



The Treatment of CISG Article 79 in German Courts:  
Halting the Homeward Trend

by

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## 1. Introduction

The *UN Convention on Contracts for the International Sale of Goods* (“CISG”)<sup>1</sup> has played a preeminent role in German jurisprudence. This is a fortunate development towards the harmonization of international sales law. This development bucks the “homeward trend” which has plagued a number of signatory states.<sup>2</sup> This is a small, but important, step towards a conceptual goal of functional uniformity in a body of international commercial law. As a review of German case law demonstrates, while excuses for non-performance in Article 79 may have developed out of variants of similar domestic legal principles, it ultimately stands alone as an autonomous international doctrine under the CISG. This suggests that the unique development of Article 79 in separate and distinct legal jurisdictions, such as Germany, may ultimately evolve into an autonomous international norm. It further supports the notion that Article 79 is capable of creating relative uniformity within the context of the CISG’s goal for a sales law that is transnational in design.

Article 79 states:

- (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 non-receipt.
- (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

<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> The “homeward trend” is that tendency of jurists to project domestic law and national legal concepts onto the international provisions of the CISG. The homeward trend has been especially noticeable in the states of Belgium, Canada, Russia, and the United States.

## 2. The Evolution of Excuses for Non-performance: from Wegfall der Geschäftsgrundlage to an International Norm

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. Under the influence of Roman law, many European states came to recognize the principle of initial impossibility, *impossibilium non est obligatio*.<sup>3</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>4</sup> This became known as the doctrine of an implied *clausula rebus sic stantibus*, and was codified in certain jurisdictions.<sup>5</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>6</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 disastrous for parties in the aftermath of World War I.<sup>7</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>8</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>9</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

<sup>3</sup> E.J. Cohn, “Frustration of Contract in German Law” (1946) 28 J. Comp. Legis. & Int’l L. 3d 15 at 15.

<sup>4</sup> *Ibid.* at 19.

<sup>5</sup> *Ibid.* at 19-20.

<sup>6</sup> Leo M. Drachsler, “Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality” (1957) 3 N.Y.L.F. 50 at 71.

<sup>7</sup> Christoph Brunner, *Force Majeure and Hardship under General Contract Principles* (The Netherlands: Wolters Kluwer, 2009) at 79 [Brunner].

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

“more civilian than common law in its conception”.<sup>10</sup> However, this is a simplification. 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>11</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>12</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 have had a profound influence on the development and legal treatment of excuses for contractual non-performance in that nation.

### 3. Article 79 in Germany: General Observations

There are some interesting facts concerning the evolution of Article 79 case law in Germany. With the exception of arbitral cases from CIETAC, even though Germany has reported more Article 79 cases than any other CISG signatory state, this amounts to only 18 cases from that country that are considered in this article. An overview of Article 79 demonstrates that parties may frequently resort to this provision as a defence, but they are rarely successful.<sup>13</sup> This may

<sup>10</sup> 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) 33-167.at “Article 79” para. 2. Ziegel’s statement, however, detracts from the approach taken by Article 79, which stands as a compromise between the different legal approaches taken towards excuses for non-performance in civil law and common law.

<sup>11</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.* 26 at 262 [Flambouras, “The Doctrines of Impossibility”].

<sup>12</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 [Rimke].

<sup>13</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 United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL*:

suggest that the standards established under Article 79 are set relatively high, particularly relative to equivalent domestic law. For example, of the 18 German cases involving Article 79 considered here,<sup>14</sup> there is only one instance where the successful party invoked that provision to its advantage.<sup>15</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>16</sup> It ultimately won

*Digest of Case Law on the United Nations Convention on the International Sale of Goods* (New York: UN, 2008) at 253: “Article 79 has been invoked with some frequency in litigation, but with limited success” [*UNCITRAL: Digest of Case Law*].

<sup>14</sup> 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] 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>>; 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>15</sup> The successful invocation of Article 79 in Germany was in the *Shoes case*, *supra* note 14.

<sup>16</sup> *Ibid.*

the case based upon receipt of the seller's non-conforming goods (in violation of CISG Article 35).<sup>17</sup> Another interesting point is that the plaintiffs' won 13 of the 18 cases.<sup>18</sup> This suggests that plaintiffs commence CISG litigation only where the likelihood of success weighs in their favour. Based on these cases, a defendant's prospect for a successful Article 79 defence would appear to be small. Indeed, of the 27 Article 79 cases recorded in the *UNCITRAL Digest*,<sup>19</sup> only four parties successfully utilized Article 79 to limit their damages.<sup>20</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>21</sup> Six of the 18 German cases analyzed involve a primary dispute over non-conforming goods, in addition to the Article 79 defence.<sup>22</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.

#### 4. 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>23</sup> Not surprisingly, therefore, courts in other CISG states have often relied on German rulings.<sup>24</sup> As Magnus notes, "decisions of the *Bundesgerichtshof* [federal Supreme Court]

<sup>17</sup> *Ibid.*

<sup>18</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.*

<sup>19</sup> *Supra* note 14.

<sup>20</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>> [*Flippe Christian*]; 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, *Shoes case*, *supra* note 14.

<sup>21</sup> See e.g. John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th ed., Harry Flechtner, ed., (Netherlands: Kluwer Law International, 2009) at 328 [Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*]. Honnold states: "Most sales controversies grow out of disputes over whether the goods conform to the contract".

<sup>22</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 14.

<sup>23</sup> Ulrich Magnus, "CISG in the German Federal Civil Court" in Franco Ferrari, ed., *Quo Vadis CISG?* (Munich: Sellier European Law Publishers, 2005) 143 at 211 [Magnus, "CISG in the German Federal Civil Court"].

<sup>24</sup> *Ibid.* at 3ff. Magnus provides three case examples, from the United States, Switzerland, and Italy.

have internationally paved the way in the interpretation and application of the CISG”.<sup>25</sup> Overall, the country is the most active adjudicator of CISG issues. According to UNILEX,<sup>26</sup> Germany has played a leading role in the interpretation of the CISG, ruling on 205 cases since the Convention’s inception.<sup>27</sup> This represents more than one-quarter (just over 26 percent) of CISG case law world-wide.<sup>28</sup> Switzerland is the next largest adjudicator of the CISG, having ruled on 80 cases.<sup>29</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>30</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>31</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 decided 18 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>32</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 18 cases.<sup>33</sup> As in CISG case law generally, Switzerland is the second-largest adjudicating state following Germany, with nine decisions involving Article 79.<sup>34</sup> It is

<sup>25</sup> *Ibid.* at 211.

<sup>26</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>27</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>28</sup> As of December 3, 2010, the total number of CISG cases reported by UNILEX is 784.

<sup>29</sup> UNILEX, online: <<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13354&x=1>> (as of December 3, 2010).

<sup>30</sup> Ulrich Magnus, “General Principles of UN-Sales Law” in Franco Ferrari, ed., *The CISG and its Impact on National Legal Systems*, (1997) 3 Int’l Trade & Bus. L. Ann. 33 at 143 [Magnus, “General Principles of UN-Sales Law”].

<sup>31</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>>.

<sup>32</sup> UNCITRAL: *Digest of Case Law*, *supra* note 13 at 252-261. These cases are listed at *supra* 14.

<sup>33</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 14.

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

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>35</sup> on the article, and in Russia, 25 arbitral cases<sup>36</sup> have decided issues that have dealt with Article 79 to some degree.

<sup>35</sup> China International Economic and Trade Arbitration Commission (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 <<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>36</sup> 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 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>>; and 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>>.

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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 complicated problems arising from the conflict of laws”.<sup>37</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>38</sup>

Rather than reflexively invoking domestic legal concepts, such as the national equivalent to Article 79—the principle of *Wegfall der Geschäftsgrundlage*<sup>39</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>40</sup> In doing so, they have 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. In 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

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>>.

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>37</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>38</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>39</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>40</sup> Magnus, “CISG in the German Federal Civil Court”, *supra* note 23 at 156.

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>41</sup> The context of the domestic legal environment can never be completely eradicated. As Murray noted, any national court finds 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>42</sup> What is to be commended is an approach that results in functional uniformity of the Convention, rather than absolute or strict uniformity, which is a practical impossibility.<sup>43</sup> In this respect, German jurisprudence on the CISG generally succeeds.

## 5. 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>44</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

<sup>41</sup> *Ibid.* at 156.

<sup>42</sup> J.E. Murray, "The Neglect of CISG: A Workable Solution" (1998) 17 J.L. & Com. 365 at 367.

<sup>43</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. 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>44</sup> Magnus, "General Principles of UN-Sales Law", *supra* note 30 at 223, states: "Delivery of non-conforming goods is the most common and frequent violation of sales contracts".

has been a matter of much scholarly debate.<sup>45</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>46</sup> Excuse for non-performance in German national law is closer to this liberal perspective.<sup>47</sup> 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>48</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>49</sup> or the “better loss-bearer” approach.<sup>50</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>51</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>52</sup> From the outset of the court’s decision, it was unequivocal in its rejection of domestic law as governing the contract.<sup>53</sup> The court held that the CISG was comprehensive enough in scope to cover all of the substantive issues under 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>54</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 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-

<sup>45</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 [Brand].

<sup>46</sup> *Ibid.* . Brand notes that John Henry Schlegel is representative of the “liberal” approach.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* Brand sees Harold J. Berman as representative of the “strict” approach.

<sup>49</sup> The “transaction test” and “litigation test” are discussed by Brand, *ibid.*

<sup>50</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 [Rapsomanikas].

<sup>51</sup> *Hearing aid case*, *supra* note 14. Note that German case citations do not name the parties to the proceedings.

<sup>52</sup> *Ibid.* at para. 4.

<sup>53</sup> *Ibid.* at para. 2(d),

<sup>54</sup> *Hearing aid case*, *supra* note 14 at paras. 2, 3 and 4.

conforming goods.<sup>55</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>56</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>57</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 covered by Article 79, and the issue was, in its opinion, settled in the Convention. Accordingly, the 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>58</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>59</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>60</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>61</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>62</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 entitled to declare partial avoidance of the contract in accordance

<sup>55</sup> *Ibid.* at para. 2(d).

<sup>56</sup> Vivian Grosswald Curran, “The Interpretive Challenge To Uniformity” (1995) 15 J.L. & Com. 175 at 181 [Curran].

<sup>57</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 [Tallon].

<sup>58</sup> *Shoes case*, *supra* note 14 at para. 2(d).

<sup>59</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 [Slater].

<sup>60</sup> *Shoes case*, *supra* note 14.

<sup>61</sup> Amtsgericht [AG] Alsfeld, see *ibid.*

<sup>62</sup> Landgericht [LG] [District Court] Berlin, *supra* note 14.

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.<sup>63</sup> 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>64</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>65</sup> Article 79(4) 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 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>66</sup> The seller brought an action against the buyer for

<sup>63</sup> Article 26 states: “A declaration of avoidance of the contract is effective only if made by notice to the other party».

<sup>64</sup> Landgericht [LG] [District Court] Berlin, *supra* note 14. 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 [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>65</sup> *Ibid.*

<sup>66</sup> *Spanish paprika case*, *supra* note 14.

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 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 had been 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>67</sup> and 25,<sup>68</sup> thereby making the seller liable for damages under CISG Articles 74<sup>69</sup> and 75.<sup>70</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 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

<sup>67</sup> See United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671. Article 35, *infra*, note 74 [CISG].

<sup>68</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". *Ibid.* at Art. 25.

<sup>69</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. *Ibid.* at Art. 74.

<sup>70</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". *Ibid.* at Art. 75.

[buyer]”.<sup>71</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-conforming goods,<sup>72</sup> but this case appears to be an exception. 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>73</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>74</sup> to supply goods conforming to the contract”.<sup>75</sup> Their view reflects an exception to the common law strict liability rule that was incorporated in Article 79. It 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>76</sup> Also in their view, 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

<sup>71</sup> *Spanish paprika case*, *supra* note 14 at para. III A.

<sup>72</sup> See Tribunal de commercial [Trib. com.] Besançon, 19 January 1998, *Flippe Christian*, *supra* note 20. This decision is problematic and its approach to Article 79 (and Article 39) can be criticized. See *infra*.

<sup>73</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 [Fletchner].

<sup>74</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 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>75</sup> Hans Stoll & Georg Guber, “Article 79” in Schlechtriem & Schwenzler eds., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2d ed. (New York: Oxford University Press, 2005) 812 at 828 [Stoll & Guber].

<sup>76</sup> *Ibid.* .



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>77</sup>

Product non-conformity and Article 79 has also been invoked in the *Used car* case<sup>78</sup> and the *Milling equipment* case.<sup>79</sup> The court’s reference to Article 79 was 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>80</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>81</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.

## 6. Product Non-Conformity as An Impediment?:

### 6.1 The *Vine Wax Case*

The German federal Supreme Court has also provided guidance on the issue of non-conformity of goods and excuses for non-performance. In the *Vine-wax case*, a case that has been considered a landmark in CISG jurisprudence,<sup>82</sup> the Supreme Court demonstrated an advanced and sophisticated understanding of the Convention’s interpretative methodology.<sup>83</sup> Schlechtriem viewed the decision with optimism:

<sup>77</sup> *Ibid.* at 829.

<sup>78</sup> *Used car case*, *supra* note 14.

<sup>79</sup> *Milling equipment case*, *supra* note 14.

<sup>80</sup> *Used car case*, *supra* note 14.

<sup>81</sup> *Milling equipment case*, *supra* note 14.

<sup>82</sup> 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>> [Schlechtriem, “Uniform Sales Law in the Decisions of the *Bundesgerichtshof*”].

<sup>83</sup> *Vine wax case*, *supra* note 14.

[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>84</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 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 Europe.<sup>85</sup> In German law, this would entail a determination as to whether or not physical performance was still possible for the promisor.<sup>86</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>87</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>88</sup> For the doctrine of impossibility to apply, for example, performance must be physically impossible.<sup>89</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>90</sup> Indeed, Harry Flechtner has recently argued that “those who have drafted the [CISG] text did not intend Article 79 to apply

<sup>84</sup> Schlechtriem, “Uniform Sales Law in the Decisions of the *Bundesgerichtshof*”, *supra* note 82.

<sup>85</sup> J. Barrigan Marcantonio, “Unifying the Law Of Impossibility” (1985) *Hastings Int’l & Com. L. Rev.* 41 at 49-50 [Marcantonio].

<sup>86</sup> *Ibid.* at 49.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* at 50. See also Stoll & Guber, *supra* note 75 at 810-811.

<sup>89</sup> Marcantonio, *supra* note 85 at 50.

<sup>90</sup> Stoll & Guber, *supra* note 75 at 810.

to deliveries of non-conforming goods”.<sup>91</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>92</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 exempted under CISG Article 79(1) or (2) (even when the reasons for the defectiveness of the goods are—as here—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>93</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>94</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>95</sup>

However, the court appeared to leave open the question that Article 79 might in some other 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, 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>96</sup> Such a development, should it occur, would undermine the objective of the CISG to create an internationally uniform sales

<sup>91</sup> Flechtner, *supra* note 73 at 36.

<sup>92</sup> CISG, *supra* note 67 at Art. 79(1).

<sup>93</sup> *Ibid.* at Art. 79(1).

<sup>94</sup> *Vine wax case*, *supra* note 14 at s. II. para. 2(a).

<sup>95</sup> *Ibid.*

<sup>96</sup> Flechtner, *supra* note 73 at 41.

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.

## 6.2 The *Powdered Milk Case*

Three years later, product non-conformity and Article 79 was also again addressed by the Supreme Court in the *Powdered milk case*.<sup>97</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 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>98</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.<sup>99</sup> 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>100</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

<sup>97</sup> *Powdered milk case*, *supra* note 14.

<sup>98</sup> Oberlandesgericht [OLG] [Appellate Court] Germany 23 October 2000 Appellate Court Dresden (*Powdered milk case*) online: Pace Law School CISG Database <://cisgw3.law.pace.edu/cases/001023g1.html> [*Powdered milk case*, Appellate Court].

<sup>99</sup> *Powdered milk case*, *supra* note 14.

<sup>100</sup> *Ibid.* at s. 2.5.1.2.c.

[...] is critical in order to argue in favor of an exemption from liability”.<sup>101</sup> It was unequivocal on this point, noting that the seller was “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>102</sup>

The Supreme Court agreed with this view to some extent, but also appeared to be unemphatic from 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>103</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>104</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 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>105</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>106</sup> As Honnold and Flechtner have noted, this position reflects a “lack of sympathy with the no-fault approach to liability for damages adopted

<sup>101</sup> *Ibid.* at s. 2.5.1.2.c.aa.

<sup>102</sup> *Ibid.* at s. 2.

<sup>103</sup> *Powdered milk case*, *supra* note 14 at s. III.

<sup>104</sup> *Ibid.*

<sup>105</sup> Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, *supra* note 21 at 618.

<sup>106</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 410.

in the CISG”.<sup>107</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 approach taken in civil law. 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 in various jurisdictions.

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>108</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)(b), “the buyer may [...] claim damages”.<sup>109</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 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 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.

<sup>107</sup> Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, *supra* note 21 at 620.

<sup>108</sup> CISG, *supra* note 67 at Art. 79(1).

<sup>109</sup> *Ibid.* at Arts. 35(1) and 45(1)(b).

## 7. The 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>110</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>111</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.

Generally, a party's sphere of control is 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 affecting trade (export or import bans, embargoes, etc.).<sup>112</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>113</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>114</sup>

In the same year as the *Tomato concentrate case*, that same court had made a similar ruling in the *Iron molybdenum case*.<sup>115</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

<sup>110</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." CISG, *supra* note 67.

<sup>111</sup> Stoll & Guber, *supra* note 75 at 814 para. 14.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Tomato concentrate case*, *supra* note 14.

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

<sup>115</sup> *Iron molybdenum case*, *supra* note 14.

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 that it was incumbent upon the seller to bear the risk of increasing market prices.<sup>116</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>117</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 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>118</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>119</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

<sup>116</sup> *Ibid.*

<sup>117</sup> *Vine wax case*, *supra* note 14 at s. II. para. 2(a).

<sup>118</sup> Peter Huber & Alastair Mullis eds., *The CISG: A New Textbook for Students and Practitioners* (Germany: Sellier European Law Publishers, 2007) at 261-262.

<sup>119</sup> *Iron molybdenum case*, *supra* note 14.



high”.<sup>120</sup> Considering the speculative nature of the industry and the contract, it was not commercially unreasonable to justify an exemption under Article 79.

## 8. Miscellaneous Article 79 Issues in German Case Law

The remaining German cases concern a variety of issues, many of which touch upon Article 79 in only a marginal manner. In 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>121</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 the seller.<sup>122</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. The court correctly noted that the failure to pay the seller was, in this case an issue governed by CISG articles 53<sup>123</sup> and 57(1).<sup>124</sup>

Non-payment was also the main issue in the *Memory module case*.<sup>125</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 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.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Copper and nickel cathodes case*, *supra* note 14.

<sup>122</sup> *Flagstone tiles case*, *supra* note 14.

<sup>123</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”. CISG, *supra* note 67 at Art. 53.

<sup>124</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”. CISG, *supra* note 67 at Art. 57(1).

<sup>125</sup> *Memory module case*, *supra* note 14.

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>126</sup> This cryptic reference to Article 79(5) appears 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>127</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 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 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>128</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 a 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>129</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

<sup>126</sup> *Ibid.* at s. III.1.

<sup>127</sup> CISG, *supra* note 67 Art. 79(5).

<sup>128</sup> Magnus, “CISG in the German Federal Civil Court”, *supra* note 23 at 156.

<sup>129</sup> *Automobile case*, *supra* note 14.

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 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>130</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 articles in a sophisticated manner. The *Stolen Automobile case* involved a buyer of an automobile from Belarus, who purchased the car "without warranty" from a German seller.<sup>131</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. As 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 relieved from his obligation to return the car "because the impossibility to do so is not due to his act or omission".<sup>132</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>133</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>134</sup> A German car dealer sold a vehicle to an Italian buyer, who was also a professional in the trade.

<sup>130</sup> *Automobile case*, *supra* note 14.

<sup>131</sup> *Stolen Automobile case*, *supra* note 14.

<sup>132</sup> *Ibid.* at s. 2(f).

<sup>133</sup> *Ibid.* at s. 2(d). Emphasis in the original.

<sup>134</sup> Oberlandesgericht [OLG] [Provincial 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>> [*Stolen car case*, Provincial Appellate Court]. Not to be confused with the *Stolen Automobile case*, *ibid.*

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 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>135</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 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>136</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

<sup>135</sup> Quote is from the judgment of the Munich court of appeal, *Stolen car case*, Provincial Appellate Court, *ibid*.

<sup>136</sup> *Stolen car case*, Provincial Appellate Court, *supra* note 134.

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>137</sup> In consequence, the buyer was entitled to damages under CISG Articles 45(1)(b) and 74.

The remaining three cases<sup>138</sup> from Germany contain very little content on Article 79. The *Glass bottles case*, which was an appeal case to the Supreme Court, 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>139</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. Both the court of first instance and the Court of Appeal dismissed the buyer's claims, but the Supreme Court reversed these two 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 a profit".<sup>140</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>141</sup> Otherwise, the buyer's obligations to perform the contract remained unaffected.

<sup>137</sup> *Ibid.*

<sup>138</sup> These are: *Beer case*, *supra* note 14; *Café inventory case*, *supra* note 14; and *Glass bottles case*, *supra* note 14.

<sup>139</sup> *Glass bottles case*, *supra* note 14.

<sup>140</sup> *Ibid.* at para. 30(b).

<sup>141</sup> *Glass bottles case*, *supra* note 14 at para. 31.

The *Café inventory case* similarly raised only a minor point on Article 79.<sup>142</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.<sup>143</sup> 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.

The *Beer case* was primarily concerned with contract avoidance, fundamental breach, and damages.<sup>144</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>145</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>146</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 adjustment 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.

<sup>142</sup> *Café inventory case*, *supra* note 14.

<sup>143</sup> Article 80 states: "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>144</sup> *Beer case*, *supra* note 14.

<sup>145</sup> *Ibid.* at s. "Position of [Seller]".

<sup>146</sup> *Ibid.* at s. III. 3.

## 9. Conclusion

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>147</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 review of Article 79 in German courts indicates that jurists there take the CISG very seriously.

Most of the German decisions demonstrate that courts 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 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>148</sup> As a civil law country, this also reflects the lack of reliance on precedent, which is widespread 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.

<sup>147</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, "General Principles of UN-Sales Law", *supra* note 30 at 143ff.

<sup>148</sup> Magnus, "General Principles of UN-Sales Law", *supra* note 30 at 155.