of unsanctioned agreements that were common, but not enforceable in law.<sup>322</sup> They were unenforceable for want of an action at law to make them binding, and were simply thought to be “natural obligations”.<sup>323</sup>

Like much of Roman law, Gaius’ discussion of the law of obligations is very narrow and focused. There was the verbal contract,<sup>324</sup> the *stipulatio*, which consisted of a formalistic series of questions and answers.<sup>325</sup> But this was valid only between Roman

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Francois Morel, *Les juridictions commerciales au moyen-âge: etude de droit compare* (Paris: Arthur Rousseau, 1897), and Levin Goldschmidt, *Handbuch des Handelsrechts*, vol. i (Stuttgart: F. Enke, 1891).

<sup>318</sup> *Ibid.* at 5 and 8.

<sup>319</sup> Coenraad Visser, “The Principle Pacta Servanda Sunt in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade” (1984) 101 S.A.L.J. 641 at 642.

<sup>320</sup> W.F. Harvey, *A Brief Digest of the Roman Law of Contracts* (Oxford: James Thornton, 1878) at 2.

<sup>321</sup> *Circa* 350 B.C.E.

<sup>322</sup> Jeremy, *supra* note 315 at 4-5.

<sup>323</sup> *Ibid.* at 6.

<sup>324</sup> While a written agreement was not necessary to make a *stipulatio* valid, often one was drawn up to record the transaction. See Thomas Collett Sandars, *The Institutes of Justinian* (Chicago: Callaghan & Co., 1876) at 427.

<sup>325</sup> Charles Sumner Lobingier, *The Evolution of Roman Law*, 2d ed. (n.p.: published by the author, 1923). In the *Institutes*, Gaius describes the *stipulatio* as follows:

A verbal contract is formed by question and answer, thus: “Dost thou solemnly promise that a thing shall be conveyed to me”? “I do solemnly promise”. “Wilt thou convey”? “I will convey”. “Dost thou pledge thy credit”? “I pledge thy

citizens, thereby excluding foreigners. Within the *stipulatio*, however, are the formative ideas that later evolved into more developed legal principles, such as *force majeure*, frustration, impossibility, hardship, and the CISG variant in Article 79. For example, in his title on invalid stipulations, Gaius tells us that “if any one stipulates for a thing which does not, or cannot exist, as for Stichus, who is dead, but whom he thought to be living, or for a Hippocentaur, which cannot exist, the stipulation is void”.<sup>326</sup> While the notions of impossibility and non-performance are evident here, absent are other fundamental ideas, such as a supervening event and unforeseeability. These are necessary in the doctrine of excuses for non-performance. Furthermore, there is also an absence of the concept of good faith, even though the idea of *ex fide bona* was a part of later Roman contract law involving sales, hires, and partnerships.

Like the Roman action of *bona fidei iudicium*,<sup>327</sup> good faith is implicit in the doctrine of excuse for non-performance, as it requires the parties to do, not what has been exactly promised, but rather that which is fair and reasonable under the circumstances. Roman law rules of *ex fide bona* were initially concerned with jurisdictional matters, not those of an ethical nature or moral responsibility.<sup>328</sup> Later, with the rise of commerce, and under the Christian influence of Justinian, the Canonists would imbue *ex fide bona* with the ideals of conscience and equity, and urge litigants to do what good faith and

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credit”. “Dost thou bid me trust thee as guarantor”? “I bid thee trust me as guarantor”. “Will thou perform”? “I will perform”.

G. 3.92 (trans. Thomas C. Sandars).

<sup>326</sup> G. 3.97 (Title XIX. “De Inutilibus Stipulationibus”).

<sup>327</sup> The action of *Bona Fidei Iudicium* directed the judge of a dispute to found his judgment on the basis of good faith. In these cases the judge would order the defendant to render performance on the basis of good faith. In the action of *Bona Fidei Iudicium*, the judge was thus given authority to introduce a good faith formula, and take into account informal agreements that would normally be unenforceable in law. See Jeremy, *supra* note 315 at 5.

<sup>328</sup> *Ibid.* at 4.

conscience required.<sup>329</sup> As Baldus de Ubaldis (1327-1400) noted, bare pacts among merchants became actionable at a very early stage, “since good faith is required in these contracts which are most frequently concluded, and in these respects a bare pact does not differ from a stipulation”.<sup>330</sup> These became known as good faith agreements, and covered sales, hire, and partnerships. They allowed a judge to take into account implied terms, customs, and the unexpressed intent of the parties. In addition to the development of good faith, the concepts of a supervening event and unforeseeability would later evolve, as commerce expanded and legal rules adapted to more complex business transactions.

While some scholars have attempted to discern the predecessor of the doctrine of excuses for non-performance in Roman private law, there is little evidence to support this finding.<sup>331</sup> As noted above, its beginnings are fractured in a variety of undeveloped legal maxims and ancient legal rules. The underpinning idea can be traced back to the Code of Hammurabi (2250 B.C.E.). For example, it stated that “the hirer of an ox is bound to return it safe and undamaged but he is excused from his liability for its death in two cases: the first is in s. 244 where the ox is devoured by a lion ‘in the open country’; the second is in s. 249 when a god has struck it”.<sup>332</sup> There are also references to legal excuses for non-performance in ancient Greek law, but these are only tenuous connections.<sup>333</sup> All that existed were certain formative ideas, and these would require considerable historical and legal development and articulation before crystallizing into

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<sup>329</sup> *Ibid.*

<sup>330</sup> Gloss ad D. 13.5.1.

<sup>331</sup> Sawada, *supra* note 313 at 114 fn. 30.

<sup>332</sup> G.R. Driver and John C. Miles, eds. & trans., *The Babylonian Laws* (Oxford: The Clarendon Press, 1952) at 438-440.

<sup>333</sup> *Ibid.* at 114.

modern concepts such as *force majeure*, impossibility, frustration, and Article 79's excuses for non-performance.

The closest ancient iteration containing certain aspects of the doctrine is evident in Gaius' discussion of cases in which a *stipulatio* would be deemed invalid. He stated: "[i]f any one stipulates for a thing sacred or religious, which he thought to be profane, or for a public thing appropriated to the perpetual use of the people, as a forum or theatre, or for a free man, whom he thought to be a slave [...] the stipulation is at once void".<sup>334</sup> These also included agreements, for example, imposing an impossible condition, such as a non-existent or unattainable object,<sup>335</sup> or a deceased<sup>336</sup> or insane<sup>337</sup> person. Also void were illegal pacts, or those between persons who had no legal capacity to form agreements.<sup>338</sup> Otherwise, obligations were to be strictly enforced, in a similar fashion to the much later doctrine of *pacta sunt servanda*. Over time even the *nuda pacta* became actionable, and was transformed into the *pacta vestita* ("clothed pacts").

Not surprisingly, contract law began its slow development with the expansion of the Roman merchant empire. While Rome expanded rapidly by conquest following the First Punic War,<sup>339</sup> and foreigners, lured by commercial opportunities, flocked to the urban centres, the *jus civile*, the primary body of law that applied only to Roman citizens, failed to address these new conditions.<sup>340</sup> Initially the *jus gentium*, which was considered

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<sup>334</sup> G. 3.97.

<sup>335</sup> "A condition is considered impossible of which nature forbids the accomplishment; as, if a person says, 'Do you promise if I touch the heavens with my finger'?" G. 3.98.

<sup>336</sup> G. 3.100.

<sup>337</sup> G. 3.106.

<sup>338</sup> G. 3.104, 109.

<sup>339</sup> From 264 to 241 B.C.E.

<sup>340</sup> Andrew Stephenson, *A History of Roman Law* (Boston: Little, Brown, & Co., 1912) at 197.

to be a component of the *jus civile*, was limited to transactions between foreigners and Roman citizens.<sup>341</sup> Eventually, the *jus gentium* adapted and became the body of law that governed all commercial matters, covering both citizens and foreigners.

### C. *The Rise of Pacta Sunt Servanda*

Even though the word *pactum* is one of the oldest words in the Latin language, the exact wording of the maxim *pacta sunt servanda* (“agreements must be honoured”) was not common in the days of the Roman Empire.<sup>342</sup> However, the concept of the sanctity of contracts is universal: it is found in all legal systems, in all periods of history, in all cultures, and in all religions.<sup>343</sup> For example, in 1292 B.C.E., a peace treaty was created between Ramses II and Hatushill III in which their respective gods were held to guarantee the sanctity of their agreement. Although the *pacta* maxim, which has since been elevated to a recognized legal principle, has its roots in Roman law, identical doctrines exist in Hindu, Buddhist, Muslim, Confucian, and in communist systems.<sup>344</sup>

It would appear that *pacta sunt servanda* has provided a standard of conduct for humanity from time immemorial. It is one of the world’s most important legal norms, and it enjoys a very long tradition in all national legal systems. As an arbitral panel the held in *Liamco v. Libya*, “[t]he principle of the sanctity of contracts [...] has always constituted an integral part of most legal systems. These include those systems that are based [on] Roman law, the Napoleonic Code (e.g. article 1134) and other European civil

<sup>341</sup> Lobingier, *supra* note 325 at 213.

<sup>342</sup> Richard Hyland, “Pacta Sunt Servanda: A Meditation” (1994) 34 Va. J. Int’l Law 405 at 412.

<sup>343</sup> W. Paul Gormley, “The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith” (1969) 14 St. Louis U. L.J. 367 at 373.

<sup>344</sup> *Ibid.* at 373-374.

codes, as well as Anglo-Saxon Common Law and Islamic Jurisprudence ‘Shari’a’<sup>345</sup>

The *pacta* principle reflects not only natural justice, but also an economic necessity: commerce would not be possible without reliable promises. As a basic and universal principle, it is today recognized in Article 1.3 of the UNIDROIT Principles,<sup>346</sup> and codified in international law in Article 26 (entitled “*Pacta sunt servanda*”) of the *Vienna Convention on the Law of Treaties*.<sup>347</sup> Unquestionably, it is a paramount feature of contract law.

The *pacta* maxim was first used in a slightly altered form in 348 A.D. in a consilium by the Church involving a dispute between two bishops.<sup>348</sup> It read: [*p*]acta quantumcunque nuda servanda sunt (“pacts, however naked, must be kept”).<sup>349</sup> The full phrase is not found in Justinian’s *Digest*, even though an entire chapter is devoted to agreements, entitled *De pactis*.<sup>350</sup> In the *Decretals* of Gregory IX, issued in 1234, it is found again in a modified form as a sub-heading to a chapter on agreements.<sup>351</sup> The maxim as it is known today was likely first coined in the seventeenth century by the German jurist Samuel von Pufendorf (1632-1694).<sup>352</sup>

#### D. Legal Abstraction and the Introduction of *Rebus Sic Stantibus*

<sup>345</sup> April 12, 1977, Y.B. Comm. Arb., (1981) 89 at 101.

<sup>346</sup> UNIDROIT Principles, *supra* note 196.

<sup>347</sup> 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980). The *Vienna Convention on the Law of Treaties* has been ratified by 111 states as of 16 June 2010.

<sup>348</sup> Gormley *supra* note 343 at 415-416.

<sup>349</sup> *Ibid.*

<sup>350</sup> *Ibid.* at 411-412.

<sup>351</sup> *Ibid.* at 415.

<sup>352</sup> *Ibid.* at 421-422.

Over the course of many centuries, excuses for non-performance did eventually develop into a recognized legal principle. This development was likely assisted by new scientific discoveries that forced academics to think in more abstract terms.<sup>353</sup> Without this level of abstraction, general legal principles would not evolve. Instead, what would follow would be a series of legal rules (i.e. maxims) and their exceptions, as typically found in Roman law.<sup>354</sup> In this way, excuses for non-performance evolved out of two conflicting Latin maxims: *pacta sunt servanda*<sup>355</sup> and *rebus sic stantibus* (“assuming things remain the same”).<sup>356</sup>

Individually, neither maxim adequately addressed the situation where unforeseen supervening events made contractual performance impossible. *Pacta sunt servanda* would insist on performance in spite of the impossibility. Alternatively, reliance on *rebus sic stantibus* provided too much uncertainty in contractual relations. As a result of this inherent conflict, each maxim presented a different vision of contractual relations. As David Bederman stated: “[o]ne is harmonious, predictable, and stable; the other is dynamic, dangerous and uncertain”.<sup>357</sup> This begs the question: how can a promise to perform a contractual obligation be reconciled with a fundamental change in circumstances? The development of the principle of an excuse for contractual non-

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<sup>353</sup> *Ibid* at 419. Hyland uses the example of Galileo’s discovery of the trajectory of a cannon shot. In finding that the cannon ball follows the outline of a parabola, he needed to separate the movement into its discrete parts. These distinctions are not empirically observable. Rather, they force men to think in abstract terms, and visualize each part of the movement of the cannon ball along the plane and its free fall. The same approach is used to develop legal maxims into more sophisticated general legal principles.

<sup>354</sup> *Ibid*.

<sup>355</sup> See Hyland, *ibid.* and Coenraad Visser, “The Principle Pacta Servanda Sunt in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade” (1984) 101 S.A.L.J. 641.

<sup>356</sup> Guenter Treitel, *Frustration and Force Majeure*, 2d ed. (London: Sweet & Maxwell, 2004) at 1.

<sup>357</sup> David J. Bederman, “The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations” (1988) 82 Am. J. Int’l L. 1 at 2.

performance, as in CISG Article 79, seeks to address this apparent contradiction.

However, prior to the adoption of the CISG, it took a number of centuries to resolve the conflict between these two competing principles.

*E. Medieval Origins of the Principle of Excuse for Non-Performance*

The rigid position of *pacta sunt servanda* was based on ancient religious notions that developed long before the Roman Empire. The Chaldeans of Babylon, the ancient Greeks, Egyptians, and Chinese, all believed that the gods participated in the creation of a contract—and the divine became guarantors of the commitment.<sup>358</sup> In Islam, *pacta sunt servanda* also has a religious foundation, and Muslims are entreated to “abide by their stipulations”.<sup>359</sup> The Koran, for example, states “[b]e true to the obligations which you have undertaken [...] Your obligations which you have taken in the sight of Allah [...] For Allah is your witness”.<sup>360</sup> As guarantors of the contract, and under divine threat, the gods ensured that the parties would honour their agreements, regardless of subsequent unforeseen hardship or impossibility of performance. The violation of a promise, particularly an oath made under the gods, was a punishable spiritual offence.<sup>361</sup> In this way, contractual promises and performance became entwined with ancient religious practices and customs.<sup>362</sup>

Early Christianity had a great impact on ideals concerning the sanctity of contracts. In the late fourth century, St. Augustine (354-430) preached that individuals

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<sup>358</sup> Hans Wehberg, “Pacta Sunt Servanda” (1959) 53 Am. J. Int’l L. 775 at 775.

<sup>359</sup> *Ibid.*

<sup>360</sup> Passage is quoted in Wehberg, *ibid.*

<sup>361</sup> Jeremy, *supra* note 315 at 8.

<sup>362</sup> *Ibid.*

must always keep their word, even with enemies.<sup>363</sup> Thomas Aquinas echoed this view regarding the performance of contracts with foes. However, in words that foreshadow the modern principle of excuses for non-performance, Aquinas also said that if the circumstances that existed at the time of contract formation had radically changed, non-performance of the contract would be excusable.<sup>364</sup> This notion likely evolved from the philosophical writings of Cicero (106-43 B.C.E.) and Seneca (4 B.C.E.-65 C.E.) who acknowledged that promises and agreements could be adapted to unforeseen and extraordinary changes in circumstances.<sup>365</sup> Cicero used the example of a person who promised to store another's sword, but argued that he was not obliged to return the sword if the depositor had subsequently become insane.<sup>366</sup> Seneca devoted a chapter on the subject of exceptions to promises. His opening statement sets the framework: "When I promise to bestow a benefit, I promise it, unless something occurs which makes it my duty not to do so".<sup>367</sup> The Roman *praetor* also accepted this principle.<sup>368</sup> These views were helpful to those who admitted that there were exceptions to the sanctity of contracts. This idea was one of the formative components that later led to the development of the maxim of *clausa rebus sic stantibus*. This maxim found its way into Canon law in the

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<sup>363</sup> Wehberg, *supra* note 358 at 775-776.

<sup>364</sup> *Ibid.* at 777. Reference is to Aquinas' *Summa Theologica* at 2, 2, q. 140.

<sup>365</sup> Ingeborg Schwenger, "Force Majeure and Hardship in International Sales Contracts" (2008) 39 V.U.W.L.R. 709 at 710 fn. 3.

<sup>366</sup> *De Officiis*, 1.10.31 and 3.25.94-95.

<sup>367</sup> *De Beneficiis*, 4.35.1.

<sup>368</sup> Schwenger, *supra* note 365 at 710 fn. 3.

fourteenth century as *rebus sic se habentibus*, and was first used as a principle in contract law in 1507.<sup>369</sup>

For the Canonist lawyers of the early medieval period, a violation of a promise became a sin, regardless of whether the promise had been made under the strict legal formalities of secular law. The Canonist Angelus Carletus put it in the following words: “The question is whether a man is bound by a naked pact. The answer is that he is so bound by Canon Law and in Conscience, under pain of mortal sin”.<sup>370</sup> To break a promise was, in the eyes of the Canonists, perjury. In the eyes of God, even informal promises were to be as obligatory as those made under oath. The authority for this principle came from Jesus himself.<sup>371</sup> These religious notions eventually transformed the *nuda pacta* into the *pacta vestita*. From the belief that all agreements were binding, the Canonists imbued the doctrine of *pacta sunt servanda* with the Roman law notion of *ex fide bona*. In this way, the Canonists infused the *pacta sunt servanda* principle with duties of conscience and equity, and directed the individual to do what good faith and conscience required.<sup>372</sup> Through this development, parol contracts of merchants and *nuda pacta*, which would previously have created no enforceable legal relationships, came to be recognized as *bona fide negotia* or “good faith agreements”.<sup>373</sup> This type of agreement bound merchants to perform not exactly what had been promised, but rather what might reasonably be expected under the circumstances. Conceptually, this laid the

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<sup>369</sup> *Ibid.* at fn. 2 and fn. 3. Schwenger notes that the phrase *rebus sic stantibus* was used by Jason de Mayno (1435-1519).

<sup>370</sup> Angelus Carletus, *Summa Angelica* quoted in Jeremy, *supra* note 315 at 8.

<sup>371</sup> “Again you have heard that it was said to men of old, ‘You shall not swear falsely, but shall perform to the Lord what you have sworn’”. *Matthew* 5:33 (Revised Standard).

<sup>372</sup> Jeremy, *supra* note 315 at 4.

<sup>373</sup> *Ibid.* at 5.

foundation to exceptions or legal excuses for the non-performance of contractual obligations.

The Canonists, in particular, Christopher St. Germain (1460–1540), had little difficulty in synthesizing these various—and sometimes conflicting—legal concepts. No doubt, scientific abstraction also played some role in the development of legal maxims into more elaborate legal principles. Echoing the words of Angelus Carletus (1411-1495) in his *Summa Angelica*, St. Germain tells us that binding promises must meet a number of criteria. These include, *inter alia*, that the promise is intentional, and that it may be disavowed if there is a material change in circumstances.<sup>374</sup> St. Germain's criterion sets the stage for *rebus sic stantibus*. The influence of the Canonists in the development of the law is clearly evident. The Canonists' proved decisive in developing the concept of *pacta sunt servanda*, even in the case of *nuda pacta*. This effect upon the nascent legal systems of Europe was to be significant.<sup>375</sup> In the West from the fifteenth century forward—roughly the era of Galileo (1564-1642)—contracts were to be honoured, unless there was no intent to attach legal significance to them, or unless a supervening material event discharged the parties' contractual obligations.

An additional influence on the conceptualization of contractual obligations in Europe was the adoption of *pacta sunt servanda* by the natural law lawyers and philosophers. One of the most prominent was Hugo Grotius (1583-1645). Writing an

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<sup>374</sup> Paul Vinogradoff, "Reason and Conscience in Sixteenth-Century Jurisprudence" (1908) 24 L.Q. Rev. 373 at 382. The passage from St. Germain is from his work *The Doctor and Student* circa 1530.

<sup>375</sup> According to Harold D. Hazeltine, "during the centuries when this long process (the growth of secular legal systems) of development was taking its course, the Canon Law, profoundly influenced by the renaissance of Roman law, had slowly taken its place as a world wide system of jurisprudence". See Hazeltine, "Roman and Canon Law in the Middle Ages" in J.R. Tanner, C.W. Previte-Orton, & Z.N. Brooke, eds., *The Cambridge Medieval History*, vol. 5 (New York: The MacMillan Co., 1926) at 749.

entire chapter on the subject of promises,<sup>376</sup> he viewed *bona fides* as being inextricably linked with *pacta sunt servanda*: “good faith [is] the foundation of justice [...] God Himself would act contrary to His nature if He did not make good on His promises. From this it follows that the obligation to perform promises arises from the nature of immutable justice”.<sup>377</sup> Pufendorf followed Grotius’ perspective in this regard and held that the sanctity of a promise was one of the inviolable rules of natural law.<sup>378</sup> A short time later, *pacta sunt servanda* was brought out in strong relief by Emer de Vattel (1714-1767). Although his primary concern was to apply the principle to the laws of nations, Vattel recognized its value in all contractual relationships. Phrasing it in very human terms, he noted that “[i]t is a settled point in natural law, that he who has made a promise to any one, has conferred upon him a real right to require the thing promised—and consequently, that the breach of a perfect promise is a violation of another person’s right [...like] it would be to rob a man of his property”.<sup>379</sup> In Vattel’s view, *rebus sic stantibus* should only be used with the greatest of caution, and it was to play a subservient role to *pacta sunt servanda*.<sup>380</sup> It would be unjust to have a contracting party take advantage of *rebus sic stantibus* to release it from its contractual obligations: “we ought to be very cautious and moderate in the application of the present rule [*rebus sic*

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<sup>376</sup> Hugo Grotius, *De Jure Belli ac Pacis* (1625), trans. by Francis W. Kelsey (Buffalo: William S. Hein & Co. Inc., 1995) at 328 (corresponding to Book II, chap. XI, “On Promises”).

<sup>377</sup> *Ibid.* at 330-331 (corresponding to Book II, chap. XI).

<sup>378</sup> Wehberg, *supra* note 358 at 779. Wehberg is referring to Pufendorf’s *De jure naturae et gentium* (1672), Book II, chap. III, s. 23 and Book III, chaps. III, IV, ss. 1, 2 respectively.

<sup>379</sup> Emer de Vattel, *The Law of Nations* (1758), trans. by [anonymous] (Indianapolis: Liberty Fund, Inc. 2008) at 342 (corresponding to Book II, chap. XII, s. 163).

<sup>380</sup> *Ibid.* at 430 (corresponding to Book II, chap. XVII, s. 296).

*stantibus*]: it would be a shameful perversion of it, to take advantage of every change that happens in the state of affairs, in order to disengage ourselves from our promises”.<sup>381</sup>

All contracts are based on the idea that at the commencement of a contract, risks are allocated to each party. As such, these risks must not be later disturbed unilaterally by one of the parties, or revised by the courts. This is the foundation of the tenacious *pacta sunt servanda* principle. In contrast, *rebus sic stantibus* acts as a counter-principle to *pacta sunt servanda*. Without *pacta sunt servanda* there would have been little need for the development of an exception to it, hence, reliance on *rebus sic stantibus* became dependent on the existence of *pacta sunt servanda*. Indeed, the notion that *rebus sic stantibus* is a recognized legal doctrine has even been contested.<sup>382</sup> Some have viewed it as nothing more than a creation of political theory, born from the statecraft of Cicero and Machiavelli (1469-1527).<sup>383</sup> Regardless of its origins, as dubious as they may be, *rebus sic stantibus* has become a principle that is recognized today (albeit, in various guises) in every legal system.

As an exception to *pacta sunt servanda*, *rebus sic stantibus* developed in the late medieval period to incorporate the premise that contractual terms are not absolute, but relative. In this respect *rebus sic stantibus* set the basis for the establishment of the modern doctrine of excuse for non-performance. From this perspective was the notion that parties enter contracts with certain shared and implicit assumptions. However, a fundamental change in subsequent circumstances may destroy the basic assumptions

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<sup>381</sup> *Ibid.*

<sup>382</sup> Bederman, *supra* note 357 at 8. This criticism of *rebus sic stantibus* has come primarily from publicists in the field of international public law. They view it as an illegitimate child of international law, as it provides states with an excuse to renege on their treaty obligations.

<sup>383</sup> *Ibid.*

upon which the contract was formed. The effect of this legal abstraction was to discharge a contract due to a supervening event that made performance excessively onerous or impossible. However, as an exception to contractual performance, the use of *rebus sic stantibus* was to be severely curtailed. From the outset, it was applied in a restrictive manner, not only in national courts, but also in arbitral practice. This approach continued into the modern era. Thus, by 1971 the sole arbitrator in ICC Case No. 1512 could state:

The principle '*Rebus sic stantibus*' is universally considered as being of strict and narrow interpretation, as a dangerous exception to the principle of sanctity of contracts. Whatever opinion or interpretation lawyers of different countries may have about the 'concept' of changed circumstances as an excuse for non-performance, they will doubtless agree on the necessity to *limit* the application of the so-called 'doctrine *rebus sic stantibus*' (sometimes referred to as 'frustration', 'force majeure', '*imprevision*', and the like) to cases where *compelling reasons* justify it, having regard not only to the fundamental character of the changes, but also to the particular type of the contract involved, to the requirements of fairness and equity and to all circumstances of the case.<sup>384</sup>

Consequently, while the principle of *rebus sic stantibus* and concept of changed circumstances were widely recognized by arbitral tribunals and the courts of most jurisdictions, in practice the requirements were rarely met.<sup>385</sup>

#### F. *Origins of the Principle of Excuse for Non-Performance in Common Law*

The dichotomy posed by the conflict between the sanctity of the contract or its discharge by supervening events has, over time, received divergent treatment by the civil and common law systems. While both legal systems acknowledged in varying degrees

<sup>384</sup> The arbitrator was Prof. Pierre Lalive. The case involved an Indian concrete company and a Pakistani bank. See Pieter Sanders, ed., "Award of 1971 in Case No. 1512" (1976) 1 Y.B. Com. Arb. 128 at 128-129 (italics are in the original).

<sup>385</sup> According to Brunner, *supra* note 47 at 417.

the doctrines of *pacta sunt servanda* and *rebus sic stantibus*, they emphasized certain aspects of each doctrine, and they did so at various historical periods. To say that one legal system embraced one doctrine over the other is to simplify the rather complex interaction each system had with these doctrines over the centuries.<sup>386</sup> Rather than focus on the broader principles of *pacta sunt servanda* or *rebus sic stantibus*, each legal system placed greater emphasis on the extent of the available remedies, as well as the culpability or degree of “fault” embedded in each doctrine.

The civil law tradition rejected the notion that a party could contract to do the impossible. This is stated in Justinian’s Digest: *impossibilium nulla obligatio*.<sup>387</sup> Civil law remedies are concerned primarily with performance, not damages. From this it follows that a party cannot be forced to do the impossible, even if this was promised in contract. Conceptually in civilian legal systems, there can be no enforceability of an impossible obligation. In contrast, this concept was originally rejected in the common law tradition. It had little difficulty in holding such a party liable, at least in damages. While the obligation may be physically impossible to perform, it could be compensated for by way of a monetary judgment. Holt J.C. put it in the following terms in 1706: “when a man will for valuable consideration undertake to do an impossible thing, although it cannot be performed, yet he shall answer in damages”.<sup>388</sup> Performance of an obligation may become physically impossible, but the payment of damages is always possible. In later common law jurisprudence, the common law came closer to

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<sup>386</sup> For example, Friedrich Kessler has noted that “[c]ivilians justify their system by reference to the maxim *pacta sunt servanda*”.

<sup>387</sup> Dig. 50.17.185.

<sup>388</sup> *Thornborow v. Whitacre* (1706), 92 E.R. 270, 2 Ld. Raym. 1164 at 1165.

acknowledging *rebus sic stantibus* as in the civil law approach. In one case it made the analogy with the civil law nullity of an impossible obligation, and ruled “the court does not compel a person to do what is impossible”.<sup>389</sup> In such cases, the courts would not order specific performance, but such a refusal did not preclude the awarding of damages.

Unlike the initial common law approach, civil law could simultaneously acknowledge the existence of *pacta sunt servanda*, while stressing the importance and the flexibility provided in the principle of *rebus sic stantibus*. Of course, this would be tempered with the principle that no contract could be formed to do the impossible (*impossibilium nulla obligatio*).<sup>390</sup> In addition, the emphasis on *pacta sunt servanda* was treated in civil law as a self-evident legal norm, with ethical and moral characteristics, incorporating the notion of “fault”. Not surprisingly, the Canonists believed all promises to be binding, including those that had not yet been accepted.<sup>391</sup> The moral imperatives of the Church were to be carried over into promissory obligations.

The prominence of *rebus sic stantibus* over *pacta sunt servanda* provided the civilian legal tradition with a differing view towards contractual obligations. Assuming events remained unchanged, this view incorporated the notion that a party would be liable for contractual non-performance, but only if it could be demonstrated that the party was somehow at fault.

By contrast, the common law tradition, at least initially, rejected the civil law position, and held parties liable to their contracts even where performance had become

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<sup>389</sup> *Forrer v. Nash* (1865), 35 Beav. 167 at 171.

<sup>390</sup> *Ibid.* at 1-2.

<sup>391</sup> Hyland, *supra* note 353 at 418.

impossible.<sup>392</sup> As Hannes Rosler has noted, “English law has never known the medieval *clausa [rebus sic stantibus]* doctrine”.<sup>393</sup> *Pacta sunt servanda* was to dominate; *rebus sic stantibus* was to play a subservient role. The earliest recorded evidence of this principle is from an unnamed case in the Year Books.<sup>394</sup> Reported in 1366, the case involved a defendant who had agreed to maintain the buildings on a property that he had leased from the plaintiff.<sup>395</sup> The defendant was to return the buildings in the same condition as they had been in when they were initially leased. When the lease ended and one building was returned to the plaintiff in damaged condition, he sued for breach of contract. In defense, the defendant pleaded that the damage, a fallen wall, had been caused by a severe wind-storm. The plaintiff argued that this was still a breach of contract. The defendant responded that he was not obliged to repair damage caused by acts of God, which were beyond his control and unavoidable. The court ruled in favour of the plaintiff, upholding the *pacta sunt servanda* principle. Strictly speaking, while the storm was a supervening event, returning the property in its original condition was not something that was impossible. Rather, the promise was simply more onerous, but still capable of being performed, as the defendant could repair the damaged wall. Thus, the defendant was liable if he did not perform. The court stated that “a man is liable to do a thing which is capable of being done by a man, thus when he bound himself to the lessor to repair them, even though it was knocked down by the wind, or by other sudden events, yet you are

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<sup>392</sup> *Ibid.* at 2.

<sup>393</sup> Rosler, *supra* note 50 at 497.

<sup>394</sup> [Anonymous] (1366), Y.B. Hil. 40 Edw. III, pl. 11, fol. 6.

<sup>395</sup> *Ibid.*

capable of repairing them, and can do this”.<sup>396</sup> If the defendant sought to avoid liability for damage caused by acts of God, he should have protected himself by expressly providing for such an exclusion at the time of contracting.

Later English cases also upheld the primacy of *pacta sunt servanda*. Many of these cases involved the carriage of goods by sea. In one case, the defendant promised to carry apples by a boat from Greenwich to London, but the vessel sank in a “great and violent tempest”.<sup>397</sup> The defendant pleaded an act of God, but the court ruled, “it was holden to be no plea in discharge of the assumpsit, by which the [defendant] had subject himself to all adventures”.<sup>398</sup> In a similar case a few years later, it was held that the defendant was still liable in damages under a contract of carriage, even though the boat was overturned “by the violence of wind and water”.<sup>399</sup>

Although the law on impossibility of performance in England was still developing at this time, the initial emphasis was on a strict reading of *pacta sunt servanda*. This principle became enshrined in the English doctrine of absolute contracts in the 1647 case of *Paradine v. Jane*.<sup>400</sup> Frequently cited in later court decisions, and still regarded by some jurists as good law,<sup>401</sup> *Paradine* has come to stand for the common law principle that an impossible supervening event will not necessarily discharge a party from its

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<sup>396</sup> *Ibid.* Translation by John D. Wladis, “Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law” (1987) 75 Geo. L.J. 1575 at 1582 note 36.

<sup>397</sup> *Taylor’s Case* (1583), 4 Leon 31, 74 E.R. 708.

<sup>398</sup> *Ibid.*

<sup>399</sup> *Tompson v. Miles* (1591), I Rolle’s Abridgement, Condition G.9.

<sup>400</sup> Aley 26, 82 E.R. 897 (K.B.) [*Paradine*].

<sup>401</sup> Treitel, *supra* note 356 at 19.

contractual obligations. In doing so the case is an implicit rejection in English common law of the principle *rebus sics stantibus*.

The action in *Paradine* grew out of the English Civil War. According to the judgment, “Prince Rupert, an alien born, enemy to the King and his kingdom, had invaded the realm with a hostile army of men” and took possession of land owned by the plaintiff, *Paradine*.<sup>402</sup> At the time, the land was under lease to the defendant, Jane. The enemy army held the land for three years, and finally relinquished it in 1646. *Paradine* sued Jane for three years back rent, but Jane argued that he was not in possession during the period as the land was in enemy hands. As such the defendant was prevented from taking profits from the use of the land. In other words, Jane claimed to be without fault for his failure to pay the rent.

The court held that Jane was still liable for the rent. It ruled that “as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses”.<sup>403</sup> Jane assumed the risk that he would make a profit (or loss) from the use of the land. The court made a crucial distinction between cases where “the party by his own contract creates a duty” and “where the law creates a duty”.<sup>404</sup> It reasoned that the parties had committed themselves to the terms of the lease, and if they had wanted to provide for the avoidance of liability in certain situations, they could have done so by redefining the terms of the contract. When a party creates “a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because

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<sup>402</sup> *Paradine*, *supra* note 400.

<sup>403</sup> *Ibid.* at para. 3.

<sup>404</sup> *Ibid.*

he might have provided against it by his contract”.<sup>405</sup> As the contract did not provide for any reallocation of the loss due to the foreign invasion, the loss remained where it fell.

Thus, without a contractual excuse for non-performance, Jane had to follow his duty as a tenant and pay the rent. This was the case even though he was deprived of the property by an event for which neither he nor the property owner was responsible.

*Paradine* was followed in many later cases where it was similarly held that a tenant was not discharged for the payment of rent due to supervening events such as fire, flood, or enemy action.<sup>406</sup> Indeed, *pacta sunt servanda*, as enshrined in the English doctrine of absolute contracts triumphed for the next two centuries. Not only did the principle prevail, it came to stand for the proposition that physical impossibility would never excuse performance. Thus, in *Brown v. Royal Insurance Company* Lord Campbell, after paraphrasing the *Paradine* principle, declared, “the fact that performance has become impossible is no legal excuse for [non-performance]”.<sup>407</sup>

The turning point for a strict reading of the *pacta sunt servanda* principle came in 1863 in the case of *Taylor v. Caldwell*.<sup>408</sup> While the case did not overturn the *pacta sunt servanda* principle in common law, it did introduce the notion that there can be mitigating factors to discharge an otherwise absolute contract. In the case, the defendant, Caldwell, contracted to permit Taylor the use of a music hall for four days in exchange for £100 per day. The contract stated that the hall must be fit for a concert but there was no express stipulation regarding disasters. The hall was destroyed by fire just before the first

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<sup>405</sup> *Ibid.*

<sup>406</sup> Treitel, *supra* note 356 at 23-26.

<sup>407</sup> (1859), 1 E1. & E1. 853, 120 E.R. 1131 (Q.B.).

<sup>408</sup> 3 B. & S. 826, 122 E.R. 309 (Q.B.) [*Taylor*].

concert. As the concerts could not be performed at any other location, Taylor sued the music hall owner, Caldwell, for breach of contract for failing to rent the hall, and for his expenses that were incurred for advertising the concerts.<sup>409</sup> There was no clause within the contract itself which allocated the risk to the underlying facilities, except for the phrase “God’s will permitting” at the end of the contract.

In *Taylor v. Caldwell* Blackburn J. skilfully avoided a direct conflict with *Paradine*. He acknowledged the well-established precedent and stated, “[t]here seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible”.<sup>409</sup> However, he dismissed Taylor’s claim on the basis that “in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance”.<sup>410</sup> Furthermore, the destruction of the hall excused not only the defendant from performance, but *also* the plaintiff: “both parties are excused, the plaintiffs from taking the [music hall] and paying the money, the defendants from performing their promise to give the use of the [music hall]”.<sup>411</sup> It is significant that Blackburn J. noted that the destruction of the music hall was the fault of *neither* party, and that this fact rendered the performance of the contract by *either* party impossible. Such a ruling went beyond what was necessary to decide the

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<sup>409</sup> *Ibid.*

<sup>410</sup> *Ibid.*

<sup>411</sup> *Ibid.*

case. Blackburn J. should have focused only on the liability of the defendant and the obligation to supply the music hall. However, he also excused the plaintiff from the obligation having to pay, even though the agreed payments were not impossible to make. The destruction of the subject matter in *Taylor*, and the associated discharge of the obligation to pay for the destroyed hall, thus, provided for an exception to the doctrine of *pacta sunt servanda* as enshrined in *Paradine*.

Over time, the exception, as initially formulated in *Taylor*, would be developed further and extended to recognition of *rebus sic stantibus* and the doctrine of discharge through frustration, impossibility, or hardship. Through this progression, by the early 1900s, the law came to recognize and address the problem of loss allocation that arises in situations where contractual performance becomes impossible because of a supervening event for which neither party is responsible.<sup>412</sup> The law did evolve to address this problem, particularly with a group of cases that arose when the coronation of King Edward VII was postponed due to illness.<sup>413</sup> It was in these coronation cases that the doctrine of frustration was recognized for the first time. Variants of the frustration, such as impossibility, hardship, and impracticability, also developed to address the realities of the modern world.

However, *pacta sunt servanda* never disappeared entirely from the legal landscape in the common law. The principle continues to exist primarily in cases that concern landlord and tenant law, as well as in other case law that follows the reasoning of

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<sup>412</sup> Wladis, *supra* note 396 at 1599.

<sup>413</sup> The cases are commonly known as the "Coronation Cases", and include *Chandler v. Webster*, [1904] 1 K.B. 493, *Clark v. Lindsay* (1903), 19 T.L.R. 202, *Griffith v. Brymer* (1903), 19 T.L.R. 434, and *Krell v. Henry*, [1903] 2 K.B. 740.

*Paradine*, including those that concern antecedent impossibility.<sup>414</sup> While the common law has developed to recognize the doctrine of discharge (through frustration, impossibility, hardship, or impracticability) due to supervening events; in the interests of commercial certainty, the common law has come to attach greater importance to *pacta sunt servanda*. For this reason, in England the doctrine of discharge was severely restricted in scope after its initial development. The First World War did give rise to a number of cases that successfully relied upon the doctrine of discharge due to impossibility.<sup>415</sup> However, by the Second World War there were few reported cases of supervening impossibility.<sup>416</sup> Indeed, in the post-War era there was a distinct judicial reluctance to apply *rebus sic stantibus* to discharge a contract except in only the rarest of circumstances. As Guenter Treitel remarked, “this reluctance is primarily based on the importance now attached to the principle of sanctity of contract”.<sup>417</sup> In this manner, excuses for non-performance of contractual obligations experienced a distinct evolution in the common law. This was to be different from the progression of excuses for non-performance as it evolved in civil law jurisdictions, and beyond, as incorporated in CISG Article 79 as an autonomous principle. But as in civil law, the common law developed an array of related doctrines and principles to deal with a fundamental change in circumstances.

### G. Frustration

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<sup>414</sup> Treitel, *supra* note 356 at 50-55. Treitel describes these as “historical survivals” and “survivals based on the reasoning of *Paradine v. Jane*”.

<sup>415</sup> *Ibid.* at 57-58.

<sup>416</sup> *Ibid.* at 58.

<sup>417</sup> *Ibid.* at 59.

The common law has developed the doctrine of frustration to deal with three types of cases that concern excuses for non-performance because of a fundamental change in circumstances: these are i) impossibility; ii) frustration of purpose; and, iii) temporary impossibility.<sup>418</sup> The first type of case is that where the frustrating event has rendered performance impossible.<sup>419</sup> In this respect, impossibility in the common law is a sub-set of the broader doctrine of frustration. In addition, the term “impossibility” must be differentiated from “frustration” even though these words are sometimes used interchangeably.<sup>420</sup> Indeed, as John McCamus has observed, “the doctrines of impossibility and frustration were received as and continue to be regarded as two separate doctrines”.<sup>421</sup>

*i) Impossibility*

Frustration in the common law provides a party with an excuse for non-performance of a contract because that party’s ability to perform has become severely compromised because of a supervening event. In many respects, it resembles the civilian doctrine of *force majeure*, but there are notable differences. While civil law never accepted that a party could contract to do the impossible, in the early stage of the development of the doctrine of frustration, the common law accepted that an impossibility was no excuse for failure to perform a contract.<sup>422</sup> As Treitel noted,

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<sup>418</sup> McCamus, *supra* note 48 at 573.

<sup>419</sup> *Ibid.*

<sup>420</sup> See e.g. G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson/Carswell, 2006) at 576-577.

<sup>421</sup> McCamus, *supra* note 48 at 576-577.

<sup>422</sup> See e.g. *Paradine v. Jane*, *supra* note 400.

generally, in most common law jurisdictions, there was no theory of impossibility.<sup>423</sup>

Thus, as noted above, initially the common law adopted the strict doctrine of “absolute” contractual obligations. From this it followed that an impossibility to perform was generally not a legally recognized excuse.

Unlike the civil law, the common law was much more reluctant to allow for the termination of a contractual obligation because of a new, unanticipated event. However, there were some exceptions to the general rule of absolute contracts. The death of a promisor in a contract of personal service was one recognized exception; the other was the enactment of subsequent legislation that would make the performance illegal.<sup>424</sup>

Apart from these narrow grounds, in the common law *pacta sunt servanda* was to prevail over a contractual impossibility. As Lord Buckmaster of the Privy Council stated in 1920, “no phrase [is] more frequently misused than the statement that impossibility of performance excuses breach of contract. Without further qualification such a statement is not accurate; and indeed if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule”.<sup>425</sup>

Thus, in the common law where a party made an unqualified contractual promise, it had a *prima facie* duty to perform. If circumstances materially changed after contract formation, making performance impossible, the parties still remained bound to their obligations unless a term of discharge could be implied in the contract. More recently, Martin C.J. of Saskatchewan made this point when he stated, “[w]here a person by his

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<sup>423</sup> Treitel, *supra* note 356 at 1-4, under the sub-heading “No Theory of Impossibility”.

<sup>424</sup> McCamus, *supra* note 48 at 568.

<sup>425</sup> *Grant, Smith & Co. v. Seattle Const. & Dry Dock Co.*, [1920] A.C. 162 at 169 (U.K.).

own agreement creates a duty or charge upon himself, he is bound to carry it out notwithstanding that he is prevented from so doing by some accident or contingency which he ought to have provided against in his agreement".<sup>426</sup> The words of Martin C.J. echo those found in the seventeenth century judgment of *Paradine*: contractual performance was to be "absolute" to the extent that impossibility was not excusable, unless such a provision was provided for in the contract.

Over time, the common law became less strict in the application of the doctrine of absolute contractual obligations. The process of change began with Blackburn J.'s decision in *Taylor v. Cadwell*.<sup>427</sup> Blackburn J. did not directly contradict the precedent in *Paradine* in that impossibility could not apply to cases involving land, as the land could not be destroyed, and the remaining interests could survive.<sup>428</sup> However, the accidental destruction of a *building* by fire on property that was to be leased could discharge a contract. Blackburn J. made a similar ruling in *Appleby v. Myers*.<sup>429</sup> That case concerned a contract for the manufacture and installation of machinery for a factory, and maintenance of the machinery for two years. The contract was held to be discharged when the factory was destroyed by fire prior to the installation of the machinery. Blackburn J. also acknowledged the principle he laid down in *Taylor v. Cadwell*—that both parties were excused from their performance—but the plaintiffs could not recover for any work that had already been completed. The common law approach to frustration and discharge was that losses should lie where they fall at the time of the frustrating

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<sup>426</sup> *McCuaig v. Kilbach*, [1954] 3 D.L.R. 117 at 119 (Sask. C.A.).

<sup>427</sup> *Supra*, note 408.

<sup>428</sup> Fridman, *supra* note 420 at 633.

<sup>429</sup> *Appleby v. Myers*, [1867] L.R. 2 C.P. 651.

event. This approach has also been adopted in Canada where two early Supreme Court decisions applied *Taylor v. Cadwell* and *Appleby v. Myers*.<sup>430</sup>

As G.H.L. Fridman noted, it was the decisions of Blackburn J. in the cases of *Taylor v. Cadwell* and *Appleby v. Myers* that were instrumental in facilitating the development of the modern doctrine of frustration in the common law.<sup>431</sup> According to Fridman, “[t]he courts were attempting to extricate themselves from the straightjacket of the absolute theory of contracts”.<sup>432</sup> Treitel would appear to concur with this view by acknowledging that the judgment of Blackburn J. in *Taylor v. Cadwell* “formulated the doctrine of discharge in a way which facilitated its development and expansion”.<sup>433</sup> However, in discussing the development of frustration, Treitel did so within the context of cases beginning with *Paradine* that remain historical “[s]urvivals of the doctrine of absolute contracts”.<sup>434</sup> The common law, in developing the modern doctrine of frustration, never abandoned the *pacta* principle. As Lord Shaw stated, “frustration can only be pleaded when the events and facts on which it is founded have destroyed the subject-matter of the contract, or have, by an interruption of performance thereunder so critical or protracted as to bring to an end in a full and fair sense the contract as a whole”.<sup>435</sup>

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<sup>430</sup> The cases were *Kerrigan v. Harrison* (1921), 62 S.C.R. 374 and *Canadian Government Merchant Marine Ltd. v. Canadian Trading Co.* (1922), 64 S.C.R. 106. See also Fridman, *supra*, note 420 at 636-637.

<sup>431</sup> Fridman, *supra*, note 420 at 633.

<sup>432</sup> *Ibid.*

<sup>433</sup> Treitel, *supra* note 356 at 55.

<sup>434</sup> *Ibid.* at 50 (sub-heading).

<sup>435</sup> *Lord Strathcona Steamship Co. v. Dominion Coal Co.*, [1926] A.C. 108 at 114 (U.K.).

What Lord Shaw was alluding to is the implied-term theory, which plays a part in the development of the doctrine of frustration in the common law. Indeed, it was Blackburn J. who, in his ruling in *Taylor*, articulated a concept that had been slowly evolving in English jurisprudence. This was the concept of an implied condition to a contract. Even though a contract might not expressly provide for discharge in the event of the destruction of a building by fire, according to Blackburn J., “a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance [...] [T]hat excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the particular person or chattel”.<sup>436</sup> This was a logical step from the decision in *Paradine* which acknowledged the defense of an implied promise or a “legal incident”, for example, “if a house be destroyed by a tempest”.<sup>437</sup> By way of contrast, an express covenant to repair the same house would make a tenant liable even “though it be burnt by lightning”.<sup>438</sup> In this way, Blackburn J. viewed the contract in *Taylor* as being subject to an implied condition that the owner be excused if the subject matter of the contract was destroyed: “looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall [...] that being essential to their performance”.<sup>439</sup> With the subject matter of the contract destroyed, it seemed reasonable to excuse the parties from performance. This solution, to Blackburn J., must have been the presumed intent of the parties.

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<sup>436</sup> *Taylor, supra*, note 408 at 839.

<sup>437</sup> *Paradine, supra* note 400.

<sup>438</sup> *Ibid.*

<sup>439</sup> *Taylor, supra*, note 408 at 839.

Thus developed the theory that performance might be dependent upon certain promises, but these same promises, in turn, might be dependent upon the performance of some other condition.<sup>440</sup> As a result, it could be implied into a contract, even where it was not made explicit that a promise depended on the occurrence of a certain event, that this was intended, based on the reasonable person standard. Hence, contracts could be subject to either a condition precedent or a condition subsequent. If the implied term where a condition precedent, it would not be a case of impossibility or frustration, but rather one from the older law that was based on dependency of performance (i.e. fulfillment of conditions precedent). Alternatively, it was now recognized as an implied contractual term that performance could be dependent upon a condition subsequent, i.e. a supervening event. As such, the contract could be deemed “frustrated” and excused based on impossibility of performance.

The concept of implied conditions became the basis for the English doctrine of frustration until the House of Lords rejected it in a decision in 1981.<sup>441</sup> The *Law Reform (Frustrated Contracts Act) 1943*<sup>442</sup> enshrined many of the legal consequences of frustration, but its primary aim was to prevent unjust enrichment.<sup>443</sup> The Act otherwise did little to change the common law in this regard, and it did not enshrine the concept of implied intent in contract interpretation.<sup>444</sup> In addition, many types of contracts fell

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<sup>440</sup> Fridman, *supra* note 420 at 633-634.

<sup>441</sup> Brunner, *supra* note 47 at 89. The decision was in *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, [1981] A.C. 675 [*National Carriers*].

<sup>442</sup> 6 & 7 Geo. 6, c. 40 (U.K.).

<sup>443</sup> Brunner, *supra* note 47 at 90-91.

<sup>444</sup> *Ibid.*

outside its scope.<sup>445</sup> The problem with the implied intent theory was that the inquiry into intent did not concern the *actual* intent of the parties, but the *presumed* intent of them acting as reasonable persons. Where the subject matter of the contract was destroyed, who can say with certainty that the parties would not have wanted to adapt or continue with the contract? As Lord Radcliffe was to later note, “there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which *ex hypothesi* they neither expected nor foresaw”.<sup>446</sup>

The inadequacy of implying contractual terms had been noted in earlier jurisprudence. In particular, a 1916 case involved the requisition of a ship from a charter party for the purpose of carrying troops during World War I.<sup>447</sup> The owners claimed that the charter party had been discharged by the requisition. The charterers, who wished to continue with the contract, claimed that the government’s intervention was not sufficient to frustrate the contract. There, in using an implied-term approach to reconstruct the intent of the parties, a majority of the court ruled that no term could be implied in the charter party to excuse performance. Thus, the contract had not been frustrated. In a dissenting opinion, and without referencing the intent of the parties or an implied contractual term, Viscount Haldane noted that the charter party could be dissolved on the basis that “[a]lthough the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence, itself, may yet be of a character and extent so

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<sup>445</sup> *Ibid.*

<sup>446</sup> *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 at 728 [*Davis Contractors*].

<sup>447</sup> *Tamplin Steamship Co. v. Anglo Mexican S.S. Co.*, [1916] 2 A.C. 397 (H.L.) [*Tamplin Steamship Co.*].

sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation”.<sup>448</sup>

The problem with the implied term theory was that it left it to the courts to determine the true intent of the parties. The courts were forced to attempt to determine whether a supervening event had had such a negative effect on the contract that it would be unfair to hold parties to their bargain, in the absence of fault and of any assumption of the risk by either party. This left unanswered the question of what was the foundation of the contract, or what was fundamental to it, or what was the adventure or purpose of the contract. As Lord Hailsham L.C. remarked when the House of Lords rejected the implied term theory, “[t]he weakness [...] of the implied term theory is that it raises once more the spectral figure of the officious bystander intruding on the parties at the moment of agreement”.<sup>449</sup> The theory preferred by Lord Hailsham L.C. and later courts was based on the construction of the contract. Such a theory sought to discern the true meaning of the contract.

ii. *Frustration of Purpose*

“Frustration of purpose” is the second type of case that falls under the doctrine of frustration. This type of case has broadened the notion of impossibility in English law. In many respects, cases of frustration of purpose seek to reconstruct the fundamental basis or foundation of the contract. The implied intent of the parties is not the focus; rather, the court attempts to uncover, or “reconstruct” the true meaning of the contract.

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<sup>448</sup> *Ibid.* at 406-407.

<sup>449</sup> *National Carriers, supra* note 441 at para. 13.

The common law concept of frustration of purpose appears to have originated with the early case of *Jackson v. Union Marine Insurance Co. Ltd.*<sup>450</sup>—at least that was the view of Diplock L.J.<sup>451</sup> In *Jackson*, a ship, which was to be chartered, ran aground without the fault of either contractual party. This caused several months' delay in the availability of the vessel. The court ruled that this event discharged the charter party. The ship could have been sent later, but by the time it would have been ready, the original purpose of the charter could not have been fulfilled. On this basis the case was decided, even though there was no physical impossibility or true frustration. Instead, there was “practical” frustration, or frustration of purpose. Giving credit to Bramwell B. in this case, Diplock L.J. noted that “it was recognized that it was the happening of the event and not the fact that the event was the result of a breach by one party of his contractual obligations that relieved the other party from performance of his obligations”.<sup>452</sup>

Following *Jackson*, English courts treated cases of this type as “frustrating” the contract, even though the contract could be performed at some point in the future. The rationale for extending the scope of frustration was the notion that the commercial purpose of the original contract had been frustrated. To continue with performance would be to bind the parties to a new arrangement, under new circumstances. This would

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<sup>450</sup> (1874), L.R. 10 C.P. 125 [*Jackson*]. According to Bramwell B. at 147:

There are the cases which hold that, where the shipowner has not merely broken his contract, but has so broken it that the condition precedent is not performed, the charterer is discharged. Why? Not merely because the contract is broken. If it is not a condition precedent, what matters it whether it is unperformed with or without excuse? Not arriving with due diligence or at a day named is the subject of a cross-action only. But not arriving in time for the voyage contemplated, but at such a time that it is frustrated is not only a breach of contract, but discharges the charterer. And so it should though he has such an excuse that no action lies.

<sup>451</sup> In *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 at 68-69 [*Hong Kong Fir*].

<sup>452</sup> *Ibid.*

be a radically different agreement than was originally agreed to. As Lord Radcliffe put it: “frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do”.<sup>453</sup>

The historical impetus for the expansion of the principle of frustration in the common law came from a series of cases<sup>454</sup> that occurred as a result of the postponement of the coronation procession of King Edward VII due to his illness. It appeared that the similar problems presented in these cases could not be easily resolved under the rigid common law rule of impossibility. As impossibility was never at issue, the courts felt compelled to expand the principle frustration to incorporate situations where the purpose of the contract failed or was defeated through a subsequent event that was not the fault of either party. In what became known as the coronation cases,<sup>455</sup> they represented an innovative approach to frustration, and marked a clear departure from earlier decisions.

The facts in these cases had a common element. Numerous contracts had been made in anticipation of the coronation, such as the rental of rooms, the rental of seats in stands, etc. When the coronation had to be postponed, performance of these contracts did not become impossible. The leased rooms and seats could still be occupied on the contracted dates, but this would have been a superfluous exercise.

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<sup>453</sup> *Davis Contractors, supra* note 446 at 729.

<sup>454</sup> *Chandler v. Webster*, [1904] 1 K.B. 493; *Clark v. Lindsay* (1903), 19 T.L.R. 202; *Griffith v. Brymer* (1903), 19 T.L.R. 434; *Herne Bay Steamboat Co. v. Hutton*, [1903] 2 K.B. 68 [*Herne Bay*]; *Krell v. Henry*, [1903] 2 K.B. 740 [*Krell*].

<sup>455</sup> *Krell, ibid.*

The leading case was *Krell v. Henry*.<sup>456</sup> The defendant, Henry, had agreed to hire from the plaintiff some rooms to watch the coronation procession on 26 and 27 June, 1902. He paid £25 as a deposit and was to pay the balance of £50 on 24 June. When the King became ill and the coronation procession was postponed, Henry refused to pay the balance, and the plaintiff brought a claim for the outstanding amount due. Henry also counterclaimed to recover the £25 deposit he had paid. At trial, the court held that there was an implied term in the contract that the procession should take place. Accordingly, Darling J. gave judgment for the defendant on both the claim and the counterclaim. Krell appealed, but the Court of Appeal dismissed the appeal, holding that the purpose of the contract had been frustrated. The court noted that the agreement made no reference to the coronation. However, the plaintiff was aware of the purpose for renting the rooms. In the court's view, the postponement of the coronation destroyed the value of the contract for the defendant. Referencing the *Taylor* case, Vaughan Williams L.J. stated that the *Taylor* rule had been expanded to include those "cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance".<sup>457</sup> In his view, the novel point in this case was whether the court should consider circumstances that went beyond the terms in the contract in applying the rule that was established in *Taylor*. He answered in the affirmative:

you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties,

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<sup>456</sup> *Ibid.*

<sup>457</sup> *Ibid.* at 748.

what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited.<sup>458</sup>

Although it was not stated in the court's decision, such an approach would also honour the *pacta* principle. It was not that the contract became impossible to perform; the payment of money for the rent of a room is rarely an impossibility. Rather, where the occurrence of an event becomes the basis of a contract—even though it may not be explicitly mentioned in the agreement—the parties may be discharged from their obligation if the event does not occur. It is not an impossibility that has prevented performance, but instead it is the failure of the purpose of the contract that has rendered performance superfluous. In this way, *Krell* established a doctrine related to, but independent of, impossibility. As McCamus stated, “[b]y eliminating references to impossibility of performance and by formulating the rule in terms of a cessation or non-existence of a ‘state of things’ going to the root of the contract, the *Krell* decision cast the rule in broad enough form to embrace all of the impossibility cases” as well as cases like *Krell* “in which no question of impossibility arises”.<sup>459</sup>

The *Krell* decision has been subject to some criticism for its theoretical ability to allow a party to be excused from a bad bargain as a result of an unfortunate subsequent

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<sup>458</sup> *Ibid.* at 749.

<sup>459</sup> McCamus, *supra* note 48 at 576.

event.<sup>460</sup> As Thomas Roberts stated, “[t]o accept *Krell* as a general precedent allowing frustration of purpose to be a valid ground for cancellation would however introduce into the law a principle at odds with the principle sanctity of contract”.<sup>461</sup> However, the potential for the expansion of the doctrine of frustration of purpose has not been realized. As Lord Wright remarked of the *Krell* decision, it “is certainly not one to be extended”.<sup>462</sup> Indeed, *Krell* has been narrowly distinguished from similar cases. In another of the coronation cases, *Herne Bay*,<sup>463</sup> decided in the same year as *Krell* by the same panel of judges, the defendant’s contract to hire a boat to watch the King at a naval review was not discharged from the agreement by the cancellation of the coronation.

*Herne Bay* begs the question: why was a contract to rent a room for viewing the coronation wholly frustrated by the cancellation of the coronation, but a contract to hire a boat to watch the naval review was not frustrated? Even though the naval review was part of the coronation activities, Vaughan Williams L.J. felt that the object of the voyage was not limited to the naval review, but also extended to “taking them round the fleet”.<sup>464</sup> The fleet was still in place, and so the tour could still proceed in spite of the cancellation of the naval review. As Treitel has noted, the *Herne Bay* case demonstrates a common feature of the cases on frustration of purpose, in that it shows that the approach of the common law to partial frustration of purpose diverges from the method that has been

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<sup>460</sup> See e.g. Treitel, *supra* note 356 at 320-321; McCamus, *supra* note 48 at 577; and Fridman, *supra* note 420 at 635.

<sup>461</sup> Thomas Roberts, “Commercial Impossibility and Frustration of Purpose: A Critical Analysis” (2003) 16 *Can. J.L. & Juris.* 129 at para. 30.

<sup>462</sup> *Martime National Fish Ltd. v. Ocean Trawlers*, [1935] A.C. 524 at 529.

<sup>463</sup> *Herne Bay*, *supra* note 454.

<sup>464</sup> *Ibid.* at 683.

adopted to cases of partial impossibility.<sup>465</sup> “In cases of partial impossibility”, he stated, “a contract can be discharged if its *main* purpose can no longer be achieved; but in cases of frustration of purpose the courts have applied the more rigorous test of asking whether *any* part of the contractual purpose [...] could still be achieved: if so, [the courts] have refused to apply the doctrine of discharge”.<sup>466</sup>

The Court of Appeal in both cases also considered the “common purpose” of the parties, and made a noteworthy distinction. In *Krell*, the “common purpose” was for the rooms to be used for the viewing of the procession and this purpose was frustrated when the coronation was postponed. There was no such common purpose in *Herne Bay*. Romer L.J. considered that, the “statement of the objects of the hirer of the ship would not [...] justify him in saying that the owner of the ship had those objects just as much in view as the hirer himself”.<sup>467</sup> This meant that, although the postponement had frustrated the defendant’s purpose in entering into the contract to hire the ship, it had not frustrated the plaintiff’s purpose, which was presumably to provide a ship for a tour of the fleet. Wherever appropriate, the *pacta* principle would be upheld, and to defeat it would require a frustrating event for *both* parties. Treitel put it in the following terms: “This emphasis on the requirement that the purpose of *both* parties must be frustrated is found also in other English and American cases. It means that the supervening event must prevent one party from supplying, and the other from obtaining, what the former had contracted to provide and the latter to acquire under the contract”.<sup>468</sup> Thus, the court was unwilling to

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<sup>465</sup> Treitel, *supra* note 356 at 324.

<sup>466</sup> *Ibid.* Emphasis in the original.

<sup>467</sup> *Herne Bay*, *supra* note 454 at 684.

<sup>468</sup> Treitel, *supra* note 356 at 324-325. Emphasis in the original.

allow the doctrine of frustration to be used by the defendant to escape from a bad commercial bargain.

The doctrine of frustration of purpose has also been recognized in Canadian law.<sup>469</sup> However, even though the doctrine was considered to be innovative, it appears that the doctrine has had little practical effect on the courts in common law jurisdictions.<sup>470</sup> Some scholars have seen its development as arising from a unique set of events.<sup>471</sup> It has also played a relatively insignificant role in the subsequent development of the law of impossibility, at least in England.<sup>472</sup> This is likely due to the preference in the common law to place *pacta sunt servanda* ahead of the competing principle of *rebus sic stantibus*.

### *iii. Temporary Impossibility*

As frustration can occur without the fault of either party, the courts have been able to fashion rules to excuse the parties from their contractual obligation as long as the impossibility continues. A problem arises, however, when the impossibility ceases and one party then insists on performance. In such cases, it must be determined whether the party should then perform, or whether the prolonged delay caused by the temporary impossibility should excuse performance entirely. In this respect, the term “temporary impossibility” must be distinguished from “partial impossibility”. The latter term is often used to designate a situation in which some part, but not all of the promised performance

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<sup>469</sup> McCamus, *supra* note 48 at 577.

<sup>470</sup> *Ibid.*

<sup>471</sup> See e.g. John D. Wladis, “Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law” (1987) 75 Geo. L.J. 1575 at 1608-1622.

<sup>472</sup> *Ibid.* at 1608-1622.

becomes legally impossible, while “temporary impossibility” refers to a delay in performance resulting from some operative facts of impossibility.

The origin of the principle of temporary impossibility can be traced to Roman law. The *perpetuatio obligationis* excused the delay in performance in those situations where the obligation had become temporarily impossible to perform.<sup>473</sup> Most importantly, it did not terminate the obligation to perform, but only suspended it.<sup>474</sup> When the temporary impossibility ceased to operate, performance was expected, or could be demanded. The same rule applies today in the common law: a temporary impossibility may have other legal effects, but it does not discharge a contract.<sup>475</sup> In this respect, temporary impossibility is not firmly rooted in the principle of frustration. However, there is one exception. Contracts will be discharged in cases of temporary impossibility only where it is deemed that time is of the essence.<sup>476</sup> In such cases, the practical effect is to treat the contract as though it were wholly frustrated. This approach is similar to that found in German and Swiss law, which is to treat a temporary impossibility as a permanent impossibility.<sup>477</sup>

Problems of temporary impossibility seemed to arise most frequently in maritime cases. These situations typically involved either a charterer or the shipowner who sought a discharge from its obligation under the charter party agreement due to an unforeseen delay. For this reason, the term “frustration of the adventure” has often been used by the

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<sup>473</sup> W.A. Ramsden, “Temporary Supervening Impossibility of Performance” (1977) 94 S. African L.J. 162 at 162.

<sup>474</sup> Dig. 46.3.98.8.

<sup>475</sup> Treitel, *supra* note 356 at 233.

<sup>476</sup> *Ibid.* at 233-235.

<sup>477</sup> Brunner, *supra* note 47 at 251.

courts to refer to cases where delayed performance had rendered the charter of no value to one of the parties. An example of such a case is *Geipel v. Smith* where the defendant shipowner had contracted to ship coal from Newcastle to Hamburg, “restraint of princes” excepted.<sup>478</sup> Before performance was effected, war broke out and Hamburg was blockaded. The court held that the blockade was likely to continue for some time, and the contract was not merely suspended, but dissolved. The court made the additional point that the contractual provision relating to the “restraint of princes” was a requirement to have performance made within a reasonable time.

In a similar case, *Jackson*,<sup>479</sup> a ship was chartered from Liverpool to Newport (U.K.) to load rails for shipping to San Francisco. It ran aground on its way to Newport. In this case, it was the ship-owner who wished to enforce the contract against the charter party. The court decided that the contract was frustrated. In the court’s view, the delay in repairs meant that it would be unreasonable to require the charterers (the owners of the rails) to supply the cargo to the ship owner. The delay, although excusable, was held to so diminish the value of performance that the charterer was entitled to repudiate the agreement.

The principle of temporary impossibility has extended to a series of cases involving prolonged delay. During World War I, for example, the principle became firmly established.<sup>480</sup> In one wartime case, *Tamplin Steamship Co.*,<sup>481</sup> the House of Lords went as far as to suggest that cases of prolonged delay were part of a line of

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<sup>478</sup> (1872), L.R. 7 Q.B. 404.

<sup>479</sup> *Supra*, note 450.

<sup>480</sup> *McCamus*, *supra* note 48 at 578-579.

<sup>481</sup> *Supra*, note 447.

jurisprudence established in *Taylor*<sup>482</sup> and *Krell*.<sup>483</sup> However, although there may be some justification for speaking of a general doctrine of frustration that could incorporate impossibility, frustration of purpose, and temporary impossibility, this merger of these separate distinctions has not occurred—at least not in the common law.<sup>484</sup> As will be illustrated below, this contrasts with CISG Article 79, which embraces the vagaries of frustration as found in the common law.

#### H. *Hardship and Impracticability*

The early common law of England rejected any notion of hardship that did not amount to an impossibility. The principle of frustration was not applied to cases of *rebus sic stantibus* where unforeseen circumstances had rendered performance extremely onerous. Treitel, for example, concluded that the “English cases do not provide a single clear illustration of discharge on such grounds [of hardship or “pure” impracticability] alone”.<sup>485</sup> The House of Lords has denied relief on the grounds of hardship or impracticability in a number of cases. As Lord Loreburn stated in one case: “the argument that a man can be excused from performance of his contract when it becomes ‘commercially’ impossible [...] seems to me a dangerous contention which ought not to be admitted unless the parties have plainly contracted to that effect”.<sup>486</sup>

Similar judicial hostility in England to hardship and impracticability appeared in a number of other cases involving contractual performance difficulties due to World War I.

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<sup>482</sup> *Supra*, note 190.

<sup>483</sup> *Supra*, note 454.

<sup>484</sup> McCamus, *supra* note 48 at 579.

<sup>485</sup> Treitel, *supra* note 356 at 283.

<sup>486</sup> *Tenants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd.*, [1917] A.C. 495 at 510.

In one case, for example, the contract was not discharged even though it was “practically impossible for the vendor to deliver”.<sup>487</sup> McCardie J. elaborated and expressed the view that it could not be “said that grave difficulty on the part of the vendor in procuring the contract articles will excuse him from the performance of his bargain”.<sup>488</sup> This is representative of the common law’s preference towards *pacta sunt servanda*, and the subservient—or almost irrelevant—role played by *rebus sic stantibus*. This is in general contrast to the treatment of hardship in civil law jurisdictions, which have been much more receptive to cases of changed circumstances that result in situations of hardship and impracticability.<sup>489</sup>

Not surprisingly, therefore, other English cases have demonstrated the hostile judicial attitude towards hardship and impracticability, even during times of war. This relatively rigid position may represent the fact that common law countries did not experience the same degree of war-time devastation as did the civil law countries of continental Europe. Thus, English courts have held that an unanticipated 88 percent increase in the cost of goods to be supplied,<sup>490</sup> or a rise in the price of raw materials to manufacture paper,<sup>491</sup> or in freight costs of the seller that made the transaction unprofitable, are not grounds to discharge a contract.<sup>492</sup> Similarly, in *Greenway Brothers Ltd. v. S.F. Jones & Co.* the defendant, who had contracted to sell zinc ingots, was not

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<sup>487</sup> *Blackburn Bobbin Co. Ltd. v. T.W. Allen & Co.*, [1918] 2 K.B. 540 at 551, aff’d [1918] 2 K.B. 467.

<sup>488</sup> *Ibid.* at 545.

<sup>489</sup> See *infra*, section D. b. *Imprevision, Wegfall der Geschäftsgrundlage, Changed Circumstances and other Hardship Principles*.

<sup>490</sup> *S. Instone & Co. Ltd. v. Speeding Marshall & Co. Ltd.* (1916), 33 T.L.R. 202.

<sup>491</sup> *E. Hulston & Co. Ltd. v. Chadwick Taylor & Co. Ltd.* (1916), 33 T.L.R. 202.

<sup>492</sup> *Blythe & Co. v. Richards, Turpin & Co. Ltd.* (1916), 85 L.J.K.B. 1425.

excused even though, due to the outbreak of war, the defendant could obtain the metal alloy only at an “abnormal price”.<sup>493</sup>

The English common law hostility to the principle of hardship and impracticability also extended to events that arose during World War II. The leading case concerned the contract for the supply of newsreels to cinemas during the war.<sup>494</sup> After the end of the war, the cinema owners argued that the contract had been discharged by the end of the war. The Court of Appeal agreed that this “uncontemplated turn of events” had released the parties from the contract,<sup>495</sup> but the House of Lords reversed the decision.<sup>496</sup> Lord Simon remarked that “parties to an executor contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution or the like. Yet this does not of itself affect the bargain they have made”.<sup>497</sup>

Later cases would follow this line of reasoning. For example, Lord Radcliffe would note that “it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play”,<sup>498</sup> and Lord Simonds would assert without any qualification that “an increase of expense is not a ground for frustration”.<sup>499</sup> These judicial statements support the English common law view that to discharge a contract on

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<sup>493</sup> *Greenway Brothers Ltd. v. S.F. Jones & Co.* (1915) 32 T.L.R. 184.

<sup>494</sup> *British Movietonews Ltd. v. London and District Cinemas*, [1952] A.C. 166 [H.L.] [*British Movietonews*].

<sup>495</sup> [1951] 1 K.B. 190 at 201.

<sup>496</sup> *Supra*, note 494.

<sup>497</sup> *Ibid.* at 185.

<sup>498</sup> *Davis Contractors*, *supra* note 446 at 729.

<sup>499</sup> *Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH*, [1962] A.C. 93 at 115.

the basis of hardship or impracticability would introduce too much uncertainty in contractual relationships. English law has, thus, placed greater emphasis on certainty and *pacta sunt servanda*, even though the result has occasionally been harsh on one of the parties. As Treitel has stated, after surveying English jurisprudence in this area of law: “[o]ne can conclude that no English decision supports a general rule of discharge by impracticability and the number of dicta of high authority appear to emphatically to reject such a rule”.<sup>500</sup>

With the notable exception of the United States, most common law jurisdictions have followed the English approach toward hardship and impracticability, and do not explicitly recognize the doctrine.<sup>501</sup> Even in the United States, where impracticability is recognized under the Uniform Commercial Code,<sup>502</sup> as well as under the Restatement (Second) of Contracts at s. 261,<sup>503</sup> the courts have applied it in a very restrictive

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<sup>500</sup> Treitel, *supra* note 356 at 290-291.

<sup>501</sup> See e.g. Brunner, *supra* note 47 at 418: “A comparative law analysis shows that hardship is not universally, but widely recognized as a ground for exemption. This is especially true for civil law systems”.

<sup>502</sup> Under the heading “Excuse by Failure of Presupposed Conditions”, the Uniform Commercial Code [UCC] s. 2-615 states in part:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

Although this provision refers explicitly to sellers, it has also been deemed to be applicable to buyers. This is through UCC s. 1-103 which preserves common law principles unless they are displaced by specific provisions of the UCC. Because impracticability is a common law defense, UCC s. 1-103 permits a buyer to also assert the defense of impracticability even though this is not explicitly provided for under s. 2-615.

<sup>503</sup> The Restatement (Second) of Contracts at s. 261 establishes common law grounds for “Discharge by Supervening Impracticability” as follows: “Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic

manner.<sup>504</sup> This strict approach has even led certain scholars to question whether a difference exists between American and English law of contractual discharge by “impracticability”.<sup>505</sup> Indeed, it has been observed that the US doctrine of impracticability is nothing more than a corollary of the English doctrine of frustration of purpose.<sup>506</sup> Such a view supports the proposition that while US law may explicitly recognize impracticability, it still retains the relatively rigid common law approach to contractual discharge due to supervening events.

Section 2-615 of the UCC, entitled “Excuse by Failure of Presupposed Conditions”, explicitly adopts the doctrine of impracticability in circumstances where supervening events affect a seller’s performance.<sup>507</sup> It can also be extended to buyers through s. 1-103.<sup>508</sup> It provides that a seller’s failure to perform a contract, either in whole or in part, is not a breach of contract “if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made”.<sup>509</sup>

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assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary”.

<sup>504</sup> See e.g. Brunner, *supra* note 47 at 408. According to Brunner, “[i]n applying the impracticability test, American courts have adopted a restrictive attitude”. See also Treitel, *supra* note 356 at 280: “in all these cases is therefore a strong indication of the restrictive attitude of the American courts towards impracticability as a ground of discharge”.

<sup>505</sup> Treitel, *supra* note 356 at 289, where he states: “The preceding discussion shows that it is hard to formulate the exact difference between English and American law on discharge by ‘impracticability’”.

<sup>506</sup> See e.g. Rivkin, *supra* note 51 at 167 who puts it in the reverse: “Frustration of purpose is the converse of impracticability”. See also Treitel, *supra* note 356 at 419: “English law acknowledges frustration of purpose as a ground of discharge, which may be considered as the mirror-image of [the American doctrine of] impracticability”.

<sup>507</sup> *Supra* note 502.

<sup>508</sup> *Ibid.*

<sup>509</sup> *Ibid.*

The American principle of impracticability incorporates of the notion that the object of a contract could not be accomplished without commercially unacceptable costs and time input far beyond that contemplated in the contract. In this respect, it can be narrowly distinguished from frustration of purpose. While both principles fall short of cases of pure physical impossibility, frustration of purpose typically involves a party in which the performance received (or expected) has substantially decreased in value. With impracticability, the cost of performance for one party has increased so dramatically, that the original obligation has become economically unviable.

The American doctrine of impracticability appears to have originated in the case of *Mineral Park Land Co. v. Howard*,<sup>510</sup> which relied in part on dictum in the English case of *Moss v. Smith*.<sup>511</sup> *Mineral Park* involved a contract where the defendants agreed to take all of the gravel required for a nearby construction project from the plaintiff's land. The plaintiff was to be paid 5¢ per cubic yard. Only about half of the gravel was taken, which was the only part that was above water level. No greater quantity could have been taken by ordinary means, except at "a prohibitive cost" of ten to twelve times the typical cost of such an extraction.<sup>512</sup> On this basis, the plaintiff's claim was rejected. In his decision, Sloss J. noted that "[a] thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost".<sup>513</sup>

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<sup>510</sup> 172 Cal. 289 (1916) [*Mineral Park*]. Sloss's J. quote came from *Beach on Contracts* at 459.

<sup>511</sup> (1850), 137 E.R. 827, 9 C.B. 94.

<sup>512</sup> *Ibid.*

<sup>513</sup> *Ibid.*

It may appear paradoxical that English law, which first recognized the doctrine of frustration of purpose, as discussed in the coronation cases, above, has been reluctant to recognize its mirror-image, the doctrine of impracticability. However, it must also be recalled that English jurisprudence has not expanded the doctrine of frustration of purpose since the coronation cases. Similarly, American jurisprudence has applied the doctrine of impracticability in a number of cases, but such an application has been very restrictive.<sup>514</sup> From this conceptual perspective, the difference between the two doctrines is not particularly striking.

In addition, American law has made a distinction between those cases where performance of a contract has become merely more onerous for one of the parties, and where performance becomes excessively more onerous. It is only in the latter case where the doctrine of impracticability may apply. The official commentary on UCC s. 2-615 makes this point in terms of increased costs: "Increased cost alone does not excuse performance".<sup>515</sup> Although the term "impracticable" suggests that far less is required than "impossibility" to release an aggrieved party from its contractual obligations, the requisite threshold remains quite high in the US. The Restatement (Second) of Contracts provides a number of examples of cases in which impracticability might apply, such as

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<sup>514</sup> See *supra* note 504.

<sup>515</sup> American Law Institute & National Conference of Commissioners on Uniform State Laws, Official Comment Number 4 to U.C.C. s. 2-615. The full passage reads: "Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover".

the loss or destruction of property necessary to perform the contract.<sup>516</sup> However, the list is not intended to be exclusive.

The required threshold whereby performance must become excessively more onerous to constitute impracticability is set considerably high. In one case, a US District Court summarized American jurisprudence on this point: “[the court] is not aware of any cases where something less than a 100% cost increase has been held to make a seller’s performance ‘impracticable’”.<sup>517</sup> As this statement suggests, in practice, US courts have interpreted rules regarding impracticability very strictly. New York courts, for example, have excused contractual obligations for impracticability “only in extreme circumstances”.<sup>518</sup> Financial difficulty or economic hardship “even to the extent of insolvency or bankruptcy” is generally not enough to render a contract impracticable.<sup>519</sup> In other American jurisdictions, courts have similarly held that even long-term contracts will not be excused as impracticable if they become more economically burdensome than anticipated.<sup>520</sup> Thus, it appears evident that US courts will rarely excuse performance because of mere financial hardship.

James White and Robert Summers have also undertaken a comprehensive review of the UCC, and have similarly concluded that “American courts have generally rejected the sellers’ arguments under section 2-615”.<sup>521</sup> They continue by adding that where sellers have sought to use the impracticability defense, “[t]he courts have [...] favored

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<sup>516</sup> Restatement (Second) of Contracts ss. 262-265 (1981).

<sup>517</sup> *Publicker Industries v. Union Carbide Corp.*, 17 U.C.C. Rep. Serv. 989 at 992 (E.D. Pa. 1975).

<sup>518</sup> *Kel Kim Corp. v. Central Markets Inc.*, 519 N.Y.S.2d 384 at 385 (N.Y. 1987).

<sup>519</sup> *406 East 61st Garage Inc. v. Savoy Fifth Avenue Corp.*, 23 N.Y.2d 275 at 281 (N.Y. 1968).

<sup>520</sup> *Valero Transmission C. v. Mitchell Energy Corp.*, 743 S.W.2d 658 at 663 (Tex. App. 1988).

<sup>521</sup> James J. White & Robert S. Summers, *Uniform Commercial Code* (4th ed.) (St. Paul, MN: West Publishing Co., 1995) at 129.

buyers”.<sup>522</sup> Thus, even though the doctrine of impracticability has been elevated in American law to black letter status, its importance appears to be significantly reduced, and it would seem that a change in this perspective should not be expected anytime soon. As White and Summers have opined, “[b]y and large, American courts have been unreceptive to such claims [of impracticability] and we expect them to continue that hostility”.<sup>523</sup>

Nicholas Weiskopf has reached a similar conclusion on this topic. Based on his survey of American jurisprudence on impracticability, “the inescapable conclusion is that the courts typically do not permit purchasers of goods and services to escape contractual liability because of supervening frustration of [the] bargaining objective [i.e., impracticability].”<sup>524</sup> He further notes that American courts, while formally recognizing the doctrine, do little more than “pay lip service to its viability, and then virtually refuse to apply it”.<sup>525</sup> Based on this treatment, one must question whether American jurists take the doctrine of impracticability seriously, or view it as an interloper. Courts there typically voice doctrinal acceptance to the doctrine, but then deny the defense on the grounds of foreseeability, contributory fault, or based on partial impracticability.<sup>526</sup>

Notwithstanding the codification of impracticability in the UCC, the apparent American aversion to hardship and the doctrine of impracticability is consistent with the general common law attitude towards *pacta sunt servanda* and *rebus sic stantibus*. While

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<sup>522</sup> *Ibid.* at 130.

<sup>523</sup> *Ibid.*

<sup>524</sup> Nicholas R. Weiskopf, “Frustration of Contractual Purpose—Doctrine or Myth?” (1996) 70 *St. John’s L. Rev.* 239 at 242.

<sup>525</sup> *Ibid.*

<sup>526</sup> *Ibid.* at 261-262.

civil law jurisdictions have maintained an affinity for *rebus sic stantibus*, the common law has emphasized the primacy of *pacta sunt servanda*. The reason for this difference in the approach in the civil law and common law towards hardship; impracticability, and *force majeure* (and its variants) can be traced to fundamental differences in each legal system. The concept of *force majeure* was imported from the Code of Napoleon when the common law courts began dealing with commercial disputes that arose under merchant law. While the *force majeure* concept had its origins in Roman law, the common law was less-influenced by this ancient legal tradition. The civilians followed the Roman rule *impossibilium nulla obligatio est*—that no person can be obliged to perform the impossible. To the common law jurists, however, this did not mean that a contract, which became impossible to perform, was necessarily void.

In this respect, the concept of *force majeure* was not embedded in the common law; rather, *force majeure* was viewed as an interloper, imported into the common law through its appearance in clauses in the contracts of commercial parties. Rather than being a universally applicable concept as in civilian jurisprudence, a *force majeure* clause in the common law tradition became a purely contractual right. The foreign nature of these clauses, in part, may explain the difficulty that common law jurisdictions have had when dealing with concepts such as hardship, impracticability, frustration, and *force majeure*. Fundamentally, the common law tradition is an adversarial system in which the courts' function is to assign liability between the two adversarial parties on the basis of either tort or contract principles. In this tradition, *pacta sunt servanda* is paramount, and liability is imposed where a party to a contract fails to perform its contractual obligations.

Although it is often equated to the common law doctrine of contractual frustration, *force majeure* is different, and it has been applied much more broadly and flexibly than has its approximate common law counterparts of frustration or impracticability. A late nineteenth-century English case illustrates this point. In *Jacobs v. Credit Lyonnaise* the defendant shipper claimed *force majeure* after it failed to deliver a number of remaining shipments of esparto due to a war that had broken out in Algeria.<sup>527</sup> Under French law, which prevailed in Algeria at that time, the defendant argued that it would not have been liable due to “the insurrection in Algeria and the military operations connected with it [which] had rendered the performance of the contract impossible; and that by the French Civil Code, which prevails throughout Algeria, *force majeure* is an excuse for non-performance”.<sup>528</sup> The court found that while French law may have given relief under *force majeure*, English law applied in this case, and there was no equivalent common law principle, including frustration, that could relieve the defendant of liability. While the intervening war had disrupted performance, it did not destroy the “subject-matter” of the contract or the underlying rationale for the bargain as was required for relief under the doctrine of frustration.<sup>529</sup> As the court explained, “one of the incidents which the English law attaches to a contract is that [...] a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by *vis major*.”<sup>530</sup>

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<sup>527</sup> (1884) 12 Q.B.D. 589 (C.A.).

<sup>528</sup> *Ibid.* at 599.

<sup>529</sup> *Ibid.* at 600.

<sup>530</sup> *Ibid.* at 603. The term *vis major* is from Latin, meaning “superior force”.

The differences between the civil law and common law become clearer when *force majeure* is contrasted with the common law doctrine of frustration. *Force majeure* and the doctrine of frustration are similar in that they deal with unforeseen supervening events that are beyond the control of parties to an agreement. Frustration requires that the entire subject matter or underlying rationale for the contract be entirely destroyed. It normally operates to relieve parties permanently from all of their contractual obligations, including those to perform and to pay, and essentially leaves the pieces of a contract to fall where they may. Courts are not able to revise the terms of the contract to achieve a fair or equitable remedy. By contrast *force majeure* permits greater flexibility. The unforeseen events giving rise to relief can be broader, and the entire rationale or subject matter of the contract need not be destroyed in order for *force majeure* to operate. Civilian courts typically have greater latitude to revise, or “re-write” contractual terms to account for the unforeseen event. *Force majeure* may also be temporary, allowing the parties to suspend their contract temporarily, and then to reinstate it once the event passes or is remedied. This is in contrast to the doctrine of frustration, which is a blunt instrument that permanently ends all contractual obligations.

The most significant difference between civil law’s *force majeure* and the concepts of hardship, impracticability, frustration, is that these latter principles are antithetical to common law principles and ideals. With the use of these defences for non-performance, parties avoid contractual obligations and fault or liability is ascribed to neither party to the contract, but rather to a cause deemed to be beyond the control of both parties. Given the great divergence between common law values and the concepts

of hardship, impracticability, frustration, and civil law's *force majeure*, it is not surprising that common law courts have repeatedly shown great reticence in giving effect to these principles:

### I. *Origins of the Principle of Excuse for Non-Performance in Civil Law*

The principle of an excuse for contractual non-performance developed along different lines in civil law jurisdictions. Even though civilian jurists utilized many of the same philosophers who had enunciated the notion of *pacta sunt servanda*, they emphasized not the rule *per se*, but rather the exceptions to the rule. Thomas Aquinas, for example, had noted that individuals must always keep their word, even with enemies. However, he also stated that an individual's promise may be excused "if circumstances have changed with regard to persons and the business at hand".<sup>531</sup> Niccolo Machiavelli went much further, eschewing the *pacta sunt servanda* principle: "experience shows that princes who have achieved great things are those who have given their word lightly".<sup>532</sup> Ever-changing circumstances were to be used to the advantage of the prince: "a prudent ruler cannot, and must not, honour his word if it places him at a disadvantage and when reasons for which he had given his promise no longer exist".<sup>533</sup> Jean Bodin (1530–1596), who opposed Machiavelli's views on power politics, was also able to formulate the exception to the rule that a prince must honour his word, for instance "in cases where what you have promised is by nature unfair or cannot be performed".<sup>534</sup>

<sup>531</sup> Quoted in Bederman, *supra* note 357 at 8 fn. 22.

<sup>532</sup> Niccolo Machiavelli, *The Prince*, trans. by George Bull (London: The Folio Society, 2006) at 93.

<sup>533</sup> *Ibid.* at 94.

<sup>534</sup> Quoted in Wehberg, *supra* note 358 at 778

In the seventeenth century, the principle of *pacta sunt servanda* was also attacked by two prominent political philosophers, Thomas Hobbes (1588-1679) and Benedict de Spinoza (1632-1677). This attack was within the context of political arguments for the supremacy of state sovereignty, yet there was little difficulty in transforming the principle of *rebus sic stantibus* to contractual relations between individuals rather than applying it to relations between states. While Hobbes acknowledged the importance of the sanctity of contracts (“[f]or performance is the natural end of obligation”), he also stressed the idea that the sovereign had almost unlimited power, and was “bound to himself only”.<sup>535</sup> However, agreements need not be kept if they might cause a person harm or threaten the security of the state.<sup>536</sup> Spinoza similarly claimed that “no holder of State power can adhere to the sanctity of contracts to the detriment of his own country, without committing a crime”.<sup>537</sup> It was also during Spinoza’s time that *rebus sic stantibus* came to be regarded in certain European jurisdictions as an implicit condition in contracts, allowing parties freedom to adjust their agreements due to a change in circumstances.<sup>538</sup>

During the seventeenth century, the attack on the principle of *pacta sunt servanda* assisted in the growth and development of *rebus sic stantibus*.<sup>539</sup> Perhaps this was influenced by the philosophers of the era and the rise of the Age of Reason. Seventeenth century Europe witnessed the culmination of the slow process of detachment of philosophy from theology, and reason was seen as the primary source for legitimacy and

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<sup>535</sup> Thomas Hobbes, *Leviathan* (Markham: Penguin Books, 1982) at 198, 313.

<sup>536</sup> *Ibid.* at 215.

<sup>537</sup> Quoted in Wehberg, *supra* note 358 at 778. The passage is from Spinoza’s *Tractatus Theologico-Politicus*.

<sup>538</sup> Bederman, *supra* note 357 at 8 fn. 24.

<sup>539</sup> Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (New York, Oxford University Press Inc., 1996) at 581.

authority. In Europe there began critical questioning of traditional institutions, customs, and morals, and a strong belief in rationality. This new perspective assisted in the growth of *rebus sic stantibus* as a rational counter-balance to the *pacta* principle.

It appears that part of the attractiveness of *rebus sic stantibus* was due to efforts to address the devastation caused by numerous wars in Europe. The *rebus* principle was also popular with the natural law theorists, particularly as it applied to public international law.<sup>540</sup> It flourished on the continent for about 200 years. However, in the area of private law, *rebus sic stantibus* began to lose its credibility as a legitimate legal principle.<sup>541</sup> By the nineteenth century most jurists were hostile to it, and the principle seemed to have disappeared. However, it is more accurate to term the disappearance as a transformation. While the term *rebus sic stantibus* may have fallen out of favour, the concept that it represented (i.e. changed circumstances) continued to develop. In this respect, the *rebus* principle only temporarily lost its attraction. As one legal commentator noted, the *rebus* principle, having been thrown out the door, found its way back in through the window.<sup>542</sup>

As already noted, the civil law system rejected the notion that a party could contract to do the impossible (*impossibilium nulla obligatio*), even if this was promised in a contract. In addition, the focus of civil law remedies is on performance, not damages. As such, in civil law jurisdictions the obligor is released from its contractual performance obligations if the impossibility was not foreseen at the time of contracting,

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<sup>540</sup> *Ibid.*

<sup>541</sup> *Ibid.*

<sup>542</sup> The remark is attributed to Bernhard Windscheid (1817-1892), a German jurist. See *ibid.*

and if the impossibility arose after the contract was formed. Alternatively, some civil law jurisdictions allow the courts to modify contracts in cases of unforeseen supervening events.<sup>543</sup> To revise contracts is to interfere with party autonomy, and such an approach would be an anathema in common law systems. Furthermore, with some exceptions, civil law jurisdictions are traditionally based on the fault principle.<sup>544</sup> Breach of contract presupposes fault on the part of the non-performing party. In common law, a contract is similar to a guarantee: if a party breaches any of its obligations under the contract, the aggrieved party is entitled to damages, regardless of the fault of the non-performing party. From a conceptual perspective, the civil law and common law systems, thus, have opposing approaches to the principle of strict liability for breach of contract.

In civil law, *pacta sunt servanda* is still, of course, an important principle. However, in comparative terms, continental legal systems have placed greater emphasis on the role of *rebus sic stantibus*, even though it is dependent on the *pacta* principle. For this reason, national laws in civilian law jurisdictions have developed an array of doctrines and principles to deal with a fundamental change in circumstances. All of these doctrines and principles differ to some extent from CISG Article 79. In these national laws, the phrase *rebus sic stantibus* is rarely used, but other terminology has developed in its place. Although the wording has been altered, the concept of changed circumstances has remained intact. This is evident in a comparative overview of excuses for non-performance in a number of continental legal systems.

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<sup>543</sup> See e.g. Rosler, *supra* note 50 at 485. Rosler notes that German courts now prefer “judicial adaptation” of the contract over discharging the contract. Note also that the French principle of *imprévision* allows a contract to be modified in case of a change of circumstances. See Schwenger, *supra* note 365 at 710.

<sup>544</sup> Brunner, *supra* note 47 at 69.

a. *Force Majeure*

There are numerous words and terms in national legal systems to describe supervening events that make contractual performance impossible or excessively more onerous. Some of these terms are used interchangeably, but this is incorrect: such imprecision masks the subtle legal complexity behind these words. Thus, even though the term “frustration” more accurately describes the common law recognition of an excuse for non-performance, courts in Canada have occasionally imported the term *force majeure* into the nation’s legal vocabulary. Dickson J. of the Supreme Court of Canada, for example, noted in a leading case on the subject that “[a]n Act of God clause or *force majeure* clause [...] generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill”.<sup>545</sup>

The term *force majeure* originated in one of the oldest codifications that still exists today: the French Civil Code of 1804.<sup>546</sup> It is defined in Articles 1147 and 1148 of the Civil Code.<sup>547</sup> It generally describes circumstances outside one’s control.<sup>548</sup>

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<sup>545</sup> *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited*, [1976] 1 S.C.R. 580 at 583.

<sup>546</sup> C.c.F. (1804-1807); Reinhard Zimmermann, “The Civil Law in European Codes” in Hector MacQueen, Antoni Vaquer, & Santiago Espiau Espiau, eds., *Regional Private Laws and Codification in Europe* (New York: Cambridge University Press, 2003) at 19. Zimmermann notes that the French Civil Code was based on the Prussian Code of 1794. The other oldest, current codification is the Austrian General Civil Code of 1811, which was also based on the Prussian Code.

<sup>547</sup> C. civ. Article 1147: “The obligor will be found liable for the payment of damages, either by reason of the inexecution of the obligation, or by reason of delay in the execution, at all times when he does not prove that the inexecution does not result from an outside cause which cannot be imputed to him, and further that there was no bad faith on his part”.

Literally, *force majeure* (or its Latin equivalent, *vis major*) means “superior force”, but the French term is often used in a generic manner in many jurisdictions, including those of the common law, to characterize a wide range supervening events. For example, even the International Chamber of Commerce promotes its own model “Force Majeure” clause which parties to international contracts may incorporate into their contracts.<sup>549</sup> The UNIDROIT Principles similarly devotes an entire article to “Force Majeure”.<sup>550</sup> The article also closely mirrors the language found in CISG Article 79.<sup>551</sup> In this respect, the term *force majeure* has been assimilated into the English language and is often used to express an extraordinary event or circumstance beyond the control of contracting parties. This may include such events a war, strike, riot, fire, storm or any “act of God”. However, strictly speaking, by way of contrast, legislation in common law jurisdictions rarely use the term *force majeure*. Instead, terms such as “frustration”, “impracticability”, “impossibility”, or “hardship” are used in its place.

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Article 1148: “No damages arise when, as a result of *force majeure* or of a fortuitous event, the obligor was prevented from giving or doing that for which he had obligated himself, or did what was forbidden to him”. Translation by Rivkin, *supra* note 51 at 174.

<sup>548</sup> The *Shorter Oxford English Dictionary*, 6th ed., defines “*force majeure*” as an “[i]rresistible force, overwhelming power”.

<sup>549</sup> International Chamber of Commerce, *ICC Force Majeure Clause 2003; ICC Hardship Clause 2003* (Paris: International Chamber of Commerce, 2003).

<sup>550</sup> UNIDROIT Principles, *supra* note 196. Article 7.1.7 (*Force majeure*).

<sup>551</sup> *Ibid.* Article 7.1.7 states:

- (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
- (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such nonreceipt.
- (4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

In the private, commercial law of France, however, the principle of *force majeure* exhibits the approach developed out of the remnants of Roman law, which focuses on the relative fault of the party in breach.<sup>552</sup> It applies to two types of cases: i) *legal* impossibility, and ii) *physical* impossibility.<sup>553</sup> Legal impossibility can arise from a supervening change in the law or a governmental decree that make it illegal for a party to perform a contractual obligation. A physical impossibility is deemed to be an “Act of God” or some other event (e.g. destruction of the goods) that makes performance of the contract materially impossible.

As noted above, as a general principle, *force majeure* deals with cases involving legal or physical impossibility of performance, even though the term “impossibility” is not used in the Code.<sup>554</sup> As it is commonly understood, and as embodied in Articles 1147 and 1148 of the Civil Code, *force majeure* is an event that is beyond a party’s control, making performance of a contract impossible. A party in default is not liable in damages only if the non-performance is a “result from an outside cause which cannot be imputed to him”.<sup>555</sup> Belgian, Dutch, and Luxembourgian law mirror the French approach.<sup>556</sup> While Articles 1147 and 1148 appear to be indistinguishable to the concept of strict liability as found in the common law, the Civil Code from its origins never adhered to the rigidity that was found in the English case of *Paradine*. Instead, French law, and other continental legal systems, utilized interpretive techniques to bring liability based on fault

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<sup>552</sup> Rivkin, *supra* note 51 at 173.

<sup>553</sup> Rene David, “Frustration of Contract in French Law” (1946) 28 J. Comp. Legis. & Int’l L. 3d ser. 11 at 12.

<sup>554</sup> James Gordley and Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law* (New York: Cambridge University Press, 2006) at 499.

<sup>555</sup> C. civ. Article 1147.

<sup>556</sup> Brunner, *supra* note 47 at 67.

closer to the common law concept of strict liability. For example, French law focuses on the substance of a party's performance obligation. In doing so, it makes a distinction between "result-based" obligations (*obligations de resultat*) and obligations of "best efforts" or conduct-oriented obligations (*obligations de moyens*).<sup>557</sup> In the case of an *obligations de moyens* the plaintiff must prove that the defendant did not act as a prudent, average person when undertaking his/her obligations.<sup>558</sup> With an *obligations de resultat* the plaintiff need only demonstrate that the result that the defendant undertook to provide had not been accomplished.<sup>559</sup>

Swiss law takes a similar approach, and makes a distinction between non-performance and fault.<sup>560</sup> As with the French Civil Code, this technique brings liability based on fault closer to the concept of strict liability. In Switzerland, a party is at fault for non-performance if it can be proven that the obligor failed to use its diligence to fulfil its contractual obligations, regardless of whether this was intentional or done through negligence.<sup>561</sup> However, in the case of a "best efforts" obligation, the distinction between non-performance and fault becomes irrelevant. Recently, the Swiss Federal Tribunal has focused on the requirement of non-performance, rather than on the requirement of fault.<sup>562</sup> Regarding the obligation to achieve a "specific result", in theory, Swiss law maintains the distinction between non-performance and fault. But in practical terms, if the plaintiff succeeds in proving the non-performance of a specific obligation, the

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<sup>557</sup> *Ibid.*

<sup>558</sup> *Ibid.*

<sup>559</sup> *Ibid.*

<sup>560</sup> *Ibid.* at 68.

<sup>561</sup> *Ibid.*

<sup>562</sup> *Ibid.*

defendant may only succeed if it can prove that it was not at fault due to a *force majeure* event. In this respect, it has been said that “fault is to a large degree merely the other side of the coin of non-performance”.<sup>563</sup> In either case, as in French law, the non-performing party is excused if *force majeure* is found. So although the concept of *force majeure* appears different, and narrower than the common law concept of frustration, in actual cases, on similar facts, the same result may be reached.

In traditional Islamic law there is no legal doctrine that might be considered analogous to *force majeure*.<sup>564</sup> In certain contracts, however, certain rules have been identified by Muslim jurists that bear some resemblance to *force majeure*. These include the concepts of *Amer min Allah* (“Act of God”) and *Afah Samawiyyah* (“calamity”), both of which render performance impossible.<sup>565</sup>

Until the revision of the German Civil Code, the Bürgerliches Gesetzbuch (“BGB”), in 2002, that country followed the Roman law rule by making a distinction between initial and subsequent liability. Under the substantially amended BGB, it now makes no difference when the impossibility occurred. Retained from the past, however, is the principle that liability for an impossible performance depended on whether a party was responsible for the fact that performance had become impossible.<sup>566</sup> In such cases, that party was liable. According to s. 276, a party is “responsible” for “wilful default and negligence”.<sup>567</sup> While the BGB incorporates the concept of *force majeure* and changed

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<sup>563</sup> *Ibid.*

<sup>564</sup> Adnan Amkhan, “Force Majeure and Impossibility of Performance in Arab Contract Law” (1991) 6 Arab L.Q. 297 at 298.

<sup>565</sup> *Ibid.* at 298-299.

<sup>566</sup> BGB s. 276.

<sup>567</sup> *Ibid.*

circumstances (i.e. *rebus sic stantibus*), these both fall under the German principle of *wegfall der geschäftsgrundlage*.<sup>568</sup> It states: “[i]f circumstances upon which a contract was based have materially changed after conclusion of the contract and if the parties would not have concluded the contract or would have done so upon different terms if they had foreseen that change”.<sup>569</sup> As noted, in cases of non-performance under *wegfall der geschäftsgrundlage*, the role of fault plays a key role in determining whether a claim for damages can be excluded due to a party’s non-performance.<sup>570</sup> However, the amended BGB now also allows for instances where fault is not to be used as a “guiding principle”.<sup>571</sup> Thus, in addition to an at-fault principle, the BGB incorporates the principle of liability without fault in certain circumstances. This stricter type of liability may apply where the obligor has assumed a guarantee, or assumed the acquisition risk to procure a certain item. These amendments to the BGB allow for greater flexibility for considering the scope of fault and liability in cases of impossibility and changed circumstances. However, with this flexibility comes, at least in theory, the possibility of greater uncertainty in the law.

In France and many other continental legal systems, *force majeure* includes such events as a natural catastrophe, a strike, war, or a sovereign decree. More specifically, there are three characteristics of *force majeure* as recognized in the Civil Code. The first is the existence of an “outside cause” that cannot be imputed to the obligor. This must be an external event that occurred beyond the obligor’s sphere of control. Secondly, *force*

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<sup>568</sup> BGB s. 313(1).

<sup>569</sup> *Ibid.* Translation by Brunner, *supra* note 47 at fn. 1969.

<sup>570</sup> BGB s. 280(1).

<sup>571</sup> Brunner, *supra* note 47 at 39.

*majeure* event must have been “unforeseeable” at the time of the execution of the contract. In making this determination, all circumstances surrounding the event must be considered. In addition, while the test is a subjective one, it does include what a “prudent” (*en bon père de famille*, literally, a good father of a family) or “average man” should have foreseen.<sup>572</sup> Finally, the requirement of “irresistibility” constitutes the third characteristic of the *force majeure* principle. In other words, the event must have raised an insurmountable obstacle to the performance of the obligation. This is an event against which there is no defense, even if the party had foreseen the event. It leaves the obligor powerless. As already noted, civil law accepts that no one can be obliged to perform what is impossible. In this respect, the “irresistibility” characteristic of *force majeure* also incorporates the notion of *rebus sic stantibus*. This recognizes that the parties would not have contracted the same way if they had reasonably considered how events might otherwise develop.

As under CISG Article 79, in French law, where *force majeure* is found, the obligor is not liable for damages. In most cases of *force majeure*, French courts will discharge *both* parties from the obligation.<sup>573</sup> But in contrast to the CISG, where an event of *force majeure* prevents performance of an obligation only partially, cancellation of the contract may be denied, but a corresponding diminution in the counter-performance of the obligee may instead be permitted.<sup>574</sup>

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<sup>572</sup> Rivkin, *supra* note 51 at 175.

<sup>573</sup> Michael D. Aubrey, “Frustration Reconsidered—Some Comparative Aspects” (1963) 12 Int’l & Comp. L.Q. 1165 at 1176.

<sup>574</sup> Rivkin, *supra* note 51 177.

b. *Imprevision, Wegfall der Geschäftsgrundlage, Changed Circumstances and other Hardship Principles*

*Imprevision, wegfall der geschäftsgrundlage, and rebus sic stantibus, inter alia,* are all recognized hardship principles found in various civil law countries. Each one of these principles recognizes an impediment to performance that consists of a fundamental change of circumstances that does not amount to a physical impossibility. In these situations, impossibility principles, such as *force majeure*, cannot apply since there is no contractual obligation that cannot be performed, but rather one where the promisor's performance, though not impossible, has become excessively onerous. The basis for this approach is that in many business and legal circles a strict interpretation of the *pacta sunt servanda* rule was thought to be too severe, especially in contracts of a lengthy duration. In this respect, a hardship principle may be considered as a subset of the *force majeure* excuse. Considering this specific group of hardship cases under *force majeure*, there exist more flexible legal rules and consequences than those found under *force majeure* and frustration.

A variation of *force majeure* exists separately in the laws of France, and it fundamentally relies on the principle of *rebus sic stantibus*.<sup>575</sup> In contracts with the French government, it is an implied term of such transactions that the continuation of the obligation is subject to the continued existence of fundamental facts or circumstances. This is the basis of the French principle of *imprevision*, which is a principle of changed circumstances (i.e. *rebus sic stantibus*). While French administrative courts will accept

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<sup>575</sup> *Ibid.* at 174.

the defence of *imprevision* in contract cases involving private parties and the government, the civil courts have thus far refused to recognize this defence when applied to private contracts.<sup>576</sup> As Rene David stated many years ago, “[t]he doctrine of *imprevision* has never been admitted by the hierarchy of civil and commercial courts”, as they favour exclusively the concept of *force majeure*.<sup>577</sup> However, this situation may be changing, as civil courts there have become increasingly more receptive to the concept in private law matters.<sup>578</sup> Until *imprevision* is fully accepted in all of France’s courts, the stricter defence of *force majeure* must be used in its place.

Conceptually, *imprevision* is closer to the common and civil law principle of hardship. It appears to have developed out of the Civil Code’s requirement of good faith, as well as the obligation it places on parties to reasonably comply with contractual obligations, while recognizing the doctrine of *rebus sic stantibus*.<sup>579</sup> In addition, until 1914 the doctrine of *force majeure* was the only defence available to a party to discharge a contract in the event of new circumstances. The advent of World War I, and the outbreak of war again in 1939, forced the courts in France, and elsewhere on the continent, to expand the *force majeure* concept to discharge certain contracts.<sup>580</sup> The new doctrine became known as the *theorie de l’imprevision*. It encompassed cases where there was no impossibility of performance, but rather where performance had become much more onerous since the time of contracting. As part of this new doctrine, *rebus sic stantibus* was considered to be an implied or tacit condition stipulated by the parties to all

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<sup>576</sup> Gordley and von Mehren, *supra* note 554 at 524.

<sup>577</sup> David, *supra* note 553 at 13.

<sup>578</sup> Brunner, *supra* note 47 at 404-405.

<sup>579</sup> C. civ. Articles 1134 and 1135. See also Aubrey, *supra* note 573 at 1175-1177.

<sup>580</sup> David, *supra* note 553 at 12.

contracts. In this respect, *rebus sic stantibus* was viewed as an intention of all contractual parties, regardless of whether or not this was expressed in the contract itself. In this way, *imprevision* could exist in harmony with the will theories of contracts, which became popular with jurists in the nineteenth century.<sup>581</sup> As Windscheid noted, the continuation of certain circumstances could simply evidence an “undeveloped condition” of the contract, the “undeveloped condition” being something that was not willed by the parties.<sup>582</sup>

In addition, the unforeseen economic hardship must be severe, such as the devaluation of the French currency after World War I, which resulted in a fundamentally different obligation for the plaintiff.<sup>583</sup> The Conseil d’Etat has explained the term in the following manner:

[a]n “unforeseen contingency” may be defined as a situation in which the balance of a contract is upset as a result of an event of a general character, which is either political or most often economic, which is, in any case, independent of the intention of the parties, and which was unforeseeable at the signing of the contract, and which, without making performance by the administration’s opposite contracting party impossible, makes the carrying out of his obligation intolerably onerous.<sup>584</sup>

*Imprevision* is limited to contracts for future and/or continuous performance, and results in the discharge of the promisor’s contractual obligations. However, it can be distinguished from the English principle of frustration. With frustration a contract comes to an end because it becomes something beyond what the parties had contemplated; it is

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<sup>581</sup> Gordley and von Mehren, *supra* note 554 at 504.

<sup>582</sup> *Ibid.*

<sup>583</sup> *Compagnie Generale d’Eclairage de Bordeaux c. Ville de Bordeaux, Conseil d’Etat*, March 30, 1916, (1916) III D. 25; (1916) III S. 17.

<sup>584</sup> Quote is from, and translated by, Rivkin, *supra* note 51 at 178.

beyond the will of the parties.<sup>585</sup> With *imprevision*, the contract may also be discharged, but this interpretation is based on the will of the parties to the contract.<sup>586</sup>

For centuries, under the concept of *rebus sic stantibus*, many civil law jurisdictions accepted the principle of changed circumstances. It is not surprising, therefore, to find that many continental legal systems have statutes that recognize the concept of hardship. Among them are Germany, The Netherlands, Italy, Greece, Portugal, and the Scandinavian countries.<sup>587</sup> In Italy, for example, the German principle of *wegfall der geschäftsgrundlage* was adopted in Article 1467 of the Italian Civil Code, which concerns cases of *eccessiva onerosita sopravvenuta*.<sup>588</sup>

In other civil law jurisdictions, hardship is recognized in case law only. These countries include Switzerland, Austria, and Spain.<sup>589</sup> In addition, the modern civil codes in many Arab countries have imported the concept of *rebus sic stantibus* from continental Europe, and recognize cases of hardship through that principle.<sup>590</sup>

The hardship principle attempts to determine which party should bear the risk of changed circumstances, and to what extent. In civilian jurisdictions this issue is typically determined by weighing the importance of *pacta sunt servanda* against the principle of good faith in contractual performance. While the *pacta* principle demands performance (assuming that physical performance of the obligations is possible), this must be balanced

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<sup>585</sup> David, *supra* note 553 at 12-13.

<sup>586</sup> *Ibid.*

<sup>587</sup> Schwenger, *supra* note 365 at 711. Schwenger provides the following examples at fn. 10: Germany: BGB s. 313 (*Störung der Geschäftsgrundlage*); Netherlands: Dutch Civil Code (BW) Art. 6:258; Italy: CC, Art. 1467 (*eccessiva onerosità sopravvenuta*); Greece: Greek Civil Code, Art. 388; Portugal: Portuguese Civil Code, Art. 437; Austria: Austrian BGB ss. 936, 1052, and 1170a.

<sup>588</sup> C.Cit. Art. 1467.

<sup>589</sup> Brunner, *supra* note 47 at 403. However, Schwenger, *supra* note 365, notes that the Austrian BGB recognizes hardship through analogy in ss. 936, 1052, and 1170a.

<sup>590</sup> *Ibid.* note 47 at 404.

against the counter-principle of good faith. A violation of good faith would likely occur if a party demanded performance of a contract according to its original terms even though this performance had become excessively burdensome for the obligor. Such a demand might even be deemed an abuse of right.<sup>591</sup> This assumes, of course, that the risk of changed circumstances was not assumed by the aggrieved party. It is also worth noting that, with the exception of the American UCC,<sup>592</sup> the common law has been hostile to recognizing good faith. This may help to explain why civilian legal systems have generally been more receptive than the common law to the concept of *rebus sic stantibus*.

By way of contrast, English law rejects not only good faith in law, but also any notion of relief for changed circumstances that do not amount to an impossibility. Furthermore, the term “hardship” is more of a factual description than it is a recognized legal concept.<sup>593</sup> As noted above, most common law jurisdictions follow the English approach. A notable exception is the United States, but even in that case, American courts have taken a rigid stance towards hardship and impracticability. While the UCC recognizes impracticability, US courts have tended to follow the rigid *pacta sunt servanda* rule in the common law, and have generally rejected the defence of changed circumstances. Such an approach appears to be at odds with the promulgation of the UCC in 1953, and its adoption of the doctrine of impracticability in s. 2-615.<sup>594</sup> The

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<sup>591</sup> *Ibid.* note 47 at 394.

<sup>592</sup> The key good faith provision of the UCC is s. 1-203, which states: “Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance or enforcement.” The good faith obligation applies to all duties imposed by the UCC, as well as all contracts subject to the UCC. However, the good faith obligation does not appear to extend to the process of contract negotiation and formation.

<sup>593</sup> Schwenger, *supra* note 38 at 711

<sup>594</sup> See UCC s. 2-615, *supra* note 502.

Restatement (Second) of the Law of Contracts reiterates this position,<sup>595</sup> but courts there still appear to follow the traditional common law approach, favouring *pacta sunt servanda* and eschewing *rebus sic stantibus*.

#### J. CISG Article 79 and Hardship

CISG Article 79 provides a bridge between the extremes found in certain civil and common law jurisdictions. The term “hardship” and *force majeure* are not mentioned in the CISG. Indeed, the concept of an “impediment” belongs exclusively in the CISG.<sup>596</sup> However, while Article 79 does not explicitly recognize hardship, a compelling case can be made for the proposition that Article 79 does, indeed, cover cases of hardship. The basis for a hardship defence exists even though Article 79 relieves a party from paying damages *only* if the breach of contract was due to an impediment beyond its control. During the CISG negotiations in Vienna, the idea that Article 79 would cover cases of changed circumstances, i.e. hardship, thus recognizing the principle of *rebus sic stantibus*, was a highly contentious issue. A proposal made by the Norwegian delegation sought to release a party from its obligation if, after the temporary impediment had

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<sup>595</sup> American Law Institute, *Restatement of the Law Second, Contracts, Vol. 2* (St. Paul, MN: American Law Institute Publishers, 1981) at s. 261. Under the heading “Discharge by Supervening Impracticability” s. 261 states: “Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or circumstances indicate the contrary”.

<sup>596</sup> See Nimrat Kaur, “Impediment: A Concept Under CISG, UNIDROIT and Indian Contract Law—A Comparative Analysis” (2011) 15 *Vindobona J. Int’l Comm. L. & Arb.* 91. Kaur notes at 91: “The concept of ‘impediment’ is exclusive to the Convention”, and goes on to state that the “counter provisions of force majeure and hardship” can be found in other international instruments, such as those promulgated under UNIDROIT.

passed, there had been a radical change of circumstances.<sup>597</sup> The issue was debated, and it was noted by both the Swedish and French delegates that the Norwegian proposal “was something very different from *force majeure* and much closer to the *theorie de l'imprevision* in French law or the doctrine of frustration in Anglo-Saxon law”.<sup>598</sup> There was only limited support for the idea that hardship be explicitly recognized in Article 79, thus, the Norwegian proposal was rejected.

However, the concept of hardship has been acknowledged as falling under Article 79 by many courts, tribunals, and scholars.<sup>599</sup> There can be no gap in the CISG regarding a party's invocation of economic impossibility and the adaptation of the contract to changed circumstances and hardship. This outcome is due to the quest for uniformity of international sales law, i.e. the CISG, across national borders. To hold that hardship is not covered under Article 79 would be to allow courts and tribunals to invoke national concepts, such as *imprevision*, *wegfall der geschäftsgrundlage*, frustration, *rebus sic stantibus*, etc., resulting diverging interpretations of the CISG. Such a result would undermine the purposes of the CISG to create a uniform sales law that is able to transcend national borders.

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<sup>597</sup> United Nations, *United Nations Conference on Contracts for the International Sales of Goods, Vienna, 10 March-11 April 1980, Official Records*, UN Doc. A/CONF.97/19 (New York: UN, 1991) at 381-382. The Norwegian delegation proposed that the draft of the Convention should be revised to allow a party that fails to perform a permanent exemption to the extent that, after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold that party liable.

<sup>598</sup> *Ibid.* at 381. Quote is from the French delegate, Mr. Plantard.

<sup>599</sup> See CISG-AC Opinion No. 7, *Exemption of Liability for Damages under Article 79 of the CISG*, Rapporteur: Alejandro M. Garro, Columbia University School of Law, New York, N.Y. at para. 3. Adopted by the CISG-Advisory Council, 12 October 2007 [CISG-AC Opinion No. 7]; Georg Gruber and Hans Stoll, “Article 79” in Peter Schlechtriem and Ingeborg Schwenzer, eds., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2d ed. (New York: Oxford University Press, 2005) at 810-811 [Schlechtriem & Schwenzer]; Lindstrom, *supra* note 187 at 23-24; Brunner, *supra* note 47 at 218.

A recent statutory acknowledgement of hardship can be found in Germany. The *Statute on the Modernisation of the Law of Obligations* in 2001 finally codified the right to have a contract adapted to a fundamental change in circumstances (i.e. *rebus sic stantibus*) in section 313 of the BGB.<sup>600</sup> This section of the BGB is all-encompassing, and it covers not only cases of hardship, where an unforeseen change in circumstances has made contractual performance excessively more onerous for a party, as well as traditional *force majeure*-type cases of impossibility. In this respect BGB section 313 is extremely comprehensive in scope, and is, arguably, analogous to CISG Article 79 in that it embraces a wide range of events that amount to a fundamental alteration of the equilibrium of a contract.

Although *force majeure* is dealt with under Articles 1147 and 1148 of the French Civil Code, and *imprevision* is accepted only in administrative contracts with the state—which is effectively a rejection of *imprevision* in the private law of France—there is no other legal principle in that country that could be deemed a “hardship” provision. Conceivably, under Article 1137, non-performance might be excused if there was a *cause estrange*, or an utter accident (*cas fortuity*) under Article 1721. However, compared to other civil law jurisdictions, French law has not been favourable to the concept of hardship.<sup>601</sup> Where it might be recognized in France, a party would most likely use the defence of *imprevision*, which shares many of the same attributes as hardship.

It is also important to note that while civil law emphasized *rebus sic stantibus*, the common law initially focused on the primacy of *pacta sunt servanda*. In conjunction

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<sup>600</sup> Schwenger, *supra* note 38 at 711.

<sup>601</sup> *Ibid.* note 38 at 710.

with the *rebus* principle, civilian legal systems focused on the degree of fault of the non-performing party. Breach of contract, thus, presupposed fault on the non-performing party. Of course there were some exceptions, but civilian legal systems would then attempt to determine the *degree* of fault of the non-performing party. Conceptually, this is at odds with the approach taken by the common law. With its closer affiliation with the *pacta* principle, the common law utilized a stricter and more rigid approach. It treated every contract as a guarantee, as in strict contractual liability. A party that breached its obligation under a contract entitled the aggrieved party to claim damages, regardless of fault on the non-performing party. Typical of this perspective is the comment of Lord Edmund-Davies: it is “axiomatic that, in relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligations, and certainly no defence to plead that he had done his best”.<sup>602</sup> From these two divergent approaches, each legal system developed unique methods to excuse contractual non-performance in cases of supervening events. Although there were some exceptions and concessions in each legal system, each began from a different vantage point. Of utmost significance is how CISG Article 79, as an autonomous principle of an excuse for non-performance, has been able to bridge this common law-civil law divide.

#### K. *CISG Article 79 as an Autonomous Legal Principle*

One of the unique aspects of CISG Article 79 is its aspiration to bridge the differences between the civilian principles of hardship and *force majeure* with the common law’s limited recognition of impracticability, frustration, and impossibility.

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<sup>602</sup> *Raineri v. Miles*, [1981] 1 A.C. 1050 at 1086 (U.K.).

Like many provisions within the CISG, Article 79 represented a compromise between civil law and common law conceptions of excuses for non-performance due to an unforeseen supervening event. However, it is more than just a compromise provision; it is a self-contained, independent, concept that must be read and interpreted without reference to domestic legal principles. It exists within its own sphere. In this fashion, Article 79 is deemed to be “autonomous”.

As noted above, civilian legal systems generally recognized the Roman rule *impossibilium nulla obligato*. Thus, parties were readily excused from the performance of their contractual obligations if such performance had subsequently become impossible. This principle was codified in the laws of most civilian jurisdictions in the form of *force majeure*-type provisions. Indeed, the principle was later extended to include not only cases of physical impossibility, but also those of hardship—cases which fell far short of impossibility. In determining whether a party might be released from its contractual obligations, the extent of that party’s “fault” was also, taken into consideration. Strict contractual liability was eschewed by the civilians. In this manner, the civilian jurisdictions emphasized *rebus sic stantibus*, and were more empathetic where circumstances had changed and performance had become more onerous for one of the parties.

By contrast, the common law never adopted the *impossibilium nulla obligato* rule from Roman law. A party could, therefore, be found contractually liable even though a supervening event had occurred without his or her fault, and had made performance physically impossible. In the common law, liability for breach of contract was often

strict: a party would be held liable in damages even if, without fault, he or she contracted to do something that had subsequently become impossible to perform. An absence of fault was not enough to discharge a contractual obligation. Contractual promises were seen as guarantees. Such an approach towards commitments accounted for the primacy of *pacta sunt servanda* in the common law. This helps to explain the absence of *force majeure*-type legislation in the early common law. Recall that issues of *force majeure* entered common law courts because the parties had borrowed the concept from civil law, and incorporated *force majeure* clauses into their contracts. Otherwise, *force majeure* was viewed as an interloper in English law.

The CISG can be regarded as one of the most successful international attempts in commercial law to harmonize divergent legal concepts and principles from various national laws and legal systems. The provisions within the CISG seek to eliminate the technical differences and peculiarities that are frequently encountered when comparing national laws and different legal systems. As Ulrich Magnus stated, “[t]he CISG provides a basic set of rules which has resulted from an intensive comparison of legal systems and politically supported compromises between these legal systems”.<sup>603</sup> The CISG achieves this by avoiding references to abstract legal concepts or principles that are peculiar to domestic laws. Instead, it uses an autonomous approach by using neutral language in describing specific circumstances, and then elaborating on the content of the rule without reference to national legal concepts. Article 79 is included in Section IV of Part III of the Convention under the heading “Exemptions”. The drafters of the CISG

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<sup>603</sup> Ulrich Magnus, “General Principles of UN-Sales Law” (1997) 3 Int’l Trade & Bus. L. Ann. 33 at s. 6(b).

chose the broad term “Exemptions”, rather than something more specific, in order to avoid any association with a national legal system. Thus, Article 79 does not refer to *force majeure*, impossibility, frustration, hardship, impracticability or other related terms that have their origin in specific legal systems. Rather, in plain, generic language it expresses a situation, as in, for example, Article 79(1): “A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”.<sup>604</sup>

As Andersen has noted, Article 79 is an excellent example of “terminological neutrality”.<sup>605</sup> The concept of “an impediment” beyond a party’s control that would excuse liability for failure to perform “would usually be deemed *force majeure*, *wegfall*, *hardship*, *impossibility*, or *frustration* in traditional legal terminology in numerous legal systems; but the drafters of the CISG sought to avoid such familiar terms, in the hope that Article 79 would establish its own autonomous definition of impediments beyond a party’s control”.<sup>606</sup>

One salient feature of CISG Article 79 is that the concept of an excuse for non-performance is unitary in scope.<sup>607</sup> It is unitary in that Article 79 encompasses a breach of any obligation under the contract. More importantly, it unifies the range of concepts

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<sup>604</sup> CISG Article 79(1).

<sup>605</sup> Camilla Baasch Andersen, *Uniform Application of the International Sales Law. Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions* (The Netherlands: Kluwer Law International, 2007) at 94.

<sup>606</sup> *Ibid.* Emphasis in the original.

<sup>607</sup> Brunner, *supra* note 47 at 57-61, 75-77.

that would be considered as legal excuses to non-performance. Specifically, the phrase “failure to perform any of his obligations [...] due to an impediment beyond his control” is extremely broad in scope, and it covers a litany of related principles that are found in a variety of national laws and legal systems. The non-performance referred to under Article 79 covers *any* failure to perform, for *any* cause whatsoever, including, for example, delay, the obligation to pay money, or the delivery of non-conforming or defective goods.<sup>608</sup> The scope of Article 79 thus includes not only typical *force majeure*-type events, or impossibility, but also related, narrower legal principles that are recognized in specific jurisdictions, such as frustration, hardship, *imprevision*, *wegfall der geschäftsgrundlage*, and impracticability, to name a few. In other words, conceptually, the impediments leading to a legal excuse for non-performance embrace a wide range of possibilities. The excuses available under Article 79 may be applicable to all types of non-performance. The range can be thought of as a spectrum of unforeseen supervening events, covering the most extreme cases at one end, such as physical impossibility because of the destruction of the subject-matter, to less-severe events, such as an unforeseen rise in prices, leading to hardship or something onerous to a party, at the opposite end. Article 79 can, thus, be successfully invoked in any case where the non-performance is due to a partial, permanent, or temporary impediment that occurred after contract formation.

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<sup>608</sup> Kruisinga, *supra* note 48 at 130. See also Brunner, *supra* note 47 at 111. Cf. Harry M. Flechtner, “Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods” (2007) 19 Pace Int’l L. Rev. 29.

CISG Article 79 is also unitary in scope in that it reconciles the differing civil law and common law positions regarding fault. In many civil law jurisdictions, the principle of a breach of contract presupposes fault on the part of the non-performing party.<sup>609</sup> This approach is due to the Roman law influence, where an obligor was absolved of liability if the obstacle to performance occurred without his/her fault.<sup>610</sup> The existence of various grades of culpa also accounts for the attempts in civil law to discern the subjective requirements for breach of contract, and to analyze, refine, and categorize the various degrees of fault.<sup>611</sup> For example, Friedrich Mommsen, writing in the nineteenth century, considered the concept of impossibility of performance within the context of breach of contract.<sup>612</sup> He applied and categorized impossibility into a wide-range of situations, such as initial and supervening, natural and legal, absolute and relative, objective and subjective, permanent and temporary, complete and partial, and apparent and “real” impossibility. The emphasis on *rebus sic stantibus* in civil law, with its allowance for changed circumstances, also reinforced this approach.<sup>613</sup>

This is conceptually at odds with the traditional common law principle of strict liability for breach of contract. In the English common law, a party’s obligation and liability to perform did not depend on fault. In accordance with *pacta sunt servanda*, all contractual promises were thought of as guarantees. Exemptions for liability had to be incorporated into the contract, otherwise a party could be held liable even when a

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<sup>609</sup> Brunner, *supra* note 47 at 65-68.

<sup>610</sup> Zimmermann, *supra* note 539 at 808.

<sup>611</sup> *Ibid.*

<sup>612</sup> Friedrich Mommsen’s publication was entitled *Die Unmöglichkeit der Leistung in ihrem Einfluss auf obligatorische Verhältnisse* (1853). See Zimmermann, *ibid.* at 809-810.

<sup>613</sup> *Ibid.*

supervening event had made performance impossible. Over time, the common law softened its rigid approach towards the *pacta* principle, and recognized the doctrine of frustration in the case of *Taylor* in 1863.<sup>614</sup> Further developments in the common law occurred to mitigate the harsh consequences of the law's recognition of absolute contracts and insistence on literal performance. Nevertheless, these advancements failed to bridge fully the gap between the civil and common laws' divergent approaches to excuses for non-performance.

As noted above, in Article 79's attempt to bridge the civil-common law divide it provides a principle of non-performance that fuses together the civil and common laws' distinctive approaches to this legal rule. It relies neither on the civil law's concept of presumed fault, nor on the common law's concept of strict liability.<sup>615</sup> However, it does not abandon the concept of fault altogether. Indeed, "fault" is still relevant, but it is not a question of law; it has been relegated to an interpretation of the facts. Utilizing generic language, Article 79 thus uses the objective test of an "impediment beyond the control" of a party. By doing so, it is implicit that such non-performance does not require fault on the part of the party in breach, nor does there need to be an absence of fault. In other words, an absence of fault is not a relevant consideration for an invocation of Article 79, but the existence of fault leading to the impediment would exclude an application of Article 79. With fault, the impediment would not be beyond the control of the non-performing party, or the impediment would have been reasonably foreseeable or avoidable.

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<sup>614</sup> *Supra* note 408.

<sup>615</sup> Brunner, *supra* note 47 at 69.

The legislative history of the CISG further supports the view that Article 79 was not designed to rely on presumed fault as found in the civil law, nor on the common law's principle of strict liability. Instead, Article 79 was designed as a compromise to bridge these two legal conceptions—and in doing so it has become an autonomous provision. In an early draft of this article from 1976, it provided that a party that failed to perform its obligations would not be liable in damages if the failure was due to an impediment that occurred without fault.<sup>616</sup> In this early draft, therefore, fault was presumed, as in the civil law. The following year, in revising the grounds for exemption, this provision was changed.<sup>617</sup> The requirement, that the party be without fault to be held not liable in damages, was dropped. The “fault” or “no-fault” requirement was replaced by a new, more objective test, as incorporated in Article 79: an “impediment beyond the control” of the party.<sup>618</sup>

In this manner, CISG Article 79 has connected the two conceptual approaches to fault as found in the civil and common law. The focus is not on “fault” or “no-fault”, but is shifted to something more neutral and objective: the conception of “impediment” and the equally official French *empêchement*. While the difference between “fault” or “no-fault” and an exemption from non-performance for an “impediment beyond the control” of a party may appear to be slight, this unitary formulation of an important legal concept is of utmost significance. As Andersen has commented, the attempt “to separate the language of the CISG from all other existing terminology demonstrates a good guideline

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<sup>616</sup> The counterpart to CISG Article 79 was Article 50 in the 1976 Geneva Draft. See Brunner, *ibid.* at 69.

<sup>617</sup> The revised article was Article 51 from the Vienna Draft, 1977. See Brunner, *ibid.* at 69-70.

<sup>618</sup> CISG Article 79(1). See also Brunner, *ibid.*

for the uniformity of the CISG, as intended by the drafters: namely the quest for the development of autonomous terms—the drafters aimed for a uniform language [...] to be understood universally the same, with no taint from domestic law”.<sup>619</sup>

Even if the lofty goal of uniform and autonomous terminology is realized, it is necessary to look at whether there is uniformity in the application of the CISG among national courts and arbitral tribunals. This requires, for example, that Article 79 be applied in similar ways across various jurisdictions. As Hans Stoll and Georg Gruber have stated,

Article 79 is the result of a difficult compromise between the advocates of an absolute guarantee that the contract will be performed [i.e. *pacta sunt servanda*], in accordance with the Anglo-American model, and the proponents of the principle of fault, characteristic for most of the continental European legal systems. The compromise must not be weakened by recourse to principles of liability under national law when interpreting Article 79; the provision’s independent character must be observed.<sup>620</sup>

John O. Honnold has similarly admonished courts, tribunals, and legal practitioners to “purge [their] minds of presuppositions derived from domestic traditions and, with innocent eyes, read the language of Article 79 in the light of the practices and needs of international trade.”<sup>621</sup> In other words, in the developing body of international cases, there should be no evidence of interpretive flexibility or divergence in its adaptation to the various national legal systems that have considered Article 79.

<sup>619</sup> Andersen, *supra* note 605 at 38-39.

<sup>620</sup> Stoll and Gruber, “Article 79” in Schlechtriem & Schwenger, *supra* note 599 at 807.

<sup>621</sup> Honnold & Flechtner, *supra* note 43 at 615.

But that might be wishful thinking. One American decision on Article 79 has been discussed in an article labeled, in part, “The Worst CISG Decision in 25 Years?”<sup>622</sup> Quoting the words of Michael Bridge, Harry Flechtner has similarly suggested that the “centrifugal forces of nationalist tendency” has come from even enlightened circles.<sup>623</sup> In John O. Honnold’s guarded view, “we face the likelihood that Article 79 may be the Convention’s least successful part of the half-century of work towards international uniformity”.<sup>624</sup> As they exist, such pronouncements are an ill-omen to the continuing development of autonomous commercial norms in cross-border transactions. But whether these statements are accurate can be discerned from the cross-jurisdictional case law on Article 79 that is discussed in the following two chapters.

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<sup>622</sup> Joseph Lookofsky and Harry Flechtner, “Nominating *Manfred Forberich*: The Worst CISG Decision in 25 Years?” (2005) 9 *Vindobona J. Int’l Com. L. & Arb.* 199. The dubious distinction for the “worst” case is *Raw Materials Inc. v. Manfred Forberich GmbH*, 2004 WL 1535839 (District Court for the Northern District of Illinois, July 7, 2004).

<sup>623</sup> Harry M. Flechtner, “Recovering Attorneys’ Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*” (2002) 22 *Nw J. Int’l L. & Bus.* 121 at 121.

<sup>624</sup> Honnold & Flechtner, *supra* note 43 at 627.

## CHAPTER FOUR

GETTING IT RIGHT: RELATIVE UNIFORMITY IN THE TREATMENT OF  
ARTICLE 79 IN DOMESTIC COURTS AND ARBITRATIONSA. *Article 79 Jurisprudence in Domestic Courts and Arbitrations: Civil Law**Dominance*

It has been stated that there are two influential legal traditions in the contemporary world, the civil law and the common law.<sup>625</sup> Of these two prominent legal traditions, it has been argued that the older of these two traditions, the civil law, is not only more widely known and used throughout the world, but it is also the more influential, and dominate<sup>626</sup> than its common law counterpart.<sup>627</sup> In an analysis of CISG jurisprudence it becomes immediately apparent that, with regards to the output of CISG case law and arbitral decisions, countries with civil law systems lead the field.<sup>628</sup> This may be due to the fact that there is greater awareness of the CISG in civil law jurisdictions.<sup>629</sup> For example, in some civil law jurisdictions study of the CISG is part of the regular law

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<sup>625</sup> John Henry Merryman & Rogelio Perez-Perdomo, *The Civil Law Tradition*, 3d ed. (Stanford: Stanford University Press, 2007) at 1. In the recent past, it could have been argued that there was also the socialist law tradition. However, most of these socialist law countries were previously part of the civil law tradition, to which they have reverted with the demise of communism in most parts of the world.

<sup>626</sup> H. Patrick Glenn, *Legal Traditions of the World*, 4th ed. (New York, Oxford University Press, 2010) at 175.

<sup>627</sup> Merryman & Rogelio Perez-Perdomo, *supra* note 625 at 1. The civil law tradition has been dated as far back to 450 B.C.E., with the publication of the Twelve Tables in Rome. By contrast, the date at which the common law is thought to have been founded is 1066, with the Norman invasion of England. See Merryman & Rogelio Perez-Perdomo, *supra* note 625 at 2-3.

<sup>628</sup> For example, excluding the nine ICC cases, of the 119 Article 79 cases noted in this dissertation, only four emanate from a common law jurisdiction, the United States. A review of the "Country Case Schedule" on the Pace CISG website reveals similar patterns. See online: Pace Law School CISG Database <<http://www.cisg.law.pace.edu/cisg/text/casecit.html>>.

<sup>629</sup> Ferrari, "General Report", *supra*, note 218 at 421-423.

school curriculum.<sup>630</sup> Bar associations in civil law countries appear to offer regular continuing legal education (CLE) courses on the CISG.<sup>631</sup> In other jurisdictions, particularly those of the common law, there is relatively little awareness of the CISG.<sup>632</sup> For instance it has been noted that in Canada “it appears that only two CLE events [on the CISG] have been presented by major CLE providers in the last five to seven years”.<sup>633</sup> The situation in the U.S. is similarly disappointing. Awareness of international case law on the CISG appears to have been ignored. As one commentator has lamented, “[m]ost of the federal courts’ decisions have actually hidden behind the ‘false’ excuse that there is little caselaw outside the U.S. caselaw on the CISG”.<sup>634</sup>

Where there is little awareness of the CISG, the Convention cannot have a significant impact on law students, practicing lawyers, judges, legislators, and businesspersons. This may help to explain why countries in the civilian tradition have been much more prolific than common law jurisdictions in their adjudication of CISG cases. For example, excluding ICC arbitrations, of the 61 Article 79 cases from signatory state courts considered in this study, only four emanate from a country from the common law tradition, the U.S.<sup>635</sup> When 58 civilian arbitral cases are added, the total civil law

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<sup>630</sup> *Ibid.* at 422. This is the case in China, Croatia, and Denmark.

<sup>631</sup> *Ibid.* at 422-423 fn. 62 where Argentina, Denmark, Germany, and Greece are cited as examples.

<sup>632</sup> See generally the chapters on “Canada”, “New Zealand”, and the “United States of America” in Ferrari, ed., *The CISG and its Impact on National Legal Systems*, *supra*, note 218.

<sup>633</sup> McEvoy, *supra* note 218 at 66.

<sup>634</sup> Alain A. Levasseur, “United States of America” in Ferrari, ed., *The CISG and its Impact on National Legal Systems*, *supra*, note 218 at 313.

<sup>635</sup> The four American cases are *Macromex Srl. v. Globex International, Inc.*, 2008 U.S. Dist. LEXIS 31442 (S.D.N.Y. 16 April 2008), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/080416u1.html>>; *Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F. Supp. 2d 781 (S.D.N.Y. 20 August 2008), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/080820u1.html>>; *Valero Marketing v. Greeni Oy*, 373 F. Supp. 2d 475 (D.N.J. 4 April 2006), online: Pace Law School CISG Database

cases expands to 119.<sup>636</sup> If Israel is included as a hybrid or mixed legal jurisdiction—it is steeped in the common law tradition, but also embraces civilian legal traditions—one more case can be added to the common law tally.<sup>637</sup> Clearly, civil law jurisdictions dominate in Article 79 jurisprudence. However, some of those civilian jurisdictions have added little to Article 79 jurisprudence.<sup>638</sup>

This is not to suggest that civil law countries have homogeneous laws and uniform legal systems. Germany, Switzerland, Italy, and France are “civil law” countries, for example, but each has their own legal structures, with quite different laws, rules, processes, and institutions. The civilian tradition is, indeed, a composite of many different elements and distinct sub-traditions with unique origins and histories. Recognizing the great diversity that exists within the civil law tradition, it must also be appreciated that there is a history and tradition that is uniquely shared by civil law members that distinguishes them from legal systems that belong to the common law.

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<<http://cisgw3.law.pace.edu/cases/060404u1.html>>; and *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. 6 July 2004), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040706u1.html>>.

<sup>636</sup> See Figure 1, *supra*. The total of 119 cases excludes the arbitral cases from the International Chamber of Commerce.

<sup>637</sup> The Israeli case is Supreme Court (CA) 3912/90 *Examin v. Textile and Footware*, 22 August 1993, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/930822i5.html>>. However, even this case provides no information of substance on Article 79. That article is cited, but it is not an Article 79 case, and as such is not discussed herein.

<sup>638</sup> In addition to the Israeli case, *ibid.*, the following cases, from China, Russia, Spain, and Ukraine respectively, add nothing to Article 79 jurisprudence. While Article 79 is briefly referred to in these cases, there is no significant discussion or analysis of that provision. Therefore, these cases are not discussed herein. See *Shen Zhen fengshen Industry Development Co. v. Inter Service Internation France*, Wuhan Economic and Technology Development Zone People’s Court [District Court], 30 June 2000, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/000630c1.html>>; Constitutional Court of the Russian Federation, 27 April 2001 (Resolution No. 7-P), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/010427r1.html>>; Juzgado de Primera Instancia [District Court] La Laguna, 23 October 2007, No. 1554/2006 [*Cattle case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/071023s4.html>>; and Tribunal of International Commercial Arbitration, Ukrainian Chamber of Commerce & Trade, 15 April 2004 [*Counter-purchase case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040415u5.html>>.

One common element is that the civil law tradition is traceable to the Roman law as codified under Justinian. More recently, and for reasons that are still debated,<sup>639</sup> another trait from countries belonging to the civilian legal tradition appears to be that they share a relative affinity (vis-à-vis the common law) for the CISG.<sup>640</sup>

*B. Austria: The Supreme Court Gets It Right—Almost.*

The five cases on Article 79 from Austria are relatively limited in the extent of their treatment of that provision.<sup>641</sup> This is somewhat in contrast to the general treatment of the CISG in that country. Considering Austria's comparatively small population,<sup>642</sup> the Supreme Court (Oberster Gerichtshof or OGH) has been very active in adjudicating a

<sup>639</sup> See e.g. Bruno Zeller, "The CISG and the Common Law; the Australian Experience" in Ulrich Magnus, ed., *CISG vs. Regional Sales Law Unification* (Munich: Sellier European Law Publishers, 2012) at 57-78.

<sup>640</sup> See generally Franco Ferrari, ed., *The CISG and its Impact on National Legal Systems*, supra note 218. The CISG has directly impacted the domestic sales legislation of the Scandinavian countries (Norway, Finland, and Sweden), with the exception of Denmark. The CISG has also had an important legislative impact in Russia, Estonia, and a number of other post-socialist Eastern and Central European countries. It has also been influential in the development of China's modern contract law. In Germany, it is reported that the CISG "had [...] a strong real impact on the final outcome" of its revision to its civil code on obligations. Indeed, within the European Union (EU), the CISG's impact on legislation has been impressive. It is in force in 23 of the 27 EU member countries, and in this way it has given "shape to a set of common rules and principles in the field of cross-border sales transactions [within the EU]". Perhaps more importantly, "this process prepared the ground for the intervention by [...] EU institutions aimed at harmonizing the national laws on sales within the EU in light of the CISG's model and to extend the CISG to a broader scope of application than simply sales law". *Ibid.*, Ferrari, ed., at 82-84, 159-160, 347, 474-475 respectively.

<sup>641</sup> In chronological order, from the most recent case, these are: Oberster Gerichtshof [OGH] [Supreme Court] 21 April 2004, 7 Ob 32/04p [*Omnibus case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040421a3.html>>; Oberster Gerichtshof [OGH] [Supreme Court] 14 January 2002, 7 Ob 301/01t [*Cooling system case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020114a3.html>>; Oberster Gerichtshof [OGH] [Supreme Court] 29 June 1999, 1 Ob 74/99k [*Dividing wall panels case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/990629a3.html>>; Oberster Gerichtshof [OGH] [Supreme Court] 15 December 1998, 1 Ob 289/98a [*Construction materials case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/981215a3.html>>; and Oberster Gerichtshof [OGH] [Supreme Court] 6 February 1996, 10 Ob 518/95 [*Propane case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960206a3.html>>.

<sup>642</sup> Currently estimated to be 8.4 million people, online, Wikipedia "Austria" <<http://en.wikipedia.org/wiki/Austria>>.

variety of CISG cases.<sup>643</sup> Unfortunately for the purposes of this dissertation, only a few concern Article 79. One of these cases mentions that provision in a negligible way in the context of its discussion of foreseeability and damages.<sup>644</sup> However, all five Article 79 cases emanate from the Supreme Court.

The earliest Austrian Article 79 case, the Propane case, was an important decision relating to the interpretation of statements made by parties to an international sales contract, but it stated nothing of significance on Article 79.<sup>645</sup> Instead, it made reference to that article's sister provision on exemptions, Article 80, which states that "[a] party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission".<sup>646</sup> In such situations, the impediment is caused, not by a supervening event, but rather by the action or inaction of one of the parties. This explains why the provision is situated together with Article 79 under CISG Section IV "Exemptions".

The rule is self-evident: a party must bear the consequences of its own misconduct and should not be able to benefit from its own wrongdoing. Thus, in the Propane case where the buyer was under a contractual obligation with the seller to obtain a letter of credit, the Supreme Court held that the buyer was exempt from liability because the seller had failed to provide it with the necessary details to open the credit. Article 80, thus, acts

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<sup>643</sup> Willibald Posch & Thoma Petz, "Austrian Cases on the UN Convention on Contracts for the International Sale of Goods" (2002) 6 *Vindobona J. Int'l Com. L. & Arb.* 1 at 2-4. Posch and Petz report that the Austrian Supreme Court has adjudicated 30 CISG cases since the end of 2001. Many more have been reported since.

<sup>644</sup> Cooling system case, *supra* note 641. As this case is insignificant in Article 79 jurisprudence, it will not be discussed.

<sup>645</sup> Propane case, *supra* note 641.

<sup>646</sup> CISG Article 80.

to prevent the claims of a party where that party has caused the non-performance of the other party. As the Supreme Court noted, “[t]he non-issuance of the letter of credit [...] was caused by an omission of the [seller], and—following Art. 80 CISG—the latter cannot rely on the [buyer’s] failure to open the letter of credit”.<sup>647</sup> In this respect, the Court correctly concluded that an omission was the equivalent to an act, as it was a necessary condition to making performance possible.

The Dividing wall panels case also considered Article 79 in a peripheral manner.<sup>648</sup> The case was primarily concerned with the return of non-conforming goods, and which party was at risk for the safe delivery of returned defective products. The Supreme Court held that by delivering non-conforming goods in the first place meant that the seller had to bear the risk of the return transportation of the goods. In making this point, the Court referred to CISG commentary on the issue and made a distinction between the CISG and the Austrian Commercial Code (“HGB”). Such distinctions are important to the development of relative uniformity in CISG case law across signatory states. In this instance, the Supreme Court held that under the CISG, “wrong delivery” had to be assessed by Articles 35 *et seq.* instead of being treated as a case of non-delivery as provided for under domestic law. In that respect, as DiMatteo *et al.* noted, the Court “indicates a commitment to interpret the CISG in a manner that tends to promote uniformity of interpretation”.<sup>649</sup> Unfortunately, the Court utilized the term *force majeure* rather than referencing Article 79 when it stated that “the seller alone bears the risk of

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<sup>647</sup> Propane case, *supra* note 641.

<sup>648</sup> Dividing wall panels case, *supra* note 641.

<sup>649</sup> DiMatteo *et al.*, *supra* note 8 at 112.

chance accidents and force majeure”.<sup>650</sup> Then in a paragraph below, the Court noted that the possibility of exoneration according to Article 79 did not need to be examined. Regrettably, the comingling of terminology—*force majeure* and Article 79—works against the effort to promote uniformity of interpretation. While the Court refrained from the homeward trend in deciding the primary issue in this case, nevertheless, it made a minor—but common—error in its use of terminology when referencing Article 79.

Not all cases from Austria are perfect in their interpretation of Article 79. Sometimes the homeward trend creeps into the courts’ analysis of that provision. For example, in another early case, the Supreme Court made references to domestic law in a manner that is not consistent with the quest for uniformity in international sales law.<sup>651</sup> The facts of the Construction materials case are complex. In essence, it involved the development of a gravel pit and the related construction of a mobile concrete facility for a grit delivery contract. The Austrian plaintiffs were to lease a gravel pit to the German defendants. The defendants were to extract raw materials from the pit, erect a processing plant, and then resell the goods to the plaintiffs. Following the conclusion of the contract, the market for gravel and concrete deteriorated significantly. Even though the plaintiffs agreed to a price adjustment, the defendants failed to erect the plant, citing economic duress.

The issue concerning the Supreme Court was whether the defendants could rely on frustration of contract as a consequence of changed market conditions to exempt them from liability for non-performance. The Court found that even though this contract

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<sup>650</sup> Dividing wall panels case, *supra* note 641.

<sup>651</sup> Construction materials case, *supra* note 641.

applied to lease of land, the CISG was applicable to the grit delivery contract. It referred to Article 79, and conceded that that provision “does also contain elements to be qualified as frustration of contract”, and accurately noted that “a party could only refer to this provision, but not to national provisions”.<sup>652</sup> Notwithstanding its desire to limit its discussion to Article 79, rather than to similar domestic legal concepts, the Court noted that “the defending parties could [...] not successfully rely on a frustration of contract as a consequence of a changed market situation”.<sup>653</sup> The reference to “frustration” was unfortunate, as was the Court’s statement that “the same results from the grounds of the doctrine of the frustration of contract according to purely national law”. Also disappointing were the references to numerous domestic examples of changed market conditions where frustration of contract was denied.<sup>654</sup> References to international case law would have been more desirable. The Court did, however, acknowledge that Article 79 was the controlling provision, so, “in the sense of Art. 79 CISG, [the defendants] had been unable at the time of the conclusion of the lease and grit delivery contract to take into account a change in the market situation”.<sup>655</sup> As such, the defendants were denied reliance on changed market conditions to exempt them from liability for their non-performance.

The issue of an exemption from liability for an impediment due to the conduct of a third person is central in the Omnibus case.<sup>656</sup> An Austrian seller/distributor of

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<sup>652</sup> *Ibid.*

<sup>653</sup> *Ibid.*

<sup>654</sup> These included “[f]rustrated expectation concerning the development of a shopping centre... a change of commodity prices, [and] a decrease of purchasing power and down-sizing of companies”. *Ibid.*

<sup>655</sup> *Ibid.*

<sup>656</sup> Omnibus case, *supra* note 641.

omnibuses was sued by a Swiss buyer for a bus that had been destroyed by fire. An investigation revealed that the cause of the fire was due to the improper installation of the air-conditioning system. It could not be determined if the improper installation was caused by the manufacturer of the bus, or its supplier. The seller argued that it should not be held liable for damages as it acquired the new vehicle from a reputable manufacturer, and had not subjected it to any modifications. Consequently, there was to be no “direct liability” from the seller to the buyer. The trial court ruled in favour of the buyer, finding the seller liable for delivering defective goods, but the seller appealed. It was not clear, however, if the court made this ruling on the basis of the CISG or under Austria’s civil code. The same problem arises with the ruling by the Appellate Court. It found that the seller, as a dealer/distributor, could not be burdened with the obligation to examine all apparently harmless parts of factory-new goods prior to their resale. It further noted that the installation of the air-conditioning system was a very complex procedure, and even if it had been inspected, it would not have attracted the attention of the seller. That would appear to be an acceptable defense under Austria’s domestic law, but it is likely to be unsuccessful under the CISG.<sup>657</sup>

The Appellate Court thus ruled that the Seller was neither liable for the defect of a supplier far down the procurement chain, nor liable for damages arising from the fire. While this may have been the correct ruling under Austria’s domestic law, the Supreme

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<sup>657</sup> As the Supreme Court made the point that unlike Austria’s civil code, the CISG features a system of strict liability. As such, “liability of the parties under the CISG exceeds that under the ABGB [Austrian Civil Code]”. *Ibid.*

Court noted that the CISG was the governing law in this matter, and it features a system of strict liability.<sup>658</sup>

Article 79(1) remains the controlling provision even where a contracting party has engaged a third person to perform the contract in whole or in part. The seller's responsibility for its suppliers is part of its general procurement risk. In general, the seller is not exempted under Article 79(1) when those within its sphere of risk fail to perform. This is the basis of Article 79(2). A seller, including a bus dealer, cannot contract away its procurement risk by using a third party, even if that party is far-removed from the seller in the supply chain. In other words, the seller cannot draw any advantages by using third party suppliers. As the Supreme Court noted, Article 79(2) is meant to increase the seller's liability, by making the seller responsible for defective performance incurred by third persons as if it were the seller's own conduct.

The key issue in the Omnibus case was whether a supplier, subcontractor, or third person to whom the seller looked for performance fit the phrase of Article 79(2) "a third person whom [the party claiming exemption] has engaged to perform the whole or part of the contract." How far down the supply chain should this extend? The Supreme Court correctly confirmed that it extended to a far-removed, system component supplier of the manufacturer's. Even though the defect was possibly from a third party that was only remotely connected to the sales contract, i.e., the bus manufacturer's air-conditioning supplier, the "[Seller] could not exempt itself through any failure on the side of its

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<sup>658</sup> *Ibid.*

suppliers; instead, it was liable for their failure”.<sup>659</sup> By a close reading of the CISG, and by remaining sensitive to the international character of the Convention, the Supreme Court divorced itself from the idiosyncrasies of domestic jurisprudence. The result was a set of decisions—although not perfect—that appear to be the product of a court with an international perspective.

*C. Bulgaria: Avoiding the Domestic Law Bias*

As is usually the case with China and Russia, Bulgarian cases involving the CISG have been settled exclusively by arbitration. In Bulgaria, commercial disputes are arbitrated under the auspices of the Bulgarian Chamber of Commerce and Industry (“BCCI”). There are three Article 79 cases that emanated from the BCCI, but only two of these rule on Article 79 in significant fashion.<sup>660</sup> In doing so, these cases appear to interpret that provision in a manner that seems to avoid a bias with domestic law. The arbitral decisions interpret Article 79 in a manner that supports international uniformity on the CISG.

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<sup>659</sup> *Ibid.*

<sup>660</sup> In chronological order, from the most recent case, these two cases are: Bulgaria Chamber of Commerce Arbitration Award, 12 February 1998, Case 11/1996 [*Steel ropes case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980212bu.html>>; and Bulgaria Chamber of Commerce Arbitration Award, 24 April 1996, Case 56/1995 [*Coal case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960424bu.html>>. The third, insignificant case is Bulgaria Chamber of Commerce Arbitration Award, 19 March 2001, Case 26/99 [*Unknown goods case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/010319bu.html>>. There, in a terse ruling, the tribunal made one obscure reference to Article 79. This was regarding the fact that the buyer was unaware that when it returned goods to the seller, the transportation company failed to inform the buyer of the date of the return. Being late, the seller sought to invoke a penalty clause, but the tribunal referred to Article 79 to excuse the buyer. While this may be a questionable use of Article 79, there is little detail in the ruling to make a proper assessment of the treatment of that provision in this case.

The earliest case is from 1996, and it involved a Ukrainian seller and a Bulgarian buyer for the sale of coal.<sup>661</sup> Following a series of shipments, the buyer became concerned about the quality of the coal, and it refused payment. Following this development, the seller alleged that there was a prohibition on coal exports by the Ukrainian government. It also argued that a strike of Ukrainian miners made it impossible to deliver the outstanding shipments of coal. The seller commenced an action for payment of the outstanding price, and the buyer counterclaimed and argued that the seller should pay the contractual penalty for non-performance of its obligation to deliver.

As the tribunal correctly stated in its award, the governmental prohibition on coal exports did not correspond with the requirements for an exemption from damages under CISG Article 79. Furthermore, the seller was not exempted because of the miners' strike, since at that time the seller was already in default, and this excluded any later reliance on *force majeure*. While the tribunal used the term *force majeure*, rather than Article 79's more neutral term "impediment", it correctly decided that the government's prohibition on exports of coal did represent *force majeure*. However, the prohibition was already in force at the time of the conclusion of the contract, and was, therefore, foreseeable. It is not enough that an impediment hindering performance is an objective one or occurs outside a party's sphere of control. In addition to this, the impediment must not have been foreseeable at the time of the conclusion of the contract. In this respect, Article 79

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<sup>661</sup> Coal case, *ibid.*

specifies the foreseeability requirement as an independent requirement of exemption, and such a risk, if assumed, should be reflected in the contract.<sup>662</sup>

Another Bulgarian case also seems consistent with Article 79's foreseeability standard. In the Steel ropes case a BCCI tribunal refused to accept a seller's argument for a price increase because of changes in market conditions.<sup>663</sup> A buyer sought to be excused from further performance of a contract to buy steel ropes for two reasons: the increase in the value of the American dollar had made the product more expensive, and a depressed construction market had lowered demand for the steel ropes. Because these were foreseeable, the tribunal ruled that these circumstances were not covered by Article 79. Risks that fall within the ordinary range of commercial probability are thought to be foreseeable under Article 79.

*D. China: Early Concerns of the Homeward Trend Ill-Founded*

In the early years of the CISG, there was some concern that Chinese arbitrators and lawyers might apply the CISG in an idiosyncratic way, and out of sync with the plain meaning of the CISG's provisions.<sup>664</sup> The fear was that the homeward trend in China might pose a threat to the uniform practice of the CISG across the signatory states. More specifically, there was concern that the influence of Chinese domestic law on the CISG would be pronounced, and that the CISG might be treated as an interloper in arbitration

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<sup>662</sup> Brunner, *supra* note 47 at 320.

<sup>663</sup> Steel ropes case, *supra* note 660.

<sup>664</sup> See generally Frank N. Fisanich, "Application of the U.N. Sales Convention in Chinese International Commercial Arbitration: Implications for International Uniformity" (1999) 10 Am. Rev. Int'l Arb. 101.

practice.<sup>665</sup> However, while the early record of Chinese jurisprudence on the CISG was not perfect, these initial fears have not been realized.

Today, China has become an influential and prolific contributor of case law and scholarship on the CISG.<sup>666</sup> The CISG is now an integral part of the Chinese legal system.<sup>667</sup> For example, it ranks second (behind Germany) in the number of cases reported on the Pace Law School CISG Database.<sup>668</sup> Of the 2,655 cases reported there, 424 have come from China.<sup>669</sup> Of these, the majority of cases come from arbitral proceedings. This is not surprising. While arbitration in China is of a more recent development, with its roots in Confucian philosophy, mediation has been used for thousands of years to resolve disputes in China.<sup>670</sup> Litigation has traditionally been viewed with derision, as a last resort.<sup>671</sup> In its place exists a legal tradition that places a great emphasis on informality and persuasion.<sup>672</sup> Perhaps that is why one commentator on Chinese law (concerning *force majeure*) went as far to state, “the role of law was never given great weight in Chinese society”.<sup>673</sup> This view was complicated by the fact that in the first two decades of the establishment of the People’s Republic of China, no

<sup>665</sup> See Xiao Yongping & Long Weidi, “Selected Topics on the Application of the CISG in China” (2008) 20 Pace Int’l L. Rev. 61.

<sup>666</sup> Albert H. Kritzer, “Celebrating and Researching the CISG—Progress in the Rule of Law in the PRC” (2008-2009) 10 Int’l L. Rev. Wuhan U. 81.

<sup>667</sup> Shiyuan Han, “China” in Franco Ferrari, ed., *The CISG and its Impact on National Legal Systems*, *supra* note 218 at 71.

<sup>668</sup> As of June 6, 2011, according to the Pace Law School CISG Database, online:

<http://www.cisg.law.pace.edu/cisg/text/casecit.html>. (German cases lead the total with 465 cases reported.)

<sup>669</sup> *Ibid.*

<sup>670</sup> Kritzer, *supra* note 666 at 83. On this point, Kritzer refers to Fiona D’Souza, “The Recognition and Enforcement of Commercial Arbitral Awards in the People’s Republic of China” (2007) 30 Fordham Int’l L.J. 1319.

<sup>671</sup> Glenn, *supra* note 626 at 351. Confucius stated that “[w]hat we need is for there to be no lawsuits” (*The Analects*, Book XII.13).

<sup>672</sup> Glenn, *supra* note 626 at 320.

<sup>673</sup> Donald L. Grace, “*Force Majeure*, China & the CISG: Is China’s New Contract Law a Step in the Right Direction?” (2001) 2 San Diego Int’l L.J. 173 at 177.

real effort was made to distinguish politics from law.<sup>674</sup> Since the death of Mao Zedong in 1976, however, the country has undergone a profound number of changes, including the establishment of a less political and more institutionalized and codified system of law.<sup>675</sup> Today, for example, for aspiring Chinese lawyers, knowledge of the CISG is required to pass the national law exams, and for this reason, the Convention is a required component of the law school curriculum.<sup>676</sup>

In 1985 China passed the *Foreign Economic Contract Law* (“FECL”) that for the first time explicitly allowed private Chinese citizens to contract openly with foreign parties.<sup>677</sup> Prior to the passage of this law, any party wishing to conduct business in China had to do so under its 1981 *Economic Contract Law* (“ECL”), but it was inadequate in that was primarily designed to cover contracts between domestic parties.<sup>678</sup> These laws were promulgated in an effort to place China on the global stage as a legitimate actor in international business. Following the ratification of the CISG on December 11, 1986, the CISG entered into force in China on January 1, 1988. Until this event, Chinese contract law was relatively complex, especially before 1999, when a new law came into force that unified the previously separate regulation of domestic contracts and contracts involving foreign parties.<sup>679</sup> Without the CISG, Chinese contract law was

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<sup>674</sup> Mark R. Shulman & Lachmi Singh, “China’s Implementation of the UN Sales Convention Through Arbitral Tribunals” (2010) 48 Colum. J. Transnat’l L. 242 at 249.

<sup>675</sup> *Ibid.*

<sup>676</sup> Han, *supra* note 667 at 71-72.

<sup>677</sup> *Foreign Economic Contract Law*, adopted Mar. 21, 1985 at the 10<sup>th</sup> Sess. of the Standing Committee of the 6<sup>th</sup> National People’s Congress, effective July 1, 1985. See also Grace, *supra* note 673 at 175.

<sup>678</sup> *Economic Contract Law*, adopted Dec. 13, 1981 by the 4<sup>th</sup> Sess. of the 5<sup>th</sup> National People’s Congress, effective July 1, 1982. See also *ibid.*

<sup>679</sup> Andrea Vincze, “Conformity of the Goods under the UN Convention on Contracts for the International Sale of Goods (CISG) – Overview of CIETAC’s Practice” in Camilla B. Andersen & Ulrich G. Schroeter,

not sufficiently adequate to cover all the aspects of an international sales transaction.<sup>680</sup>

The CISG has, thus, corrected a number of deficiencies in international sales law in China, and it has generally had a positive impact on trade and economic development in that nation. Still, there was concern that there was some interaction between domestic sales law and the CISG in China where judicial bodies had “customized” the CISG to Chinese law and ideas.<sup>681</sup> However, the new contract law of 1999 has restricted this practice as it makes it explicit that the CISG prevails in sales transactions with foreign parties. This has led one reviewer on CISG jurisprudence in that country to note that “[u]niformity of application of the CISG has been emphasized by Chinese scholars”.<sup>682</sup> However, other scholars have noted a disturbing lack of consistency in the application of the CISG in China. Xiao Yongping and Long Weidi, for example, have concluded that

Chinese courts and CIETAC arbitrators have demonstrated a homeward trend in applying the CISG, which is well manifested by the parallel application of the CISG and Chinese domestic law to the same matters, the reliance upon Chinese legal rationale in the interpretation of the CISG, the fallback role of the CISG to fill the gaps of Chinese domestic law, and the exclusive resort to Chinese domestic law despite the applicability of the CISG.<sup>683</sup>

In their view, it is difficult to determine that the CISG has received uniform interpretation in China. According to Yongping and Weidi, “Chinese courts and CIETAC arbitrators are familiar with Chinese domestic law and, hence, feel more confident when dealing with this body of law, while they are not well equipped with a comprehensive

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eds., *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (London: Wildy, Simmonds & Hill Publishing, 2008) at 552.

<sup>680</sup> *Ibid.*

<sup>681</sup> *Ibid.* at 553.

<sup>682</sup> Han, *supra* note 667 at 77.

<sup>683</sup> Yongping & Weidi, *supra* note 665 at 101.

understanding of the CISG”.<sup>684</sup> Such a view suggests that the CISG, particularly Article 79, will be interpreted in a less than uniform manner in that country. This review of Article 79 case law, however, strongly suggests that this concern with homeward trend is exaggerated. In the majority of cases analyzed below, arbitral tribunals were careful to avoid references to domestic law.

Arbitration in China is governed by the *Arbitration Law* that came into effect in 1995.<sup>685</sup> Pursuant to this legislation, the China International Economic and Trade Arbitration Commission (“CIETAC”), which was established in 1956, is best known internationally because of its license to handle disputes with foreign parties. Access to public courts for commercial dispute resolution is usually not available. CIETAC is now the most prominent arbitral institution in China, and it is also influential on a global level.<sup>686</sup> This is due not only to the prolific number of CISG cases emanating from CIETAC—which, at its current rate will allow China to surpass all other signatory states in the production of CISG case law—but also because CIETAC provides extensive redacted reports on its arbitral proceedings.<sup>687</sup> However, as with the homeward trend with CISG case law in China, criticism of the CIETAC arbitral process is also evident. Jerome Cohen, a leading authority on Chinese law, has remarked that CIETAC’s practices need substantial reform if it is to compete with other international arbitral

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<sup>684</sup> *Ibid.* at 102.

<sup>685</sup> Zhonghua Renmin Gongheguo zhongcai fa [“Arbitration Law”] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective September 1, 1995), translated in 34 I.L.M. 1650 (1995) (P.R.C.). See also Catherine Mun & Shen Peng, “China” in Baker & McKenzie, ed., *The Baker & McKenzie International Arbitration Yearbook, 2010-2011* (New York: JurisNet, LLC, 2011) at 25.

<sup>686</sup> Vincze, *supra* note 679 at 554, 581.

<sup>687</sup> Fan Yang, “CISG, CIETAC Arbitration and the Rule of Law in the P.R. of China: A Global Jurisconsultorium Perspective” in Camilla B. Andersen & Ulrich G. Schroeter, eds., *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (London: Wildy, Simmonds & Hill Publishing, 2008) at 602.

institutions.<sup>688</sup> In describing his experiences with CIETAC, he stated: “I saw some of the most blatant contract violations I’d ever seen, but it was like the [other arbitrators] had been watching a different case”.<sup>689</sup> Some critics view CIETAC as an institution that is not entirely independent or impartial.<sup>690</sup> A review of decisions on CISG Article 79 from CIETAC will help to determine whether these criticisms are justified.

*D.i. Force Majeure in China*

The laws of most, if not all, countries allow for an exception to the important rule of *pacta sunt servanda*. In this respect, China is no exception, but this is a relatively recent development. Under the communist regime, the comparative growth of private commercial practices was stunted until relatively recently. Doctrines such as *force majeure*, therefore, did not develop, as China remained relatively isolated from international trade until the last few decades.<sup>691</sup> The concept of *force majeure*, when it did develop, followed the French terminology that connoted a superior or irresistible force. That is where the comparison ends. It is defined in Article 153 of the *General Principles* as an unforeseeable, unavoidable, and insurmountable condition or event.<sup>692</sup> The *General Principles* does not enumerate or elaborate or define the various conditions that would qualify an event as unforeseeable, unavoidable, or insurmountable. However, in practice it seems that these three prongs of *force majeure* refer only to natural disasters (i.e., earthquakes, floods, fire, storms) that could not have arisen from any human

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<sup>688</sup> Shulman & Singh, *supra* note 674 at 257.

<sup>689</sup> *Ibid.*

<sup>690</sup> *Ibid.*

<sup>691</sup> Grace, *supra* note 673 at 177.

<sup>692</sup> *General Principles of the Civil Law*, adopted by the 4<sup>th</sup> Sess. of the 6<sup>th</sup> National People’s Congress on Apr. 12, 1986, effective Jan. 1, 1987.

intervention. Even such calamities as war, revolution, strikes, and government intervention are excluded, as these stem from human causes. In this respect, the Chinese concept of *force majeure* resembles the stricter principle of *pacta sunt servanda*, as found in the common law. Indeed, the concept of *force majeure* in China has been compared to the common law principle of frustration.<sup>693</sup>

A *force majeure* provision is found in Article 27 of its 1981 ECL,<sup>694</sup> as well as in Article 24 of the FECL<sup>695</sup> which applies to foreign parties. While many layers of Chinese law may be applicable to foreign transactions, the FECL is the most relevant, having been based on the CISG, with a few notable exceptions.<sup>696</sup> In terms of excuses for non-performance, the FECL and the CISG differ considerably. CISG Article 79 allows for excuse when a party proves that his failure to perform was due to “an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”.<sup>697</sup> The main FECL provision on *force majeure* is in Article 24 that reads:

A party should be exempted from his obligations in whole or in part in case he fails to perform all or part of his obligations as a result of a force majeure event.

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<sup>693</sup> Herve Leclercq, “Force Majeure in Chinese Commercial Law” (1989) 7 J. Energy Nat. Resources L. 238.

<sup>694</sup> *Supra* note 678.

<sup>695</sup> *Supra* note 677.

<sup>696</sup> The most important difference between the CISG and the FECL is in the area of contract formation. The FECL has no provisions for offer and acceptance as in CISG Articles 14-24. See Frank N. Fisanich, “Application of the U.N. Sales Convention in Chinese International Commercial Arbitration: Implications for International Uniformity” (1999) 10 Am. Rev. Int’l Arb. 101 at 104, 112.

<sup>697</sup> CISG Article 79.

In case a party cannot perform his obligations within the time limit set in the contract due to a force majeure event, he should be relieved from the liability for delayed performance during the period of continued influence of the effects of the event. An event of force majeure means the event that the parties could not foresee at the time of conclusion of the contract and its occurrence and consequences cannot be avoided and cannot be overcome.<sup>698</sup>

As with many domestic laws concerning excuses for contractual non-performance, there is a superficial similarity in this provision of the FECL and the CISG. In theory and practice, CISG Article 79 is much broader and more liberal in scope. For example, Article 79 refers to a party's "failure to perform any of his obligations", so government acts may result in an "impediment" under the CISG. In contrast, China has generally not allowed acts of government to be regarded as *force majeure* events for the purpose of excusing performance.<sup>699</sup> As already noted, China has allowed excuse due to a *force majeure* event only in cases of natural disasters. Considering this definition of *force majeure*, the time limits noted in the second paragraph of the FECL reflect the Chinese view that natural disasters are only temporary impediments, and that a party's excuse only lasts as long as the disaster impedes performance.<sup>700</sup> Unlike CISG Article 79, there is almost no recognition in Article 24 of a permanent impediment to performance. Such differences between the CISG and the FECL belie the similarities between the two laws and weaken any claim that having the FECL apply to an international sale of goods contract will make little difference in the outcome of a contract dispute. In addition, the FECL contains an additional provision on *force majeure*

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<sup>698</sup> *Supra* note 677.

<sup>699</sup> Fisanich, *supra* note 696 at 114.

<sup>700</sup> *Ibid.* at 115.

that requires that the party relying on *force majeure* to secure proof of the event from a relevant agency in the form of a certificate.<sup>701</sup> Such a requirement would be incompatible with the CISG, and fortunately, none of the CIETAC cases show evidence of this domestic law requirement. However, five cases involved contracts with *force majeure* clauses that required that if a party relied on the *force majeure* provision, it would need to furnish proof from a third party agency or authority.<sup>702</sup> This requirement must be differentiated from the necessity to procure a certificate under domestic law.

From the perspective of the general principle of uniformity in international trade as embodied in CISG Article 7, an application of the CISG should not rely on the eccentricities of local practice, but on demonstrable evidence of a uniform, international practice. Thus, an analysis of Article 79 decisions from CIETAC should indicate that the CISG has been applied without reference to China's domestic contract laws, particularly those referencing national conceptions of *force majeure*.

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<sup>701</sup> Brunner, *supra* note 47 at 106.

<sup>702</sup> These cases are: CIETAC Arbitration Award, 17 June 1994 [CISG/1994/08] [*Warm rolled steel plates case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/940617c1.html>>; CIETAC Arbitration Award, 14 March 1996 [CISG/1996/14] [*Dried sweet potatoes case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960314c1.html>>; CIETAC Arbitration Award, 31 December 1996 [CISG/1996/58] [*High carbon tool steel case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/961231c2.html>>; CIETAC Arbitration Award, 4 February 2002 [CISG 2002/17] [*Steel bar case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020204c2.html>>; and CIETAC Arbitration Award, 9 August 2002 [CISG 2002/21] [*Yellow phosphorus case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020809c1.html>>.

D.ii. *Article 79 Jurisprudence under CIETAC*

There are 26 CIETAC cases that directly or indirectly invoke Article 79 as an excuse for non-performance.<sup>703</sup> As noted above, this demonstrates that parties may often

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<sup>703</sup> In chronological order, from the most recent case, these are: CIETAC Arbitration Award, May 2007 [CISG 2007/06] [*Hammer mill case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/070500c1.html>>; CIETAC Arbitration Award, 7 December 2005 [CISG/2005/05] [*Heaters case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/051207c1.html>>; CIETAC Arbitration Award, 25 May 2005 [CISG 2005/09] [*Iron ore case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/050525c1.html>>; CIETAC Arbitration Award, 17 September 2003 [CISG 2003/14] [*Australia cotton case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/030917c1.html>>; CIETAC Arbitration Award, 26 June 2003 [CISG 2003/10] [*Alumina case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/030626c1.html>>; CIETAC Arbitration Award, 21 October 2002 [CISG 2002/16] [*Engraving machine case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/021021c1.html>>; CIETAC Arbitration Award, 9 August 2002 [CISG 2002/21] [*Yellow phosphorus case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020809c1.html>>; CIETAC Arbitration Award, 4 February 2002 [CISG 2002/17] [*Steel bar case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020204c2.html>>; CIETAC Arbitration Award, 25 December 2001 [CISG 2001/04] [*DVD HiFi case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/011225c1.html>>; CIETAC Arbitration Award, 31 May 1999 [CISG/1999/27] [*Indium ingot case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/990531c1.html>>; CIETAC Arbitration Award, 15 December 1998 [CISG/1998/09] [*Shirt case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/981215c1.html>>; CIETAC Arbitration Award, 31 December 1997 [CISG/1997/37] [*Lindane case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/971231c1.html>>; CIETAC Arbitration Award, 30 November 1997 [CISG/1997/33] [*Canned oranges case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/971130c1.html>>; CIETAC Arbitration Award, 29 September 1997 [CISG/1997/28] [*Aluminium oxide case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970929c1.html>>; CIETAC Arbitration Award, 25 June 1997 [CISG/1997/16] [*Art paper case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970625c1.html>>; CIETAC Arbitration Award, 7 May 1997 [CISG/1997/11] [*Sanguinarine case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970507c2.html>>; CIETAC Arbitration Award, 31 December 1996 [CISG/1996/58] [*High carbon tool steel case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/961231c2.html>>; CIETAC Arbitration Award, 30 July 1996 [CISG/1996/33] [*Ferro-molybdenum alloy case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960730c2.html>>; CIETAC Arbitration Award, 2 May 1996 [CISG/1996/21] [*“FeMo” alloy case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960502c1.html>>; CIETAC Arbitration Award, 14 March 1996 [CISG/1996/14] [*Dried sweet potatoes case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960314c1.html>>; CIETAC Arbitration Award, 30 January 1996 [CISG/1996/05] [*Compound fertilizer case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960130c1.html>>; CIETAC Arbitration Award, 28 April 1995 [CISG/1995/08] [*Rolled wire rod coil case*], online: Pace Law School CISG Database

resort to this provision as a defence, but they are rarely successful.<sup>704</sup> Of all of the CIETAC cases, only once was an Article 79 defense used with success. That single case involved the sinking of a ship.<sup>705</sup> This suggests that the standards established under Article 79 are set relatively high, even where, comparatively speaking, Article 79 is broader and more liberal in scope than the equivalent domestic legislation, as in the case of Chinese law. For example, of the 26 CIETAC cases involving Article 79 considered here, there is only one single instance where a party invoked that provision to its advantage.<sup>706</sup> Another interesting point is that the claimants won 23 of the 26 cases.<sup>707</sup> This suggests that claimants commence CISG arbitrations only where the likelihood of success weighs in their favour.

Many of the CIETAC Article 79 cases refer to that provision in only minor way. Indeed, of the total of 29 cases cited by the 2008 *UNCITRAL Digest* of Article 79 case law, none refer to decisions emanating from CIETAC.<sup>708</sup> As previously noted, however,

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<<http://cisgw3.law.pace.edu/cases/950428c1.html>>; CIETAC Arbitration Award, 10 March 1995 [CISG/1995/04] [*Wool case*], online: Pace Law School CISG Database  
 <<http://cisgw3.law.pace.edu/cases/950310c1.html>>; CIETAC Arbitration Award, 17 June 1994 [CISG/1994/08] [*Warm rolled steel plates case*], online: Pace Law School CISG Database  
 <<http://cisgw3.law.pace.edu/cases/940617c1.html>>; CIETAC Arbitration Award, 7 August 1993 [CISG/1993/11] [*Semi-automatic weapons case*], online: Pace Law School CISG Database  
 <<http://cisgw3.law.pace.edu/cases/930807c1.html>>; and CIETAC Arbitration award, 6 June 1991 [date claim filed] Shenzhen [*Cysteine Monohydrate case*], online: Pace Law School CISG Database  
 <<http://cisgw3.law.pace.edu/cases/910606c1.html>>.

<sup>704</sup> *Supra* note 775.

<sup>705</sup> Art paper case, *supra* note 703.

<sup>706</sup> *Ibid.*

<sup>707</sup> The claimants that lost their cases are: CIETAC Arbitration award, 6 June 1991 [date claim filed] Shenzhen [*Cysteine Monohydrate case*], online: Pace Law School CISG Database  
 <<http://cisgw3.law.pace.edu/cases/910606c1.html>>; CIETAC Arbitration Award, 31 December 1996 [CISG/1996/58] [*High carbon tool steel case*], online: Pace Law School CISG Database  
 <<http://cisgw3.law.pace.edu/cases/961231c2.html>>; and CIETAC Arbitration Award, 4 February 2002 [CISG 2002/17] [*Steel bar case*], online: Pace Law School CISG Database  
 <<http://cisgw3.law.pace.edu/cases/020204c2.html>>.

<sup>708</sup> See *UNCITRAL Digest*, *supra* note 44.

the fact that cases may not appear in the *UNCITRAL Digest* does not mean that they are irrelevant or unimportant. Rather, it may suggest that the case is not a key case for that particular article of the Convention. It may also mean that the national UNCITRAL correspondents may not be aware of that particular case, or that the case is relatively recent. The Pace CISG database, from which these translated CIETAC cases were culled, is more current and comprehensive in scope. Its only disadvantage is that it may include cases that mention Article 79 in a minor way. Nevertheless, important material concerning the application of the CISG Article 79 can still be gleaned from these cases.

The first CIETAC Article 79 case, from 1991, did not even mention the article, but instead referred to an “Act of God”.<sup>709</sup> Indeed, many of the parties in the CIETAC cases refer to the term *force majeure* rather than to Article 79. This appears to be common with many courts and arbitral panels. The term *force majeure* is used with great frequency in many Article 79 cases. While the tribunal made no correction by noting that an “Act of God” and Article 79 should be differentiated, it nevertheless rejected the respondent’s defense in this regard. It stated that the bankruptcy of the consignee was no excuse for its failure to seek a return of the goods. However, the tribunal ruled in favour of the respondent on other grounds. That a party cannot rely on the bankruptcy or insolvency of a consignee to excuse its non-performance appears to be a correct interpretation of Article 79. The bankruptcy or insolvency of a commercial party is typically thought to be a normal business risk.

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<sup>709</sup> CIETAC Arbitration award, 6 June 1991 [date claim filed] Shenzhen [*Cysteine Monohydrate case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/910606c1.html>> at s. A.

*D.iii. Article 79(1) Impediments and Non-conforming Goods*

Disputes concerning the non-conformity of goods are the most common cases that appear before courts and tribunals.<sup>710</sup> For this reason, there is an abundance of case law at the juncture of non-conformity of goods and excuses for non-performance. As a prerequisite to an exemption, Article 79(1) requires that a party's failure to perform under the contract be due to an "impediment" that was beyond the party's control, and that the party could not have reasonably taken it into account at the time of the conclusion of the contract. The issue of whether a party is able to invoke Article 79 successfully when it has sold non-conforming goods has been a subject of much debate.<sup>711</sup> Some scholars prefer a liberal approach of excuse that attempts to seek fairness in the allocation of the costs of the unforeseen event between the parties.<sup>712</sup> As noted above, excuse for non-performance in many civil law jurisdictions, particularly on the European continent, are closer to this liberal perspective.<sup>713</sup> At the other end of the spectrum is a strict construction approach that provides for very few conditions that will serve to excuse a party from performing.<sup>714</sup> This latter approach is closer to the traditional *pacta sunt servanda* doctrine, and is more consistent with the relatively rigid attitude found in common law jurisdictions. The CIETAC cases appear to adopt the stricter, common law

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<sup>710</sup> Magnus, *supra* note 6 at 223.

<sup>711</sup> See generally Ronald A. Brand, "Article 79 and a Transactions Test Analysis of the CISG" in Franco Ferrari, Harry Flechtner, & Ronald A. Brand, eds., *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (Munich: Sellier European Law Publishers, 2004) at 395-397.

<sup>712</sup> *Ibid.* Brand notes that John Henry Schlegel is representative of the "liberal" approach.

<sup>713</sup> *Ibid.*

<sup>714</sup> *Ibid.* Brand sees Harold J. Berman as representative of the "strict" approach.

approach. This should not be surprising, as Article 79 also incorporates a “no-fault” or “strict liability” rule that sets a more objective and higher standard to trigger relief.

Many of the CIETAC cases involving Article 79 also concerned alleged non-conforming goods and an attempt to invoke Article 79. These cases involved a shipment of damaged and defective shirts,<sup>715</sup> non-conforming indium ingots,<sup>716</sup> DVD players with quality problems,<sup>717</sup> a problematic engraving machine,<sup>718</sup> the return of malfunctioning heaters,<sup>719</sup> and a faulty hammer mill.<sup>720</sup> In none of these cases was the non-performing party excused with an Article 79 exemption for delivering non-conforming goods. In this respect, these decisions are in harmony with an interpretation of Article 79(1) that deems a party’s failure to perform must be due to an “impediment”, that is, where performance has been *prevented*, and not where a party has rendered *defective* performance, such as non-conforming goods. This view also highlights the no-fault nature of the seller’s liability for damages where it delivers non-conforming goods. Even where a reliable supplier has furnished the goods, and the seller has had no reasonable opportunity to discover defects before delivery, the seller will not be exempt from liability. Thus, the

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<sup>715</sup> CIETAC Arbitration Award, 15 December 1998 [CISG/1998/09] [*Shirt case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/981215c1.html>>.

<sup>716</sup> CIETAC Arbitration Award, 31 May 1999 [CISG/1999/27] [*Indium ingot case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/990531c1.html>>.

<sup>717</sup> CIETAC Arbitration Award, 25 December 2001 [CISG 2001/04] [*DVD HiFi case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/011225c1.html>>.

<sup>718</sup> CIETAC Arbitration Award, 21 October 2002 [CISG 2002/16] [*Engraving machine case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/021021c1.html>>.

<sup>719</sup> CIETAC Arbitration Award, 7 December 2005 [CISG/2005/05] [*Heaters case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/051207c1.html>>. This case had only a minor Article 79 issue. The seller claimed that it could not receive a return of its standard merchandise (as agreed to by the parties in the contract) because the buyer sent the return notice to the wrong party. It argued unsuccessfully that under Articles 79 and 80, it was unable to receive the returned goods.

<sup>720</sup> CIETAC Arbitration Award, May 2007 [CISG 2007/06] [*Hammer mill case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/070500c1.html>>.

issue of fault becomes irrelevant. In all cases, the seller is strictly liable, even though it may have taken extreme care in selecting a supplier.

*D.iv. The Impediment Requirement under Article 79(1)*

A prerequisite to an exemption under Article 79(1) is the specification that a party “is not liable” for failing to perform its obligations, as well as the remedial consequences if the exemption from liability applies.<sup>721</sup> This sub-section relieves a party of liability for “a failure to perform any of his obligations”, but only if all of the following requirements are met: the party’s non-performance was “due to an impediment”; the impediment was “beyond his control”; the impediment is one that the party “could not reasonably be expected to have taken into account at the time of the conclusion of the contract”; the party could not reasonably have “avoided” the impediment; and the party could not reasonably have “overcome” the impediment “or its consequences”.<sup>722</sup>

In all the CIETAC cases, the impediment requirements for an exemption were not met. The language used sometimes by the tribunals reflected the domestic law on *force majeure*, such that an “impediment” as used in Article 79 was deemed instead as an “unforeseeable”, “unavoidable”, and “insurmountable condition or event”, as reflected in the domestic law of China.<sup>723</sup> This was particularly evident in the earlier case law. For example, the tribunal in the 1996 Dried sweet potatoes case noted that according to domestic law “*force majeure* means unforeseeable, unavoidable and insurmountable

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<sup>721</sup> CISG Article 79(1).

<sup>722</sup> *Ibid.*

<sup>723</sup> *General Principles of the Civil Law, supra* note 692.

objective conditions”.<sup>724</sup> Fortunately, the tribunal proceeded to invoke CISG Article 79(1) as the basis to deny the respondent the *force majeure* defense. Similar references to domestic *force majeure* law and terminology were also evident in the “FeMo” alloy case,<sup>725</sup> the Aluminium oxide case,<sup>726</sup> and the Canned oranges case.<sup>727</sup> In all these cases there was a *force majeure* clause in the contracts, which may have provided the parties with some latitude in their use of language. In the “FeMo” alloy case, the tribunal even referred to the doctrine of “frustration”, but this may have been partly in response to the respondent’s references to the same, and its assertion that “[n]either Civil Law, Common Law, Chinese Law nor International Convention” would recognize “such an unconscionable transaction with [an] unpredictable loss”.<sup>728</sup>

A common theme in CIETAC case law is that the disputants frequently invoked or resorted to domestic *force majeure* law and terminology in their pleadings. As just noted, *force majeure* clauses are frequently included in these contracts, and that may explain the use of that particular, domestic terminology. However, the use of domestic law and terminology was often done even when the parties acknowledged that the CISG was the applicable law. Considering that none of the parties objected to the applicability of the CISG in these cases, the references to domestic *force majeure* were likely made in ignorance of the fact that Article 79’s rule of “impediment” would govern any claim for

<sup>724</sup> CIETAC Arbitration Award, 14 March 1996 [CISG/1996/14] [*Dried sweet potatoes case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960314c1.html>>. The tribunal was referring to Article 153 of the *General Principles of the Civil Law*, *supra* note 692.

<sup>725</sup> CIETAC Arbitration Award, 2 May 1996 [CISG/1996/21] [*“FeMo” alloy case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960502c1.html>>.

<sup>726</sup> CIETAC Arbitration Award, 29 September 1997 [CISG/1997/28] [*Aluminium oxide case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970929c1.html>>.

<sup>727</sup> CIETAC Arbitration Award, 30 November 1997 [CISG/1997/33] [*Canned oranges case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/971130c1.html>>

<sup>728</sup> “FeMo” alloy case, *supra* note 725.

an excuse for non-performance due to a supervening event. While the disputants may have inaccurately referred to domestic *force majeure* law and terminology instead of Article 79's "impediment", the relevant tribunals failed to correct the parties in this regard.

Even though these can be deemed minor errors, some CIETAC tribunals were just as careless as the disputants in their references and use of language. This is much more apparent in the earlier cases, which suggests that arbitral tribunal members needed time to learn of the nuances of the CISG, and lose their domestic law focus. For example, in the 1997 Aluminum oxide case, it was the buyer that referred to Article 79, and argued that its bank's refusal to issue a letter of credit was beyond its control.<sup>729</sup> The tribunal made reference to both domestic law and the CISG with respect to other aspects of the case. It did not mention Article 79 or "impediment". It referred only to domestic law.<sup>730</sup> The tribunal noted that the bank's refusal to provide the letter of credit to the buyer was based on a history of poor business practices by the buyer. As a result, the bank's denial was foreseeable and did not constitute *force majeure*. While the same result would have likely occurred had the tribunal examined the issue under Article 79, it is unfortunate that the tribunal did not focus on the Convention with its legal analysis.

Later that year (1997) in the Canned oranges case, the seller attempted to use a *force majeure* defense based on a provision in the contract and domestic law<sup>731</sup> to excuse

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<sup>729</sup> Aluminium oxide case, *supra* note 726.

<sup>730</sup> *Ibid.*

<sup>731</sup> Article 24 of the *Foreign Economic Contract Law*, *supra* note 677. Article 24 states: "A party who cannot perform part or the entire contract due to force majeure should be exempted from bearing part or the entire responsibility" (trans. by Meihua Xu, Queen Mary Case Translation Programme).

it from its failure to supply oranges to the buyer.<sup>732</sup> It argued that the non-performance of the contract was caused by unavoidable and uncontrollable reasons, namely heavy rains and flooding, which caused a shortage of oranges in the area. This time the tribunal correctly referred to Article 79 sub-sections (1), (2), (3), and (4), as well as the contractual *force majeure* clause, to deny the seller's defense. As a commercial party in the trade, the seller should have foreseen that weather might affect its ability to procure oranges from the region. Even though there was flooding in the area, which caused a shortage of oranges, this was not a sufficient impediment. Under the Chinese domestic *force majeure* law, excuses for non-performance are only allowed in cases of natural disasters, such as storms and flooding. The tribunal obviously did not apply the domestic rule in this instance. As a commodity product, it held that the seller could have procured the oranges from other provinces (albeit at a higher cost). Accordingly, the tribunal denied the seller the *force majeure*/Article 79 defense.

Some of the Chinese decisions have focused on what constitutes an "impediment" within the meaning of Article 79(1). Even where the language is framed in terms of *force majeure*, the tribunals in the remaining CIETAC cases have defined Article 79(1)'s "impediment" requirement as performance that is beyond a party's control, and that the party could not have anticipated or explicitly or implicitly assumed the risk of its occurrence. Furthermore, "fault" is not a relevant criterion in an excuse for non-performance. In other words, the issue of "fault" should be removed from an evaluation of a party's non-performance. The essence of the test is that the impediment hindering

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<sup>732</sup> Canned oranges case, *supra* note 727.

performance must be beyond the control of the non-performing party. There is also no need to make a distinction between the different types of failure to perform, such as partial, temporary, or absolute impossibility of performance. Article 79 can apply to any type of performance that has been *prevented*; it cannot apply where a party has rendered *defective* performance. This is supported by the language of Article 79(4): “The party *who fails to perform* must give notice to the other party of the impediment”.<sup>733</sup> This requirement would be illogical if it were to apply to the delivery of defective or non-conforming goods.<sup>734</sup>

The term “impediment” suggests that like the word “obstacle”, there is a barrier to performance, such as a fire, military blockade, or government prohibition, rather than an obstacle that is personal to one of the parties’ performance. As the CIETAC decisions demonstrate, while it may be difficult to determine the exact point on a continuum between “difficult” and “impossible”, the requirement under Article 79(1) is strict. One of the decisions went so far and stated that a lightning strike that knocked out power to a transformer, causing a delay in production, as well as a typhoon and subsequent flooding that led to a suspension of the railroad, were not sufficient impediments to excuse the seller.<sup>735</sup> Even though these supervening natural events caused extensive delays (of many months), the seller could have procured substitute goods from other suppliers to fulfill its contractual obligation to the buyer. This decision suggests that difficulties, even extreme ones, in fulfilling a contractual obligation are not sufficient to warrant an excuse for non-

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<sup>733</sup> CISG Article 79(4). Emphasis added.

<sup>734</sup> This point is noted in Honnold & Flechtner, ed., *supra* note 43 at 617-618.

<sup>735</sup> CIETAC Arbitration Award, 9 August 2002 [CISG 2002/21] [*Yellow phosphorus case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020809c1.html>>.

performance. The impediment needs to be much closer to, or an actual impossibility, for a party to be successful with an Article 79(1) defense.

Most CIETAC decisions have not focused on what constitutes an “impediment” within the meaning of Article 79(1). Rather, they have more often presumed that the impediment requirement was not met, without elaborating on a precise definition of “impediment”. These decisions focus on elements that are peripheral to the impediment requirement. For example, many decisions have acknowledged that an impediment existed, but concluded that the impediment was foreseeable or should have been considered a normal business risk. Thus, the necessity of getting import approval from its government should have been foreseen by the buyer of semi-automatic weapons.<sup>736</sup> Similarly, where a buyer could not open a letter of credit in time due to a provisional government measure that required an importation certificate, this was deemed not “due to an impediment that was beyond his control”.<sup>737</sup> The seller reiterated the more widespread view that “[b]ased on the common practices of international trade, the reasons of force majeure could be war, strike or Act of God”.<sup>738</sup> Even though the buyer thought that the governmental measure was “unforeseeable, unavoidable and insurmountable”, the tribunal agreed with the seller and held, without much elaboration, that the buyer was not exempt under Article 79.<sup>739</sup>

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<sup>736</sup> CIETAC Arbitration Award, 7 August 1993 [CISG/1993/11] [*Semi-automatic weapons case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/930807c1.html>>.

<sup>737</sup> CIETAC Arbitration Award, 31 December 1996 [CISG/1996/58] [*High carbon tool steel case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/961231c2.html>>.

<sup>738</sup> *Ibid.*

<sup>739</sup> *Ibid.*

Similar situations applied in a number of CIETAC cases, where government import or export requirements were used as an excuse for non-performance. In the Steel bar case, due to Chinese foreign exchange controls, the buyer was required to obtain an original invoice from the seller.<sup>740</sup> This regulation, and a national holiday that required banks to close, caused a delay for the buyer. The seller was not obliged to ship the goods until receipt of the letter of credit. Because of this interruption, the seller could not charter a ship on time, and the buyer's importation certificate became void. The buyer claimed that the invalidation of its importation license should be considered an act of the government that would exempt it from liability under Article 79. According to the buyer, this was an impediment that was "unpredictable", and the "impediment or its consequences could not be overcome or avoided".<sup>741</sup> The tribunal disagreed. Without referring to Article 79, but rather to the Convention generally, it ruled in favour of the seller.

The Alumina case<sup>742</sup> and Australian cotton case<sup>743</sup> had similar issues regarding the requirement that the buyer obtain a governmental importation certificate. In the former case, the buyer used an amended government regulation in an attempt to excuse it from non-performance in the purchase of a large quantity of alumina. It argued that after the contract was signed, the imposition of the amended regulation was out of the parties'

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<sup>740</sup> Steel bar case, *supra* note 707.

<sup>741</sup> *Ibid.*

<sup>742</sup> CIETAC Arbitration Award, 26 June 2003 [CISG 2003/10] [*Alumina case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/030626c1.html>>.

<sup>743</sup> CIETAC Arbitration Award, 17 September 2003 [CISG 2003/14] [*Australia cotton case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/030917c1.html>>.

control, and represented a “legal barrier” to performance.<sup>744</sup> Without referencing Article 79, the tribunal found that the revised regulation did not completely prohibit the import of alumina, but rather stipulated some new requirements that the buyer could have overcome. The buyer was, thus, found to have fundamentally breached the contract. Similarly, in the Australian cotton case, the buyer claimed that its ability to obtain a quota and import permission were preconditions to contractual performance. The tribunal disagreed. It noted that as a company that specializes in textiles, it knew, or ought to have known, that the importation of Australian cotton was restricted by the Chinese trade system. It held that neither the quota nor the import permission constituted preconditions to performance, or were sufficient excuses to exempt the buyer from liability for its non-performance.

An American buyer also attempted to rely on a *force majeure* clause in its contract to release it from its obligations to purchase and import Sanguinarine into the United States. Sanguinarine is a product that is used in insecticide. The contract contained a *force majeure* clause that specifically noted, “the [buyer’s] failure to get an import license shall not be deemed as a force majeure event”.<sup>745</sup> This did not prevent the buyer from arguing that the government’s restriction or ban on products containing Sanguinarine was different from the requirement to obtain an import license. Thus, it was the ban on the product, not the failure to get an import license that was beyond the buyer’s control. Referring to Article 79(1), the tribunal disagreed. It noted that as a

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<sup>744</sup> Alumina case, *supra* note 742.

<sup>745</sup> CIETAC Arbitration Award, 7 May 1997 [CISG/1997/11] [*Sanguinarine case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970507c2.html>>.

prudent businessperson, and as a normal business risk, the buyer should have been aware of the government's banning order.

Even where a *force majeure* clause has been incorporated into the contract between the parties that deems that government conduct falls within the scope of *force majeure*, the excuse for non-performance has been denied. The Iron ore case, for example, contained such a contractual provision.<sup>746</sup> From the time that the contract was signed, the price of iron ore had dropped dramatically. The seller shipped the goods, even though the buyer had failed to open a letter of credit in time as required by the contract. The buyer claimed that a new government document had been issued with revised guidelines that were designed to control credit risk. Due to this policy change, its bank could not open the letter of credit. Additionally, it argued that because the seller shipped the goods before the credit was issued, such an uncommon practice allowed it to refuse delivery. The tribunal held that the decline in the price of iron ore was a normal commercial risk, and was not a relevant *force majeure* defense. Further, the government conduct that caused restrictions on credit did not fall within the scope of *force majeure*. Although the tribunal did not explicitly state this, presumably, changes in government conduct in the form of new policies regarding credit were also deemed to be normal commercial risks.

Other supervening events have also been deemed commercial risks that fall outside of an Article 79 excuse. A technical problem resulted in one manufacturer's

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<sup>746</sup> CIETAC Arbitration Award, 25 May 2005 [CISG 2005/09] [*Iron ore case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/050525c1.html>>.

production capacity to be reduced by 35 percent.<sup>747</sup> This caused a temporary delay, and the seller then claimed that it could not book a ship on time. The tribunal held the seller liable. Even though one manufacturer had a production problem, the seller's non-performance could not be exempted, as it could have ordered the goods from other factories (although at a higher cost).

Difficulties resulting in the failure to rent a ship have also been regarded as an insufficient "impediment" and excuse for non-performance.<sup>748</sup> However, the sinking of a ship was an "unforeseeable [...] act of God" and "impediment beyond [the seller's] control".<sup>749</sup> But as title to the goods had already passed to the buyer, it could not seek damages from the seller. Rather, it had to claim compensation from its insurance company. This is the only example in this body of CIETAC case law where the tribunal upheld the *force majeure* defense. This appears to be a correct interpretation of Article 79(1), as the sinking of a vessel is clearly an unforeseen event that prevents performance. This case also suggests that like Article 79 jurisprudence in other jurisdictions, the requirements for a successful excuse for non-performance are set relatively high.

A flood could be deemed a natural disaster and an Act of God under both Chinese domestic law and CISG Article 79. As noted earlier,<sup>750</sup> natural disasters are one of the few events that qualify for an exemption from non-performance under Chinese domestic law. In one case, the area around a mine was flooded and the seller (smelter) of ferro-

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<sup>747</sup> CIETAC Arbitration Award, 17 June 1994 [CISG/1994/08] [*Warm rolled steel plates case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/940617c1.html>>.

<sup>748</sup> CIETAC Arbitration Award, 28 April 1995 [CISG/1995/08] [*Rolled wire rod coil case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950428c1.html>>.

<sup>749</sup> Art paper case, *supra* note 703.

<sup>750</sup> *Supra* at s. C. *Force Majeure in China*.

molybdenum claimed *force majeure*.<sup>751</sup> It was still willing to perform its obligation, but at a later date. As the price of the alloy was increasing in domestic and international market; it also requested more money from the buyer. Fortunately, the tribunal referred only to the CISG as the applicable law. The tribunal held that, as the seller did not ask for a termination of the contract, and appeared willing and able (at a later date) to perform its obligation, that it could not rely on the *force majeure* defense. As the impediment was only of a temporary nature, the seller was liable for breach of contract.

*D.v. Particular Impediments: Breach by Third-Party Suppliers*

A few CIETAC cases concern the claim of an impediment to performance due to a failure by a third-party supplier. In these cases, the sellers have typically invoked their suppliers' default as grounds to exempt them from liability for their own failure to deliver the goods. However, these cases demonstrate the prevailing view that according to Article 79, a seller bears the risk that its supplier might not perform, and the seller will not receive an exemption when its own failure to perform was the result of its supplier's default.

Recall that the CISG contains a special provision on exemption related to third parties that are retained by the obligor to perform its contractual duties. Article 79(2) states that “[i]f the party’s failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has

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<sup>751</sup> CIETAC Arbitration Award, 30 July 1996 [CISG/1996/33] [*Ferro-molybdenum alloy case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960730c2.html>>.

so engaged would be so exempt if the provisions of that paragraph were applied to him".<sup>752</sup> In essence, this provision, in the absence of an agreement to the contrary, extends the obligor's sphere of control to their third-party suppliers, and as such, makes the obligor liable. Thus, it is the seller's risk if it engages third-party suppliers or others to perform its contractual duties. The obligor should not be able to rely on any advantage by engaging a third-party, even where it has diligently selected or supervised the third person. The objective of Article 79(2) is to make exoneration more difficult in cases where performance has been delegated to others. This also highlights the fact that in order to claim an exemption under Article 79, performance must be prevented. Excuses of a personal nature, such as the engagement of a non-performing third-party, will not excuse the obligor of liability.

The CIETAC cases that have considered a non-performing third-party have ruled accordingly. In the Compound fertilizer case, the seller claimed *force majeure* under a contract clause because it could not obtain the materials from its supplier.<sup>753</sup> As its supplier was in another country, and the seller could not find any other sources for the materials, it informed the buyer "it is impossible to deliver the goods".<sup>754</sup> In the tribunal's view this was an insufficient excuse, and it held the seller liable. A similar case involved an installment contract of an insecticide.<sup>755</sup> The seller informed the buyer that a production problem caused its supplier to cease production mid-contract, so it

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<sup>752</sup> CISG Article 79(2).

<sup>753</sup> CIETAC Arbitration Award, 30 January 1996 [CISG/1996/05] [*Compound fertilizer case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960130c1.html>>.

<sup>754</sup> *Ibid.*

<sup>755</sup> CIETAC Arbitration Award, 31 December 1997 [CISG/1997/37] [*Lindane case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/971231c1.html>>.

could not ship the outstanding product. It claimed that “[s]ince that was beyond the control of the [Seller], it was unable to supply the [remaining] goods”.<sup>756</sup> Even though the seller performed the first installment of the contract, it was not released from its liability to perform the remainder. Although the tribunal was not explicit on this point, its decision reflected the accurate view that a seller cannot invoke its supplier’s default to claim an exemption under Article 79.

*Force majeure* has also been invoked by a seller to excuse it, not from default by a third-party supplier, but from the negligence of its shipping agent. In the Wool case, its shipping company gave the seller incorrect information.<sup>757</sup> As a result, the buyer was given the wrong ship name and date of arrival, and the buyer had to incur a substantial lateness penalty. According to INCOTERMS, because the hiring of the shipping company was the responsibility of the seller, it had a duty to provide correct shipment information to the buyer. That the shipping company failed to perform its duty properly did not excuse the seller under Article 79(1) or (2). On this point, it has been noted that the distinction between a third-party under Article 79(2) and a third-party under Article 79(1) has no practical consequences.<sup>758</sup>

In all cases, the seller bears the procurement risk, whether it involves its own personnel, a supplier’s default or for its supply of non-conforming goods. The only situation that may lead to an exemption is where the contract specifies an exclusive source or supplier of the seller’s, and that source is destroyed or somehow unable to

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<sup>756</sup> *Ibid.*

<sup>757</sup> CIETAC Arbitration Award, 10 March 1995 [CISG/1995/04] [*Wool case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950310c1.html>>.

<sup>758</sup> This has been noted by Brunner, *supra* note 47 at 187.

perform. Otherwise, the seller bears all the procurement risks, including that one of its agents, such as a transportation company or bank, may not perform. This reasoning is also in harmony with the CISG's no-fault or strict liability approach for damages. There is no further need for the injured party to prove that the non-performance was also due to the *fault* of the non-performing party. The right to damages flows from the sole fact of non-performance.

The CIETAC decisions on Article 79 generally demonstrate a nuanced understanding of that provision. While there has been a tendency to use the terminology from domestic sales law (e.g. *force majeure*, "unforeseeable", "unavoidable", and "insurmountable condition or event"), there is no other evidence that the CIETAC decisions have interpreted Article 79 in a manner that shows a predisposition towards domestic law and the homeward trend. The CIETAC cases interpreting Article 79, while sometimes imperfect, have, overall, avoided any interpretation to suggest that decisions were made with reference to the domestic law on *force majeure* rather than on the basis of CISG Article 79. This is an important step in the development of relatively uniform CISG jurisprudence.

*E. Finland: A Small Contribution Towards Relative Uniformity*

Of the two Finnish cases that mention Article 79, only one of those cases considers that provision in a significant manner.<sup>759</sup> In the Canned food case, which was a

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<sup>759</sup> In chronological order, from the most recent case, these are: Hovioikeus/hovrätt [HO] [Appellate Court] Turku, 24 May 2005, S 04/1600 [*Radiated spice case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/050524f5.html>>; and Tampereen käräjäoikeus [Court of First Instance], 17 January 1997, 95/11193 [*Canned food case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970117f5.html>>.

dispute regarding non-conforming food products, the trial and appeal courts cited Article 79 in a marginal manner, in reference to their discussion on damages.<sup>760</sup> Noteworthy were the courts' recognition that the application of Article 79 could only be effective when it is based on an "*external* impediment".<sup>761</sup> In other words, the impediment must have been extraneous to the activity of the defaulting party, otherwise it would have produced no exempting effect. This observation can be considered part of the conventional view with respect to the nature of Article 79 impediments. As such, it contributes—albeit in a small way—to the development of a relatively uniform jurisprudence in international sales law.

The Radiated spice case also concerned non-conforming goods, and the discussion by the appeal court was primarily concerned with the extent of damages.<sup>762</sup> The case involved the sale of powdered paprika from a Spanish seller (the defendant) to a Finnish buyer. The contract specified that the powder was to be steam-treated to reduce bacteria. However, laboratory tests established that the powder had been treated with radiation and not steam. Under a European Union directive, all consumer products treated with radiation were to be marked as such on the packaging of the goods. According to buyer, its customers did not wish to purchase products treated with radiation, so this rendered the powder unsalable.

The seller testified that it did not radiate the paprika, but had treated it with steam. However, the seller also admitted that its own suppliers might have radiated the spice; if

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<sup>760</sup> *Ibid.*

<sup>761</sup> *Ibid.* Emphasis added.

<sup>762</sup> Radiated spice case, *supra* note 759.

that had been the case, it was done without the seller's knowledge. It was on this basis that the seller attempted to claim an exemption from damages under Article 79. The trial and appeal courts rejected this argument. In particular, the appeal court, without referring specifically to Article 79(2), noted that the seller bears the risk that its suppliers might provide non-conforming goods. This was the opposite ruling of an anomalous decision with similar facts in the District Court of Besançon in the French case of *Flippe Christian v. Douet Sport Collections*.<sup>763</sup> It should make no difference whether a defect was the fault of the seller's supplier. By using a third party supplier, a seller cannot contract away its liability. The seller is exempt under Article 79 only if the failure to perform is due to an impediment beyond the control of the seller and the seller's supplier. Without an in-depth discussion of the issue of impediments or third-party suppliers, the appeal court dismissed the seller's claim on the merits because it involved a breach of contract under Article 35.<sup>764</sup> While this was the correct outcome, it is disappointing that the Finnish courts did not provide greater analysis of these issues under Article 79.

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<sup>763</sup> Discussed *infra* note 1109. Tribunal de commercial [Trib. com.] Besançon, 19 January 1998, *Flippe Christian v. Douet Sport Collections*, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980119f1.html>>.

<sup>764</sup> CISG Article 35 states:

- (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
  - (a) are fit for the purposes for which goods of the same description would ordinarily be used;
  - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
  - (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

F. *Germany: Mastery of CISG Jurisprudence*

F.i. *The Evolution of Excuses for Non-performance: from Wegfall der Geschäftsgrundlage to an International Standard in Article 79*

The theory of excuse for contractual non-performance has a long history in Germany. This development in law reflects the history and fate of that nation, as well as its civil law tradition. As noted above, under the influence of Roman law, many European states came to recognize the principle of initial impossibility, *impossibilium non est obligato*.<sup>765</sup> In continental Europe in the seventeenth and eighteenth centuries, legal scholars further developed this principle, and contracts were to be considered concluded under the implied condition that there would be no fundamental change in the circumstances under which the agreement had been completed.<sup>766</sup> This became known as the doctrine of an implied *clausula rebus sic stantibus*, and was codified in certain jurisdictions.<sup>767</sup> Over the course of the nineteenth century, the doctrine of implied conditions experienced a number of modifications, but the most substantial revision occurred in 1921, under the influence of the currency inflation crisis.<sup>768</sup> At that time, the former *Reichsgericht* applied the doctrine of changed circumstances (*rebus sic stantibus*) to cases of economic hardship in long-term contracts when inflation threatened to prove

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(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

<sup>765</sup> E.J. Cohn, "Frustration of Contract in German Law" (1946) 28 J. Comp. Legis. & Int'l L. 3d 15 at 15.

<sup>766</sup> *Ibid.* at 19.

<sup>767</sup> *Ibid.* at 19-20.

<sup>768</sup> Leo M. Drachler, "Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality" (1957) 3 N.Y.L.F. 50 at 71.

disastrous for parties in the aftermath of World War I.<sup>769</sup> In 1923, *rebus sic stantibus* and the concept of the lapse of the contractual basis were codified into the legal doctrine of *Wegfall der Geschäftsgrundlage*, which was then used by German courts to decide cases of hardship and impracticability.<sup>770</sup> In the civilian tradition, courts had the option of either terminating or revising contracts when the balance of the contract had significantly changed due to unforeseeable events. In the revised German civil code of 2002, BGB section 313 has modified slightly the doctrine of *Wegfall der Geschäftsgrundlage*. Under the modified title of *Störung der Geschäftsgrundlage*, which means “interference with the basis of the contract”, BCB s. 313 now incorporates the principles of *rebus sic stantibus*, which amounts to hardship, as well as the doctrine of absolute impossibility.<sup>771</sup> This extended the existing doctrines beyond the sphere of frustration or impossibility, to situations where unexpected changes in circumstances had simply made performance more onerous for one party. In this respect, BCB s. 313 bares some semblance to CISG Article 79.

The liberal approach towards excuses for non-performance under German law may also explain why Jacob Ziegel stated that Article 79 is “more civilian than common law in its conception”.<sup>772</sup> Ziegel made this point because the existence of an impediment under Article 79 does not automatically terminate the contract, as is generally the case with “frustration” or “impossibility” in the common law. Article 79 also recognizes temporary impediments. The immediate effect of Article 79 is to excuse the non-

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<sup>769</sup> Brunner, *supra* note 47 at 79.

<sup>770</sup> *Ibid.*

<sup>771</sup> *Ibid.*

<sup>772</sup> Ziegel, *supra* note 192 at “Article 79”, para. 2.

performing party from liability from a claim in damages. In the common law a contract is “frustrated” where the supervening event has so radically altered the basis of the contract that it is automatically terminated.

But rather than conceptualize Article 79 as being more civilian in scope, that provision was designed to be a compromise between the different legal approaches taken towards excuses for non-performance in civil law and common law systems. While German law is thought to be generally in harmony with some of the most liberal articles of the CISG, other civilian jurisdictions, such as France, employ relatively strict rules to excuse non-performance.<sup>773</sup>

As suggested by the historical development in German law, the approach to the principle of excuses for contractual non-performance is relatively liberal, even by civilian standards. For example, a strict application of the rule of *pacta sunt servanda* is rarely invoked.<sup>774</sup> This flexible approach is partially the result of the German historical experience of the last century. During that time, the country has been subjected to severe social and political upheavals. Its economy has been ravaged by two major wars, it had witnessed rampant currency inflation and revaluation, and it has had to reabsorb and restructure the economic system of the former German Democratic Republic. Under such conditions, the certainty and dependability of commercial contractual performance was often in doubt. Impossibility of performance, hardship, or frustration, have been constant risks in the commercial life of the modern German nation. Not surprisingly, these events

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<sup>773</sup> Flambouras, *supra* note 37 at 262.

<sup>774</sup> Joern Rimke, “Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts” in Pace Int’l L. Rev., ed., *Pace Review of the Convention on Contracts for the International Sale of Goods (1999-2000)*, (Boston: Kluwer Law International, 2001) at 207.

have had a profound influence on the development and legal treatment of excuses for contractual non-performance in that nation.

*F.ii. Article 79 in Germany: General Observations*

Having a relatively large number of Article 79 cases from Germany provides a window from which to view general trends concerning that provision. With the exception of the Chinese arbitral cases from CIETAC, Germany has reported more Article 79 cases than any other CISG signatory state. This amounts to 19 cases from that country that are considered in this dissertation.

There are some interesting facts concerning the evolution of Article 79 case law in Germany. An overview of Article 79 demonstrates that parties may frequently resort to this provision as a defence, but they are rarely successful.<sup>775</sup> This may suggest that the standards established under Article 79 are set relatively high, particularly relative to equivalent domestic law. For example, of the 19 German cases involving Article 79 considered here,<sup>776</sup> there is only one instance where the successful party invoked that

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<sup>775</sup> According to CISG-AC Opinion No. 7, “Exemption of Liability for Damages under Article 79 of the CISG” at 4: “Article 79 has been invoked in litigation and arbitration by sellers and buyers with limited success”. Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. See also *UNCITRAL Digest*, *supra* note 44 at 253: “Article 79 has been invoked with some frequency in litigation, but with limited success”.

<sup>776</sup> This total includes one arbitral case and 18 court cases. In chronological order, from the most recent German case to the earliest, these are: Oberlandesgericht [OLG] [Appellate Court] Brandenburg, 18 November 2008, 6 U 53/07 [*Beer case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/081118g1.html>>; Oberlandesgericht [OLG] [Appellate Court] München, 5 March 2008, 7 U 4969/06 [*Stolen car case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/080305g1.html>>; Oberlandesgericht [OLG] [Appellate Court] Hamburg, 25 January 2008, 12 U 39/00 [*Café inventory case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/080125g1.html>>; Bundesgerichtshof [BGH] [Federal Supreme Court], 27 November 2007, X ZR 111/04 [*Glass bottles case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/071127g1.html>>; Oberlandesgericht [OLG] [Appellate Court] Dresden, 21 March 2007, 9 U 1218/06 [*Stolen automobile case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/070321g1.html>>; Oberlandesgericht [OLG] [Appellate Court]

provision to its advantage.<sup>777</sup> Even in that case, Article 79 was not the primary CISG article relied upon by the party; rather, it used Article 79 only to excuse it for a delay in payment.<sup>778</sup> It ultimately won the case based upon receipt of the seller's non-conforming goods (in violation of CISG Article 35).<sup>779</sup> Another interesting point is that the plaintiffs/claimants won 14 of the 19 cases.<sup>780</sup> This suggests that plaintiffs or claimants commence CISG litigation only where the likelihood of success weighs in their favour. Based on these cases, a defendant's or respondent's prospect for a successful Article 79 defence would appear to be small. Indeed, of the 27 Article 79 cases recorded in the

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Zweibrücken, 2 February 2004, 7 U 4/03 [*Milling equipment case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040202g1.html>>; Landgericht [LG] [District Court] Freiburg, 22 August 2002, 8 O 75/02 [*Automobile case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020822g1.html>>; Bundesgerichtshof [BGH] [Federal Supreme Court], 9 January 2002, VIII ZR 304/00 [*Powdered milk case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020109g1.html>>; Oberlandesgericht [OLG] [Appellate Court] Hamm, 12 November 2001, 13 U 102/01 [*Memory module case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/011112g1.html>>; Bundesgerichtshof [BGH] [Federal Supreme Court], 24 March 1999, VIII ZR 121/98 [*Vine wax case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/990324g1.html>>; Oberlandesgericht [OLG] [Appellate Court] Hamburg, 4 July 1997, 1 U 143/95 and 410 O 21/95 [*Tomato concentrate case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970704g1.html>>; Oberlandesgericht [OLG] [Appellate Court] Hamburg, 28 February 1997, 1 U 167/95 [*Iron molybdenum case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970228g1.html>>; Oberlandesgericht [OLG] [Appellate Court] Köln, 21 May 1996, 22 U 4/96 [*Used car case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960521g1.html>>; Hamburg Arbitration Award, 21 March 1996 [*Chinese goods case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960321g1.html>>; Landgericht [LG] [District Court] Ellwangen, 21 August 1995, 1 KfH O 32/95 [*Spanish paprika case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950821g2.html>>; Amtsgericht [AG] [Lower Court] Alsfeld, 12 May 1995, 31 C 534/94 [*Flagstone tiles case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950512g1.html>>; Landgericht [LG] [District Court] Berlin, 15 September 1994, 52 S 247/94 [*Shoes case*], online: Pace Law School CISG Database <<http://www.cisg.law.pace.edu/cases/940915g1.html>>; Landgericht [LG] [District Court] München, 2 August 1994, 13 HKO 17330/93 [*Copper and nickel cathodes case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/940802g1.html>>; and Landgericht [LG] [District Court] Aachen, 14 May 1993, 43 O 136/92 [*Hearing aid case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/930514g1.html>>.

<sup>777</sup> The successful invocation of Article 79 in Germany was in the Shoes case, *ibid*.

<sup>778</sup> *Ibid*.

<sup>779</sup> *Ibid*.

<sup>780</sup> The 13 successful plaintiff actions are: Electronic hearing aid case, Cathodes case, Flagstone tiles case, Chinese goods case, Used automobile case, Iron Molybdenum case, Vine wax case, Powdered milk case, Used automobile II case, Milling equipment case, Stolen automobile case, Stolen car case, and the Beer case, *ibid*.

UNCITRAL *Digest*,<sup>781</sup> only four parties successfully utilized Article 79 to limit their damages.<sup>782</sup> It also appears that disputes involving non-conforming goods and Article 79 are a common theme in this jurisprudence. Perhaps this should not come as a surprise, as most sale of goods disputes arise over the issue of whether the product conforms to the contract description.<sup>783</sup> Six of the 19 German cases analyzed involve a primary dispute over non-conforming goods, in addition to the Article 79 defence.<sup>784</sup> Of course, issues of non-conforming goods exist in some of the remaining German cases, but product non-conformity is not central to those disputes.

*F.iii. The Pre-Eminent Treatment of Article 79 in Germany*

German courts have been pre-eminent in their treatment of the CISG. Many of the decisions were the first in which a Supreme Court of a signatory state has ruled on specific CISG provisions.<sup>785</sup> Not surprisingly, therefore, courts in other CISG states have often relied on German rulings.<sup>786</sup> As Magnus notes, “decisions of the *Bundesgerichtshof*

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<sup>781</sup> *Supra* note 44.

<sup>782</sup> According to UNCITRAL, the four successful parties were two sellers and two buyers. They are, in respective order: Tribunal de commercial [Trib. com.] Besançon, 19 January 1998, *Flippe Christian v. Douet Sport Collections*, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980119f1.html>>; Handelsgericht [HG] [Commercial Court] Zürich, 10 February 1999, HG 970238.1 [*Art books case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/990210s1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 22 January 1997, Award 155/1996 [*Butter case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970122r1.html>>; and, Landgericht [LG] [District Court] Berlin, 15 September 1994, 52 S 247/94 [*Shoes case*], online: Pace Law School CISG Database <<http://www.cisg.law.pace.edu/cases/940915g1.html>>.

<sup>783</sup> See e.g. Honnold & Flechtner, ed., *supra* note 43 at 328. Honnold states: “Most sales controversies grow out of disputes over whether the goods conform to the contract”.

<sup>784</sup> The six cases are: Shoes case, Spanish Paprika case, Used automobile I case, Vine wax case, Powdered milk case, and the Milling equipment case, *supra* note 1.

<sup>785</sup> Ulrich Magnus, “CISG in the German Federal Civil Court” in Franco Ferrari, ed., *Quo Vadis CISG?* (Munich: Sellier European Law Publishers, 2005) at 211.

<sup>786</sup> *Ibid.* at n. 3. Magnus provides three case examples, from the United States, Switzerland, and Italy.

[federal Supreme Court] have internationally paved the way in the interpretation and application of the CISG".<sup>787</sup> Overall, the country is the most active adjudicator of CISG issues. According to UNILEX,<sup>788</sup> Germany has played a leading role in the interpretation of the CISG, ruling on 205 cases since the Convention's inception.<sup>789</sup> This represents more than one-quarter (just over 26 percent) of CISG case law world-wide.<sup>790</sup> Switzerland is the next largest adjudicator of the CISG, having ruled on 80 cases.<sup>791</sup> Magnus similarly notes that "[n]o wonder, that the first CISG cases published by UNCITRAL in its databank CLOUT [Case Law on UNCITRAL Texts] were seven German decisions [...] and in 2000 one third of the 600 CLOUT cases were of German origin".<sup>792</sup>

Germany has also played a leading role in cases that touch on Article 79 issues. The Pace Law School CISG website database records a total of 128 cases from a variety of signatory states and arbitral panels that mention Article 79.<sup>793</sup> Some of these cases only touch upon Article 79 in a marginal manner. However, of all the Article 79 cases listed on the Pace CISG database, Germany leads in Article 79 jurisprudence, having

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<sup>787</sup> *Ibid.* at 211.

<sup>788</sup> UNILEX is database of international case law and bibliography on the CISG and the UNIDROIT Principles of International Commercial Contracts. It is operated by the Centre for Comparative and Foreign Law Studies, which is a joint venture between the Italian National Research Council, the University of Rome I "La Sapienza", and the International Institute for the Unification of Private Law (UNIDROIT). See UNILEX online: <<http://www.unilex.info>>.

<sup>789</sup> UNILEX online: <<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13354&x=1>> (as of December 3, 2010). Note that the UNILEX database lags significantly behind the Pace Law School CISG database on reported cases.

<sup>790</sup> As of December 3, 2010, the total number of CISG cases reported by UNILEX is 784.

<sup>791</sup> UNILEX, online: <<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13354&x=1>> (as of December 3, 2010).

<sup>792</sup> Ulrich Magnus, "Germany" in Franco Ferrari, ed., *The CISG and its Impact on National Legal Systems*, *supra* note 218 at 143.

<sup>793</sup> As of June 10, 2010, according to the Pace Law School CISG Database, online: <<http://www.cisg.law.pace.edu/cisg/text/case-annotations.html>>.

decided 19 of these cases. UNCITRAL cites only 27 cases from *all* jurisdictions (signatory state courts and arbitral decisions) in its 2008 *Digest of Article 79 case law*.<sup>794</sup> However, the Pace CISG database is more current and comprehensive in scope. Its only disadvantage is that it also includes cases that mention Article 79 in a minor or peripheral manner. Based on the Pace CISG database, excluding arbitral decisions, German courts lead other signatory states in their interpretation of this article, having decided 19 cases.<sup>795</sup> As in CISG case law generally, Switzerland is the second-largest adjudicating state following Germany, with nine decisions involving Article 79.<sup>796</sup> It is noteworthy that certain arbitral organizations have also been active in Article 79 adjudication. The China International Economic and Trade Arbitration Commission (CIETAC) has considered 26 cases<sup>797</sup> on the article, and in Russia, 25 arbitral cases<sup>798</sup> have decided issues that have dealt with Article 79 to some degree. In those countries, arbitration of cases is the norm because parties are not able to access the public court system with commercial disputes.

From the outset of CISG jurisprudence in Germany, the courts of that state have displayed a remarkable sensitivity to the interpretive requirements of the Convention. This is no easy task. As Enderlein and Maskow stated, “the existence of different national legal systems impedes the development of international economic relations with

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<sup>794</sup> *Supra* note 44 at 252-261. These cases are listed at note 207, *supra*.

<sup>795</sup> *Ibid.* Not all of these cases have English translations, and some only refer to Article 79 in minor ways. For a list of the 18 German cases see *supra*, note 776.

<sup>796</sup> *Ibid.*

<sup>797</sup> For a list of the CIETAC cases, see *infra*.

<sup>798</sup> For a list of the Russian arbitration cases, see *infra*.

complicated problems arising from the conflict of laws".<sup>799</sup> However, in Germany, when the CISG was ratified in 1991, it did not represent an entirely new type of law. German courts already had practical experience with the predecessor laws to the CISG, the 1964 Hague Conventions, which had governed international sale of goods transactions there since 1974.<sup>800</sup>

Rather than reflexively invoking domestic legal concepts, such as the national equivalent to Article 79—the principle of *Wegfall der Geschäftsgrundlage*<sup>801</sup>—courts in Germany have gone to great lengths to divorce themselves from the idiosyncrasies of domestic jurisprudence. As Magnus stated, in a recent decision the German "Federal Supreme Court felt the need to repeat the maxim of an international and autonomous interpretation of the CISG and underpinned that this kind of interpretation generally does not allow any redress to concepts developed under national law".<sup>802</sup> In doing so, the Supreme Court has assisted in the development of a separate, international legal doctrine into an autonomous principle. This is a small, but important step towards a conceptual goal of functional uniformity in a body of international commercial law, the CISG. In

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<sup>799</sup> Fritz Enderlein & Dietrich Maskow, *International Sales Law* (Dobbs Ferry NY: Oceana Publications, 1992) at 1, online: Pace Law School CISG Database  
<<http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html#pref>>.

<sup>800</sup> *Convention Relating to a Uniform Law on the International Sale of Goods*, 834 U.N.T.S 107 (July 1, 1964) [hereinafter, *ULIS*] and *Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods*, 834 U.N.T.S 169 (July 1, 1964) [*ULF*].

<sup>801</sup> According to Chengwei Liu, *Wegfall der Geschäftsgrundlage* can be translated into English as "disappearance of the basis of the transaction". See *Changed Contract Circumstances* [2nd edition: Case annotated update (April 2005)], online: Pace Law School CISG Database  
<<http://www.cisg.law.pace.edu/cisg/biblio/liu5.html>>. Similarly, Theo Rauh translates *Wegfall der Geschäftsgrundlage* into "destruction of the basis of the contract". See "Legal Consequences of Force Majeure Under German, Swiss, English and United States' Law" (1996-1997) 25 Den. J. Int'l L. & Pol'y 151 at 152.

<sup>802</sup> Ulrich Magnus, "Germany" in Franco Ferrari, ed., *The CISG and its Impact on National Legal Systems*, *supra* note 218 at 156.

this way, the unique development of Article 79 in separate and distinct legal jurisdictions may ultimately evolve into an autonomous international norm. German jurisprudence in support of this proposition indicates that there has developed a generally cohesive body of case law exemplifying a functionally uniform and autonomous doctrine of excuses for non-performance. This is substantiated by general consistency in the application of excuses for non-performance, as well as by judicial deference to international case law and scholarly opinion when those courts decide cases under the CISG in general, and Article 79 in particular.

This is not to suggest, however, that all German court decisions are to be held as exemplary jurisprudential models of the proper application of the CISG. Scrutiny of any jurisdictions' case law will invariably reveal certain imperfections, and certainly, German jurisprudence is no exception. Even Magnus, in his assessment of the treatment of the CISG in German courts, noted that "in the first years after the CISG entered into force in Germany a certain homeward trend of the lower courts could be observed which partly imported concepts of German domestic law into the interpretation of the CISG".<sup>803</sup> The context of the domestic legal environment can never be completely eradicated. As Murray noted, national courts find it difficult to "transcend its domestic perspective and become a different court that is no longer influenced by the law of its own nation state".<sup>804</sup> What is to be commended is an approach that results in functional uniformity

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<sup>803</sup> Ulrich Magnus, *ibid.* at 156.

<sup>804</sup> John E. Murray, Jr., "The Neglect of CISG: A Workable Solution" (1998) 17 J.L. & Com. 365 at 366.

of the Convention, rather than absolute or strict uniformity, which is a practical impossibility.<sup>805</sup> In this respect, German jurisprudence on the CISG generally succeeds.

*F.vi. Article 79(1) Impediments and Non-conforming Goods*

Of all the CISG cases that find their way to court or arbitration, disputes concerning the non-conformity of goods are the most common.<sup>806</sup> It is not surprising, therefore, to find case law at the juncture of non-conformity of goods and excuses for non-performance. As a prerequisite to an exemption, Article 79(1) requires that a party's failure to perform under the contract be due to an "impediment" that was beyond the party's control, and that the party could not have reasonably taken it into account at the time of the conclusion of the contract. The issue of whether a party is successfully able to invoke Article 79 when it has sold non-conforming goods has been a matter of much scholarly debate.<sup>807</sup> At one end of the debate is a liberal doctrine of excuse that attempts to seek fairness in the allocation of the costs of the unforeseen event between the parties.<sup>808</sup> Excuse for non-performance in German national law is closer to this liberal

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<sup>805</sup> "Functional uniformity" must be differentiated from "absolute" or "strict uniformity." It is closer to the concept of "harmonization" in that the goal is to lessen the legal impediments to international trade. See Larry A. DiMatteo *et al.*, *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 34 *Nw. J. Int'l L. & Bus. J.* 299, 309-10 (2004). See also Charles Sukurs, *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, 34 *Vand. J. of Transnat'l L.* 1481, 1500-503 (2001) (Sukurs utilizes the term "vertical uniformity," which is similar to the concepts of "functional uniformity" or "harmonization.").

<sup>806</sup> Magnus, *supra* note 6 at 223, states: "Delivery of non-conforming goods is the most common and frequent violation of sales contracts".

<sup>807</sup> See generally Ronald A. Brand, "Article 79 and a Transactions Test Analysis of the CISG" in Franco Ferrari, Harry Flechtner, & Ronald A. Brand, eds., *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (Munich: Sellier European Law Publishers, 2004) at 395-397.

<sup>808</sup> *Ibid.* Brand notes that John Henry Schlegel is representative of the "liberal" approach.

perspective.<sup>809</sup> Fortunately, there is no evidence to suggest that domestic law concepts have crept into the case law on Article 79. At the other end of the spectrum is a strict construction analysis that provides for very few conditions that will serve to excuse a party from performing.<sup>810</sup> This latter approach is closer to the traditional *pacta sunt servanda* doctrine, and more consistent with the relatively rigid approach found in common law jurisdictions. There are also middle positions in this dichotomy, which attempt to apply various approaches, such as the “transaction test”, the “litigation test”,<sup>811</sup> or the “better loss-bearer” approach.<sup>812</sup> These intermediate approaches attempt to balance contractual justice with predictability and security of transactions.

The earliest German case involving Article 79 also concerned alleged non-conforming goods and an attempt to invoke Article 79. The 1993 case<sup>813</sup> involved the sale of hearing aids by a German seller (plaintiff) to an Italian buyer (defendant). The latter party had refused to take delivery of the products, even though the seller had allowed the buyer an additional period of time to perform.<sup>814</sup> From the outset of the court’s decision, it was unequivocal in its rejection of domestic law as governing the contract.<sup>815</sup> This was an implicit rejection of the homeward trend. The court held that the CISG was comprehensive enough in scope to cover all of the substantive issues under

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<sup>809</sup> *Ibid.*

<sup>810</sup> *Ibid.* Brand sees Harold J. Berman as representative of the “strict” approach.

<sup>811</sup> The “transaction test” and “litigation test” are discussed by Brand, *ibid.*

<sup>812</sup> For an overview of the “economic analysis of frustration” and the “better loss-bearer” approach, see generally Michael G. Rapsomanikas, “Frustration of Contract in International Trade Law and Comparative Law” (1980) 18 Duq. L. Rev. 551 at 568-570.

<sup>813</sup> Landgericht [LG] [District Court] Aachen, 14 May 1993, 43 O 136/92 [*Hearing aid case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/930514g1.html>>. Note that German case citations do not name the parties to the proceedings.

<sup>814</sup> *Ibid.* at para. 4.

<sup>815</sup> *Ibid.* at para. 2(d),

consideration. More importantly, it noted that the Convention precluded recourse to domestic law, an approach that is mandated in Article 7(1). Accordingly, CISG Articles 31(b)(c) and 60(b) dictated that the buyer was under an obligation to take delivery of the goods.<sup>816</sup> That the buyer failed to do so entitled the seller to claim damages under Articles 61(1)(b), 63, and 74-77. This was the correct approach.

In terms of excuses for non-performance, the buyer erroneously invoked the domestic rules of impossibility, frustration, and hardship, which are all incorporated under the German principle of *Wegfall der Geschäftsgrundlage*, and attempted to apply these rules as a defense from the acceptance of non-conforming goods.<sup>817</sup> More specifically, the buyer attempted to avoid the contract by claiming that the hearing aids were not suitable for resale because a domestic regulation banned the sale of the products in question.<sup>818</sup> In domestic law the modification or avoidance of a contract owing to *Wegfall der Geschäftsgrundlage* is connected to the notion of good faith.<sup>819</sup> It would be considered bad faith to require a party to perform when the circumstances surrounding the basis of the contract have become highly unbalanced. However, the temptation of the court to apply a domestic rule over Article 79 was avoided. The court was resolute in its application of the CISG.

In rendering its decision, the court determined that “hardship” was trumped by Article 79, and the issue was, in its opinion, settled in the Convention. Accordingly, the

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<sup>816</sup> *Ibid.* at paras. 2, 3 and 4.

<sup>817</sup> *Ibid.* at para. 2(d).

<sup>818</sup> Vivian Grosswald Curran, “The Interpretive Challenge To Uniformity” (1995) 15 J.L. & Com. 175 at 181.

<sup>819</sup> Denis Tallon, “Article 79” in Bianca-Bonell, eds., *Commentary on the International Sales Law* (Milan: Dott. A Giuffrè Editore, S.p.A., 1987) at 593-594.

court had no reason to look beyond the text of CISG to either domestic law or elsewhere in order to fill possible gaps in the Convention. It rejected the more liberal domestic rule of *Wegfall der Geschäftsgrundlage*. Instead, the court stated that “[r]ules of frustration or economic hardship (*Wegfall der Geschäftsgrundlage*) under domestic law or domestic law challenges having to do with mistake as to the quality of the goods are irrelevant because the CISG fills the field in these areas”.<sup>820</sup> It is noteworthy that the court’s reference to the impediment under Article 79 negated an analysis under the domestic concepts of “frustration” and “economic hardship”. The implication is that Article 79 stands alone, and is differentiated from similar domestic concepts, and is uniquely able to address the matter in question.<sup>821</sup>

A number of other German cases involved the alleged delivery of non-conforming goods and Article 79. In the Shoes case, the defendant buyer ordered shoes from an Italian seller.<sup>822</sup> The buyer refused to pay the full amount of the invoice on the basis that a portion of the goods were defective and non-saleable. The seller commenced an action for the balance due plus interest. Ruling in favor of the buyer, the lower court<sup>823</sup> noted that the defendant had given proper notice of the defective goods in accordance with CISG Article 39(1), and denied the seller’s claim. The appeal court upheld the decision.<sup>824</sup> Both courts analyzed the facts of the case within the context of the CISG without any explicit references to domestic law. Both courts agreed that the buyer was

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<sup>820</sup> *Supra* note 13 at para. 2(d).

<sup>821</sup> *Contra* Scott D. Slater, “Overcome by Hardship: The Inapplicability of the UNIDROIT Principles’ Hardship Provisions to CISG” (1998) 12 Fla. J. Int’l L. 231 at 257

<sup>822</sup> Landgericht [LG] [District Court] Berlin, 15 September 1994, 52 S 247/94 [*Shoes case*], online: Pace Law School CISG Database <<http://www.cisg.law.pace.edu/cases/940915g1.html>>.

<sup>823</sup> Amtsgericht [AG] Alsfeld, see *ibid*.

<sup>824</sup> Landgericht [LG] [District Court] Berlin, *supra* note 822.

entitled to declare partial avoidance of the contract in accordance with CISG Articles 49(1)(a) and 51(1), as the non-conformity of part of the goods sold constituted a fundamental breach of the contract by the seller. The appeal court further held that the buyer's offer to make restitution of the goods was an unmistakable declaration of its intention to avoid the contract, per CISG Article 26. Its attempt to try to resell the defective goods after the declaration of partial avoidance was considered to be an attempt to mitigate the damages in accordance with Article 77, and not as an implicit waiver of its right to rely on the lack of conformity.

Considering this relatively sophisticated analysis of the CISG, at the end of its judgment, the lower court invoked Article 79 in a peculiar manner. One must question whether the court made a typographical error, but if it did, the appeal court did not make a correction. The lower court stated that “[p]ursuant to Art. 79(1) CISG, the buyer is not liable for the delayed payment as it could not reasonably be expected to pay immediately for defective goods the seller did not want to take back without either an agreement in this respect or without having tested the possibility of selling the goods despite their described defects”.<sup>825</sup> This reference to Article 79 appears to be out of context. Equally perplexing is the court's next statement that “[t]he buyer has also communicated to the seller the reason for its late payment (Art. 79(4) CISG)”.<sup>826</sup> This requires that a party who fails to perform give notice to the other party of the impediment, and its effect on its ability to perform. If the notice is not received by the other party within a reasonable

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<sup>825</sup> *Ibid.* Both the English translation of the judgment and the German version make this reference to CISG Article 79. For the original language (German) decision see: [cisg-online.ch <http://www.cisg-online.ch/cisg/urteile/399.htm>](http://www.cisg-online.ch/cisg/urteile/399.htm); and, Unilex database  [<http://www.unilex.info/case.cfm?pid=1&do=case&id=218&step=FullText>](http://www.unilex.info/case.cfm?pid=1&do=case&id=218&step=FullText).

<sup>826</sup> *Ibid.*

time after the party who fails to perform knew, or ought to have known, of the impediment, the non-performing party is liable for damages resulting from the failure of the notice to be received by the other party. Considering the context of this reference, the court's invocation of Article 79 does not appear to be an error. It is possible that the buyer relied on Article 79 to some extent in its submissions to the court. However, there is no reference in the decision to the buyer's argument that it had relied on Article 79 as an excuse for its delayed partial payment, and notice of such, to the seller. Rather, the buyer refused to pay the full purchase price because the goods were defective, and it could not re-sell them. It likely invoked Article 79 without realizing that it was not the appropriate provision for this argument. In any event, the seller refused to accept a return of the non-conforming portion of the shipment. These are the reasons addressed in the court's decision; there is no mention of a failure to pay due to an "impediment" beyond the buyer's control.

The Spanish paprika case also involved an argument over non-conforming goods, partial non-payment, and the invocation of Article 79.<sup>827</sup> The seller brought an action against the buyer for payment for a partial consignment of paprika pepper powder. The buyer counterclaimed for damages for breach of contract. It contended that some of the goods delivered were not fit to be sold in Germany. According to an expert's analysis, the pepper contained approximately 150 percent of the maximum concentration of ethyl oxide admissible under German food and drug law. However, courts will not usually make a seller liable for knowing and complying with the national laws and regulations in

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<sup>827</sup> Landgericht [LG] [District Court] Ellwangen, 21 August 1995, 1 KfH O 32/95 [*Spanish paprika case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950821g2.html>>.

the buyer's country. The court found that the seller had prior knowledge of the laws and, therefore, could not argue that it was ignorant of the requirement that the goods comply with the German laws. The court held that since the paprika contained more ethylene oxide than permitted under German law, the goods failed to conform to the contract and specifically failed to meet the buyer's purpose that was made known to the seller. This amounted to a fundamental breach as it deprived the buyer of what it was entitled to expect from the contract as per CISG Articles 35(1)<sup>828</sup> and 25,<sup>829</sup> thereby making the seller liable for damages under CISG Articles 74<sup>830</sup> and 75.<sup>831</sup>

Before the litigation commenced, the seller agreed to take back the goods and admitted that they were non-conforming under German food law. It stated it would deliver substitute goods, but failed to perform within the additional period of time for performance fixed by the buyer. It later argued that it should be exempt from having to pay damages under Article 79. The reason for invoking Article 79 is not made explicit in the court's judgment, but it appears that the seller tried to convince the court that the contamination of the pepper was beyond its control. The court correctly noted that the

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<sup>828</sup> See CISG Article 35, *infra*, note 835.

<sup>829</sup> CISG Article 25 states: "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".

<sup>830</sup> CISG Article 74 states:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

<sup>831</sup> CISG Article 75 states: "If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74".

seller “is responsible for the performance of its contractual obligations (Art. 79 CISG) independently of whether the goods were contaminated with ethylene oxide through a treatment in the plant of the [seller] or in any different way. In the latter case, [the seller] was able to examine the goods before delivering them to the [buyer]”.<sup>832</sup> Indeed, non-conformity of goods is almost always deemed to be within the seller’s sphere of control, even if the non-conformity was caused by the seller’s supplier or producer.

However, not all commentators agree with this approach —particularly those from civil law jurisdictions. One French court has, in fact, granted an Article 79 exemption to a seller that delivered non-con-forming goods,<sup>833</sup> but this case appears to be an anomaly. As Fletchner has noted, scholars from the civil law tend to see Article 79 as providing some scope for exempting a seller from damages for delivering non-conforming goods.<sup>834</sup> For example, Stoll and Gruber are of the view that an exemption under Article 79 “is also possible in principle if the seller fails in his obligation under Article 35<sup>835</sup> to supply goods conforming to the contract”.<sup>836</sup> Their view reflects an

<sup>832</sup> Spanish paprika case, *supra* note 827 at para. III A.

<sup>833</sup> See Tribunal de commercial [Trib. com.] Besançon, 19 January 1998, *Flippe Christian v. Douet Sport Collections*, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980119f1.html>>. This decision is problematic and its approach to Article 79 (and Article 39) can be criticized. See *infra*.

<sup>834</sup> See Harry Fletchner, “Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods” (2007) 19 Pace Int’l L. Rev. 29.

<sup>835</sup> Article 35, in its entirety, states:

- (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
  - (a) are fit for the purposes for which goods of the same description would ordinarily be used;
  - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill

exception to the common law strict liability rule that was incorporated in Article 79. The civilian perspective also reflects a rejection of the strict common law view of *pacta sunt servanda* by allowing for altered circumstances to exempt a seller's reasonable efforts to supply goods that are *prima facie* conforming. In their view, even though the cases may be rare, where a latent defect exists in goods at the time of the conclusion of the contract, a "seller must [...] be permitted the defense that the defect was hidden and could not have been discovered by methods which a reasonable person in the seller's position could have reasonably have been expected to adopt".<sup>837</sup> From this perspective it also follows that in cases of an insuperable event that caused the defect, such as a natural catastrophe, or an act of sabotage, should allow the seller an exemption under Article 79. Stoll and Gruber concede, however, that a seller is always responsible for the sale of generic goods, or for defects that occur in the typical course of manufacturing, and where this occurs, "the question of fault is irrelevant".<sup>838</sup>

Product non-conformity and Article 79 has also been invoked in the Used car case<sup>839</sup> and the Milling equipment case.<sup>840</sup> The court's reference to Article 79 was

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and judgment;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

<sup>836</sup> Gruber and Hans "Article 79" in Schlechtriem & Schwenzler, *supra* note 599 at 828.

<sup>837</sup> *Ibid.*

<sup>838</sup> *Ibid.* at 829.

<sup>839</sup> Oberlandesgericht [OLG] [Appellate Court] Köln, 21 May 1996, 22 U 4/96 [*Used car case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960521g1.html>>.

<sup>840</sup> Oberlandesgericht [OLG] [Appellate Court] Zweibrücken, 2 February 2004, 7 U 4/03 [*Milling equipment case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040202g1.html>>.

indirect in the Used car case, where it simply noted that damages would only be recoverable if they could have been “classified as unforeseeable”. In that case, where the buyer claimed damages from the fraudulent seller for a defective used automobile, damages were clearly warranted.<sup>841</sup> Similarly, in the Milling equipment case, the plaintiff buyer claimed the partial refund of the price it paid when it discovered that the milling components it received from the defendant seller were not the same as those specified in the contract.<sup>842</sup> The seller attempted an Article 79 defense on the basis that it could not obtain the specified milling components as offered by the original producer, and thus, was forced to use substitute parts of a foreign origin. It was aware of this non-conformity, but did not disclose this fact to the buyer. As this could not be deemed an unforeseeable impediment within the meaning of Article 79, the court rejected this argument.

*F.vii. Product Non-Conformity as an Impediment?: The Vine Wax Case*

The German federal Supreme Court (*Bundesgerichtshof*) has also provided guidance on the issue of non-conformity of goods and excuses for non-performance. In the Vine wax case, which has been considered a landmark in CISG jurisprudence,<sup>843</sup> the Supreme Court demonstrated an advanced and sophisticated understanding of the

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<sup>841</sup> Used car case, *supra* note 839.

<sup>842</sup> Milling equipment case, *supra* note 840.

<sup>843</sup> According to Peter Schlechtriem, “Uniform Sales Law in the Decisions of the *Bundesgerichtshof*” 50 Years of the *Bundesgerichtshof*: A Celebration Anthology from the Academic Community, online: Pace Law School CISG Database <<http://www.cisg.law.pace.edu/cisg/biblio/slechtriem3.html>>.

Convention's interpretative methodology.<sup>844</sup> Schlechtriem viewed the decision with an optimistic perspective:

[t]he decision of the *Bundesgerichtshof* in the "vine-wax case" brought needed clarity [in this area of law] and is furthermore a "liberation" [...]. In its treatment of the legal issue as well as in its reasoning, the decision is not only a welcome movement towards the point of view of other legal systems regarding seller's liability, which is extremely important for the preservation of a uniform interpretation of the Convention, but is also in two ways guiding for the future legal developments in internal German sales law and the Convention.<sup>845</sup>

The 1999 case involved the sale of vine wax used to protect vines from drying out, and to reduce the risk of infection. The buyer (plaintiff), from Austria, claimed that the vine wax was defective. The seller (defendant), from Germany, had obtained the vine wax from a third-party manufacturer. The buyer that took delivery in the original packaging directly from the manufacturer, gave notice of the non-conforming wax to the seller, and complained of major damage to its vines treated with the wax. It also demanded damages from the seller. The latter party refused to provide any compensation. It not only attributed the alleged damages to frost, but argued that it was exempt from any liability as an intermediary pursuant to Article 79. Because it only acted as an "agent" in the transaction, and purchased the product from a third party supplier, it argued that the reasons for the damages were beyond its control.

The seller's invocation of Article 79 reflects a broader interpretation of excuses for non-performance that tends to be more widespread in the civil law jurisdictions of

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<sup>844</sup> Bundesgerichtshof [BGH] [Federal Supreme Court], 24 March 1999, VIII ZR 121/98 [*Vine wax case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/990324g1.html>>.

<sup>845</sup> Schlechtriem, *supra* note 843.

Europe.<sup>846</sup> In German law, this would entail a determination as to whether or not physical performance was still possible for the promisor.<sup>847</sup> If performance was possible, a case for delay may be made. In such a situation, specific performance would still be available, and damages for the delay may be awarded.<sup>848</sup> This allowance provides a greater scope for an aggrieved party to perform. In harmony with the *pacta* principle, the common law takes a much more restrictive view of the doctrine.<sup>849</sup> For the traditional doctrine of impossibility to apply, for example, performance must be physically impossible.<sup>850</sup> In addition, the events surrounding the failure to perform must be beyond the control of the non-performing party. Some academics also suggests that the delivery of non-conforming goods should not fall within the scope of Article 79, as the term “impediment” assumes the prevention of the delivery of goods.<sup>851</sup> Indeed, Harry Flechtner has recently argued that “those who have drafted the [CISG] text did not intend Article 79 to apply to deliveries of non-conforming goods”.<sup>852</sup> Unfortunately, that intention was not clearly expressed in Article 79(1), as it states that it applies to “a failure to perform *any* [...] obligation”.<sup>853</sup>

The *Bundesgerichtshof*, therefore, considered impediments that might excuse a party from damages based on the non-performance attributable to third-party contractor.

The Court stated: “Because the seller has the risk of acquisition [...] he can only be

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<sup>846</sup> J. Barrigan Marcantonio, “Unifying the Law Of Impossibility” (1985) *Hastings Int’l & Com. L. Rev.* 41 at 49-50.

<sup>847</sup> *Ibid.* at 49.

<sup>848</sup> *Ibid.*

<sup>849</sup> *Ibid.* at 50. See also Georg Gruber and Hans Stoll “Article 79” in Schlechtriem & Schwenger, *supra* note 599 at 810-811.

<sup>850</sup> Marcantonio, *ibid.* at 50.

<sup>851</sup> Gruber and Stoll, “Article 79” in Schlechtriem & Schwenger, *supra* note 599 at 810.

<sup>852</sup> Flechtner, *supra* note 834 at 36.

<sup>853</sup> CISG Article 79(1).

exempted under CISG Article 79(1) or (2) (even when the reasons for the defectiveness of the goods are [...] within the control of his supplier or his sub-supplier) if the defectiveness is due to circumstances out of his own control or out of each of his suppliers' control".<sup>854</sup>

In analyzing the facts of the vine wax case, the *Bundesgerichtshof* identified a discord among scholars as to whether Article 79 "encompasses all conceivable cases and forms of non-performance of contractual obligations creating a liability and is not limited to certain types of contractual violations and, therefore, includes the delivery of goods not in conformity with the contract because of their defectiveness", or "whether a seller who has delivered defective goods cannot rely on Article 79 CISG at all".<sup>855</sup> The Court did not deem it necessary to resolve this conflict stating that, "in any case, the defectiveness of the [goods] was not outside [the seller's] control. [The seller] is, therefore, responsible for the consequences of a delivery of goods not in conformity with the contract".<sup>856</sup>

However, the court appeared to leave open the question that Article 79 might in some other exceptional circumstances exempt a seller for delivery of non-conforming goods. Although that was not the case in this instance, the court suggested that if defective goods had been caused by the seller's supplier, the seller would be exempt from that situation under Article 79 only if the defect was beyond its control as well as the control of the seller's suppliers. While the court did not provide a definitive answer on this question, this suggests, according to dicta from the German federal Supreme Court,

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<sup>854</sup> *Ibid.*

<sup>855</sup> Vine wax case, *supra* note 844 at s. II. para. 2(a).

<sup>856</sup> *Ibid.*

that a seller could escape liability for damages under Article 79 for supplying non-conforming goods. Such an approach would allow for fault-based liability, which is recognized in German law, to creep into Article 79. Recall that Article 79 does not follow the civil law, which bases solutions to impediments on the doctrine of fault. According to Honnold, who represents the scholarly view from a common law perspective, Article 79 is simply inapplicable when a seller supplies non-conforming goods.<sup>857</sup> Such a development, should it occur, would undermine the objective of the CISG to create an internationally uniform sales law. For this reason, while the Vine wax case is an admirable addition to CISG jurisprudence, theoretically, it does leave open the possibility of divergence in the case law on Article 79 in national courts.

*F.viii. Product Non-Conformity as an Impediment?: The Powdered Milk Case*

Three years later, product non-conformity and Article 79 was also again addressed by the *Bundesgerichtshof* in the Powdered milk case.<sup>858</sup> A German firm sold powdered milk to a company in the Netherlands. The buyer sampled the product at the time of delivery, and the test results failed to disclose any problems with the milk. The buyer then exported the goods to customers in Algeria and Aruba. These customers, however, claimed that some parts of the powdered milk were contaminated, so the buyer sought compensation from the seller. While the seller agreed that defects existed, and offered to take back the powdered milk, it declined to pay damages as requested by the

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<sup>857</sup> Flechtner, *supra* note 834 at 41.

<sup>858</sup> Bundesgerichtshof [BGH] [Federal Supreme Court], 9 January 2002, VIII ZR 304/00 [*Powdered milk case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020109g1.html>>.

buyer. The seller first claimed that its performance should be excused because the bacterial infestation occurred after the milk had been delivered, and therefore, the goods as delivered had conformed to the contract. Secondly, it argued that under the German Civil Code, no damages could be claimed. One of the conflicting terms was a *force majeure* clause in the seller's order confirmation. At the appeal court,<sup>859</sup> the seller argued that this contractual provision trumped the CISG as the Convention was derogated by a clause in its standard forms.

The appeal court ruled that the *force majeure* clause was not part of the contractual relationship as it was not agreed to by the buyer. The Supreme Court also confirmed that neither the buyer's nor the seller's standard forms could be included in the contractual agreement. While the contract was deemed to be valid, the conflicting terms from the parties' standard forms were declared void, and were to be replaced by the provisions of the CISG that regulated the respective subject matter, including Article 79.

As for the non-conformity, both the appeal court and Supreme Court were of the view that, in this case, the seller was not exempt from liability under Article 79(1). The appeal court noted that the seller failed to comply with its burden to demonstrate that it was exempt from liability for damages under Article 79(1).<sup>860</sup> The seller had not demonstrated that the product non-conformity "originated from outside of its sphere of control" and remarked that "[t]his proof [...] is critical in order to argue in favor of an exemption from liability".<sup>861</sup> It was unequivocal on this point, noting that the seller was

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<sup>859</sup> Oberlandesgericht [OLG] Dresden, 23 October 2000, available *ibid.*

<sup>860</sup> *Ibid.* at s. 2.5.1.2.c.

<sup>861</sup> *Ibid.* at s. 2.5.1.2.c.aa.

“obliged [...] to pay damages because [...] the] powdered milk lacked conformity with the contract”, therefore, there was “no exemption from liability in accordance with Art. 79 CISG”.<sup>862</sup>

The Supreme Court agreed with this view to some extent, but also appeared to be less emphatic from ever denying a seller’s non-conforming goods an exemption under Article 79. In this respect, it appeared to leave open the possibility that a seller might, in certain cases, be excused from liability for damages for supplying defective goods under Article 79. The decision lacks clarity on this important issue. In this respect, it referred back to the Vine wax case “as Art. 79 also applies to the delivery of goods that do not meet the requirements of the contract”.<sup>863</sup> It elaborated on this point and ruled that if the existence of the infestation prior to the transfer could not be excluded, the seller’s success under Article 79 would depend on the seller proving that the contamination would not have been detectable with the best possible testing method and, further, that any infestation had occurred outside of its sphere of control.<sup>864</sup> The Supreme Court then remanded the case for further fact finding on the timing of the contamination.

The Supreme Court did not explain from where this test had originated, but it appears to have been based on its interpretation of the language of Article 79. It is also in harmony with the civil law tradition that is more accommodating to an unforeseen change in circumstances, i.e. *rebus sic stantibus*. The court’s first condition for excusing the seller—that the non-conformity would be undetectable with the best possible methods of

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<sup>862</sup> *Ibid.* at s. 2.

<sup>863</sup> Powdered milk case, *supra* note 858 at s. III.

<sup>864</sup> *Ibid.*

testing—arguably echoes the words of Article 79’s requirement that the failure to perform be out of the seller’s control. However, this perspective also appears to reflect the civilian fault-oriented position. The problem is that this perspective may be due to an ingrained familiarity with domestic law, but this view is not supported by the drafting history of the Article.<sup>865</sup>

In the *Official Records* of the Conference it was made clear that a “seller was not to be held free of responsibility for defects in the goods he supplied, even if he had not been at fault in regard to his own manufacturing process. It was also understood that [...] there would be no ‘impediment’ if a seller instead of doing the manufacturing himself, bought goods from a supplier and those goods proved defective”.<sup>866</sup> As Honnold and Flechtner have noted, this position reflects a “lack of sympathy with the no-fault<sup>867</sup> approach to liability for damages adopted in the CISG”.<sup>868</sup> Yet according to the Supreme Court, if “the best possible testing” failed to detect the defect, the seller could not have discovered and cured it, nor could he have taken it into account or overcome its consequences. The result of this approach is a situation where a seller delivering non-conforming goods would not be liable in damages. This reasoning bears a close resemblance to the more liberal approach towards “impediments” and *force majeure* in most civil law jurisdictions. Unfortunately, should this line of reasoning continue to develop in civilian courts, it could lead to significant differences in the outcomes of Article 79 cases across the CISG signatory states.

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<sup>865</sup> See e.g. Honnold & Flechtner, ed., *supra* note 43 at 618.

<sup>866</sup> *Official Records*, *supra* note 597 at 410.

<sup>867</sup> “No-fault” under the CISG is similar to the concept of “liability without fault” or “strict liability” where there is no determination that a party is blameworthy.

<sup>868</sup> Honnold & Flechtner, ed., *supra* note 43 at 620.

To complicate matters, the Supreme Court's second requirement that the seller prove that the infestation was caused by something "outside its sphere of control" appears to restate Article 79's "beyond the seller's control" test. Indeed, there is nothing in the language of Article 79 that might unambiguously limit its scope, and forbid its application to cases of non-conforming goods. This was only made explicit during the drafting of the Convention, but express terms were not incorporated into the CISG. Perhaps this was a drafting oversight. The provision does state in subpart (1) that it applies to "a failure to perform *any* [...] obligation".<sup>869</sup>

However, when read within the context of other articles in the CISG, an argument can be made that a party delivering non-conforming goods was not to be entitled to an Article 79 defense. This is particularly evident when considering the CISG's approach to each parties' contractual obligations and its unitary approach to remedies for breach. For example, Article 35(1) states that a "seller *must* deliver goods which are of the quantity, quality and description required by the contract", and Article 45(1) provides that "[i]f the seller fails to perform *any* of his obligations under the contract or this Convention" which includes the seller's obligations under Article 35(1), "the buyer may [...] (b) claim damages".<sup>870</sup> A similar provision for a breach by the buyer exists under Article 61(1)(b). The CISG is, thus, based on a no-fault unitary contractual principle that all parties are obliged to perform their obligations, and will be held responsible for damages. This strict view differs to some extent from certain legal systems, particularly from civil law jurisdictions, that take a more liberal approach to the concept of fault when dealing with

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<sup>869</sup> CISG Article 79(1).

<sup>870</sup> CISG Articles 35(1) and 45(1)(b).

liability for damages for a contractual breach. The approach taken by the Supreme Court, thus, appears to reflect its ingrained familiarity with domestic law, and would seem to be a sensible and obvious interpretation of the CISG. However, such a result could lead to divergent interpretations of the Convention, and reflects the sometimes subtle, but insidious, nature of the homeward trend.

*F.ix. The Strict Impediment Requirement under Article 79(1)*

As a prerequisite to an exemption, Article 79 (1) requires that a party's failure to perform be due to an "impediment" that was beyond the control of the party, and that the party could not reasonably be expected to have taken it into account at the time of the conclusion of the contract, or to have avoided it or its consequences.<sup>871</sup> In the Chinese goods arbitration case the tribunal in Hamburg compared the "impediment" standard under Article 79 to those for excuse under the equivalent national legal doctrines of *force majeure*, economic impossibility, and excessive onerousness.<sup>872</sup> There the tribunal refused to find that the seller was exempt from liability because its supplier had run into severe financial difficulties.<sup>873</sup> An increase in the cost of performing the contract cannot excuse a seller from damages for failing to deliver the goods. The impediment must amount to "an unmanageable risk or totally exceptional event".<sup>874</sup> This underscores the reluctance to find changes to economic circumstances to amount to an impediment.

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<sup>871</sup> The full text of Article 79(1) states: "A party is not liable for a failure to perform any of its obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."

<sup>872</sup> Chinese goods case, *supra* note 776 at para. 12.

<sup>873</sup> *Ibid.*

<sup>874</sup> *Ibid.*

Under Article 79, a party is deemed to assume the risk of market fluctuations and other cost factors affecting performance under the contract. As the tribunal stated, these factors are not an “impediment beyond the control of the seller”, but rather “belongs typically to the sphere of responsibility of the debtor”.<sup>875</sup>

The English wording in Article 79(1), “beyond his control” is more precise than the general wording found in the German language (*aufserhalb ihres Einflusbereichs*).<sup>876</sup> In order to determine whether the impediment was beyond the party’s control, courts must undertake a risk analysis to establish whether the risk of the occurrence of the impediment was something within that party’s sphere of control. In other words, a court is required to assess the risks that a party claiming exemption assumed when it concluded the contract. It must have regard to the allocation of risk that was incorporated in the contract, as well as any trade usages or practices that might be relevant (according to CISG Article 9). In the absence of any *force majeure*-type agreement, recourse must be made to the CISG. Indeed, even where a contract incorporates a *force majeure* clause, such a provision does not necessarily exclude Article 79. Many contract clauses are incomplete, and need to be interpreted and supplemented by reference to international conventions, such as the CISG.

Generally, a party’s sphere of control is thought to be extensive. There will rarely be impediments that are deemed to be beyond its control. The most common examples for such cases are unforeseen events, such as natural catastrophes (storms, flooding, fire, earthquakes, disease epidemics, etc.), war or terrorist attacks, and governmental measures

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<sup>875</sup> *Ibid.* at paras. 11-12.

<sup>876</sup> Gruber and Stoll “Article 79” in Schlechtriem & Schwenger, *supra* note 599 at 814 para. 14.

affecting trade (export or import bans, embargoes, etc.).<sup>877</sup> The unforeseen event must also be exceptional. Thus, in the Tomato concentrate case, the seller was not exempted from liability under Article 79, even though heavy rainfall had reduced the production of tomatoes.<sup>878</sup> According to the Hamburg appellate court (OLG), even though the French seller claimed “*force majeure*”, the crop of tomatoes was not entirely destroyed, and the supply was not exhausted, thus, performance was still possible. The reduction of the tomato crop, and the resultant increase in the market price of tomatoes were burdensome, but not impediments that the seller could not overcome. The supply, although restricted, was deemed to be within the seller’s sphere of control.<sup>879</sup>

In the same year as the Tomato concentrate case, that same court had made a similar ruling in the Iron molybdenum case.<sup>880</sup> An English buyer and a German seller had entered into a contract for the supply of iron molybdenum from China in 1994. The goods were never delivered to the buyer because the seller had not itself received delivery of the goods from its own Chinese supplier. The buyer then concluded a substitute transaction with a third party and sued the seller for the difference between the price paid and the price under the contract. The seller claimed that it was exempt from liability under a *force majeure* clause in the contract, as well as under Article 79, as the market price for the product had tripled since the time of the conclusion of the contract. The court held that the buyer was entitled to damages under Article 75 of the CISG. It stated

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<sup>877</sup> *Ibid.*

<sup>878</sup> Oberlandesgericht [OLG] [Appellate Court] Hamburg, 4 July 1997, 1 U 143/95 and 410 O 21/95 [*Tomato concentrate case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970704g1.html>>.

<sup>879</sup> *Ibid.*

<sup>880</sup> Oberlandesgericht [OLG] [Appellate Court] Hamburg, 28 February 1997, 1 U 167/95 [*Iron molybdenum case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970228g1.html>>.

that it was incumbent upon the seller to bear the risk of increasing market prices.<sup>881</sup> The court made the additional point that a seller has to make greater efforts where the transaction had a speculative character, as in this case, so the fact that the market price had tripled was not sufficient to exempt the seller.

Where the seller has sold generic or commodity goods, such as tomato paste or iron molybdenum, it will have to bear the acquisition or procurement risk, assuming there is no agreement to the contrary. Failure to do so is not considered an “impediment”. Recall that the German federal Supreme Court also made this point in the Vine wax case. It noted that the seller normally bears the risk that its supplier might breach, and that the seller will not generally receive an exemption when its failure to perform was caused by its supplier’s default.<sup>882</sup> Where other sources of supply exist, even if more expensive than the one from which the seller intended to purchase the goods, the seller must obtain the goods from any available source. Failure to do so will deprive that party from a defense under Article 79. Also, from the perspective of the buyer, it is often irrelevant how the seller obtains the goods, or whether the goods by-pass the seller, and come directly from the seller’s supplier or producer. If a seller does not want to assume the acquisition risk, it should ensure that an exemption clause is included in the contract with the buyer exempting it from liability for failure to perform by its supplier or producer.

There do appear to be limits to the extent to which the seller must bear all of the risk of acquisition. For example, if the contract provided that the seller was to supply the goods from a specific source, or if the seller promised to deliver the goods provided that

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<sup>881</sup> *Ibid.*

<sup>882</sup> Vine wax case, *supra* note 844 at s. II. para. 2(a).

it received the product from its supplier, then a failure of the intended source, or a failure by the supplier to deliver, will normally exempt the seller from having to perform.<sup>883</sup>

Furthermore, even if no specific source of goods was identified in the contract, the court in the Iron molybdenum case suggested that a post-contract market rise could become so extreme and unreasonable so as to entitle a seller to claim an exemption under Article 79.<sup>884</sup> It stated, however, that “[f]or parties doing business in a sector that has a very speculative aspect the limits of reasonability are very high”.<sup>885</sup> Considering the speculative nature of the industry and the contract, it was not commercially unreasonable to justify an exemption under Article 79. In any event, these cases are small, but important contributions to the development of relative uniformity in the interpretation of CISG Article 79.

*F.x. Miscellaneous Article 79 Issues in German Case Law: Additions to the Quest for Relative Uniformity*

The remaining German cases concern a variety of issues, many of which touch upon Article 79 in only a marginal manner. One early case, the Copper and nickel cathodes case, for example, which dealt with contract formation, Article 79 was cited, but it otherwise had no other application in the case.<sup>886</sup> Similarly, in the Flagstone tiles case, the court referred to Article 79 by noting that the buyer had to accept certain foreseeable risks by paying an unauthorized sales agent, rather than directly remitting the payment to

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<sup>883</sup> Huber & Mullis, *The CISG* at 261-262.

<sup>884</sup> Iron molybdenum case, *supra* note 880.

<sup>885</sup> *Ibid.*

<sup>886</sup> Landgericht [LG] [District Court] München, 2 August 1994, 13 HKO 17330/93 at II.6 [*Copper and nickel cathodes case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/940802g1.html>>.

the seller.<sup>887</sup> In this respect, the court noted that by the buyer's conscious act of paying an agent instead of the seller, the buyer had to bear the consequences of the possibility that the agent might cash the cheque without handing over the purchase price to the seller. If the buyer commissioned the agent to transmit the purchase price to the seller, it had to bear the risk of that transmission. In the court's view, this was a risk that fell under Article 79, even though this provision of the CISG is not explicit on this subject. The reference to Article 79 was, thus, inappropriate, but it is possible that the buyer attempted to use this provision as a defense, and the court was, thus, obliged to respond. Unfortunately for this buyer, non-payment has never been deemed to be an unforeseeable supervening event in CISG jurisprudence; it is never "impossible" for a party to make payment. The court correctly noted that the failure to pay the seller was, in this case an issue governed by CISG articles 53<sup>888</sup> and 57(1).<sup>889</sup>

Non-payment was also the main issue in the Memory module case.<sup>890</sup> There, the Chinese seller sued the German buyer for payment of the purchase price for delivered memory modules, as well as for reimbursement of its legal fees. The district court ruled in the seller's favour, and the buyer appealed. It argued that it had rightfully avoided the contract under CISG Article 49, and that the legal fees were not recoverable by the seller. It also must have made an argument under Article 79 to support its position on contract

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<sup>887</sup> Amtsgericht [AG] [Lower Court] Alsfeld, 12 May 1995, 31 C 534/94 [*Flagstone tiles case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950512g1.html>>.

<sup>888</sup> CISG Article 53 states: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention".

<sup>889</sup> CISG Article 57(1) states: "If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller: (a) at the seller's place of business; or (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place".

<sup>890</sup> Oberlandesgericht [OLG] [Appellate Court] Hamm, 12 November 2001, 13 U 102/01 [*Memory module case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/011112g1.html>>.

avoidance. The court noted, however, that contrary to the buyer's view, the contract was not properly avoided under Article 49 as there was no fundamental breach by the seller.

In its only reference to Article 79, the court stated that "[i]t is irrelevant according to Art. 79(5) CISG whether or not the seller is responsible for the failure to perform".<sup>891</sup>

This cryptic reference to Article 79(5) appears to be peculiar. The article itself states:

"[n]othing in this article prevents either party from exercising any right other than to claim damages under this Convention".<sup>892</sup> By this reference, the court simply

acknowledged that a party who fails to perform a contract owing to an impediment that meets all the requirements set forth in Article 79(1) is not liable for damages, but the exemption of a party from damages does not prevent the other party from claiming other remedies. For example, since Article 79 does not prevent the other party from exercising any right other than to claim damages, a serious delay by one party will entitle the other party to avoid, i.e., put an end to the contract by reason of a fundamental breach.

Because delayed delivery and payment were issues in this case, it can only be surmised that the buyer attempted to use, to a limited degree, an Article 79 defense, but was unsuccessful.

In the German courts' interpretations of Article 79, it is important to consider the extent to which they have remained true to the interpretive mandate in CISG Article 7(1) and promoted uniformity in their court decisions. For the most part, German courts have been relatively sensitive to this requirement. As Ulrich Magnus has noted, it is his "impression that German courts today do neither directly nor indirectly on a subconscious

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<sup>891</sup> *Ibid.* at s. III.1.

<sup>892</sup> CISG Article 79(5).

level follow the homeward trend. As far as the interpretation of the CISG is concerned the courts, and in particular the Federal Supreme Court, try to avoid any interpretation which merely imports the domestic solution into the CISG”.<sup>893</sup> The remaining German cases on Article 79 appear to underpin the need for an autonomous interpretation of the CISG that negates any recourse to law and legal concepts of a purely domestic nature.

In the Automobile case, for example, the plaintiff buyer of vehicle with a defective title attempted to rely on s. 306 of the BGB to avoid the contract for reason of impossibility of performance.<sup>894</sup> It argued that under German domestic law regarding the legal consequences of an impossibility of a contractual performance, the seller was unable to properly transfer the ownership of the car to the buyer. The seller made a similar argument under Article 79(1), as it sold the automobile to the buyer without realizing that the vehicle was stolen property. It, thus, attempted to rely on an exception to its duty to perform under Article 79(1), arguing that the failure to properly transfer property (and title) was due to an impediment beyond its control. The Freiburg District Court (*Landgericht*) invoked numerous articles of the CISG, which it deemed to govern the dispute. It disregarded the inapplicable references that the parties made to domestic law, and determined that the buyer’s claim was justified. It awarded the buyer reimbursement of the purchase price under Article 81(2) CISG, and of all its expenses on under Article 74. In making this award, the court noted that the seller could not rely on exceptions under Article 79(1). It held that the seller’s failure to properly transfer the

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<sup>893</sup> Ulrich Magnus, “Germany” in Franco Ferrari, ed., *The CISG and its Impact on National Legal Systems*, *supra* note 218 at 156.

<sup>894</sup> Landgericht [LG] [District Court] Freiburg, 22 August 2002, 8 O 75/02 [*Automobile case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020822g1.html>>.

property was not due to an impediment beyond its control. On the contrary, it was the responsibility of the seller to inquire into the background of the car. In addition, according to CISG Article 41, the seller was liable for any defects in title. If it had undertaken a proper examination, the seller would have discovered that the car had been stolen and, thus, would have refrained from reselling it. This was within the seller's sphere of control.

In addition to the Automobile case,<sup>895</sup> German courts have made similar rulings in two other cases that involve stolen vehicles and Article 79. What is also interesting is that it is apparent that these courts have had little difficulty in applying the CISG's articles in a sophisticated manner. Doing so retards the homeward trend. The Stolen automobile case involved a buyer of an automobile from Belarus, who purchased the car "without warranty" from a German seller.<sup>896</sup> Shortly after taking delivery, the car was seized by Belarusian authorities based on an alleged theft. The buyer immediately informed the seller that the vehicle had been seized, and the seller agreed to reimburse the buyer for the purchase price on condition that the car be returned. As the car was impounded by the authorities, the buyer was unable to return it to the seller. Because the buyer had not been able to make restitution to the seller, the latter argued that it had been relieved of its obligation to perform. The court noted, however, that the buyer was

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<sup>895</sup> *Ibid.*

<sup>896</sup> Oberlandesgericht [OLG] [Appellate Court] Dresden, 21 March 2007, 9 U 1218/06 [*Stolen automobile case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/070321g1.html>>.

relieved from his obligation to return the car “because the impossibility to do so is not due to his act or omission”.<sup>897</sup>

In the alternative, the seller utilized an Article 79 defense by claiming it was unaware that it had sold stolen property. In ruling against the seller, the court noted that it was not relieved from its obligation to reimburse the purchase price and to pay damages according to Article 79(1). In the words of the court, “[t]his Article provides that a party is not liable for a failure to perform any of his obligations *if he proves* that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract”.<sup>898</sup> As the seller should have been aware that a separate vehicle identification number had been spot-welded on top of the original plate, it was the seller who bore the burden of proof in this case, and he had not demonstrated he could not have noticed the attached plate. Damages were thus awarded to the buyer under CISG Article 74.

Similar facts and arguments were also present in the Stolen car case in the following year.<sup>899</sup> A German car dealer sold a vehicle to an Italian buyer, who was also a professional in the trade. The seller had purchased the car from another automobile dealer and had submitted the vehicle registration document to local authorities for a preliminary check. Although nothing was revealed by this check, it later turned out that the car had been stolen prior to its sale. Consequently, the Italian police confiscated the car and returned it to its original owner. In the interim, the buyer, having resold the car to

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<sup>897</sup> *Ibid.* at s. 2(f).

<sup>898</sup> *Ibid.* at s. 2(d). Emphasis in the original.

<sup>899</sup> Oberlandesgericht [OLG] [Appellate Court] München, 5 March 2008, 7 U 4969/06 [*Stolen car case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/080305g1.html>>. Not to be confused with the Stolen *automobile* case, *ibid.*

a third party, had to return the funds received as payment for the car. The buyer then filed a suit against the seller claiming breach of contract plus damages and lost profits. The seller requested the dismissal of the claim, alleging that it had acted in good faith, as it had conducted due diligence on the title prior to the sale.

The court of first instance had dismissed the claim, holding that, according to Article 79(1), the seller was not liable. This appears to be an unusual determination, as the court also seemed to be of the view “that Article 79 CISG had to be interpreted in a very restrictive way”.<sup>900</sup> In that court’s view, the seller had demonstrated that its breach of contract—its failure to discern that the car was stolen property—was due to an impediment beyond its control, and it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome it or its consequences. Such a ruling, rather than restricting the scope of Article 79, appears to broaden it considerably. It must be questioned whether the court of first instance was subconsciously influenced by its own domestic laws, in particular, BGB section 313’s more liberal doctrine of *Wegfall der Geschäftsgrundlage*. Relying on its erroneous interpretation of Article 79, the buyer appealed the court’s ruling,

The Munich court of appeal partially reversed the decision of the court of first instance, and found that the seller had failed to perform its obligation, namely the transfer of ownership of the car to the buyer. In this respect, the court of appeal undertook a more sophisticated analysis of the CISG. After pointing out that while the CISG was the law applicable to the merits of the dispute, as per Article 4(b), it did not govern the effects of

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<sup>900</sup> Quote is from the judgment of the Munich court of appeal, *ibid.*

the contract on the property in the goods sold. As a consequence, this was a matter governed by domestic law. The court, thus, correctly applied German law, which prohibits the acquisition of stolen property, even by those who act in good faith.

Furthermore, in contrast to what the court of first instance had affirmed, the court of appeal held that the seller could not be exempted from liability under Article 79, since such an exemption implies the occurrence of objective circumstances preventing the fulfillment of the contractual obligations, while in this case the alleged circumstances were of a subjective nature. In the words of the court, “[a]ccording to Article 79 CISG, an exemption of the seller from the consequences of a breach of obligation is only possible if the breach cannot reasonably be attributed to him”.<sup>901</sup> Moreover, the argument that the alleged impediment could not reasonably be expected to have been taken into account at the time of the conclusion of the contract was not convincing. Based on the facts of the case, including the low price of the car, the mileage, and the disparities in the owner’s registration document, this should have led the seller to be suspicious regarding the ownership of the vehicle. As the court stated, “the obligation to inquire whether a seller is entitled to transfer property of a car dealer of used cars does not meet the requirements of Article 79”.<sup>902</sup> In consequence, the buyer was entitled to damages under CISG Articles 45(1)(b) and 74.

The remaining three cases<sup>903</sup> from Germany contain very little content on Article 79. The Glass bottles case, which was an appeal case to the federal Supreme Court,

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<sup>901</sup> *Ibid.*

<sup>902</sup> *Ibid.*

<sup>903</sup> These are: Oberlandesgericht [OLG] [Appellate Court] Brandenburg, 18 November 2008, 6 U 53/07 [*Beer case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/081118g1.html>>;

involved a German seller and a Greek buyer who had entered into a contract for the manufacture and supply of bottles that were to be resold to the buyer's customers in Russia.<sup>904</sup> Due to the difficulties of selling bottles in Russia caused by the ruble's decline, the buyer informed the seller of its intention to accept only the goods already produced. It also asked the seller for the return of its moulds, which the buyer had financed with a loan from the seller. The seller refused, and the buyer brought an action against it claiming, *inter alia*, repayment of the loan. The seller counterclaimed with a claim for compensation of lost profits it had allegedly suffered as a result of early termination of the contract. The court of first instance and the Court of Appeal dismissed the buyer's claims, but the Supreme Court reversed these decisions in part, noting that the seller was entitled to set-off because the buyer had failed to perform its contractual obligations under the CISG.

The buyer attempted an Article 79 defense, apparently first under German domestic law. It claimed that there had been a disruption of the "equivalence mandate" (*Aquivalenzstörung*), which is a domestic rule that stipulates that the duties of both contractual parties remain approximately the same. The *Aquivalenzstörung* rule bears a close resemblance to *Wegfall der Geschäftsgrundlage*, which is the German rule concerning the destruction of the basis of the contract. The Supreme Court acknowledged that although the ruble's value fell, resulting in a disruption of sales on the part of the buyer, "the buyer bears the risk whether the purchased object can be resold for

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Oberlandesgericht [OLG] [Appellate Court] Hamburg, 25 January 2008, 12 U 39/00 [*Café inventory case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/080125g1.html>>; and, Bundesgerichtshof [BGH] [Federal Supreme Court], 27 November 2007, X ZR 111/04 [*Glass bottles case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/071127g1.html>>.

<sup>904</sup> Glass bottles case, *ibid*.

a profit”.<sup>905</sup> While the Court referred to previous Bundesgerichtshof jurisprudence and cited BCB s. 313, it correctly noted that CISG Article 79 was the governing provision. That the buyer was not able to sell the bottles because of a decline of the ruble exchange rate did not entitle the buyer to terminate the contract. At most, Article 79(1) simply “releases the debtor only from damages claims by the creditor”.<sup>906</sup> Otherwise, the buyer’s obligations to perform the contract remained unaffected.

The Café inventory case similarly raised only a minor point on Article 79.<sup>907</sup> The Court held that the buyer’s assignees were entitled to recover a contractual penalty for the seller’s partial non-performance (in supplying defective equipment). In so doing, the Court left open the problem as to whether an exemption from the obligation to pay the contractual penalty should be decided on the basis of CISG, or on the basis of domestic law. With respect to CISG, the Court noted that an exemption for the seller’s non-performance would only be allowed if proper installation of the equipment at the buyer’s premises had been impossible due to an unforeseeable impediment beyond the seller’s control, as per Article 79(1), or through conduct by the buyer, in accordance with Article 80. While the buyer did not leave its premises in an ideal condition to enable the seller to properly install the equipment, the seller’s complete failure to install the equipment deprived it from a right to rely on Articles 79 and/or 80. This decision, while limited in scope, appears to be a correct application of the facts with regard to Article 79.

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<sup>905</sup> *Ibid.* at para. 30(b).

<sup>906</sup> *Ibid.* at para. 31.

<sup>907</sup> Café inventory case, *ibid.*

The Beer case was primarily concerned with contact avoidance, fundamental breach, and damages.<sup>908</sup> The dispute concerned two breweries with reciprocal claims involving contracts for the manufacturing of a plant and the bottling of beer for the buyer. When the buyer failed to purchase all the beer manufactured for the venture, the relationship between the parties deteriorated. The buyer attempted to argue that a distortion of the parties' implicit contractual purpose occurred, which is a principle recognized in German law (under *Wegfall der Geschäftsgrundlage*). This principle is often compared to *force majeure*, frustration, and CISG Article 79. However, the Court was quick to dismiss this argument, and stated that “[t]he CISG does not contain this legal principle”.<sup>909</sup> While Article 79 did not apply to these changed circumstances, the Court noted that CISG Article 7(1) provides that the principle of good faith is inherent to the Convention.<sup>910</sup> As such, it could construe the principle of good faith in a way that when circumstances change, an aggrieved party could demand an adjustment of the obligations under a contract. So while Article 79 could not be used to broaden the scope of excuses for non-performance when new situations arise, the Court appeared to open the door for Article 7(1) to be used in claims for contract adaption, at least in some situations. However, in this case, the Court found that good faith was not a relevant factor, and dismissed this line of argumentation.

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<sup>908</sup> Beer case, *ibid.*

<sup>909</sup> *Ibid.* at s. “Position of [Seller]”.

<sup>910</sup> *Ibid.* at s. III. 3.

*F.xi. Sophisticated Understanding of Article 79 in German Case Law*

Germany has a long history in efforts to unify international sales law, and it is likely that this experience has assisted jurists in that country to treat the CISG in a sensitive and sophisticated manner.<sup>911</sup> This should not be surprising as German courts have had experience in applying ULIS and ULF from 1974 to 1990. The relatively large number of CISG cases coming from that country also speaks to the relative popularity and success of the Convention in Germany. Indeed, this analysis of Article 79 in German courts indicates that jurists there take the CISG very seriously.

Most decisions demonstrate that courts there have a nuanced understanding of both the CISG's general principles as well as its specific provisions, such as Article 79. While there has been a tendency to make a distinction between "normal" domestic sales law, and the CISG as a unique law for international sales, there is little evidence that German courts have interpreted Article 79 in a manner that shows a bias for the homeward trend. The German cases interpreting Article 79, although not always perfect, have gone to great lengths to avoid any interpretation that might import domestic law into the CISG. This is the case even though German courts have not quoted foreign case law on the Article 79. This practice is common in German courts, as they rarely invoke the decisions of foreign courts unless there is a specific international matter at stake.<sup>912</sup> As a civil law country, this also reflects the lack of reliance on precedent, which is widespread

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<sup>911</sup> See generally, Martin Karollus, "Judicial Interpretation and Application of the CISG in Germany 1988-1994" in Cornell J. Int'l L., eds., *Cornell Review of the Convention on Contracts for the International Sale of Goods (CISG) 1995* (New York: Kluwer Law International, 1996) 51. See also, Magnus, *supra* note 792 at 143ff.

<sup>912</sup> Magnus, *supra* note 792 at 155.

in common law jurisdictions. Nevertheless, the CISG calls for a uniform interpretation and application across signatory states, and German courts have managed to pay heed to this requirement.

*G. Greece: Autonomous Interpretation as the Rule*

In one scholarly analysis of Greek case law on the CISG, it was noted that “Greek courts have delivered interesting and mostly correct (although often incomplete) judgments in connection with various important [CISG] matters”.<sup>913</sup> Indeed, many court and tribunal decisions contain incomplete analysis of the CISG’s various provisions. But fortunately, “autonomous interpretation [of the CISG] seems to be [...] a general rule respected by Greek courts”.<sup>914</sup> This is the approach used by the Court of Appeals of Lamia in the first Greek case that considered Article 79.<sup>915</sup>

There are two Greek cases that mention Article 79,<sup>916</sup> but only one of those cases provides a significant treatment of that provision.<sup>917</sup> The Sunflower seed case involved a Greek buyer and a Bulgarian seller that had concluded a contract for the sale of 3,000 tons of sunflower seeds. The seeds were to be produced in Bulgaria. Just prior to the delivery date, the seller informed the buyer that it was unable to perform the contract.

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<sup>913</sup> Dionysios P. Flambouras, “Case Law of Greek Courts for the Vienna Convention (1980) for International Sale of Goods” (2009) 2 Nordic J. Com. L. 1 at 37 online: <[http://www.njcl.fi/article.php?issue=2\\_2009&n=4](http://www.njcl.fi/article.php?issue=2_2009&n=4)>.

<sup>914</sup> *Ibid.* at 38.

<sup>915</sup> Court of Appeals of Lamia, Decision 63/2006 [*Sunflower seed case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/060001gr.html>>.

<sup>916</sup> In chronological order, from the most recent case, these are: Multi-Member Court of First Instance of Athens, Decision 4505/2009 [*Bullet proof vest case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/094505gr.html>>; and Sunflower seed case, *ibid.* The *Bullet proof vest case* mentions Article 79 as an example of the CISG’s excuse provisions. As nothing more is considered in the judgment, the case is of little relevance to Article 79 case law.

<sup>917</sup> That case is the Sunflower seed case, *supra* note 915.

The buyer covered its purchase with another supplier, and sued the seller for damages. At trial, the seller invoked weather-related impediments to excuse its performance. Specifically, it claimed that prolonged dryness resulted in the destruction of a large quantity of the sunflower seed harvest. In addition, the dryness caused a lowering of the level of the Danube river, so the seller would not have been able to load the goods on a ship near a port close to its premises. This situation meant that the seller would have been obliged to load the goods at a more distant sea port, entailing an increase in transportation costs. Such an increase, argued the seller, would have rendered the initially agreed price burdensome to the seller. Accordingly, the seller claimed that these were impediments beyond its control, and as such, it was exempt from liability to pay damages under Article 79.

The court correctly rejected the arguments of the seller. It took the position that the CISG does not release a party from its liability in cases where there has been a mere change in the economic circumstances that surrounded the parties at the time of contract formation, even where there is a higher cost to the seller.<sup>918</sup> The court was correct in not applying Article 79 in an event that constituted hardship. This was an implicit rejection of the *rebus sic stantibus* principle. The court specifically noted that at the time of contracting, the seller was already aware that the production of sunflower seeds would be limited due to the dry season, and that the lowering of the level of the Danube was an impediment within the control of the seller, since the same event had occurred a few years ago. As a general principle under CISG Article 79, even a considerable change in

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<sup>918</sup> Flambouras, *supra* note 913 at 21.

the price or costs of goods sold, after contract formation, will not be allowed as grounds for an exemption from liability. In this way, the Greek Sunflower seed case has made a small contribution towards relative uniformity in CISG Article 79 jurisprudence.

#### *H. Hungary: A Small Contribution to Relative Uniformity*

There are both court and arbitral cases from Hungary. The sole court case on Article 79 from that jurisdiction concerned the sale of language interpreting machines from Germany.<sup>919</sup> The defendant was a consignee of the plaintiff buyer, and it had entered into a sale of goods contract with a German seller that was appointed by the buyer. The defendant was obliged to take delivery any time within a twelve months period. The contract provided that in case of delay or frustration of the delivery due to *force majeure*, strike, or other circumstances beyond the control of the seller, the defendant consignee would not have the right to claim damages. The seller failed to deliver the goods, hence, the buyer avoided the contract and claimed damages. The seller stated that it was not liable for the non-delivery because its liability was excused by the relevant provision of the contract since non-delivery was due to a production failure at the manufacturer, which was beyond its control. At the trial level, the buyer claimed that the contractual *force majeure* provision trumped any guarantees provided for in the CISG. The defendant objected to this argument and argued that the contractual terms were in accordance with CISG Article 79. Unfortunately, the trial court failed to address the issues related to the CISG, even though it acknowledged that the Convention was

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<sup>919</sup> Legfelsobb Biróság [Supreme Court], 1992 [*Interpreting machine case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/920000h1.html>>.

applicable. Instead, it based its decision on the Hungarian Civil Code and ruled in favor of the defendant. As a matter of proper methodology, the trial court erred by referring to domestic law in a dispute that was clearly governed by the CISG.

The plaintiff buyer appealed to the Supreme Court, and now argued that pursuant to Article 79(2), the defendant was liable for third party suppliers of the seller. This is, indeed, a correct reading of that sub-Article. Under Article 79(2), the sphere of control of an obligor extends to cover the actions of third party suppliers. The Supreme Court held that even though the contract did not explicitly include Article 79, this did not mean that the liability of the seller for third parties would have been excluded. In this case, the seller was not obliged to purchase the goods from a specific source; rather, it was obliged to procure the goods from any source and sell them to the defendant. Thus, the Supreme Court held that the intermediary traders and the third party producers of the goods were within the seller's sphere of business control. As such, an impediment within the sphere of interest of the seller did not qualify as a ground for exemption under the contract or under Article 79. Such a ruling is consistent with most of the Article 79(2) case law on the topic of exemption from liability for the conduct of third parties. Although a small contribution, the Hungarian Supreme Court decision adds to the relative uniformity of Article 79 jurisprudence.

The arbitral decision from Hungary has suggested that a correct application of Article 79 must focus on the risks that a party claiming exemption assumed at the

conclusion of the contract.<sup>920</sup> The Caviar case raised issues concerned with risk allocation and highlighted the relationship between Article 79 and risk of loss rules.<sup>921</sup> A Yugoslavian company had sold and delivered caviar to a Hungarian buyer, but prior to payment a UN embargo against the former Yugoslavia took effect in Hungary. The case is of interest because one other tribunal (the BCCI in Bulgaria) noted that an embargo may constitute an “impediment” within the meaning of Article 79.<sup>922</sup>

The sanction against Yugoslavia prevented the buyer from taking delivery of the caviar, and the product was eventually destroyed. Although the tribunal ruled that the CISG was applicable, it referred to the sanctions as *force majeure* under the former Yugoslavian *Law on Obligatory Relations* rather than referring to Article 79.<sup>923</sup> This was an unfortunate, but minor, error as the tribunal could have conducted its risk assessment exclusively under the rules of the CISG. In any event, the outcome would likely have been the same. In this case, it determined that the damage caused by the embargo had to be borne by the party that was liable for the risk at the time the *force majeure* event occurred. Similar reasoning under Article 79 would likely have resulted in the tribunal ruling that the loss had to be incurred by the party who bore the risk at the moment of the impediment. To use the words of another arbitral tribunal, to be granted an exemption under Article 79, the impediment must be “an unmanageable risk or a totally exceptional

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<sup>920</sup> Budapest Arbitration Award, 10 December 1996, Vb 96074 [*Caviar case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/961210h1.html>>. The other Article 79 arbitral case from Hungary contains insufficient information and will not be discussed. See Article Budapest Arbitration Award, 8 May 1997, Vb 96036, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970508h1.html>>.

<sup>921</sup> Caviar case, *ibid.*

<sup>922</sup> Coal case, *supra* note 660.

<sup>923</sup> 1978, Article 262(4).

event, such as *force majeure*”.<sup>924</sup> In the case of the Hungarian buyer, it had assumed the ownership risk before the sanctions became effective. Indeed, by being late with its payment to the seller, it was technically in default before the sanctions were implemented. Loss of the goods after the risk has passed to the buyer does not discharge or exempt it from its obligation to pay the price. These two Hungarian cases appear to interpret Article 79 in a manner that is consistent with a growing body of relatively uniform jurisprudence.

*I. International Chamber of Commerce: International Expertise on Article 79*

While much scholarly literature on the CISG has come from cases in national courts, relatively little has focused exclusively on the decisions of arbitral panels. This is unfortunate, as important trends and data could be culled from the arbitral decisions originating from specific institutions. Indeed, most arbitral institutions are associated with specific countries, regions, or industries. Because of this narrower scope, these institutions may have a national or regional bias, or may not have requisite expertise to adjudicate international disputes. In this respect, as a truly “international” institution, the decisions of the International Chamber of Commerce (ICC) International Court of Arbitration provide a unique perspective on the treatment of CISG Article 79.

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<sup>924</sup> Hamburg Arbitration Award, 21 March 1996 [*Chinese goods case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960321g1.html>>.

*I.i. Article 79 Jurisprudence in Arbitrations: Complementing Procedure and Substance*

Many parties to international sale of goods contracts choose arbitration as an alternative to litigation in national courts. This form of dispute resolution has a number of advantages to litigation, and this may explain, in part, the growing body of CISG case law emanating from arbitral institutions. One example of this growth is the fact that over half of the Article 79 cases considered in this study were from arbitral institutions rather than from national courts. Specifically, of these 128 cases, 67 (or 52 percent) emanated from arbitrations; 61 (or 48 percent) originated from national courts.<sup>925</sup>

There are many reasons to explain the growth of arbitration as a form of dispute resolution in international sales transactions. One obvious explanation is that in certain jurisdictions like China and Russia, commercial parties do not have access to state courts to resolve their disputes. In these countries, arbitration is the only viable option. However, there are other attractions to this method of dispute resolution. One unique feature of arbitration is that it is a private means of settling disputes. The content of the proceedings remain confidential, which avoids public scrutiny. This is very attractive to commercial parties who wish to avoid negative publicity. Arbitration is also perceived as being a more neutral forum for the resolution of disputes than subjecting one of the parties to the national courts of the other party's country. Unlike national courts, members of an arbitral panel do not necessarily have ties to a particular country. In addition, members of an arbitral panel are often selected because they have the requisite

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<sup>925</sup> See Figure 1, *supra* note 208.

industry knowledge or technical expertise to understand the nuances and complexities of the case. The same level of expertise may not be available from judges sitting in national courts.

Arbitration is also favoured because awards are usually more easily enforced in other countries than are court awards. This is the result of the wide acceptance of the New York Convention.<sup>926</sup> Finally, arbitration is perceived to be more expeditious than litigation. The time saved with the relatively quick resolution of disputes is an attractive feature of arbitration. While the costs of the arbitrators and institutions may be more expensive than paying for the services of a national court, the expedited and simplified nature of arbitration often results in an overall cost savings to the parties.

*I.ii. The ICC Cases: A Nuanced Understanding of Article 79*

The ICC International Court of Arbitration cases on Article 79 come from a variety of jurisdictions, all of them from the civil law tradition.<sup>927</sup> None are identifiable as emanating from a common law jurisdiction.<sup>928</sup> In any event, these cases are “international” in scope. Perhaps most importantly, the ICC cases on Article 79 generally

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<sup>926</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 38, 7 I.L.M. 1046 (entered into force 7 June 1959) [*New York Convention*].

<sup>927</sup> The countries named in these Article 79 cases are Austria, Bulgaria, Egypt, Finland, Germany, Italy, Syria, Switzerland, and Yugoslavia. In some of these cases, the countries are not identified (Case 8786 *supra* note 931) or just the regions are identified (Case 8501 identifies an “Oriental country” and a “European country”, *supra* note 931; Case 8790 identifies the parties from “Central Europe” and Western Europe”, *supra* note 931).

<sup>928</sup> In Case 8786, *supra* note 931, no countries are identified, however, there are clues that suggest that the parties were from Europe. One clue is that the tribunal refers to Swiss law (as well as the CISG). The second clue is that a German case is referenced.

reveal a nuanced understanding of that provision. In this respect, they add to the relative uniformity in the interpretation of Article 79.

The ICC is one of the world's leading institutions for resolving international commercial disputes. The total number of cases handled by the ICC since it was founded in 1919 stands at more than 17,000.<sup>929</sup> It is truly an institution with an international approach to commerce. For example, in 2010, 793 cases were filed, involving 2,145 parties from 140 countries.<sup>930</sup> However, the decisions relating to Article 79 are substantially less, and cover only nine awards.<sup>931</sup> Two of these cases contribute insignificantly to Article 79 jurisprudence, and are not considered in this discussion.<sup>932</sup> Nevertheless, the remaining seven cases illustrate how ICC arbitrators have dealt with this important provision in this major instrument of international sales law, and the extent to which they have, for the most part, achieved a relatively uniform interpretation of

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<sup>929</sup> ICC, online: International Court of Arbitration <<http://www.iccwbo.org/court/arbitration/id4584/index.html>>. Note that the ICC's International Court of Arbitration was created in 1923.

<sup>930</sup> *Ibid.*

<sup>931</sup> In chronological order, from the most recent case, these are: ICC Court of Arbitration, 2000, Case 8790 [*Processed food product case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/008790i1.html>>; ICC Court of Arbitration, June 1999, Case 9187 [*Coke case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/999187i1.html>>; ICC Court of Arbitration, January 1997, Case 8786 [*Clothing case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/978786i1.html>>; ICC Court of Arbitration, 1996, Case 8501, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/968501i1.html>>; ICC Court of Arbitration, 1995, Case 8128 [*Chemical fertilizer case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/958128i1.html>>; ICC Court of Arbitration, 1994, Case 7585, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/947585i1.html>>; ICC Court of Arbitration, 26 March 1993, Case 6653 [*Steel bars case 2*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/936653i1.html>>; ICC Court of Arbitration, 1992, Case 7197 [*Failure to open letter of credit and penalty clause case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/927197i1.html>>; and ICC Court of Arbitration, 26 August 1989, Case 6281 [*Steel bars case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/896281i1.html>>.

<sup>932</sup> These unimportant cases are: ICC, 26 March 1993, Case 6653 (*Steel bars case 2*) and ICC, 1994, Case 7585, *ibid.*

Article 79. Only in one case is the outcome a questionable ruling that may detract from a relatively uniform interpretation of Article 79.<sup>933</sup>

One common element in these cases is the attempt on the part of sellers to invoke their supplier's default as an impediment to exempt the seller from liability for non-conforming goods. As similar cases on this point have demonstrated, this defense has rarely been successful.<sup>934</sup> Article 79 jurisprudence has been relatively uniform on this point: the seller bears the acquisition risk and cannot rely on its suppliers default as a basis for an exemption under the CISG. Thus, in ICC Case 9187, the seller was not exempted from its liability for delivering non-conforming coke, even though it had argued that it had acted only as an agent of the manufacturer in the transaction.<sup>935</sup> As it had never disclosed this fact to the buyer, the seller was fully liable. The tribunal stated that "[i]f the seller uses auxiliary people for the performance of its contractual obligations, the consequences of their knowledge or grossly negligent lack of knowledge of the non-conformity have to be borne by the seller as if it had acted itself".<sup>936</sup> The unanswered question in this case is whether the tribunal would have ruled differently if the seller had made known to the buyer that it was acting only in an agency capacity.

Another ICC decision was also in harmony with this approach to third party suppliers, even though the buyer was complicit to a small degree in the non-performance of the contract. In ICC Case 8128 involving the supply of chemical fertilizer, an Austrian

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<sup>933</sup> That case is ICC, 2000, Case 8790, *supra* note 931. It is discussed *infra*.

<sup>934</sup> The exception being a single case, that of Tribunal de commercial [Trib. com.] Besançon, 19 January 1998, *Flippe Christian v. Douet Sport Collections*, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980119f1.html>>. This case is discussed *infra*.

<sup>935</sup> ICC, June 1999, Case 9187 (*Coke case*), *supra* note 931.

<sup>936</sup> *Ibid.* at s. 3, "Notice of Non-Conformity".

seller contracted with its Ukrainian supplier to obtain part of the contract.<sup>937</sup> Under the instructions of the seller, the buyer sent the packaging (sacks) to the Ukrainian supplier to be used for the delivery of the product. However, the packaging did not conform to the requirements of the Ukrainian chemical industry, so they could not be used by the supplier. Consequently, the goods were not delivered on time and the buyer was forced to make a substitute purchase at a higher price. The seller attempted to use Article 79 as a defense, but the tribunal held that the seller was ultimately responsible for the non-delivery by its supplier, as it had breached its duty to give the proper packaging instructions to the buyer. As per Article 79(2), a third-party supplier's faulty or delayed performance is at the seller's risk.

Other impediment issues in ICC cases concern the suspension of foreign debt payments,<sup>938</sup> an increase in prices,<sup>939</sup> delayed delivery of samples,<sup>940</sup> and difficulties arising from government action and flooding.<sup>941</sup> Many of these issues have been considered reasonable business risks that are typically foreseeable. In Case 7197 the buyer alleged that it could not have opened a letter of credit because the Bulgarian government had ordered the suspension of payment of foreign debt.<sup>942</sup> The tribunal correctly refused to apply Article 79(1), as it noted that the suspension had already been declared at the time of the conclusion of the contract. Obviously, the buyer should have foreseen the difficulties in opening the credit in such an instance.

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<sup>937</sup> ICC, 1995, Case 8128 (*Chemical fertilizer case*), *supra* note 931.

<sup>938</sup> ICC, 1992, Case 7197, *supra* note 931.

<sup>939</sup> ICC, 26 August 1989, Case 6281, *supra* note 931.

<sup>940</sup> ICC, January 1995, Case 8786 (*Clothing case*), *supra* note 931.

<sup>941</sup> ICC, 1996, Case 8501 (*Chemical fertilizer case*), *supra* note 931.

<sup>942</sup> ICC, 1992, Case 7197, *supra* note 931.

Case 6281 also involves a situation where the claimed exemption has been denied, as an increase in market prices is rarely thought to be a supervening event.<sup>943</sup> The parties had concluded a contract for steel bars, which gave the buyer an option to purchase an additional quantity of the product at a future date at the same price. The buyer exercised its option, but the seller refused to deliver the steel because the market price had increased (by 13.16 percent). Interestingly, the tribunal found that the CISG was not applicable since the contract had been concluded before the Convention had entered into force in the countries of the buyer and seller (Egypt and Yugoslavia, respectively). Ruling that Yugoslavian law applied, the tribunal noted that that country was a signatory of ULIS.<sup>944</sup> Nevertheless, the tribunal compared Article 74.1 of ULIS with Article 79(1), and noted that as would have been the case under Article 79(1), it was appropriate to apply “a strict approach in assessing lack of predictability”.<sup>945</sup> The tribunal also considered Yugoslavian domestic law on changed circumstances.<sup>946</sup> In an interesting statement on this topic, it stated that the domestic provision

corresponds to that of a “frustration” according to Anglo-American law or of a *Wegfall der Geschäftsgrundlage* according to German and Austrian law. Yugoslav commentaries speak of a *clausula rebus sic stantibus*, mainly because of the historical development of Yugoslav law. After all, a “genuine” *clausula rebus sic stantibus* would sustain (in a positive sense) legal relationships only for as long as there are no changes at all, giving no consideration to predictability and applicability.

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<sup>943</sup> ICC, 26 August 1989, Case 6281, *supra* note 931.

<sup>944</sup> ULIS, *supra* note 157.

<sup>945</sup> ICC, 26 August 1989, Case 6281, *supra* note 931. The quote is from an excerpt of the decision edited by Albert Kritzer.

<sup>946</sup> *Yugoslav Law of Obligations*, 1978, Art. 133, paras. 1-2.

But considering that world market prices for products, such as steel, fluctuate, a 13.16 percent increase in prices was a reasonable and predictable entrepreneurial risk. Indeed, noted the tribunal, “[a] reasonable seller had to expect that steel prices might go up further, perhaps even more dramatically than in actual fact”.<sup>947</sup>

Considering that arbitrators do not have a permanent forum, unlike domestic courts, they have more flexibility in the choice of applicable law.<sup>948</sup> For that reason, the question of the applicability of the CISG appears in a rather different light in arbitration than before a domestic court. That may explain why, in Case 6281 above,<sup>949</sup> the tribunal utilized the CISG (by way of comparison to ULIS), even though it found the CISG to be inapplicable. In a similar fashion, the tribunal in Case 8501 found that no express or implied choice of law could be inferred from the parties, so it invoked the “generally accepted principles of international trade”, in particular, the CISG.<sup>950</sup> It did this, even though an argument could have been made that the respondent seller’s domestic law applied to the case, which would have been Vietnamese law. Had this been the case, the CISG would likely have been inapplicable as Vietnam was not a contracting state of the Convention.<sup>951</sup> But as the respondent did not state its position as to which law should apply, the tribunal was of the opinion that it was “not required *ex officio* to identify potential issues that might possibly arise under Vietnamese law”.<sup>952</sup>

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<sup>947</sup> ICC, 26 August 1989, Case 6281, *supra* note 931 at para. 14.

<sup>948</sup> See generally Alexis Mourre, “Application of the Vienna International Sales Convention in Arbitration” (2006) 17:1 ICC Int’l Ct. Arb. Bull. 43.

<sup>949</sup> ICC, 26 August 1989, Case 6281, *supra* note 931.

<sup>950</sup> ICC, 1996, Case 8501, *supra* note 931.

<sup>951</sup> As of August 24, 2011, Vietnam is still not a CISG contracting state.

<sup>952</sup> ICC, 1996, Case 8501, *supra* note 931.

As the tribunal was of the opinion that the CISG reflected widely accepted trade rules and commercial values, it referred to its provisions, as well as the UNIDROIT Principles,<sup>953</sup> in making its ruling. The seller sought to rely on an impediment that delayed its performance, which included government action and flooding. Without referring to CISG Article 79 or the *force majeure*<sup>954</sup> or hardship<sup>955</sup> provisions in the UNIDROIT Principles, the tribunal found that there was no case of *force majeure* preventing it from performing its contractual obligations. While much detail is lacking in this decision,<sup>956</sup> supervening government acts and seasonal droughts are most often deemed to be foreseeable business risks under Article 79. As such, they are rarely utilized with success as a defense for non-performance.

An impediment under Article 79 has been described in this dissertation as a legal principle for allocating the loss caused by a supervening event that prevents performance by making it impossible. It is intended to apply only where the event is one over which the parties have no control and without the fault of the party seeking to rely on this defense. For these reasons, a self-induced impediment will not be grounds for relief.<sup>957</sup>

This point is illustrated in Case 8786.<sup>958</sup> A seller of clothing had entered into a contract with the buyer, where the seller had to first produce satisfactory samples before the buyer would place the order. The buyer complained that the first samples were of poor quality, so the seller immediately delivered a second set of samples. By this point, a

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<sup>953</sup> UNIDROIT Principles, *supra* note 196.

<sup>954</sup> Article 7.1.7.

<sup>955</sup> Articles 6.2.1-6.2.3.

<sup>956</sup> The published decision in Case 8501 contains only extracts. *Supra* note 931.

<sup>957</sup> See Treitel, *supra* note 143 at 521-544.

<sup>958</sup> ICC, January 1997, Case 8786, *supra* note 931.

significant amount of time had lapsed and the buyer canceled the order, claiming that it was planned for a seasonal collection of clothing. Timeliness of the delivery of the clothing was of fundamental importance to the buyer. This being the case, the tribunal ruled that since the seller initially delivered defective samples, it caused the impossibility of the delivery of the goods by the deadline. As such, the seller, as claimant, could not rely on Article 79 to excuse it from its non-performance. In the words of the tribunal, “the impediment was well within the [seller]’s control considering that the entire chain of events which lead to the non-performance of the contract was commenced by the [seller]’s delayed delivery of the samples”.<sup>959</sup> In other words, the impediment was self-induced.

This being the case, the tribunal should have also made reference to CISG Article 80, which provides: “A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission”.<sup>960</sup> Article 80 releases a party from its obligations where the other party has impaired its performance. Thus, if the seller frustrated performance by not providing clothing samples in a timely manner, it cannot demand specific performance or declare avoidance. In the words of Honnold regarding Article 80, “[t]he making of a contract necessarily implies an expectation of performance; action by one party to prevent performance by the other is clearly inconsistent with their mutual expectations”.<sup>961</sup> While the tribunal appears to

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<sup>959</sup> *Ibid.*

<sup>960</sup> CISG Article 80.

<sup>961</sup> Honnold & Flechtner, ed., *supra* note 43 at 647-648.

have understood this principle, it ignored an important provision within the CISG that covered the issue.

While it was found in Case 8501 (above)<sup>962</sup> that flooding in the country of exportation (and government action) were not sufficient for a *force majeure* defense, the opposite conclusion was reached four years later in Case 8790.<sup>963</sup> Indeed, it is difficult to reconcile the reasoning in these two cases, and the lack of detail contributes to this problem, especially in Case 8501 (above).<sup>964</sup> The facts of Case 8790 are relatively complex, and may help us understand why the sole arbitrator accepted the claimant's *force majeure* argument. The seller (claimant) concluded a contract where the buyer was to furnish the seller with a number of components for the production of a food product. The seller was then required to deliver to the buyer a large quantity of the processed product in periodic shipments. Following a number of deliveries, the seller informed the buyer that it was compelled to suspend its deliveries of the finished product for approximately one month. It initially stated to the buyer that the reason for the suspension was due to a reduction in its supply of raw materials and a modification in the assortments of the products of its plants. It also informed the buyer that the price had also increased by ten percent. The buyer responded by withholding payment, and it also complained that some of the goods had been received in bad condition. When settlement negotiations failed, the seller commenced arbitration proceedings.

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<sup>962</sup> ICC, 1996, Case 8501, *supra* note 931.

<sup>963</sup> ICC, 2000, Case 8790, *supra* note 931.

<sup>964</sup> ICC, 1996, Case 8501, *supra* note 931.

The arbitrator found that the claimant was justified in its suspension of further deliveries due to *force majeure*. Thus, the impediment was of a temporary nature. The seller produced a chamber of commerce certificate, which stated that the climatic conditions during the period in question led to a reduction of raw material, and that these circumstances were beyond human control and prevented the claimant from fulfilling its contractual obligations towards defendant. The buyer noted that the contract, which contained a *force majeure* clause, did not specifically mention the term “drought”. Instead, the contract clause referred to “natural catastrophes” and also to “other circumstances outside [the] control” of the parties.

Considering this definition, the arbitrator felt entitled to include “drought” in this definition, even though this is arguably incorrect. While natural catastrophes can include such things as drought, these are more often thought to be significant only when they are unpredictable, and of considerable duration—known as “historical droughts”.<sup>965</sup> A drought causing a one-month delay in a shipment can hardly be considered a “natural catastrophe”. Furthermore, the defendant introduced evidence that brought the existence of the drought into doubt. During the period in question, it showed that it had been able to sign a contract with another company in the same country of the seller. The arbitrator rejected this argument by noting that the other supplier was located in a city 300 kilometers away from the claimant. In any event, this evidence suggests that the severity

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<sup>965</sup> See generally Luis F. Ballesteros, “What Determines a Disaster?” September 11, 2008, online: 54 Pesos <<http://54pesos.org/2008/09/11/what-determines-a-disaster>> and Neil Smith, “There’s No Such Thing as a Natural Disaster” June 11, 2006, online: Social Science Research Council <<http://understandingkatrina.ssrc.org/Smith>>.

and duration of the drought were not sufficient impediments to warrant the successful invocation of *force majeure*.

Finally, it must be noted that the obligation to supply generic goods is usually not excused by a *force majeure* event or under Article 79.<sup>966</sup> In this case it is unknown what the actual composition of the goods was, but the information given suggests that the goods required some degree of processing. However, it is not uncommon for generic goods to require some degree of processing. Unless otherwise stipulated in the contract, the seller bears the risk of procuring the goods it has sold to the buyer, even if this results in an increased cost (or loss) to the seller. And as the buyer demonstrated, another supplier was readily available. However, as the buyer was to supply some components for the production of the product, that may have limited the seller's procurement risk. In such delivery-against-supply contract clauses, the seller is not obliged to attempt to purchase goods from other suppliers.<sup>967</sup> But that was not likely applicable in this case. As the seller claimed that the "drought" caused a reduction of raw materials in its region, that statement suggests that the seller had otherwise sufficient components from the buyer. That being the case, the delivery-against-supply clause would not have released the seller from procuring the goods from another source. Unfortunately, the arbitrator did not consider these aspects of the case. Had he/she done so, it is much more likely that the claimant would not have been successful with its *force majeure* argument. Fortunately, the majority of ICC cases have demonstrated a nuanced understanding of Article 79, and Case 8790 may represent an anomaly in CISG jurisprudence.

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<sup>966</sup> Brunner, *supra* note 47 at 171-175.

<sup>967</sup> *Ibid.* at 176.

J. *Italy: "Enlightened" Article 79 Case Law*

In his assessment of the impact of the CISG in Italy, Marco Torsello has noted that the Convention has played an increasingly important role in the legal system of that country, but "it still has not gained wide-spread popularity".<sup>968</sup> Torsello correctly noted that one of the challenges for the CISG in Italy (as elsewhere) was that as a uniform international sales law instrument it was at the "risk of being frustrated by divergent interpretations by domestic courts adjudicating similar cases".<sup>969</sup> National courts, thus, play a pivotal role in assuring the uniform application of international conventions, such as the CISG. In the case of Italy generally, CISG case law suggests that some courts there constitute an "enlightened minority", but they unfortunately co-exist with many courts that have rendered "low-quality Italian decisions about the CISG".<sup>970</sup> A larger sampling of Italian case law might support such a claim, but with only four Italian cases on Article 79 reported, few hard inferences can be made regarding the overall treatment of the CISG in that country.<sup>971</sup> However, if any tentative conclusions can be drawn from these four cases, it is that these Italian courts appear to belong to the "enlightened minority".

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<sup>968</sup> Marco Torsello, "Italy" in Franco Ferrari, ed., *The CISG and its Impact on National Legal Systems*, *supra* note 218 at 189.

<sup>969</sup> *Ibid.* at 211.

<sup>970</sup> *Ibid.* at 219.

<sup>971</sup> In chronological order, from the most recent case, these are: Tribunale [District Court] Vigevano, 12 July 2000 n. 405 (*Rheinland Versicherungen v. Atlarex*), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/000712i3.html>>; Tribunale [District Court] Pavia, 29 December 1999 (*Tessile v. Ixela*), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/991229i3.html>>; Corte di Appello [Appellate Court] Milano, 11 December 1998 (*Bielloni Castello v. EGO*) [*Printer device case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/981211i3.html>>; and Tribunale [District Court] Monza, 14 January 1993 n. R.G. 4267/88 (*Nuova Fucinati v. Fondmetall International*), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/930114i3.html>>.

The first Italian case that considered Article 79 involved an Italian seller of ironchrome to a Swedish buyer, where the latter party attempted to avoid the contract on the basis of hardship (or *eccessica on erositasopravvenuta*) as provided for in the Italian Civil Code.<sup>972</sup> The basis for the avoidance was that the price of the goods had increased after the conclusion of the contract, but before delivery, by 30 percent. The court found that the CISG was not applicable in this case since at the time of the conclusion of the contract the Convention was in force in Italy but not in Sweden. What is remarkable about this case is that the court, while recognizing the inapplicability of the CISG, nevertheless undertook an enlightened comparative analysis of Article 79. Although this is *dicta*, the court stated that even if the CISG was applicable, the seller could not have relied on hardship to excuse the seller's performance because the Convention did not contemplate this remedy in Article 79 (or elsewhere). A party cannot be excused as long as performance had not been made physically impossible. Consequently, a party cannot be excused in cases of severe price increases because performance is always physically possible.

Article 79 provides for release from an obligation made impossible by a supervening impediment not attributable to a party according to a rule roughly similar to article 1463 *et seq.* of the Italian Civil Code, but it does not consider the remedy of avoidance for supervening excessive onerousness (or hardship), which might be the case under Italy's domestic law.<sup>973</sup> Thus, a domestic court cannot integrate into the CISG

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<sup>972</sup> *Nuova Fucinati v. Fondmetall International, ibid.* The provision dealing with "hardship" or excessive onerousness can be found in articles 1463 and 1467 of the Civil Code.

<sup>973</sup> In particular, Article 1467 of the Civil Code.

provisions of domestic law that recognize the right of avoidance of a contract in cases of excessive onerousness (or hardship). But considering that the CISG did not apply, the court noted that a defense of supervening excessive onerousness was available to the seller. Nevertheless, it denied the claim under the Civil Code.

Supervening excessive onerousness or hardship may exempt a party from liability under the Italian Civil Code, but these principles have no place in Article 79.<sup>974</sup> The threshold for such an exemption in the CISG is much higher. Indeed, the legislative history of demonstrates that Article 79 was crafted in a manner that deliberately avoided the use of the terms “economic hardship...*imprévision*, frustration of purpose, and the like”.<sup>975</sup> The UNCITRAL Working Group drafted Article 79 in a stricter manner than its predecessor conventions.<sup>976</sup> In Vienna the new article was designed to deny relief to a party that had failed to perform simply because the performance had become unforeseeably more burdensome or unprofitable. At the conference the drafters rejected the Norwegian delegation proposal of supplementing paragraph (3) of Article 79 on the ground that it would allow commercial or economic hardship as a basis of claiming excuse for non-performance under the CISG.<sup>977</sup> The drafters chose the word “impediment” after subjecting the Article to three stages of debates in order to define the extent of a party’s liability for non-performance. In the end it was decided that the CISG

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<sup>974</sup> *Contra*, CISG-AC Opinion No. 7, *supra* note 599 at s. 3.1 and para. 26 *ff.* Adopted by the CISG-Advisory Council, 12 October 2007. This author takes the opposite view, and believes there is strong evidence in the records of the Diplomatic Conference (and elsewhere) to support the argument that “hardship” and changed circumstances were specifically excluded from CISG Article 79.

<sup>975</sup> *Ibid.* at para. 30.

<sup>976</sup> The Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), *supra* note 800.

<sup>977</sup> CISG-AC Opinion No. 7, *supra* note 599 at para. 30.

would only exempt a party from liability for physical or legal impossibility rather than on the basis of legal principles of *imprevision*, hardship, or changed circumstances.

Thus, the hardship of an increase in the price of goods is deemed to be an assumed business risk, and not an impediment outside a party's control, as are other business difficulties. In *Bielloni Castello v. EGO*, for example, construction delays that made it difficult for the buyer to take delivery of the goods was also beyond the scope of a successful Article 79 defense. In that case, a French buyer sought an exemption "due to circumstances beyond its control" because the printing equipment it purchased was to be placed in premises still to be built. The buyer alleged that the construction of the building had been substantially delayed, and this rendered it impossible to accept delivery of the goods. The trial level court erroneously applied Italian domestic law to the dispute and ruled in favour of the buyer. The Appellate Court found the CISG to be applicable rather than the Civil Code. In a passage that reflects an enlightened understanding of the CISG, the Court stated that it was "appropriate to stress that all references to the Italian internal law [...] referring to this issue [...] made by the [seller] do not appear appropriate. The provisions of the Convention should be deemed [...] self-sufficient and in general cannot be integrated with other internal provisions, which would contradict the Convention's intended [objectives of uniformity]".<sup>978</sup> It reversed the decision of the trial court, and awarded damages to the seller pursuant to Article 74.

The remaining two Italian cases that refer to Article 79 are primarily concerned with damages and the burden of proof. Article 79 issues are not central in these cases,

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<sup>978</sup> *Bielloni Castello v. EGO*, *supra* note 971.

but the *dicta* is noteworthy. In *Tessile v. Ixela*, an Italian seller sued the Greek buyer for payment, as well as of interests and damages.<sup>979</sup> In awarding payment to the seller, the Court noted that the CISG was the applicable law, but the rate of interest was not settled by the Convention. The Court also emphasized that, under Article 78, the entitlement to interest did not prejudice the right to claim damages, but it was the party claiming damages that had to prove them, according to the principle underlying Article 79. In this manner, Article 79 was used to inform the Court of other principles underlying the CISG, specifically those concerning the burden of proof. The Court was also informed by foreign case law on the CISG. It recognized the non-binding nature of these foreign decisions, but noted that they should be taken into account by courts when interpreting and applying the CISG. The Court made specific reference to Article 7(1), which expressly provides that “regard is to be had” to the “international character” of the Convention and “the need to promote uniformity in its application”.<sup>980</sup> Thus, although a case that is of minor significance for Article 79, the Court displayed a sophisticated and nuanced understanding of the CISG.

*Rheinland Versicherungen v. Atlarex* is a case that also concerned issues of damages and the burden of proof, and made reference to Article 79.<sup>981</sup> It is also a case that is remarkable in that it demonstrates the Court’s, sophisticated international perspective, and its desire to promote uniformity in the application of the CISG. The opinion of the sole judge, Alessandro Rizzieri, was exemplary in its faithful attempt to

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<sup>979</sup> *Tessile v. Ixela*, *supra* note 971.

<sup>980</sup> CISG Article 7(1).

<sup>981</sup> *Rheinland Versicherungen v. Atlarex*, *supra* note 971.

apply the CISG in a manner befitting the spirit of an internationally uniform law. It also utilized the approach that has been exhorted by so many scholars and jurists.<sup>982</sup> In the process of making his ruling, Rizzieri J. cited American, Austrian, Dutch, French, German, Italian, and Swiss court cases contained in national reporters, ICC arbitral awards, as well as two CISG websites and UNILEX.

The case involved an Italian seller that had delivered vulcanized rubber to a German buyer for the production of shoe soles. The soles produced by the buyer were sold to an Austrian manufacturer who produced a number of shoes, and exported them to Russia. After receiving complaints from its customer, the Austrian manufacturer complained to the German buyer, who then sued the seller alleging non-conforming goods.

The court dealt with various highly debated issues, but the conformity of the goods under CISG Article 35 was of primary importance in this case. Rizzieri J. also referred to damages under Article 74, and noted that the party that alleged damages had to prove the damages it had suffered. This evidentiary issue also played a key role in this case. On that point, Rizzieri J. avoided any reference to domestic law and Italian jurists. He noted that “[a]ccording to better-reasoned and more numerous authorities [the CISG] governs the burden of proof issue although it does not directly deal with it”.<sup>983</sup> To support his view that the burden of proof issue was not excluded from the CISG, Rizzieri J. referred “to Article 79(1) of the Convention, which expressly refers to the burden of

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<sup>982</sup> The approach referred to is one of “relative uniformity” in the application of the CISG across national borders. See s. Aii. The Importance of Uniformity, *supra*.

<sup>983</sup> *Rheinland Versicherungen v. Atlarex*, *supra* note 971 at para. 23.

proof concerning exemption from damages for breach”.<sup>984</sup> In this manner, Rizzieri J. utilized Article 79 to inform him of the principle that the “issue of the burden of proof cannot be deemed beyond the ambit of the Convention”.<sup>985</sup>

This was the court’s attempt to utilize the principles upon which the CISG is based, as mandated by Article 7(2). But Rizzieri J. went further. He recognized the international character of the CISG, and stated with respect to foreign case law that, even if it was not binding, he would hold that foreign case law should be taken into consideration in order to promote the uniform application of the CISG and the observance of good faith in international trade, as mandated by Article 7(1).<sup>986</sup> This willingness to take foreign case law into consideration illustrated a deep and sophisticated understanding of international jurisprudence, which has been uncommon among the courts of many CISG signatory states. In this manner, the Italian courts have assisted in the promotion of the uniform application of the CISG by putting forth solutions that “are tenable on an international level”.<sup>987</sup>

*K. The Netherlands: A Favourable Reception of the CISG*

The CISG has been in force in The Netherlands since 1992. Since that time, the courts, legal community, and businesspersons of that country have favourably received

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<sup>984</sup> *Ibid.*

<sup>985</sup> *Ibid.*

<sup>986</sup> *Ibid.* at para. 5.

<sup>987</sup> Francesco G. Mazzotta, “The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example” June 2003, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cisg/biblio/mazzotta.html>>.

the CISG.<sup>988</sup> There are a number of reasons for this positive treatment of the CISG in The Netherlands. Historically, The Netherlands is a nation that has been involved in trade with other nations: It has, thus, become heavily dependent on the import and export of goods. With the rise of international trade comes the concomitant increase in legal disputes. In addition to this history of international trade, the Dutch have also become familiar with international sale of goods law. The Netherlands was a contracting state to the forerunners to the CISG, the ULF and the ULIS.<sup>989</sup> These conventions were very similar in content to the CISG. This experience meant that with the introduction of the CISG, little adaption was needed with the new law on the international sale of goods. Finally, the content between the Dutch Civil Code (Burgerlijk Wetboek), the ULF, the ULIS, and the CISG, is very similar. Indeed, these international sale of goods conventions have had a significant influence on the internal sales law of The Netherlands.<sup>990</sup> In particular, they were highly influential during the creation of The Netherlands' new internal sale of goods law, which also came into force at the same time as the CISG.<sup>991</sup> As Andre Janssen stated, the result is that "in contrast to many other jurisdictions in Contracting States which only apply the CISG with much hesitation, Dutch courts cannot be said to have a general 'fear' of the CISG".<sup>992</sup>

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<sup>988</sup> See e.g. Andre Janssen, "Application of the CISG in Dutch Courts" in Franco Ferrari, ed., *Quo Vadis CISG?* (Munich: Sellier European Law Publishers, 2005) at 129-165.

<sup>989</sup> ULF and ULIS, *supra* note 800.

<sup>990</sup> *Ibid.* at 130.

<sup>991</sup> *Ibid.*

<sup>992</sup> *Ibid.* at 130-131.

Of the four reported Article 79 cases from The Netherlands,<sup>993</sup> three of them concern agricultural products,<sup>994</sup> and the fourth contains no useful information on that provision.<sup>995</sup> As Andre Janssen has noted, the Dutch courts have had little difficulty in applying the CISG in a manner that avoids the homeward trend. Although the number of cases is not large, the results are encouraging for the development of relative uniformity in the CISG across signatory states. While Article 79 has rarely been used by the Dutch, the treatment of that provision by the courts has been in relative harmony with letter and spirit of that provision. Perhaps this is partly due to the fact that CISG Article 79 and the domestic Dutch law of *force majeure* are very similar.<sup>996</sup>

Article 79 was first discussed by the District Court (Rechtbank) in 's-Hertogenbosch in *Malaysia Dairy Industries Pte. Ltd. v. Dairex Holland B.V.*<sup>997</sup> The Dutch seller attempted to use an Article 79(1) defense by arguing that the strict Singaporean regulations on the radioactive content of powdered milk constituted an impediment beyond its control, and this exempted the seller from performance as it was not foreseeable. The District Court correctly rejected this defense. It held that the seller

<sup>993</sup> In chronological order, from the most recent case, these are: *Agristo N.V. v. Maccas Agri B.V.*, Arrondissementsrechtbank [Rb] [District Court] Maastricht, 9 July 2008, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/080709n1.html>>; *Ö. Vattenkvalité A.B. v. Sepeq B.V.*, Arrondissementsrechtbank [Rb] [District Court] Zwolle, 29 January 2003, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/030129n1.html>>; *Hispafruit B.V. v. Amuyen S.A.*, Arrondissementsrechtbank [Rb] [District Court] Rotterdam, 12 July 2001, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/010712n1.html>>; and *Malaysia Dairy Industries v. Dairex Holland*, Arrondissementsrechtbank [Rb] [District Court] 's-Hertogenbosch, 2 October 1998, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/981002n1.html>>.

<sup>994</sup> *Agristo N.V. v. Maccas Agri B.V.*, *Hispafruit B.V. v. Amuyen S.A.*, and *Malaysia Dairy Industries v. Dairex Holland*, *ibid.*

<sup>995</sup> *Ö. Vattenkvalité A.B. v. Sepeq B.V.*, *supra* note 993. Due to this lack of information, the case is not considered in this discussion.

<sup>996</sup> Sonja A. Kruisinga, "The Impact of Uniform Law on National Law: Limits and Possibilities – CISG and Its Incidence in Dutch Law" EJCL 13:2 (May 2009) 1 at 17, online: Electronic Journal of Comparative Law <<http://www.ejcl.org>>.

<sup>997</sup> *Supra* note 993.

was aware of the regulations before the conclusion of the contract and, therefore, it took the risk of not being able to supply conforming goods. As a general rule, the risk assumption may not include the risk of a *subsequent* change in a government regulation, but in this case the regulation was in effect long before the conclusion of the contract. Thus, as the seller had knowingly accepted the procurement risk, it also had to accept the responsibility for supplying conforming goods.

The case of *Hispafruit B.V. v. Amunyen S.A.* was slightly more complex.<sup>998</sup> In it the District Court of Rotterdam noted that “the trade relationship between the [buyer] and [seller needed to] be placed in an international context”.<sup>999</sup> The court decided to give the Argentinean seller of mandarins the opportunity to support its claim for an Article 79 exemption. Normally sellers of agricultural products should be able to foresee that poor weather conditions might affect the production of crops. Contracts typically include allowances for such crop failure, but in this case, the seller was a dealer in citrus products, and not a grower, and there was no contractual limitation of the seller’s procurement risk. As such, it was expected that the dealer should have been able to procure the goods from other sources, even though at a much higher cost. In order to be successful with an Article 79 defense, the court stated that the seller would have to prove that due to frost, at the time of delivery no mandarins of the quality agreed to with the Dutch buyer were available *anywhere* on the Argentinean market. The court remanded the case to give the seller an opportunity to produce evidence to this effect. While the final outcome of the case is unknown, the court appears to have taken the correct position

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<sup>998</sup> *Supra* note 993.

<sup>999</sup> *Ibid.* at para. 4.3.

by maintaining that the seller would need to prove that the frost was so unusual and devastating in its effect to have destroyed all available supplies of Argentinean mandarins. It is doubtful that this was the case.

A similar case was that of *Agristo N.V. v. Macces Agri B.V.*<sup>1000</sup> A Dutch seller and a Belgian buyer entered into a contract for the sale and delivery of all the potatoes harvested by the seller in the year 2006. It was expected that the harvest would be 400 tons of potatoes. Due to extreme weather conditions, the harvested potatoes were inferior both in quality and amount than expected. The seller was only able to make partial shipments. When the buyer requested delivery of the outstanding potatoes, the seller did not perform, and the buyer terminated the contract and sued the seller for damages. The seller responded by arguing that its failure to deliver part of the goods should be excused on *force majeure* grounds.

As the court found the CISG to be applicable, it had to determine whether the seller's non-performance was excusable under Article 79. It held that the seller was obligated to deliver all the potatoes it had grown during the season, and this amount was to be the full 400 tons. It made the point that a diligent grower in similar circumstances was expected to consider all possibilities regarding weather conditions when entering into a forward contract for the sale of its entire harvest. But the court also noted that the seller was the grower of the potatoes, and not a trader in the market. In that respect, this case must be distinguished from *Agristo N.V. v. Macces Agri B.V.*, which involved an agricultural trader, rather than a grower of crops. Therefore, the court rejected the

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<sup>1000</sup> *Supra* note 993.

buyer's argument that an impediment could not occur in this case, because potatoes were generic goods, and as such, the seller could have purchased them from elsewhere. In fact, the Court noted that the obligation to deliver was limited to the crop grown by the seller.

The court reasoned that the seller could be exempted under Article 79 only by demonstrating that its non-performance was due to such extreme weather conditions that made it impossible to grow at least 90 percent of its crops when compared to previous growing seasons. The court provided no information or analysis on how it arrived at the threshold test of "90 percent". However, this appears to be the correct outcome. As this was a contract for the sale of goods from a specific source, the parties contracted on the basis of the continued existence of the goods. The failure of the specified source to produce the quantity of goods was an impediment that excused the seller if the source failed without the fault of that party. In this respect, the case is not unlike the 1863 English case of *Taylor v. Caldwell* where Blackburn J. enunciated the principle that if the parties contract on the basis of the continued existence of a "particular specified thing" or of a "particular [...] chattel", the obligor is excused from performance by the "perishing of the thing".<sup>1001</sup> In a situation where the goods are specified from an exclusive source, performance is excused were the goods from that source have been destroyed. Even though the Court decided to ask for a detailed report from an independent appraiser on the extent of the extreme weather conditions and subsequent crop failure, its reasoning appears to be in harmony with most Article 79 case law from other jurisdictions.

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<sup>1001</sup> *Taylor, supra* note 190.

L. *Russian Arbitrations and CISG Article 79: The Cases Promoting Uniformity*

The USSR became a signatory state of the CISG in 1991, and since that year the Russian Federation has acquired all of the rights and obligations of the USSR's multilateral treaties. Russia is, therefore, a successor to the membership of the USSR in the CISG. In accordance with Article 15(4) of the Constitution of the Russian Federation, the CISG has become a constituent part of the legal system of Russia, and as an international convention, it enjoys priority over national (i.e. domestic) legislation.<sup>1002</sup> This fact, however, does not mean that the CISG has been interpreted in Russia without inappropriate references to national laws and domestic legal concepts. While there is ample evidence to suggest that the homeward trend prevails in that jurisdiction, there are some cases that have contributed to relative uniformity in the interpretation of Article 79.

Of the 25 Russian cases<sup>1003</sup> on Article 79 considered in this dissertation, two cases<sup>1004</sup> are lacking in detail so no conclusions can be drawn. In one other case, a one

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<sup>1002</sup> Djakhongir Saidov, "Cases on CISG Decided in the Russian Federation" (2003) 7 *Vindobona J. Int'l Com. L. & Arb.* 1 at 1.

<sup>1003</sup> In chronological order, from the most recent case, these are: Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 13 May 2008, Award 13/2007, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/080513r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 15 November 2006, Award 30/2006, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/061115r2.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 21 November 2005, Award 42/2005 [*Equipment case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/051121r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 9 April 2004, Award 129/2003, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040409r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 16 June 2003, Award 135/2002, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/030616r1.html>>; Federal Arbitration Court for the Moscow Region [Appellate Court], 4 February 2002 (*Rimpi Ltd v. Moscow Northern Customs Department*), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020204r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 30 July 2001, Award 198/2000, online: Pace Law School CISG Database

paragraph excerpt is all that is available, which makes an analysis of that case

impossible.<sup>1005</sup> A relatively large number of CISG cases have been decided in Russia,

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<<http://cisgw3.law.pace.edu/cases/010730r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 6 June 2000, Award 406/1998, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/000606r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 24 November 1998, Award 96/1998, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/981124r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 6 October 1998, Award 269/1997, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/981006r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 10 June 1998, Award 83/1997, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980610r1.html>>; High Arbitration Court of the Russian Federation, 16 February 1998, [Information Letter No. 29] [*Onions case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980216r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 12 January 1998, Award 152/1996, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980112r1.html>>; High Arbitration Court of the Russian Federation, 1997, [Ruling No. 4, case 4], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970000r2.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 11 June 1997, Award 255/1994, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970611r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 13 May 1997, Award 3/1996, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970513r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 11 May 1997, Award 2/1995, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970511r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 22 January 1997, Award 155/1996 [*Butter case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970122r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 10 February 1996, Award 328/1994, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960210r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 13 December 1995, Award 364/1994, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/951213r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 1 December 1995, Award 369/1994, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/951201r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 17 October 1995, Award 123/1992 [*Automatic diffractameter equipment case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/951017r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 15 May 1995, Award 321/1994, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950515r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 16 March 1995, Award 155/1994 [*Metallic sodium case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950316r1.html>>; and Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 17 November 1994, Award 493/1993, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/941117r1.html>>.

<sup>1004</sup> These two cases are: High Arbitration Court of the Russian Federation, 1997, [Ruling No. 4, case 4]; and ICAC, 17 November 1994, Award 493/1993, *ibid*.

<sup>1005</sup> ICAC, 13 May 2008, Award 13/2007, *supra* note 1122.

and arbitral tribunals have heard the vast majority of those cases. Indeed, next to CIETAC, Russia has more Article 79 arbitrations than any other jurisdiction. This is for three reasons. First, access to state courts is usually unavailable to commercial parties and for this reason arbitration is the only method for resolving disputes in Russia, particularly where the dispute involves a foreign party. Secondly, international sales are the most common type of international economic transaction undertaken by Russian parties.<sup>1006</sup> Thirdly, the CISG is very popular in Russia, and it is rarely excluded by parties to an international sales transaction.<sup>1007</sup>

Most Russian cases on the CISG have been conducted under the auspices of the International Commercial Arbitration Court (“ICAC”) at the Russian Federation Chamber of Commerce and Industry. The ICAC is one of the leading international arbitration institutions in Eastern Europe.<sup>1008</sup> It has been functioning since 1932. The legal background for ICAC is found mainly in the Russian Federation law “On International Commercial Arbitration” that was adopted in 1993 and is based on the UNCITRAL Model Law.<sup>1009</sup> Domestic arbitration is subject to special regulations that do not apply to international arbitration proceedings.

*L.i. Article 79(1): The High Standard for Impediments*

In many cases, the Russian arbitral tribunals have recognized that impediments within the meaning of Article 79 had not taken place. As with most decisions on the

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<sup>1006</sup> *Ibid.* at 2.

<sup>1007</sup> *Ibid.*

<sup>1008</sup> See the ICAC website (available in English), online: <<http://www.tpprf-mkac.ru/en/>>.

<sup>1009</sup> *Ibid.*, online: <<http://www.tpprf-mkac.ru/en/-whatis-/lawstatus/>>.

impediment requirement, this suggests that the standard for an exemption under Article 79 is set relatively high. In this respect, *some* Russian jurisprudence on Article 79 is generally in harmony with the rulings in other jurisdictions. As we have seen, this approach favours a strict construction analysis that holds parties liable for their obligations unless performance is prevented by unforeseen supervening events beyond their control. Incidents of a personal nature, such as procurement risk, foreign currency freezes, or import or export bans, do not fall within this scope. As such, few conditions will serve to excuse a party for non-performance.

As with many decisions from other jurisdictions, the Russian cases do not elaborate on a definition of “impediment”, but focus on the facts that do not constitute an impediment. In other words, the Russian tribunals were more likely to determine what was *not* an impediment under Article 79(1), rather than explaining what might constitute an impediment. Thus, in Award 155/1994, the seller claimed that it could not deliver the remaining goods due to impediments beyond his control, “i.e., his supplier’s emergency stopping of metallic sodium production”.<sup>1010</sup> In addition, the seller argued “that it was impossible to make delivery due to circumstances beyond his control, i.e., cancellation of his export license”.<sup>1011</sup> Quoting Article 79 in its entirety, the tribunal found that these impediments were not sufficient to excuse the seller from its contractual obligations. Although it was not explicit on this point, the ruling correctly suggests that these are ordinary business risks that ought to have been taken into account when engaging in international commercial activity.

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<sup>1010</sup> Metallic sodium case, *supra* note 1122.

<sup>1011</sup> *Ibid.*

In a number of cases, the parties referred to a failure of third parties to perform the obligations under the contract, as a ground for exemption. Typically, the production problems of a third party supplier will not release the seller from its responsibility to deliver the goods, unless that specific supplier is named as the exclusive source in the contract. Thus, in the absence of an agreement to the contrary, no impediment will exist if the seller contracts a third party to perform its contractual duties. Thus, in Award 129/2003, that the seller's non-delivery of goods was caused by production difficulties of the producer of the goods was not deemed to be an impediment beyond its control.<sup>1012</sup> This was a fact that the seller ought to have foreseen at the time of the conclusion of the contract. Similarly, financial problems resulting from the inability of the buyer's customers to make payments due to a severe drought was not deemed to be an impediment excusing the buyer from responsibility.<sup>1013</sup> Nor was a rise in taxes (customs duties), resulting from the seller's failure to export goods at a price lower than sold in the domestic market, deemed to be a *force majeure* impediment beyond that party's control.<sup>1014</sup>

In another case the tribunal was correct to point out to the respondent buyer that it could not invoke Article 79 when it did not submit any evidence to demonstrate that its

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<sup>1012</sup> ICAC, 9 April 2004, Award 129/2003, *supra* note 1122. The tribunal held the CISG to be applicable, but did not refer to Article 79 (or domestic law) when making this determination.

<sup>1013</sup> ICAC, 15 November 2006, Award 30/2006, *supra* note 1122. As in Award 129/2003, *ibid.*, the tribunal held the CISG to be applicable, but did not refer to Article 79 (or domestic law) in this ruling.

<sup>1014</sup> ICAC, 6 June 2000, Award 406/1998, *supra* note 1122. As in Award 30/2006, *ibid.*, and Award 129/2003, *supra* note 1012, the tribunal held the CISG to be applicable, but did not refer to Article 79 (or domestic law) in this ruling. The tribunal also stated that the seller failed to provide it with sufficient evidence to establish *force majeure*.

delay in payment was due to “reasons beyond his responsibility”.<sup>1015</sup> That the seller’s extension of the products’ expiry dates was prohibited by law, or that a great number of the products were defective and could not be resold, were not impediments to pay the seller. The tribunal correctly decided that this was an ordinary risk that ought to have been taken into account when conducting commercial activity. In a similar case, the party that invoked Article 79 in its defense provided no evidence to substantiate its argument.<sup>1016</sup> In Award 2/1995, the buyer had paid for the goods, but the seller had not shipped them because it claimed that the shipping arrangement was the responsibility of the buyer.<sup>1017</sup> It provided no other evidence for its failure to perform the contract. As such, the tribunal held that in the absence of such explanations or evidence, the seller failed to prove that its non-performance of the contract was due to circumstances beyond its control. The party invoking an Article 79 exemption always bears the burden of proving that all the requirements of the excuse have been met.

*L.ii. Particular Impediments: Non-conforming Goods*

Non-conforming goods has often been invoked with an Article 79 defense, but there are only two Russian cases that are relevant in this regard. In Award 155/1996 it was the claimant buyer that successfully used a *force majeure* argument to recover its deposit.<sup>1018</sup> Article 79 was not mentioned, even though the tribunal found the CISG to be applicable. The buyer argued that it did not become the owner of a shipment of table

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<sup>1015</sup> ICAC, 1 December 1995, Award 369/1994, *supra* note 1122.

<sup>1016</sup> ICAC, 11 May 1997, Award 2/1995, *supra* note 1122.

<sup>1017</sup> *Ibid.* The seller also claimed that the certificate to transfer the goods was not signed for the same reason.

<sup>1018</sup> ICAC, 22 January 1997, Award 155/1996, *supra* note 1122.

butter because the customs department was prohibited from releasing the goods due to a high content of lead salts. This argument was substantiated by the contract that required the seller to ship the butter, and be responsible for it, until it reached its final destination in St. Petersburg.<sup>1019</sup> The tribunal agreed with the buyer. It held that “due to circumstances beyond his control”, the buyer was not able to take delivery of the goods because the Russian state Customs Department would not release the butter as it was unsafe for human consumption.<sup>1020</sup>

The contract between the parties specified a particular INCOTERM that identified the seller as the party with the duty to obtain the necessary authorization for import clearance. On this basis, the tribunal ruled in favour of the claimant buyer. The reasoning of the tribunal in this regard appears to be correct, but only because of a specific contractual term worked to the advantage of the buyer. Normally, an “impediment” does not include a lack of a customs authorization, or any governmental approval necessary for the performance of the contract in the country of the party seeking relief, *unless it is otherwise noted in the contract*. In this case, the reasoning of the tribunal suggested that the INCOTERM could be read to imply that the customs authorization was a contractual term. Failure to obtain this authorization would relieve the aggrieved party from its obligations. Because of the high lead content and other product defects, the buyer was not willing to accept the goods, and sought a return of its

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<sup>1019</sup> INCOTERM CIP or “Carriage and Insurance Paid to” requires the seller to arrange for the goods to be delivered to the named port of destination, or a final destination point. The seller’s risks do not end until the carrier reaches the agreed destination.

<sup>1020</sup> ICAC, 22 January 1997, Award 155/1996, *supra* note 1122.

deposit. That the seller was obliged to obtain import clearance under the CIP<sup>1021</sup> shipping term was also uncommon. Typically, courts and tribunals have held that in cases involving the export/import of goods, it is the duty of the buyer to obtain any license or import approval from the state authorities.<sup>1022</sup> Fortunately for the buyer in this case, that obligation fell on the seller.

In the other case involving non-conforming goods, a Russian seller brought an action against a Swiss buyer for its failure to pay for the goods.<sup>1023</sup> The CISG was deemed applicable, but reference was made to *force majeure* rather than Article 79. The buyer refused to pay for the goods because of their deterioration and poor quality. The seller claimed that the defect in the goods was the result of wetness, but because the contract stipulated an INCOTERM “FOB Black Sea port”, the wetness occurred after title to the goods had transferred to the buyer.<sup>1024</sup> The seller had delivered the goods to the port on time, but the buyer had difficulty in chartering a ship because of an accident in the Bosphorus Strait. The temporary closing of the channel for navigation was the *force majeure* event that the buyer relied on in its attempt to excuse it from performance of the contract. Although this delay caused the goods at the port to be exposed to the elements, causing some of the goods to absorb unacceptable levels of moisture, the tribunal found that the buyer had failed to prove a causal connection between the accident in the Bosphorus Strait and its failure to pay for the goods. In other words, the buyer failed to prove *force majeure*. The same result would likely have occurred under Article 79. As

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<sup>1021</sup> See *supra* note 1019.

<sup>1022</sup> Brunner, *supra* note 47 at 128-129.

<sup>1023</sup> ICAC, 10 February 1996, Award 328/1994, *supra* note 1122.

<sup>1024</sup> *Ibid.*

the buyer had title to the goods under the FOB shipping term, there was nothing to prevent it from paying the seller. That there was a delay in chartering a vessel due to the accident in the channel was a risk to be borne by the buyer.<sup>1025</sup>

*L.iii. Particular Impediments: Foreign Currency Controls*

Many of the Russian cases concern difficulties that parties had in securing the requisite foreign currency to pay for the goods. Much of this difficulty is related to the economic ills that have plagued Russia in the last two decades. Rigid foreign exchange controls and bank failures provide the background to a number of cases involving Article 79 and the inability of buyers to make payment to the sellers. Five cases are factually similar in that they all involve non-payment due to some form of foreign currency control, frozen bank funds, or lack of a foreign currency license.<sup>1026</sup> All these cases have the same outcome: the buyer of goods must ensure that it has a sufficient amount of the foreign currency to pay for the goods. The seller is typically indifferent to the source of the payment; that source is normally only a concern of the buyer. Its failure to obtain the funds from that source means that the buyer will need to get the money from another source. The fact that a buyer does not have the hard currency, a foreign currency license, or “frozen” funds will not excuse it from liability for non-performance. The payment of money is never impossible.<sup>1027</sup> Readiness to pay is a business risk that the recipient of

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<sup>1025</sup> The tribunal did find the seller partly liable for the deterioration of the goods. It found that under CISG Article 85, the seller should have taken additional steps to preserve the goods from getting wet.

<sup>1026</sup> These cases are: ICAC, 15 May 1995, Award 321/1994; ICAC, 17 October 1995, Award 123/199; ICAC, 13 December 1995, Award 364/1994; ICAC, 24 November 1998, Award 96/1998; and ICAC, 30 July 2000, Award 198/2000, *supra* note 1122.

<sup>1027</sup> See Treitel, *supra* note 143 at 186, 196.

the goods assumes. Even where post-contract payment in a foreign currency becomes prohibited by a government act, the seller may ask for payment in the buyer's local currency.<sup>1028</sup> Thus, the necessity to pay is always foreseeable.

The risk that a bank may go bankrupt, and that payment may not be able to be made, or received, is also thought to be a general business risk that is outside the scope of Article 79. As two ICAC cases demonstrate, this applies equally to buyers as it does to sellers. In Award 269/1997, the buyer argued that it should be excused from its liability to pay for the goods on the basis of Article 79 due to an obstacle beyond its control: its bank, where the buyer's money was deposited, had gone bankrupt.<sup>1029</sup> In harmony with other jurists on this point, the tribunal noted that under Article 79, a bank's bankruptcy is not grounds to release a party from its liability to pay. The same reasoning applies where the seller's bank goes bankrupt. Thus, in Award 152/1996, the buyer claimed against the seller as it failed to ship the goods under the contract.<sup>1030</sup> As instructed, the buyer had wired the money to the seller's bank, but when it received the funds the bank was adjudged bankrupt and the funds were frozen. Without referring to Article 79, the tribunal denied the seller's argument that the bank's bankruptcy amounted to *force majeure*. In its view, the seller was still obliged to perform the contract. Another Russian arbitration panel has similarly ruled that even where money has been stolen from a bank account, according to Article 79, the failure of the buyer to pay is not an impediment beyond its control.<sup>1031</sup> That is the correct outcome.

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<sup>1028</sup> Brunner, *supra* note 47 at 170-171.

<sup>1029</sup> ICAC, 6 October 1998, Award 269/1997, *supra* note 1122.

<sup>1030</sup> ICAC, 12 January 1998, Award 152/1996, *supra* note 1122.

<sup>1031</sup> High Arbitration Court of the Russian Federation, 16 February 1998, *Onions case*, *supra* note 1122.

These Russian cases support a relatively uniform interpretation of Article 79. Unfortunately, there are many other Russian cases that do the opposite, and support a divergent interpretation of that provision. Those cases with a propensity towards the homeward trend are discussed in the following chapter.

*M. Slovak Republic: Right Outcome; Wrong Reference*

The two cases from the Slovak Republic that reference Article 79 are primarily concerned with the issue of non-conforming goods.<sup>1032</sup> Both of these cases, even though they are unrelated, are strikingly similar in terms of their facts and the legal analysis. This is likely due to the fact that the same court administered the cases<sup>1033</sup> and the same judge delivered the judgments.<sup>1034</sup> The issue in each case was whether the notice of non-conformity had been given within a reasonable time as per CISG Article 39.<sup>1035</sup> In the Frozen peas case, the buyer refused to pay for part of the purchase price as it claimed that a portion of the goods were defective. The seller sued and argued that the buyer had failed to provide evidence of both the defects and a reasonable notice of the lack of

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<sup>1032</sup> In chronological order, from the most recent case, these are: District Court in Komarno, 12 March 2009, 5 Cb/254/2008 [*Frozen peas case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/090312k1.html>>; and District Court in Komarno, 24 February 2009, 5 Cb/114/2006 [*Potatoes case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/090224k1.html>>.

<sup>1033</sup> The District Court of Komarno.

<sup>1034</sup> Mgr. Peter Mezoszallasi.

<sup>1035</sup> CISG Article 39 states:

- (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
- (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

conformity.<sup>1036</sup> The court ruled that the buyer had not provided evidence of having notified the seller of a lack of conformity as required by Article 39. In doing so, however, the court made a minor erroneous reference to Article 79(4).<sup>1037</sup> Although it was a small error, the court noted that “[i]f the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages”.<sup>1038</sup> The invocation of Article 79(4) was incorrect. There was no impediment that prevented performance, and as such, the court should not have referenced Article 79(4).

Similarly, in the Potatoes case, the buyer noticed that some of the goods were defective. It stated that it had notified the seller of the lack of conformity immediately after delivery. According to the buyer, the seller had accepted this notice and had promised to make a delivery of equivalent conforming goods. That promise had never been performed. At trial, the seller claimed that the buyer had failed to provide evidence of both the defects and the notice of the lack of conformity. The court agreed. It ruled that the buyer had not given adequate evidence of the non-conformity as required by Article 39. However, as in the Frozen peas case,<sup>1039</sup> and using almost identical language as found in that case, the court again mistakenly referenced Article 79(4) and noted that “if there is an impediment to performance the party who fails to perform must give notice

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<sup>1036</sup> *Frozen peas case, supra* note 1032.

<sup>1037</sup> Article 79(4) states: “The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such nonreceipt”.

<sup>1038</sup> *Frozen peas case, supra* note 1032.

<sup>1039</sup> *Ibid.*

to the other party of the impediment”.<sup>1040</sup> This was a redundant reference to Article 79(4). As in the Frozen peas case, there was no impediment to performance, so a notice of an impediment was superfluous. The notice required concerned non-conforming goods, not an “impediment”. While these are minor errors, they are bound to cause some confusion in Article 79 jurisprudence. Although the CISG incorporates the principle that matters governed by the “Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based” jurists must recognize that certain articles within the CISG are separate and distinct entities. A notice requirement for an “impediment” under Article 79 is a very different matter than a notice of non-conforming goods under Article 39. To comingle the notice requirements under these two separate Articles will only add to confusion and the divergence of relative uniformity of Article 79 case law.

*M. Switzerland: Paying Heed to the International Character of the CISG*

As with its neighbor Germany, the theory of excuse for contractual non-performance has a long history in Switzerland. And like many civil jurisdictions in continental Europe, there is the recognition of hardship and changed circumstances in its contract law. This reflects its civil law tradition. As noted above, under the influence of Roman law, many European states came to recognize the principle of initial impossibility, *impossibilium non est obligatio*.<sup>1041</sup> In continental Europe, legal scholars further developed this principle, and contracts were to be considered concluded under the

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<sup>1040</sup> *Potatoes case*, *supra* note 1032.

<sup>1041</sup> Cohn, *supra* note 765 at 15.

implied condition that there would be no fundamental change in the circumstances.<sup>1042</sup>

Thus, in the case of changed circumstances or hardship the consequences could lead to an adaptation or modification of the contractual terms. Known as the doctrine of an implied *clausula rebus sic stantibus*, this principle was codified in certain jurisdictions, including Switzerland.<sup>1043</sup> It was embodied in Article 119(1) of the Swiss Federal Code of Obligations relating to contracts and tort,<sup>1044</sup> which was adopted in 1911, but its roots go back to 1883.<sup>1045</sup> Its creation preceded that of the German Civil Code, the BGB.<sup>1046</sup> Fortunately, none of the Swiss cases on Article 79 make reference to its Code of Obligations or to hardship or changed circumstances. Indeed, most of the Swiss case law makes an effort to acknowledge that where the CISG applies, it supersedes domestic law that might otherwise apply *clausula rebus sic stantibus*.

There are nine cases from Switzerland that have considered Article 79.<sup>1047</sup> Many of these cases present issues that typically arise under Article 79: claims of an

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<sup>1042</sup> *Ibid.* at 19.

<sup>1043</sup> *Ibid.* at 19-20.

<sup>1044</sup> Alexander von Ziegler & Lars Gerspacher, "Switzerland" in Global Legal Group, ed., *The International Comparative Legal Guide to: Commodities and Trade Law 2006* (London: Global Legal Group Ltd., 2006) at 177.

<sup>1045</sup> Eugene Bucher, "Law of Contracts" in F. Dessemondet & T. Ansay, eds., *Introduction to Swiss Law*, 3d ed. (The Netherlands: Kluwer Law International, 2004) at 103.

<sup>1046</sup> *Ibid.*

<sup>1047</sup> In chronological order, from the most recent case, these are: Bundesgericht [BGer] [Federal Supreme Court], 5 April 2005, 4C.474/2004 [*Chemical products case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/050405s1.html>>; Amtsgericht [County Court] Willisau, 12 March 2004, 10 01 5 [*Wood case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040312s1.html>>; Appellationshof [Appellate Court] Bern, 11 February 2004, 304/II/2003/wuda/scch [*Wire and cable case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040211s1.html>>; Tribunale d'appello [Appellate Court] Lugano, Cantone del Ticino, 29 October 2003, 12.2002.181 [*Modular wall partitions case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/031029s1.html>>; Handelsgericht [HG] [Commercial Court] St. Gallen, 3 December 2002, HG.1999.82-HGK [*Sizing machine case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/021203s1.html>>; Bundesgericht [BGer] [Federal Supreme Court], 15 September 2000, 4C.105/2000, (*FCF S.A. v. Adriafile Commerciale S.r.l.*),

impediment in conjunction with non-conforming goods supplied by the seller<sup>1048</sup> and a third-party,<sup>1049</sup> late delivery,<sup>1050</sup> non-payment,<sup>1051</sup> and bankruptcy.<sup>1052</sup> Two of these cases cite Article 79, but do not contain any facts or legal analysis that might be significant to that provision.<sup>1053</sup> Two additional cases are listed separately but are companion cases that were considered together by the Supreme Court of Switzerland (Bundesgericht).<sup>1054</sup> These two cases involved a series of sales of Egyptian cotton by an Italian seller to a Swiss buyer. The seller experienced a delay in one of the shipments, and when asked by the buyer to perform, it failed to respond. The buyer then purchased substitute goods from other suppliers at a higher price, and sued the seller for the price difference.

The trial court ruled in favour of the buyer and the seller appealed. The appellate court rejected the seller's argument for an exemption of liability for non-performance under Article 79, and the seller then appealed to the Supreme Court. It argued that the appeal court had denied it justice by remaining silent with regard to the seller's pleadings in connection with the existence of an impossibility to performance. The basis for arguing its case under Article 79 was "the existence of an impossibility of performance

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online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/000915s2.html>>; Bundesgericht [BGer] [Federal Supreme Court], 15 September 2000, 4P.75/2000 [*Egyptian cotton case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/000915s1.html>>; Handelsgericht [HG] [Commercial Court] Zürich, 10 February 1999, HG 970238.1 [*Art books case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/990210s1.html>>; and Handelsgericht [HG] [Commercial Court] Zürich, 26 April 1995, HG 920670 [*Saltwater isolation tank case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950426s1.html>>.

<sup>1048</sup> Wire and cable case, *ibid*.

<sup>1049</sup> Modular wall partitions case, *supra* note 1047.

<sup>1050</sup> Art books case, *supra* note 1047.

<sup>1051</sup> Wood case, *supra* note 1047.

<sup>1052</sup> Sizing machine case, *supra* note 1047.

<sup>1053</sup> The two cases are the Saltwater isolation tank case and the Chemical products case, *supra* note 1047.

As they are of little relevance to Article 79 jurisprudence, they will not be discussed in this dissertation.

<sup>1054</sup> The two cases considered together by the Bundesgericht are the Egyptian cotton case and *FCF S.A. v. Adriafile Commerciale S.r.l.*, *supra* note 1047.

beyond [the seller's] control".<sup>1055</sup> The details of exactly what constituted this impossibility appear to have been restrictions imposed by the Egyptian authorities on the export of cotton. However, the seller supplied insufficient proof of the alleged impossibility. The Supreme Court, thus, ruled that even though the appeal court did not examine the seller's claim under Article 79, it did not violate the seller's legal rights. As with the appeal court, it excluded the application of Article 79 because there was no existence of an impediment beyond the seller's sphere of control that prevented it from performing the contract. Interestingly, the court noted that the burden of proof was not a matter expressly settled by the CISG, but it excluded recourse to domestic law and referred instead to the international principle of *actori incumbit probatio*.<sup>1056</sup> In this manner, the Supreme Court appeared to pay heed to the international character of the CISG, even though its analysis on the burden of proof was slightly incorrect.<sup>1057</sup>

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<sup>1055</sup> Egyptian cotton case, *supra* note 1047 at para. C.5.

<sup>1056</sup> This principle literally means "acts of a court". With respect to the allocation of the burden of proof in international procedure, in that the party who asserts a fact, whether claimant or respondent, is responsible for providing proof thereof.

<sup>1057</sup> Other CISG scholars have differed on this point. Larry A. DiMatteo *et al.* took issue with the Bundesgericht in this case on the issue of contract avoidance under CISG Article 49(1). The relevant passage from DiMatteo *et al.* states:

In this case, a Swiss court used language that to the common law lawyer appears to reflect a homeward trend in its mode of interpretation. The court was faced with contract for cotton to be delivered between certain dates, with payment to be made by letter of credit due 60 days after the date of customs clearance. The buyer and seller contracted for a series of cotton deliveries that, to condense the facts, did not materialize according to the times specified in the contract. The buyer sued for the costs of cover, and the seller complained that the buyer had unilaterally cancelled the contracts with no justification. One of the issues for the court was the significance of avoidance under Article 49(1). Citing commentary on the CISG, the court characterized avoidance under the CISG in this manner: 'It is not an avoidance in the juridical way of the words with effects *ex tunc*, but a *résiliation* which releases both parties from their contractual obligations yet to be executed and which executes itself *ex nunc*'. The court in explaining its decision in a manner sensible to Swiss lawyers is doing so at the expense of hindering the development of uniform concepts.

Larry A. DiMatteo *et al.*, *supra* note 8 at 135, note 29.

To state it more accurately, the allocation of the burden of proof is, with the exception of Article 79, implicitly governed by the CISG. The wording of Article 79(1) makes it clear that the non-performing party claiming an impediment is under an obligation to prove that the requirements for the excuse are met. Furthermore, the burden of proof is also recognized under Article 79(2). There a party that utilizes a third-party in the performance of its obligation, but where an impediment has caused the third-party to not perform, the party seeking to be excused under the primary contract must prove cumulatively that it would be exempt because of the impediment *and* the third-party would also be exempt if it would have been a party to the contract. Article 79(4) adds to the burden of proof by establishing a notice duty for any type of impediment, hence, the party that seeks an exemption must also prove that it has satisfied this prerequisite by giving notice to the other party.

While the Supreme Court in the Egyptian cotton case<sup>1058</sup> took the position that the burden of proof was not a matter expressly settled by the CISG, in the Wire and cable case the legal analysis of the Appellate Court (Appellationshof) on this point was much more accurate.<sup>1059</sup> The Appellationshof was clear in its analysis of the burden of proof, in that it was a matter “governed by the CISG only impliedly—with Art. 79(1) as an exception”.<sup>1060</sup> This case was primarily concerned with a shipment of allegedly non-conforming goods, where the burden of proof regarding the examination and notice (under Articles 38 and 39) became a pivotal issue. The difficulty for the Appellationshof

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<sup>1058</sup> Egyptian cotton case, *supra* note 1047.

<sup>1059</sup> Wire and cable case, *supra* note 1047.

<sup>1060</sup> *Ibid.*

was to ascertain which party bore the burden of proof, and therefore, who should bear the consequences for a possible lack of evidence. As such, Article 79 played only a minor, interpretive role.

In undertaking its legal analysis, the Appellationshof was careful not to resort to domestic law to uncover the procedural rules that might govern the issue had the case been between local parties. Instead, it respected the international character of the Convention by seeking to fill these legal gaps with general principles that were based on the CISG, as directed by Article 7(1) and (2). Referring to leading CISG commentators, such as Peter Schlechtriem and Franco Ferrari, as well as the dissertation of Michael Henninger, the Appellationshof ruled that a gap in terms of Article 7(1) CISG existed, “but it was to be resolved primarily in accordance with the general principles underlying the Convention, and only secondarily—in the absence of such principles—according to the domestic law which is applicable under the rules of private international law”.<sup>1061</sup> By utilizing this sophisticated legal analysis, the Appellationshof was able to conclude that the CISG embraced the general rule (and Article 79 the explicit rule) that each party bore the burden to prove the factual aspects which were favorable to it, or which it attempted to claim as a prerequisite for a favorable legal provision. With this judgment, the Appellationshof also contributed to a growing body of relatively uniform case law on the CISG.

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<sup>1061</sup> *Ibid.*

Two of the Swiss cases concern claimed impediments based on the non-performance of third parties.<sup>1062</sup> This type of excuse appears in Article 79 case law with some frequency, but it is rarely used with success. As a general principle, the obligor must assume the risks related to the assignment to third parties of tasks associated with the performance of its obligations under the contract. As the obligor benefits from the advantages of using third parties, the obligor cannot be excused if that party fails to perform. Thus, in the Modular wall partitions case the court observed that the seller would be liable for non-performance if that were due to the failure of a third party who had been engaged to perform the whole or part of the contract, unless both the seller and the third party were exempted under Article 79(1).<sup>1063</sup> As the court correctly noted, “Article 79(2) has as its scope maintaining the responsibility of the seller if he relies on third parties for the total or partial execution of the contract”.<sup>1064</sup> Fortunately for the seller in that case, the buyer failed to prove that the seller had actually contracted the third parties who had defectively installed the wall partitions. Since the burden of proof was placed on the buyer to prove that the installation had been the responsibility of the seller, and the buyer failed to bring sufficient evidence on that issue, the seller was not held liable for the non-conformity in the installation of the wall panels.

The Art books case had similar issues regarding the burden of proof as well as the use of third parties in the performance of the seller’s contractual obligations.<sup>1065</sup> A Swiss buyer commissioned an Italian seller to print, bind, and supply it with art books. When

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<sup>1062</sup> Modular wall partitions case and the Art books case, *supra* note 1047.

<sup>1063</sup> Modular wall partitions case, *ibid.*

<sup>1064</sup> *Ibid.* at para. 2.1.

<sup>1065</sup> Art books case, *supra* note 1047.

the buyer failed to pay the outstanding purchase price, claiming late delivery and non-conformity of one shipment of the goods, the seller sued and the buyer counterclaimed. At the outset, the court held that based on the underlying principles of the CISG, a party asserting a claim was responsible for bearing the burden of proof. The issue under Article 79 was whether the seller was excused for late delivery because of the fault of the freight forwarding company that it had used to ship the books to the buyer. According to the seller, the freight forwarding company could be regarded as the seller's vicarious agent, which would make the seller liable for third parties engaged by it under Article 79(2). The court did not need to answer this question directly under Article 79, as it held that under an Ex Works<sup>1066</sup> contract the seller was only obliged to arrange for the transport of the books, and that it had performed its obligation when it handed over the goods to the carrier on time. The court correctly referred to Article 31<sup>1067</sup> when it, thus, ruled that the seller could not, under Article 79(2), be held liable for the conduct of the carrier, whom it had engaged to perform part of the contract. The court concluded that the seller performed its obligations in time by dispatching the goods in time. That the buyer received the books late was an issue between it and the carrier.

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<sup>1066</sup> "EXW" – Ex Works (named place of delivery). This INCOTERM requires the seller to make the goods available at its premises. Ex Works places the maximum obligation on the buyer and minimum obligations on the seller. The buyer pays all transportation costs and also bears the risks for bringing the goods to their final destination.

<sup>1067</sup> Article 31 states: "If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

- (a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer."

Arguably, CISG Article 30 also applies, as it states: "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention".

In many cases courts that have failed to find an exemption under Article 79 have used language to suggest that there was not an impediment within the meaning of Article 79(1). This was the situation in the Sizing machine case, which involved a Swiss seller and an Israeli buyer.<sup>1068</sup> After concluding the contract for a machine and placing a deposit on the order, the buyer encountered financial difficulties and its creditors commenced bankruptcy proceedings over the buyer's assets. The buyer sought to recover its deposit and the seller counterclaimed for damages. The court correctly observed that the buyer could not rely on Article 79 to excuse it from its contractual obligations. In the words of the court, "mere lack of financial wherewithal and capital is generally irrelevant [under Article 79]".<sup>1069</sup> The court found this fact to be even more applicable where it was not an impediment beyond the buyer's control that prevented it from paying, but rather "the lack of financial ability [...] based on mismanagement".<sup>1070</sup> Article 79 case law is relatively consistent on this point: financial matters are a normal business risk and as such are always deemed to be within a party's sphere of control.

Of the nine Article 79 cases from Switzerland, only one utilized that provision successfully in its defense. The important issue relating to an Article 79 impediment for the court in the Wood case was to determine whether an impediment existed in light of an uncommon set of facts.<sup>1071</sup> In this respect, the case is quite novel. The plaintiff seller's assignee sought from the buyer the outstanding payment due, plus interest, from a previous shipment of wood. However, a legal representative from the original seller had

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<sup>1068</sup> Sizing machine case, *supra* note 1047.

<sup>1069</sup> *Ibid.* at para. IV.2.

<sup>1070</sup> *Ibid.*

<sup>1071</sup> Wood case, *supra* note 1047.

notified the buyer that a German court had issued a temporary prohibition order that prohibited payment to the seller. Due to this unclear legal situation, the buyer refrained from making the payment. Shortly after, the seller's assignee sought to have the buyer pay the outstanding amount, with interest, but it provided no proof of the assignment. Due to these circumstances, the buyer was not sure which party it should pay without incurring the risk of double payment.

In its defense the buyer invoked Article 79 and claimed that the delay in payment was an impediment beyond its control. The court acknowledged that under Article 79 a strict standard must be adopted. That an impediment might include the absence of information necessary to effect payment would be a novel use of that provision. Making payment is never impossible, and in this respect the court appears to have adopted not a strict standard, but rather one that was very elastic. It found that the buyer was initially not allowed to pay the seller due to the court-imposed freezing of payment. Thereafter, the dispute between the seller and the seller's assignee as to who was entitled to the payment confused the buyer, so it simply withheld payment. To make matters worse, the seller's assignee did nothing for almost a year to prove that it was entitled to the payment. It only asserted the assignment. On this basis the court concluded that the buyer was not liable for the non-performance of its obligation as it could rely on the impediment provision under Article 79(1). As such the seller's assignee claim for compensation, which consisted mostly of interest on the outstanding balance and legal costs, was rejected.

Perhaps the novelty of the facts in this case played a large part in its outcome. The plaintiff/seller's assignee did little to clarify its legal entitlement to the payment from the buyer. It simply asserted its claim to the buyer in the context of an unclear legal environment. In the face of this uncertainty, the buyer could have paid one of the parties, or paid both the seller and the seller's assignee and then seek reimbursement from the incorrectly paid party. That was not an impossibility. Rather than risk paying the incorrect party or risk a double payment, the buyer chose to wait for a clarification. In a strict reading of Article 79(1), there was no impediment beyond the control of the buyer. It could pay. The only "impediment" was the absence of information, and an uncertain legal environment. Indeed, even the legal barrier to payment—the court freezing of payments to the seller—had been lifted. From this perspective, the decision of the court appears to be a departure from the strict impediment standard imposed under Article 79(1). Instead, it is a generous reading of that article in light of the unique circumstances of this case.

#### *N. Conclusion*

The majority of the cases noted above, particularly from civil law jurisdictions, support the view that Article 79 of the CISG may be regarded as an expression of an autonomous international legal principle. This has resulted from a growing body of Article 79 case law that has interpreted that provision in a relatively uniform manner. These interpretations have led to considerable convergence regarding the breadth and scope of Article 79 internationally. Credit for this development must be given to civil law jurisdictions, as they have led in the development of converging Article 79 case law.

The case law further supports the notion that Article 79 is an autonomous international norm, and is capable of creating relative uniformity within the context of the CISG's goal for a sales law that is transnational in design. While excuses for non-performance in Article 79 may have developed out of variants of similar national conceptions—and while some courts and tribunals may still erroneously refer to domestic legal terminology—it ultimately stands alone as an autonomous international doctrine under the CISG.

While the CISG has sought to develop autonomous terminology and relatively uniform interpretation, absolute uniformity was neither a necessity nor a realizable goal. However, there is no room for flexibility in its adaptation and interpretation in the various domestic legal regimes of the signatory states. Where such flexibility exists (i.e. non-uniformity) those cases are to be considered homeward trend aberrations leading to divergence in the interpretation of the CISG. The next chapter considers those cases.

## CHAPTER FIVE

## GETTING IT WRONG: DIVERGENCE IN ARTICLE 79 CASE LAW IN DOMESTIC COURTS AND ARBITRATIONS

*A. Threats to Autonomous Interpretations*

The fact that the CISG is in force in 78 countries says little about the how it has been received in those countries and the level of awareness regarding the existence of the Convention.<sup>1072</sup> But as noted above,<sup>1073</sup> an analysis of a large body of case law on Article 79 has demonstrated that there is a growing body of autonomous judicial decisions on that Article and, for the most part, these decisions have avoided references to domestic law. Since the CISG has come into effect, jurisprudence on Article 79 has produced a mix of properly-reasoned cases that have avoided the homeward trend. These decisions are consistent with the CISG's objective that it be applied in a uniform manner. They are also true to the original intent of the drafters of the CISG when they incorporated neutral terminology that eschewed words and concepts that were common to specific legal systems. This explains why the legal idioms of the CISG avoid references to divergent, national meanings and instead speak in terms of physical events that occur in the conduct of international trade.

Unfortunately, there are some Article 79 cases from specific jurisdictions that have diverged from the CISG's mandate to create a relatively uniform international sales

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<sup>1072</sup> For a list of contracting states, see *supra* note 4.

<sup>1073</sup> See Chapter Four, *Getting it Right: Relative Uniformity in the Treatment of Article 79 in Domestic Courts and Arbitrations*, *supra*.

law. In these cases, the homeward trend is clearly discernable. This is an undesirable development, as it promotes parochialism and defeats the very purpose behind the creation of the CISG, which was to create legal certainty and reduce the barriers to international trade. While courts and arbitral panels in many countries—such as for example, Austria, Germany, and Italy—have gone to great lengths to fend off the homeward trend, the record of other countries is mixed, if not poor. For example, in Belgium, France, Russia, and the United States, the evidence is strong that the homeward trend prevails over autonomous interpretation. But even in jurisdictions where Article 79 has been interpreted with relative uniformity, there have been some problems.

*A.i. Blips on the Road to Autonomous Interpretations: Austria and CIETAC*

As noted above,<sup>1074</sup> in Austria, for example, in one case the Supreme Court made references to domestic law in a manner that was not consistent with the quest for uniformity in international sales law.<sup>1075</sup> In that case the Court noted “the defending parties could [...] not successfully rely on a frustration of contract as a consequence of a changed market situation”.<sup>1076</sup> The reference to “frustration” was unfortunate, as was the Court’s statement that “the same results from the grounds of the doctrine of the frustration of contract according to purely national law”.<sup>1077</sup> Also disappointing were the references to numerous domestic examples of changed market conditions were frustration

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<sup>1074</sup> See Chapter Four, s. B. Austria: The Supreme Court Gets It Right—Almost.

<sup>1075</sup> Construction materials case, *supra* note 641.

<sup>1076</sup> *Ibid.*

<sup>1077</sup> *Ibid.*

of contract was denied, even though it noted that Article 79 was the controlling provision.<sup>1078</sup>

Similarly, it has been shown that disputants, arbitral tribunals, and courts often refer to related domestic legal concepts rather than Article 79. This is common, even when the parties all agree that the CISG and Article 79 governs the contract (and provision) in question. For example, a common theme in CIETAC case law is that the disputants frequently invoked or resorted to domestic *force majeure* law and terminology in their pleadings. This appears to be the case even though the majority of CIETAC case law was sensitive to the autonomous nature of Article 79. As noted above,<sup>1079</sup> *force majeure* clauses are frequently included in CIETAC contracts, which typically involve Chinese parties. That may explain the use of domestic terminology. References to domestic law were often made even when the parties acknowledged that the CISG was the applicable law. Considering that none of the parties objected to the applicability of the CISG in the CIETAC cases, the references to domestic *force majeure* were likely made in ignorance of the fact that Article 79's rule of "impediment" would govern any claim for an excuse for non-performance due to a supervening event. While some CIETAC disputants may have inaccurately referred to domestic *force majeure* law and terminology instead of Article 79's "impediment", it was the duty of the relevant tribunals to correct the parties in this regard.

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<sup>1078</sup> These included "[f]rustrated expectation concerning the development of a shopping centre [...] a change of commodity prices, [and] a decrease of purchasing power and down-sizing of companies". *Ibid.*

<sup>1079</sup> See CIETAC, *supra* note 686 and *ff.*

Unfortunately, in some CIETAC cases the tribunals were just as careless as the disputants in their references and use of language. This was especially apparent in the earlier cases: For example, in the 1997 Aluminum oxide case, it was the buyer that referred to Article 79, and argued that its bank's refusal to issue a letter of credit was beyond its control.<sup>1080</sup> The tribunal made reference to both domestic law and the CISG with respect to other aspects of the case. It did not mention Article 79 or "impediment". It referred only to domestic law and "deem[ed] that force majeure, subject to *the Law of the People's Republic of China on Economic Contracts Concerning Foreign Interests*, refers to any event that is unforeseeable for the parties when the contract is signed and whose occurrence and consequences are inevitable and unconquerable".<sup>1081</sup> The tribunal noted that the bank's refusal to provide the letter of credit to the buyer was based on a history of poor business practices by the buyer. As a result, the bank's denial was foreseeable and did not constitute *force majeure*. While the same result would have likely occurred had the tribunal examined the issue under Article 79, it is unfortunate that the tribunal did not focus on the CISG with its legal analysis.

*A.ii. Blips on the Road to Autonomous Interpretations: ICC Case 8790*

While it was found in Case 8501 (above)<sup>1082</sup> that flooding in the country of exportation (and government action) were not sufficient for a *force majeure* defense, the

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<sup>1080</sup> Aluminium oxide case, *supra* note 726.

<sup>1081</sup> *Ibid.*

<sup>1082</sup> ICC, 1996, Case 8501, *supra* note 931.

opposite conclusion was reached four years later in Case 8790.<sup>1083</sup> Indeed, it is difficult to reconcile the reasoning in these two cases, and the lack of detail in the latter case contributes to this problem.<sup>1084</sup> The facts of Case 8790 are relatively complex, and may help us understand why the sole arbitrator accepted the claimant's *force majeure* argument. The seller (claimant) concluded a contract where the buyer was to furnish the seller with a number of components for the production of a food product. The seller was then required to deliver to the buyer a large quantity of the processed product in periodic shipments. Following a number of deliveries, the seller informed the buyer that it had to suspend its deliveries of the finished product for approximately one month. It initially stated to the buyer that the reason for the suspension was due to a reduction in its supply of raw materials and a modification in the assortments of the products of its plants. It also informed the buyer that the price had also increased by ten percent. The buyer responded by withholding payment for the last shipment, and it also complained that some of the goods had been received in bad condition. When settlement negotiations failed, the seller commenced arbitration proceedings.

The arbitrator found that the claimant was justified in its suspension of further deliveries due to *force majeure*. Thus, the impediment was to be a temporary. The seller produced a certificate issued by a local chamber of commerce, which stated that the climatic conditions during the period in question led to a reduction of raw material, and that these circumstances were beyond human control and prevented the claimant from fulfilling its contractual obligations towards defendant. The buyer noted that the contract,

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<sup>1083</sup> ICC, 2000, Case 8790, *supra* note 931.

<sup>1084</sup> This is especially the case in Case 8501. See ICC, 1996, Case 8501, *supra* note 931.

which contained a *force majeure* clause, did not specifically mention the term “drought”. Instead, the contract clause referred to “natural catastrophes” and also to “other circumstances outside [the] control” of the parties. Considering this definition, the arbitrator felt entitled to include “drought” in this definition. That is arguably incorrect. While natural catastrophes can include such things as drought, these are more often thought to be significant only when they are unpredictable, and of considerable duration—known as “historical droughts”.<sup>1085</sup> A drought causing a one-month delay in a shipment can hardly be considered a “natural catastrophe”. Furthermore, the defendant introduced evidence that, notwithstanding the certification from a local chamber of commerce, brought the existence of the drought into doubt. During the period in question, it showed that it had been able to sign a contract with another company in the same country of the seller. The arbitrator rejected this argument by noting that the other supplier was located in a city 300 kilometers away from the claimant. In any event, this evidence suggests that the severity and duration of the drought were not sufficient impediments to warrant the successful invocation of *force majeure*.

*A.iii. Blips on the Road to Autonomous Interpretations: Slovak Frozen Peas Case*

In the Frozen peas case, the buyer refused to pay for part of the purchase price as it claimed that a portion of the goods were defective. The seller sued and argued that the buyer had failed to provide evidence of both the defects and a reasonable notice of the

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<sup>1085</sup> See generally Luis F. Ballesteros, “What Determines a Disaster?” September 11, 2008, online: 54 Pesos <<http://54pesos.org/2008/09/11/what-determines-a-disaster>> and Neil Smith, “There’s No Such Thing as a Natural Disaster” June 11, 2006, online: Social Science Research Council <<http://understandingkatrina.ssrc.org/Smith>>.

lack of conformity.<sup>1086</sup> The court ruled that the buyer had not provided evidence of having notified the seller of a lack of conformity as required by Article 39. In doing so, however, the court made an erroneous reference to Article 79(4).<sup>1087</sup> Although it was a small error, the court noted that “[i]f there is an impediment to performance, under article 79(4) of the Convention, the party who fails to perform must give notice to the other party of the impediment [...] If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages”.<sup>1088</sup> The invocation of Article 79(4) was incorrect. There was no impediment that prevented performance, and as such, the court should not have referenced Article 79(4).

In a similar case involving potatoes, a different Slovakian court made the same error.<sup>1089</sup> It used almost identical language as found in in the Frozen peas case<sup>1090</sup> and mistakenly referenced Article 79(4). While these are minor errors, they are bound to cause some confusion in Article 79 jurisprudence. A notice requirement for an “impediment” under Article 79 is a very different matter than a notice of non-conforming goods under Article 39. To coningle the notice requirements under these two separate Articles will only add to confusion and the divergence of relative uniformity of Article 79 case law.

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<sup>1086</sup> Frozen peas case, *supra* note 1032.

<sup>1087</sup> Article 79(4) states: “The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such nonreceipt”.

<sup>1088</sup> Frozen peas case, *supra* note 1032.

<sup>1089</sup> Potatoes case, *supra* note 1032.

<sup>1090</sup> *Ibid.*

As difficult as it may be for domestic courts and arbitral panels to interpret the CISG autonomously, there has been a propensity in certain jurisdictions to construe the Convention in a nationalistic manner. This nationalistic approach, which includes “minor” terminological errors, not only leads to divergent interpretations of the CISG, but also promotes “forum shopping” which the CISG seeks to eliminate.<sup>1091</sup>

*B. Belgium: Similar Issue; Mixed Results*

There are only three cases in Belgium that have invoked Article 79. Two of these cases concern an unanticipated change in the market prices of goods.<sup>1092</sup> The third case mentions Article 79 only in a peripheral manner.<sup>1093</sup> The two cases on changed market prices were separated by a span of almost ten years and offer interesting insights into this specific issue. Particularly noteworthy was the divergent result from the Belgian courts, from the first case in 1995 to a decision by the Supreme Court 2009.

Case law from numerous jurisdictions has established the general principle that changes in the market prices of goods after the conclusion of a contract is not considered to be grounds to excuse a party from its obligations under Article 79. If that were the case, buyers would be able to argue successfully that taking delivery and paying the contact price when the market price of goods had fallen constituted an “impediment”

<sup>1091</sup> Honnold & Flechtner, ed., *supra* note 43 at 621.

<sup>1092</sup> In chronological order, from the most recent case, these are: *Scaform International BV v. Lorraine Tubes S.A.S.*, Court of Cassation [Supreme Court] 19 June 2009, C.07.0289.N, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/090619b1.html>>; *L. v. SA C.*, Rechtbank van Koophandel [District Court] Ieper 18 February 2002, A.R. 318/00, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020218b1.html>>; and *Vital Berry Marketing v. Dira-Frost*, Rechtbank van Koophandel [District Court] Hasselt 2 May 1995, A.R. 1849/94, 4205/94, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950502b1.html>>.

<sup>1093</sup> *L. v. SA C.*, *ibid.* This was within the context of the possibility that meat was infected by dioxin during the dioxin crisis in Belgium. As the meat was tested after delivery and was found to be free of dioxin, the court did not undertake a discussion of Article 79.

within the meaning of Article 79. If that were possible, an enormous degree of business uncertainty would be introduced into contractual relationships, as prices in virtually all goods tend to fluctuate. While the wording of Article 79 appears to encompass economic impediments, such as changes in market prices, in practice only those impediments that are comparable to non-economic (or “physical”) impediments are likely to be exempted. Not surprisingly, in the 1995 case of *Vital Berry Marketing v. Dira-Frost* the court ruled that a significant drop in the price of frozen raspberries did not constitute a case of *force majeure* within the meaning of Article 79.<sup>1094</sup> Indeed, the vast majority of case law on this issue has indicated that a change in market prices will never amount to an impediment.<sup>1095</sup> Fluctuations in the prices of goods are a business risk, and as such are always foreseeable events in international trade. Rather than rendering performance impossible, price fluctuations only result in an economic gain for one party at the expense of the counterparty. They are in the normal risk of commercial activities.

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<sup>1094</sup> *Vital Berry Marketing v. Dira-Frost*, *supra* note 1092.

<sup>1095</sup> See e.g. Oberlandesgericht [OLG] [Appellate Court] Hamburg, 28 February 1997, 1 U 167/95 [*Iron molybdenum case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970228g1.html>> (“Despite of the triplication of market price that had to be paid for Chinese iron-molybdenum...[t]he Seller is also not exempted by the fact that acquiring the goods elsewhere would have led to considerable financial loss because it would have had to pay a higher price”); Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 11 June 1997, Award 255/1994, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970611r1.html>> (“no possible change of market conditions can release the buyer from this duty [to accept the goods] in accordance with...the contracts and Article 79 CISG”); and Bulgaria Chamber of Commerce Arbitration Award, 12 February 1998, Case 11/1996 [*Steel ropes case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980212bu.html>>.

*B.i. Circumventing Article 79: The Supreme Court Upholds the “Hardship” Principle*

In a landmark 2009 decision the Belgian Supreme Court took a contrary view to existing jurisprudence on the issue of price fluctuations.<sup>1096</sup> In the *Scafom Internationnal* case, the parties had concluded an agreement for the sale of steel tubes. After the conclusion of the contract and before delivery, the price of steel unexpectedly rose by about 70 percent. Claiming “hardship”, the seller tried to renegotiate a higher contract price, but the buyer refused and insisted on delivery of the goods at the original price. The trial court correctly held that the seller’s invocation of “hardship” was beyond the scope of Article 79. It stated “that changes in prices are foreseeable and do not exempt the parties from performance of their obligations”.<sup>1097</sup> This has long been the conventional view with regard to Article 79 and similar *force majeure* provisions. With references to numerous authorities, it elaborated on the point that changes in prices are foreseeable and do not exempt the parties from performing their obligations. It has been well-established with jurists, as the court noted, that “a contract that is not lucrative or that is even a losing proposition, is part of the risks that belong to commercial activities”.<sup>1098</sup>

However, the Court of Appeal overturned the decision of the trial court. The Court of Appeal agreed that the issue regarding “hardship” was not dealt with by the CISG, it censured the trial court for its failure to not resort to domestic law to resolve the issue regarding “hardship”. Such an approach would be antithetical to Article 79. Its

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<sup>1096</sup> *Scafom International BV v. Lorraine Tubes S.A.S.*, *supra* note 1092.

<sup>1097</sup> *Ibid.*

<sup>1098</sup> *Ibid.*

reasoning was based on the proposition that Article 79 does not explicitly exclude the possibility of an impediment due to price changes and unforeseen changed market conditions. It proceeded in finding that domestic law did not apply, but rather French law. Therefore, the appeal court allowed the seller's counterclaim for an amount based on a higher price. In this manner, it rejected the direct application of Article 79, and instead invoked French domestic law. It ruled that although French law did not recognize the theory of *imprévision* in this case, it did impose, in certain circumstances, a duty to renegotiate the contract based on the principle of good faith. In this manner, the appeal court was able to circumvent Article 79, and put in its place the principle of "hardship", a principle that was specifically excluded during the drafting history of the CISG.<sup>1099</sup>

The Supreme Court reversed the appeal decision in part by utilizing a different line of reasoning that rejected the application of French domestic law. It went much further than the appeal court decision and held that while there was a gap in the CISG, it was to be filled not by domestic law—French or Belgian—but rather by the general principles of international trade. This was in accordance with CISG Article 7. Without adding any further explanation, it affirmed that such principles were to be found in other sources, in particular, the *UNIDROIT Principles*.<sup>1100</sup>

However, the hardship provision in the *UNIDROIT Principles* is completely separate from its *force majeure* provision, which closely mirrors CISG Article 79.<sup>1101</sup>

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<sup>1099</sup> Harry M. Flechtner, "The Exemption Provisions of the Sales Convention, Including Comments on 'Hardship' Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court" (2011) 3 *Belgrade L. Rev.* 84 at 89.

<sup>1100</sup> *UNIDROIT Principles*, *supra* note 196.

<sup>1101</sup> Article 7.1.7 ("Force majeure") of the *UNIDROIT Principles*, *ibid.*, states:

Hardship in the *UNIDROIT Principles* closely resembles the hardship doctrines in many civil law jurisdictions.<sup>1102</sup> In many ways, the *UNIDROIT Principles* show a bias in favour of civil law principles.<sup>1103</sup> Some jurists even question whether they should be allowed to fill “gaps” in the CISG.<sup>1104</sup> As Anna Veneziano has noted, the *UNIDROIT Principles* “may be used to supplement CISG only as long as they help in clarifying or supporting already existing general principles underlying the Convention”.<sup>1105</sup> The problem is that the hardship provision in the *UNIDROIT Principles* has significant features that distinguish it from traditional *force majeure* doctrine, including Article 79. In particular, the threshold for invoking a successful hardship defense is much lower:

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(1) Nonperformance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such nonreceipt.

(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

<sup>1102</sup> Article 6.2.3 (“Hardship”) of the *UNIDROIT Principles*, *ibid.*, states:

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed; or

(b) adapt the contract with a view to restoring its equilibrium.

<sup>1103</sup> See Flechtner, *supra* note 1099 at 97.

<sup>1104</sup> See e.g. *ibid.* at 96-97.

<sup>1105</sup> Anna Veneziano, “UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate According to the Belgian Supreme Court” (2010) 1 *Unif. L. Rev.* 137 at 142.

hardship includes events that do not render a party's performance impossible, but only more onerous. Furthermore, the hardship doctrine provides for a remedy that is not available under Article 79: a requirement that the parties renegotiate the contract and, most extraordinarily is the possibility that a court will impose changed contractual terms upon the parties in order to restore the contractual equilibrium. These are unique civil law principles that have no place in Article 79. Indeed, the traditional view of common law courts is that they are there to *enforce* contracts made by the parties, and not *create* these contracts. The fact that the CISG does not authorize a court to revise the contractual terms between the parties does not create a "gap" in the Convention. Rather, it reflects the rejection of the adaptation remedy in the CISG.<sup>1106</sup>

Unfortunately, the Supreme Court held that the market price increase in the cost of steel was a changed circumstance or "hardship" that demanded a revision of the contract. In this sense it was considered an impediment under Article 79, even though the court acknowledged that the CISG provided no indication as to how hardship issues were to be resolved, and therefore resorted to the *UNIDROIT Principles*. Its decision in *Scaform International BV v. Lorraine Tubes S.A.S.* was a marked departure from convention, and will likely create considerable divergence in the effort to create a uniform sales law, as well as introduce added uncertainty in international commercial transactions.<sup>1107</sup> It undermines the principle of *pacta sunt servanda*. As Harry Flechtner recently noted, the decision "is likely to seriously increase non-uniformity in the

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<sup>1106</sup> A point made by Flechtner, *supra* note 1099 at 93-94.

<sup>1107</sup> *Scaform International BV v. Lorraine Tubes S.A.S.*, *supra* note 1092.

application of the Convention”.<sup>1108</sup> Should courts find that a “gap” exists in the CISG whenever familiar domestic legal principles fail to appear in the Convention, there exists the likelihood that the CISG will fail in the effort to create a relatively uniform international sales law.

### C. *France: Flawed Article 79 Jurisprudence*

As with Belgium, there are only three French Article 79 cases.<sup>1109</sup> One case involves the issue of an “impediment” due to the actions of a third party supplier,<sup>1110</sup> and two of the cases are related actions that concern the “impediment” of a change in market conditions.<sup>1111</sup> Unfortunately, the court decisions, particularly the lower level decisions, reveal a flawed understanding of the CISG and Article 79. They also suggest that courts in France, as with Belgium, tend to have a flexible attitude towards buyers.<sup>1112</sup> Fortunately, in one case the appeal and supreme courts were able to correct an erroneous lower level decision, but even there they appeared to have a tainted view of Article 79. These decisions, although few in number, fail to add to the development of a relatively uniform international sales law.

<sup>1108</sup> See Flechtner, *supra* note 1099 at 97.

<sup>1109</sup> In chronological order, from the most recent case, these are: Cour d’appel [CA] Colmar, 12 June 2001, *Société Romay AG v. SARL Behr*, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/010612f1.html>>; Tribunal de commercial [Trib. com.] Besançon, 19 January 1998, *Flippe Christian v. Douet Sport Collections*, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980119f1.html>>; and Tribunal de grande instance [Trib. gr. inst.] Colmar, 18 December 1997, *Romay v. Behr France*, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/971218f1.html>>.

<sup>1110</sup> *Flippe Christian v. Douet Sport Collections*, *ibid.*

<sup>1111</sup> *Romay v. Behr France* and *Société Romay AG v. SARL Behr*, *supra* note 1109. These two cases have been treated separately on the Pace Law School CISG Database. However, they are the same cases. The only difference is the treatment of the case name at the trial level and appeal and Supreme Court levels.

<sup>1112</sup> A point made by S.A. Kruisinga, particularly with respect to the reasonable time in which a buyer is to examine the goods. See Kruisinga, *supra* note 48 at 86-88.

The treatment of Article 79 in *Flippe Christian v. Douet Sport Collections* has been described as “anomalous” and “confused and at odds with the other [Article 79] cases”.<sup>1113</sup> The case involved the purchase by a Swiss buyer of sweatsuits from a French seller for resale to members of a judo club. After having received complaints due to excessive shrinking of the goods during washing, the buyer gave notice to the seller of the defect. Not having received any reply from the seller, the buyer commenced legal action. Ruling in favour of the buyer, the District Court of Besancon concluded that it was entitled to avoid the contract and be awarded damages. However, in determining the amount of damages (which amounted to a reduction of the purchase price by 35 percent), it allowed the seller a partial Article 79 defense. The court pointed out that the seller’s failure to perform was due to an impediment beyond its control, since the goods had been manufactured by a third party. It also noted that because there was no evidence that the seller had acted in bad faith, Article 79 could be successfully invoked by the seller.

The decision is an incorrect application of Article 79. Sellers should not be excused due to the non-conforming goods of a third party supplier. In such a situation, it would be inappropriate to grant a seller refuge under Article 79. The court also ignored the fact that in order for the seller to be exempt under Article 79(2), the third-party supplier must be exempt. As Carla Spivack has noted of the case, “[t]his reasoning not only misses the point of Article 79, it also flies in the face of all of the other cases interpreting it”.<sup>1114</sup> This perspective is also shared by S.A. Krusinga, when she stated

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<sup>1113</sup> According to Carla Spivack, “Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse under U.C.C. § 2-615 and CISG Article 79” (2006) 27 U. Pa. J. Int’l Econ. L. 757 at 797.

<sup>1114</sup> *Ibid.* at 798.

that “[t]he application of art. 79 CISG in that case was, in my view, incorrect, because even if the seller does not have any control over the production of the goods sold, he will still have to bear the consequences of any incorrect delivery”.<sup>1115</sup>

A flawed understanding of the CISG was also evident in *Romay v. Behr France*.<sup>1116</sup> A Swiss seller and a French buyer entered into a long-term agreement where the buyer committed to purchasing a certain quantity of automotive parts according to the needs of its customer. After taking delivery of some of the goods over a two-year period, a dispute arose when the buyer refused to take delivery of the remainder. It claimed that there was a change in market conditions, and that its customer no longer had a need for the goods. The seller brought an action to recover damages based on CISG Article 74.

At the court of first instance the buyer invoked the theory of unforeseeability under Swiss law, as well as Article 79, to support its defense that the interruption in the purchase of the goods was due to the needs of its customer, and this constituted an economic impediment outside the buyer’s control. Rather than refer to the precise language of the official text version of the CISG, the court utilized its own terminology when it summarized the various articles in the Convention.<sup>1117</sup> Ultimately, the court rejected the application of the CISG on the grounds that the agreement was a “framework” agreement only, and did not constitute a contract of sale. According to the court, the CISG would have been applicable if the contract of sale had bound the seller to deliver a specific quantity of goods. This relieved the court of the need to consider an

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<sup>1115</sup> Kruisinga, *supra* note 48 at 143.

<sup>1116</sup> *Romay v. Behr France*, and the related case of *Société Romay AG v. SARL Behr*, *supra* note 1109.

<sup>1117</sup> A point noted by the translator of the court decision, Charles Sant ‘Elia. See *Romay v. Behr France*, *ibid.*

analysis under the CISG. Instead, it held that Swiss law was applicable, and on that basis the buyer was not liable for terminating a framework supply agreement.

The Court of Appeal reversed the decision and found the CISG to be applicable to the “collaboration agreement”.<sup>1118</sup> Despite the title of the agreement, it held that it was a sales contract under the CISG. It also considered the buyer’s defense under Article 79. Even though the appeal court refused to excuse the buyer’s performance under Article 79, it should have declined to entertain this argument. The contract was a long-term international agreement over the span of eight years. The buyer also had extensive experience in international markets. The matter of a change in market conditions within this context should have been addressed by the parties in their contract, and not brought to a court for adjudication.<sup>1119</sup> Also interesting is the suggestion in the appeal court’s reasoning that an unforeseeable drop in prices might bring the contract within the scope of Article 79(1). It focused on the issue of foreseeability, rather than on the difficulties raised by the term “impediment”, or the official French term “empêchement”.<sup>1120</sup> Although the appeal court rejected the buyer’s Article 79 defense, it should have read the word “impediment” or “empêchement” so as to preclude a market change defense. Thus, the case represents an example of an Article 79 defense that the drafters of the CISG did not intend to allow under that Article. This case was a clear instance of the use of an Article 79 defense that fell short of the physical impediments that the drafters had in mind

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<sup>1118</sup> *Société Romay AG v. SARL Behr*, *supra* note 1109.

<sup>1119</sup> Spivack, *supra* note 1113 at 790.

<sup>1120</sup> “Empêchement” can be translated to mean “impediment”, “unforeseen difficulty”, or “obstacle”.

during the Diplomatic Conference in Vienna.<sup>1121</sup> On appeal, the Supreme Court, in a terse judgment, upheld the decision of the Court of Appeal.

*D. Russian Arbitrations and CISG Article 79: The Problematic Cases*

While it is a relatively prominent arbitral institution, there are concerns with a number of the decisions that have emanated from the International Commercial Arbitration Court (“ICAC”) at the Russian Federation Chamber of Commerce and Industry. Many of the decisions, while factually interesting and addressing important legal issues, are lacking in sufficient detail and clarity. This makes any analysis of the interpretation of the CISG more difficult. Thus, of the 25 Russian cases<sup>1122</sup> on Article 79

<sup>1121</sup> Krusinga, *supra* note 48 at 127-128.

<sup>1122</sup> In chronological order, from the most recent case, these are: Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 13 May 2008, Award 13/2007, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/080513r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 15 November 2006, Award 30/2006, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/061115r2.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 21 November 2005, Award 42/2005 [*Equipment case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/051121r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 9 April 2004, Award 129/2003, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040409r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 16 June 2003, Award 135/2002, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/030616r1.html>>; Federal Arbitration Court for the Moscow Region [Appellate Court], 4 February 2002 (*Rimpi Ltd v. Moscow Northern Customs Department*), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/020204r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 30 July 2001, Award 198/2000, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/010730r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 6 June 2000, Award 406/1998, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/000606r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 24 November 1998, Award 96/1998, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/981124r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 6 October 1998, Award 269/1997, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/981006r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 10 June 1998, Award 83/1997, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980610r1.html>>; High Arbitration Court of the Russian Federation, 16 February 1998, [Information Letter No. 29] [*Onions*

considered here, two cases<sup>1123</sup> are so devoid of information that no conclusions can be drawn. In one other case, a one paragraph excerpt is all that is available.<sup>1124</sup> All that can be gleaned from that case is the buyer's view that Article 79 can be invoked where it is unable to refund a payment and pay a penalty. The tribunal agreed with respect to the payment of the penalty, but not regarding the refund. It then, strangely, referred to the *force majeure* provision in the *UNIDROIT Principles*<sup>1125</sup> when it decided that interest

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*case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980216r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 12 January 1998, Award 152/1996, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/980112r1.html>>; High Arbitration Court of the Russian Federation, 1997, [Ruling No. 4, case 4], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970000r2.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 11 June 1997, Award 255/1994, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970611r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 13 May 1997, Award 3/1996, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970513r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 11 May 1997, Award 2/1995, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970511r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 22 January 1997, Award 155/1996 [*Butter case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/970122r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 10 February 1996, Award 328/1994, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/960210r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 13 December 1995, Award 364/1994, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/951213r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 1 December 1995, Award 369/1994, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/951201r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 17 October 1995, Award 123/1992 [*Automatic diffractometer equipment case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/951017r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 15 May 1995, Award 321/1994, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950515r1.html>>; Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 16 March 1995, Award 155/1994 [*Metallic sodium case*], online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/950316r1.html>>; and Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, 17 November 1994, Award 493/1993, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/941117r1.html>>.

<sup>1123</sup> These two cases are: High Arbitration Court of the Russian Federation, 1997, [Ruling No. 4, case 4]; and ICAC, 17 November 1994, Award 493/1993, *ibid*.

<sup>1124</sup> ICAC, 13 May 2008, Award 13/2007, *supra* note 1122.

<sup>1125</sup> *UNIDROIT Principles*, *supra* note 196, at Article 7.4.9.

was due even if the delay in payment caused by a *force majeure* event. The same determination could have been made under Article 79, so there was no need to gap-fill and reference the *UNIDROIT Principles*.

The remaining ICAC decisions are often deficient in detail, so only general conclusions can be drawn. For example, little information is given in Award 3/1996, particularly with respect to Article 79.<sup>1126</sup> In that case, a Russian buyer made an advance payment to a Canadian seller, which after a significant delay delivered only part of the goods. The seller used an Article 79 defense, but the ICAC decision is terse and vague in this regard, referring only to “certain circumstances” and “some difficulties” the seller encountered in performance of its obligations under the contact.<sup>1127</sup> No detail is provided as to exactly what these “circumstances” or “difficulties” were.

In addition to these problems, one commentator has noted that many of the ICAC decisions have reflected the homeward trend, and have not respected the international character of the CISG.<sup>1128</sup> This is reflected in another case involving a buyer’s claim for its advance payment for undelivered goods.<sup>1129</sup> Even though the tribunal acknowledged that the CISG was the applicable law, it decided the seller’s *force majeure* argument on the basis of Article 405 of the Russian Federation Civil Code.<sup>1130</sup> It stated that “a debtor, who delays his performance, shall not be released from his liability to the creditor for any consequences of the impossibility of performance that accidentally occurred during [the]

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<sup>1126</sup> ICAC, 13 May 1997, Award 3/1996, *supra* note 1122.

<sup>1127</sup> *Ibid.*

<sup>1128</sup> Saidov, *supra* note 1002 at 2.

<sup>1129</sup> ICAC, 16 June 2003, Award 135/2002, *supra* note 1122.

<sup>1130</sup> *Ibid.*

delay”.<sup>1131</sup> Why the tribunal felt a need to refer to domestic law instead of relying on Article 79 to rule in a similar manner is unknown.

The same error occurred in Award 364/1994.<sup>1132</sup> The tribunal concluded that the CISG was applicable, and noted the buyer’s defense under Article 79. The buyer argued that its payment of funds to the seller were frozen by its bank due to a new foreign currency regulation. However, the tribunal referred to Article 223 of the Russian Civil Code, 1994, instead of Article 79 to dismiss the buyer’s argument. Referencing the Russian law, it ruled that “when the debtor imposes upon a third party the obligation to perform its contractual obligation, the debtor is liable for non-performance [...] of its obligations by the third party”.<sup>1133</sup> The same ruling could have been made under Article 79(2). While the end result would likely have been the same, these cases illustrate instances where the “international character”<sup>1134</sup> of the CISG has not been respected. Thus, even if in substance a tribunal has given a correct ruling, if the CISG is applicable, tribunals should not utilize domestic law or local terminology when interpreting the Convention. This would be inconsistent with the CISG’s interpretive mandate to “promote uniformity in its application”.<sup>1135</sup>

The opposite problem occurred in another (but non-ICAC) case involving an appeal to the Cassation Board from the Appellate Division of the Arbitration Court for the City of Moscow.<sup>1136</sup> In *Rimpi Ltd. v. Moscow Northern Customs Department* the

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<sup>1131</sup> *Ibid.*

<sup>1132</sup> ICAC, 13 December 1995, Award 364/1994, *supra* note 1122.

<sup>1133</sup> *Ibid.*

<sup>1134</sup> CISG Article 7(1).

<sup>1135</sup> *Ibid.*

<sup>1136</sup> *Rimpi Ltd. v. Moscow Northern Customs Department*, 4 February 2002, *supra* note 1122.

claimant invoked CISG Article 79 to provide it with the basis for relief for a customs penalty imposed on it for late payment.<sup>1137</sup> In this case, the disputants were *both* Russian parties arguing over an internal customs penalty. In addition, there was no transaction in goods between these two parties. This dispute was the result of a sales transaction between the claimant and a Ukrainian buyer that was unable to make timely payments due to delays by the Ukrainian government. In such a case, the claimant should have relied on domestic *force majeure* law for grounds for relief. The invocation of Article 79 was an obvious error. The CISG applies “to contracts of sale of goods between parties whose places of business are in different [contracting] States”.<sup>1138</sup> It is unknown what analysis of the applicable law the arbitration courts undertook in this case. The lower and an appellate court heard the case before it reached the Cassation Board, and all three levels agreed on the outcome. However, it is inconceivable that the CISG should have been the applicable law in a matter concerning a tax penalty in a domestic arbitration between parties from the same state.

Russian law on excuses for non-performance differs considerably from CISG Article 79. Thus, reliance on domestic law instead of Article 79 could lead to very different outcomes. For example, as in many civil law jurisdictions, under Article 451 of the Russian Civil Code it recognizes the principle of changed circumstances.<sup>1139</sup> This is a relatively broad and liberal principle, which can lead to a change or alteration of a contract by a court, or its termination. “Changed circumstances” and court-altered

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<sup>1137</sup> *Ibid.*

<sup>1138</sup> CISG Article 1(1).

<sup>1139</sup> Brunner, *supra* note 47 at 402-403, 490. The law bears the heading “Change and Dissolution of Contract In Connection with Material Change of Circumstances”.

contracts are anathemas in the common law. Recall that in the common law, under the more ridged principle of *pacta sunt servanda*, that where there is a case of impossibility the termination of the contract is the primary remedy.

*D.i. A High Standard to “Impediments” but Imperfect Decisions*

Article 79 has been at issue in a variety of other ICAC cases. With relative consistency, the tribunals did not recognize that impediments within the meaning of Article 79 had occurred. Non-payment has been a recurrent theme in many of these cases. Thus, where a buyer failed to obtain the permission from a government agency to pay for the goods did not release it from its liability to make payment.<sup>1140</sup> Regrettably, the tribunal referred neither to Article 79 nor to domestic law or *force majeure* to ground its ruling with respect to the buyer’s excuse for non-performance. However, the same logic applied to a seller who had been adjudged to return an advanced payment to the buyer. In such a situation, the seller was not able to successfully invoke Article 79 to excuse it from returning the deposit.<sup>1141</sup> It claimed that it lacked the funds because it had used the money to purchase the goods from another party, and that third party had the goods seized by the authorities.<sup>1142</sup> Unfortunately, the tribunal referred to *both* Article 79 and the domestic civil code<sup>1143</sup> to hold the seller liable for the repayment.

A change in market conditions cannot be used as an excuse for a buyer to avoid payment under Article 79. In Award 255/1994, the buyer argued that “supply had

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<sup>1140</sup> ICAC, 10 June 1998, Award 83/1997, *supra* note 1122.

<sup>1141</sup> ICAC, 21 November 2005, Award 42/2005, *supra* note 1122.

<sup>1142</sup> *Ibid.*

<sup>1143</sup> Civil Code of the Russian Federation, Art. 401(3).

exceeded demand for this type of good on the Western European market”, and requested that it stop receiving shipment of the goods.<sup>1144</sup> In the opinion of the tribunal, under Article 79, a change in market conditions cannot release a party from its obligations to accept and pay for the goods for which it has contracted.<sup>1145</sup>

While it is difficult to make sweeping generalizations on the ICAC decisions regarding Article 79, two important points must be noted. Firstly, many of the decisions have been lacking in crucial detail. This makes an analysis of the cases more difficult. Instead, only broad conclusions and general outcomes may be drawn. Secondly, and related to this difficulty, is the apparent tendency to use the terminology and provisions from domestic sales law, sometimes concurrently with Article 79. While this is unnecessary and inappropriate, one must wonder whether the lack of detail in the decisions contributes to this problem. For example, many of the cases did not refer to Article 79, even though the CISG was deemed the applicable law, and the fact that an impediment or *force majeure* was argued by one of the parties. One must wonder if references to Article 79 were simply not recorded in the decisions of many of the cases.

If the CISG was the governing law, and Article 79 was applicable, reference to similar domestic laws was not necessary, even if it led to the same outcome. Should this trend continue, it is possible that future decisions from Russian arbitrations, with their apparent predisposition towards domestic law and the homeward trend, could lead to different results for the parties concerned. This would have a negative impact on the development of the CISG as a relatively uniform international sales law. The Russian

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<sup>1144</sup> ICAC, 11 June 1997, Award 255/1994, *supra* note 1122.

<sup>1145</sup> *Ibid.*

arbitration cases interpreting Article 79, while sometimes imperfect, have, overall, suggested that decisions were made with reference to the domestic law on *force majeure* rather than on the basis of, or concurrently with CISG Article 79. Thus, many of these cases illustrate how the CISG should *not* be applied.

*E. United States of America: The Homeward Trend Revisited*

Generally, the CISG has not been well-received by the courts in the United States. Courts there were very slow to consider the CISG. The federal courts did not fully consider the CISG until ten years after its ratification.<sup>1146</sup> A few scholarly comments summarize the American situation with respect to U.S. jurists. In 2004, Harry Flechtner completed an analysis of U.S. court decisions on the CISG.<sup>1147</sup> In that analysis Flechtner stated that “the picture of U.S. decisions is by no means a completely flattering one,”<sup>1148</sup> and thus, “examples of laudable interpretive methodology in U.S. case law on the CISG are the exceptions rather than the rule.”<sup>1149</sup> It appears that American courts have tended to suffer from the homeward trend. Flechtner noted that “[a] disturbing number of U.S. decisions [...] are guilty of an even more grievous ‘sin of commission’—the use of cases that apply U.S. domestic sales and contract law in interpreting the Convention... Worse yet, the courts asserting that UCC case law can guide them in interpreting the CISG

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<sup>1146</sup> Levasseur, “United States of America” in Ferrari, ed., *The CISG and its Impact on National Legal Systems*, *supra*, note 218 at 313. The CISG did not enter into force in the United States until January 1, 1988.

<sup>1147</sup> Harry M. Flechtner, “The CISG in US Courts: The Evolution (and Devolution) of the Methodology of Interpretation” in Ferrari, ed., *Quo Vadis CISG?*, *supra* note 785 at 91.

<sup>1148</sup> *Ibid.* at 92.

<sup>1149</sup> *Ibid.* at 98.

actually put the idea in practice”.<sup>1150</sup> He concluded by remarking: “U.S. decisions include flagrant and disturbing examples of the homeward trend in operation”.<sup>1151</sup> This unfortunate state of affairs for the CISG in the U.S. does not appear to be shared in many other signatory states.

Regrettably, the four American cases on Article 79 demonstrate ample evidence of the homeward trend.<sup>1152</sup> The first was the landmark case of *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*.<sup>1153</sup> It was such a poor example of CISG jurisprudence that it was singled-out for the “Worst [CISG] Case” award in an article with the unflattering title of “Nominating *Manfred Forberich*: The Worst CISG Decision in 25 Years?”<sup>1154</sup> The authors identified this case from a pool of more than 1500 as representative of “the worst example of the ‘homeward trend’”.<sup>1155</sup> While the result in the decision by the U.S. federal court may have been the correct one, it was the flawed methodology the court used to decide the case that has been the subject of much criticism.<sup>1156</sup>

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<sup>1150</sup> *Ibid.* at 103.

<sup>1151</sup> *Ibid.* at 111.

<sup>1152</sup> In chronological order, from the most recent case, these are: *Macromex Srl. v. Globex International, Inc.*, 2008 U.S. Dist. LEXIS 31442 (S.D.N.Y. 16 April 2008), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/080416u1.html>>; *Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F. Supp. 2d 781 (S.D.N.Y. 20 August 2008), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/080820u1.html>>; *Valero Marketing v. Greeni Oy*, 373 F. Supp. 2d 475 (D.N.J. 4 April 2006), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/060404u1.html>>; and *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. 6 July 2004), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040706u1.html>>.

<sup>1153</sup> *Ibid.*

<sup>1154</sup> Joseph Lookofsky & Harry Flechtner, “Nominating *Manfred Forberich*: The Worst CISG Decision in 25 Years?” (2005) 9 *Vindobona J. Int’l Com. L. & Arb.* 199.

<sup>1155</sup> *Ibid.* at 201.

<sup>1156</sup> See also Alain A. Levasseur “United States of America” *supra*, note 218 at 313-314, and Albert Kritzer, “Comments on *Raw Materials Inc. v. Manfred Forberich*” (February 2005), online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cases/040706u1.html>>.

In this case, the Illinois U.S. District Court had to decide whether the German seller of used railroad rails could claim an exemption under Article 79 because it failed to deliver the goods due to the freezing of the port of St. Petersburg at an unusually early date. The court applied the CISG to the contract, but when it considered Article 79 it quoted the plaintiff's brief and lamented that "while no American court has specifically interpreted or applied Article 79 of the CISG, caselaw interpreting the Uniform Commercial Code's ('U.C.C.') provision on excuse provides guidance for interpreting the CISG's excuse provision since it contains similar requirements as those set forth in Article 79".<sup>1157</sup> In making this statement, the court ignored its obligations under CISG Article 7(1). Had the court consulted foreign case law on Article 79 it would have found important guidance on the issue. A number of foreign decisions on Article 79 deal directly with the topic of a seller's claim for exemption on the basis of adverse weather conditions.<sup>1158</sup>

Instead, the court was guided by case law from s. 2-615 of the U.C.C., which deals with "impracticability".<sup>1159</sup> This is a different standard from the Article 79 standard of physical (or absolute) impossibility of performance, as the American version includes

<sup>1157</sup> *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*, *supra* note 1152.

<sup>1158</sup> See e.g., *Tomato concentrate case*, *supra* note 878; *Hispafruit B.V. v. Amuyen S.A.*, *supra* note 993; *Agristo N.V. v. Maccas Agri B.V.*, *supra* note 993; and *Canned oranges case*, *infra* note 727.

<sup>1159</sup> U.C.C. section 2-615 is entitled "Excuse by Failure of Presupposed Conditions" and states, in part:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

the concepts of “economic impossibility” and “commercial impracticability”.<sup>1160</sup> The latter two terms incorporate the concept of economic hardship that simply makes performance excessively onerous. As such, the foreseeability threshold is lowered; the approach in the CISG is more stringent for the non-performing party.<sup>1161</sup> Rather than conduct its analysis under the CISG, the court referred to domestic case law and noted “that the freezing over of the upper Mississippi River has been the basis of a successful force majeure defense”, hence, it ruled in favor of the defendant.

Had the court considered the case under the stricter excuse requirements under Article 79, it is possible that it may have concluded that it was likely that the Russian port of St. Petersburg might become frozen in the winter months, and that occurrence should have been foreseeable by the defendant. As the plaintiff noted in its brief, the fact that the St. Petersburg port might become frozen in the winter would not be “a surprise to any experienced shipping merchant (or any grammar school geography student)”.<sup>1162</sup> Thus, under Article 79’s stricter foreseeability regime and excuse requirements, the result for the parties could have been the opposite. The court’s flagrant disregard of Article 79 (and the CISG generally) is an obstacle in the efforts to create a relatively uniform international sales law.

The question of whether a storm and the September 11, 2001, terrorist attacks on the World Trade Center in New York constituted a successful defense under Article 79 were considered in a cursory manner in *Valero Marketing v. Greeni Oy*.<sup>1163</sup>

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<sup>1160</sup> Brunner, *supra* note 47 at 78-79.

<sup>1161</sup> *Ibid.* at 354.

<sup>1162</sup> *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*, *supra* note 1152 at s. C. “Foreseeability”.

<sup>1163</sup> *Valero Marketing v. Greeni Oy*, *supra* note 1152.

Unfortunately, the two courts that considered the defendant's Article 79 defense relegated the argument to a reply in the footnotes of their judgments.<sup>1164</sup> Although the primary issue in the case concerned late delivery and fundamental breach, the lack of discussion on Article 79 was disappointing. The delays in delivery, caused in part by Hurricane Gabrielle in the North Atlantic, and the difficulty in unloading the cargo in port of New York shortly after the terrorist attacks on the World Trade Center, were issues that deserved greater legal analysis by the courts in this case. Instead, in its discussion of the late delivery the Federal District Court confined its comments on Article 79 to a footnote, and rejected the defendant's "force majeure" defense.<sup>1165</sup> It stated: "With the possible exception of the storm, the circumstances upon which [the defendant] relies were not impediments beyond [the defendant's] control and which it could not reasonably have been expected to take into account within the meaning of Article 79(1) of the CISG".<sup>1166</sup> On appeal, the Federal Court of Appeals was even more terse. This failure to properly consider the defendant's Article 79 defense reflects poorly on American CISG jurisprudence.

The issue of an outbreak of war, which made performance impossible, was considered in *Hilaturas Miel S.L. v. Republic of Iraq*.<sup>1167</sup> Before the Iraqi War, a Spanish company, Hilaturas, agreed to sell yarn to the Republic of Iraq under the U.N. Oil For Food Program. This program provided letters of credit to the seller, but required independent inspection of goods when they were received in Iraq. When war erupted, the

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<sup>1164</sup> The two courts were the Federal District Court (New Jersey) and the Federal Court of Appeals (3d Circuit), *supra* note 1152.

<sup>1165</sup> Federal District Court (New Jersey), *ibid*.

<sup>1166</sup> *Ibid* at fn. 5.

<sup>1167</sup> *Hilaturas Miel S.L. v. Republic of Iraq*, *supra* note 1152.

United Nations inspectors left the country, leaving no one to inspect the Hilaturas yarn. Shortly thereafter, the government of Iraq ceased to function. Still later, the letter of credit for the Hilaturas yarn expired. Hilaturas was forced to sell the yarn at a loss and sued Iraq for damages.

Applying Article 79, the New York Federal District Court concluded that since the contract required product inspections, the withdrawal of the inspectors created an impossibility of performance. That is, payment for the yarn under the letter of credit could only be made after presentation of the required documents, including the inspector's report. In this respect, the court's reasoning was correct. Unfortunately, the court elaborated by remarking that American courts often looked to similar provisions in the U.C.C. to resolve issues arising under the CISG. This was a clear invocation of the homeward trend.

Hilaturas argued that Iraq should have provided an alternative means of performance. A reasonable alternative would have been a revised inspection procedure or the waiving of that provision of the letter of credit. Because the CISG did not directly deal with substitute performance, the court concluded that U.C.C. s. 2-614, which concerns substituted performance due to impracticability of delivery or payment, was an appropriate provision to apply. Quoting the case of *Delchi Carrier SpA v. Rotorex Corp.*, the court noted that "Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code [...] may also inform a court where the language of the relevant CISG provisions tracks that of the UCC".<sup>1168</sup> Also important to the court was

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<sup>1168</sup> *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024 [*Delchi*].

the official commentary of the U.C.C. The commentary explained that “a reasonable substituted performance tendered by either party should excuse that party from strict compliance with the contract terms which do not go to the essence of the agreement”.<sup>1169</sup>

The court felt obliged to invoke these domestic sources because the CISG did not directly deal with these issues. In doing so, the court failed to pay heed to CISG Article 7(2), which instructs courts that questions concerning matters to which the CISG is silent “are to be settled in conformity with the general principles on which it is based”.<sup>1170</sup> By focusing on a marginally relevant domestic legal provision, the court was thus able to avoid the lurking issue in Article 79 regarding whether the inspection impediment was beyond the control of Iraq and whether it could have “avoided or overcome it or its consequences”.<sup>1171</sup> The issue was a difficult one for the court to decide since the former government of Iraq no longer existed in a way that would have made it accountable for the breach of contract or for the creation of the impediment. As the seller noted, the court should have explored the plaintiff’s argument that it should have been Iraq that should have found a substituted performance. Regrettably, these important issues were not explored by the court under Article 79.

The issue of substitute performance was of primary importance in the fourth American case involving Article 79, *Macromex Srl. v. Globex International, Inc.*<sup>1172</sup> The case was particularly noteworthy as it delved into certain issues that the court in *Delchi*

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<sup>1169</sup> *Hilaturas Miel S.L. v. Republic of Iraq*, *supra* note 1152.

<sup>1170</sup> In its entirety, CISG Article 7(2) states: “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”

<sup>1171</sup> CISG Article 79.

<sup>1172</sup> *Macromex Srl. v. Globex International, Inc.*, *supra* note 1152 [*Macromex*].

failed to address. In this respect, the *Macromex* case revisits the question of an impediment and substituted performance under the CISG.

The case involved an American seller of chicken parts and a Romanian buyer. The seller failed to deliver a portion of the goods within the contract delivery date. Shortly thereafter, the Romanian government issued a new regulation that required that all imported chicken products be certified. Citing this new regulation, the seller failed to ship the remainder of the goods, even though it could have done so before the regulation came into effect. To avoid the regulation, the buyer offered to have the goods delivered to Georgia, which it would have accepted as substituted performance. However, the seller refused to ship to the alternative destination. It appears that it was influenced by the rising prices for chicken products. Thus, the buyer commenced arbitration proceedings against the seller alleging breach of contract, plus damages.

The seller contended that its failure to perform should be excused under Article 79 due to the ban on importing chicken without certification. The arbitrator held that the seller's defense did not meet the requirements specified in Article 79. In its view, the seller could have reasonably overcome the governmental regulations by delivering the goods to Georgia. The arbitrator ruled in favor of the buyer, basing its decision on the principles of CISG supplemented by the U.C.C. The use of domestic law to inform the CISG was another example of the homeward trend.

On appeal from the arbitral award, the defendant argued that the arbitrator's application of the U.C.C.'s substituted performance provision "constituted a manifest

disregard for the law”.<sup>1173</sup> The seller did not contest the arbitrator’s decision to use the U.C.C. to help clarify the CISG, but rather it argued that the arbitrator misapplied the U.C.C. In particular, it contended that U.C.C. s. 2-614 was not intended to be applied to *force majeure* situations, because those were covered instead by s. 2-615.<sup>1174</sup> An analysis under Article 79 and related provisions of the CISG were not considered by the parties or the court. Rather, the U.S. Court of Appeal cited *Delchi* and noted that “there is virtually no caselaw under the Convention”, hence, it made reference to two domestic cases that applied U.C.C. s. 2-614.<sup>1175</sup> It justified this domestically-focused approach by remarking that “[t]he arbitrator found that the materials within the CISG were of limited use”, and “[b]y contrast, the arbitrator found that s. 2-614 of the U.C.C. was dispositive of the issue”.<sup>1176</sup>

The need to refer exclusively to domestic law sources to determine whether the request for substituted performance was commercially reasonable, in light of an impediment, was unnecessary. The court could have looked at the “general principles” upon which the CISG is based, such as Article 46 that discusses substitute goods. In accordance with Article 7(2), such an approach could have informed the court on a rule for substitute performance under the CISG. In addition, “reasonableness” is mentioned 37 times in the CISG, and an analysis of the principle of commercial “reasonableness” within the four corners of the Convention would have been a more appropriate

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<sup>1173</sup> *Ibid.*

<sup>1174</sup> U.C.C. s. 2-615, *supra* note 1159.

<sup>1175</sup> *Macromex Srl. v. Globex International, Inc.*, *supra* note 1152. The two cases were *International Paper v. Rockefeller*, 146 N.Y.S. 371 (3d Dep’t 1914), and *Meyer v. Sullivan*, 181 P. 847 (Cal. App. 1919).

<sup>1176</sup> *Macromex Srl. v. Globex International, Inc.*, *supra* note 1152.

adjudication of a case with international dimensions.<sup>1177</sup> The need to resort to domestic law and case law to determine the scope of commercially reasonable substitute performance in the face of an impediment was a disservice to the attempts to create a relatively uniform international sales law.

#### F. Conclusion

Although the majority of reported Article 79 cases interpret that provision with a strict interpretation of “impediment”, the above cases demonstrate that there exists a certain tendency for homeward trend interpretations. The homeward trend is evident in those cases where Article 79 is interpreted with reference to similar domestic legal provisions or where the interpreter(s) is generally influenced by the legal system in which he/she operates. As Honnold put it: “[o]ne threat to international uniformity in interpretation is a natural tendency to read the international text through the lens of domestic law”.<sup>1178</sup> Thus, there are cases that equate the “impediment” requirement in Article 79 to domestic legal concepts, such as *force majeure* and “impracticability”. As Andersen has stated, “Article 79 exists outside of such labeling, in its own autonomous sphere”.<sup>1179</sup> While it could be argued that the use of domestic legal terminology made little difference in the outcome of these cases, the use of such terminology and references

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<sup>1177</sup> Bojidara Borisova, “Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 75 of the CISG” October, 2003, online: Pace Law School CISG Database <<http://cisgw3.law.pace.edu/cisg/text/peclcomp75.html#edv>>.

<sup>1178</sup> John O. Honnold, “The Sales Convention in Action—Uniform International Words: Uniform Application?” (1988) 8 J.L. & Comm. 207 at 208.

<sup>1179</sup> Camilla Baasch Andersen, *Uniform Application of the International Sales Law. Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions* (The Netherlands: Kluwer Law International, 2007) at 98.

to local laws causes affiliations with incorrect legal concepts. In addition, the use of these misplaced terms may lead to the wrong outcome in future cases.

Fortunately, many jurists are aware of the homeward trend. It can only be hoped that as the CISG grows in popularity, jurists will become more attuned to the issues of interpretation, and will treat the CISG in a relatively uniform manner.

## CHAPTER SEVEN

## CONCLUSION

*A. Article 79: Heeding to the Interpretive Provision of Article 7*

Most—but not all—cases on CISG Article 79 have shared remarkable similarities in that they form a substantial body of relatively uniform jurisprudence. With the exception of a small number of cases,<sup>1180</sup> there have been laudable efforts to interpret Article 79 in a strict manner—in a fashion that is more in harmony with the legal principle of *pacta sunt servanda*. That helps to explain why an Article 79 defense has rarely been successful.

As the cases analyzed in this dissertation illustrate, most courts have not treated Article 79 in a cursory manner; they have rarely made decisions reflexively, that is, based on domestic law. Generally, they have heeded to the mandate of Article 7,<sup>1181</sup> and treated Article 79 as an autonomous provision, that is, without reference to national legal concepts. In other words, for the most part, Article 79 jurisprudence is not permeated with domestic gloss. Internationally, this suggests that CISG jurists have a certain analytical sophistication with international law, and do not suffer from legal parochialism.

Unfortunately, not all jurists share this same fate. Interpretive flaws do exist. The evidence shows that the courts and tribunals of some signatory states are much more

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<sup>1180</sup> See the cases discussed in Chapter Five, *supra*.

<sup>1181</sup> Article 7 requires, in part, that “[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade”.

enlightened than are others. A typical example of legal parochialism is that of the United States, and one must wonder if there is something inherent in common law jurisdictions which makes them eschew recognizing the international character of the CISG. The problem may also have to do with the use of *stare decisis* or precedent. Rather than look at non-binding case law from foreign jurisdictions for guidance, common law jurisdictions reflexively look to binding and persuasive domestic cases and laws. Such an approach does little to promote relative uniformity in the jurisprudence of the CISG across the signatory states.

Thus, while there appears to be a growing body of relatively uniform Article 79 case law, the homeward trend remains a problem with some signatory states.<sup>1182</sup> Some of the problem appears due to the ambiguous and vague language incorporated in the CISG. Oftentimes, a high level of abstraction was necessary in order to accommodate the diverse political considerations during the drafting of the Convention.<sup>1183</sup> While this created a law that is formally and linguistically uniform in numerous jurisdictions, subsequent case law creates many opportunities for divergent interpretations of the Convention's provisions.<sup>1184</sup> Perhaps for this reason, DiMatteo *et al.* found that, “[a]t one extreme, some courts have largely ignored the CISG’s mandate that interpretations are to be formulated with an eye toward the international character of the transaction and the

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<sup>1182</sup> DiMatteo *et al.*, *supra* note 8 at 437.

<sup>1183</sup> Clayton Gillette and Robert Scott, “The Political Economy of International Sales Law” (April 23, 2005) New York University Law and Economics Research Paper Series, Working Paper No. 05-02, at 4. Available online: Social Science Research Network <<http://ssrn.com/abstract=709242>>.

<sup>1184</sup> *Ibid.* Gillette and Scott proceed to predict the demise of the CISG because of its failure to supply a truly uniform interpretive language to resolve all contractual problems.

need for uniformity of application.”<sup>1185</sup> This appears to be the category in which some Article 79 case law belongs. At the other extreme are many more courts and tribunals that have made a concerted effort to apply the mandate of the CISG seriously, and reject the temptation of the homeward trend.

However, as DiMatteo notes, and as this analysis of Article 79 case law has demonstrated, the vast majority of CISG cases fall somewhere in the middle, between the two extremes of recognition and insensitivity to the interpretive requirements of the Convention.<sup>1186</sup> They conclude on a positive note by acknowledging that there are signs that courts are becoming more serious in applying the CISG’s interpretive methodology.<sup>1187</sup> This conclusion is shared in this dissertation. At the very least, this development illustrates the fundamental difficulties that nations face when trying to implement uniform international law. Indeed, as Denis Tallon states, “diverging interpretations by national courts is a problem of all international uniform laws”.<sup>1188</sup> Perhaps this is simply evidence that the CISG, like other uniform laws, is an evolving, living code. As it develops, it is hoped that courts everywhere will apply the interpretive methodology of the Convention more rigorously. Doing so will produce a greater coalescing of national CISG jurisprudence, and will create a relatively uniform law for the international merchants of the future.

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<sup>1185</sup> DiMatteo *et al.*, *supra* note 8 at 440.

<sup>1186</sup> *Ibid.*

<sup>1187</sup> *Ibid.*

<sup>1188</sup> Quote by Denis Tallon, in Leonardo Graffi, “Case Law on the Concept of ‘Fundamental Breach’ in the Vienna Sales Convention” (2003) 3 I.B.L.J. 338 and online: Pace Law School CISG Database at <<http://cisgw3.law.pace.edu/cisg/biblio/graffi.html>>.

B. *Article 79: The Appropriate Standard in International Commerce*

It has been noted above<sup>1189</sup> that Article 79 is a compromise provision between the civil law and common law. Article 79 bridges the civil-common law divide by providing a principle of non-performance that fuses together the civil and common laws' distinctive approaches to this legal rule. It relies neither on the civil law's concept of presumed fault, nor on the common law's concept of strict liability.<sup>1190</sup> But is this the right standard to apply in international commerce? After all, it is a compromise provision.

Article 79 seeks to strike a balance between the traditionally ridged approach found in the common law under the *pacta* principle and the more liberal *rebus sic stantibus* principle that is recognized in civil law jurisdictions. As a compromise, Article 79 is the appropriate standard in international commercial transactions. It provides the flexibility to solve problems that arise for international commercial traders. It does so by rejecting the ridged approach to excuses for non-performance as found in English law and related common law jurisdictions. It does so by relieving a party of liability for "a failure to perform *any* of his obligations".<sup>1191</sup> At the same time, it recognizes the *rebus sic stantibus* principle by acknowledging the factual circumstances surrounding "an impediment beyond his control".<sup>1192</sup> The issue of an "impediment" becomes a matter to be determined by the facts surround the case. In theory, the impediment may also include changed circumstances or economic hardship, but they must meet the strict standard of being beyond the control of the party seeking the exemption. In this manner Article 79

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<sup>1189</sup> See Chapter Three, Section K.

<sup>1190</sup> Brunner, *supra* note 47 at 69.

<sup>1191</sup> CISG Art. 79(1). Emphasis added.

<sup>1192</sup> *Ibid.*

connects the *pacta* principle with *rebus sic stantibus*. In doing so Article 79 bridges the common law-civil law divide and offers international parties a commercially reasonable standard for selling goods across borders.

## APPENDIX 'A' CISG ARTICLE 79

Section IV. *Exemption**Article 79*

- (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
  - (a) he is exempt under the preceding paragraph; and
  - (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
- (3) The exemption provided by this article has effect for the period during which the impediment exists.
- (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such nonreceipt.
- (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

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