Exemptions under article 79 of the Vienna Sales Convention

By Peter Winship, Dallas, Texas

Contents

Article 79 of the Vienna Sales Convention[1] exempts a breaching party from liability for damages when unanticipated difficulties prevent performance as promised. It is an exception to the general principle that a breaching party must compensate an aggrieved party for losses caused by the breach without regard to fault[2]. The key provision of art. 79 is para. (1), which provides:

> "(1) 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."

Paragraph (5) supplements this formula by providing that this exemption is only from the payment of damages.

The language of art. 79 differs from that found in national laws and unlike some national laws the formula does not distinguish between impossibility

[1] Convention on Contracts for the International Sale of Goods (CISG), A/Conf.97/18, reprinted in: United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March/11 April 1980, Official Records (New York 1981) (cited as Official Records).

[2] CISG art. 74.

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(impossibility; force majeure; frustration) and economic hardship (Wegfall der Geschäftsgrundlage; eccessiva onerosità sopravvenuta). However the art. 79 formula is sufficiently flexible that judges and arbitrators will have significant leeway when applying it to the facts before them. Commentators have therefore predicted that these judges and arbitrators are likely to read art. 79 in the light of their national law. Denis Tallon writes, for example, that

> "[t]he judge will have a natural tendency to refer to similar concepts in his own law. Thus, the judge of a socialist country will have a restrictive approach to *force majeure* ... On the contrary a common lawyer will feel inclined to refer to the more flexible notions of frustration and impracticability. In the Roman-German system, the judge will reason in terms of *force majeure*."[3]

He concludes that the risk of divergence should not be underestimated. The late Barry Nicholas is even more categorical in his prediction: the art. 79 formula "is so vague that there are bound to be differences of interpretation in different jurisdictions"[4].

This paper examines the judicial and arbitral decisions construing art. 79 to see if these predictions have been realized. The paper first sets out a brief sketch of the issues addressed during the drafting process, followed by a summary of the salient characteristics of the decisions. The paper then analyzes decisions that have exempted a party from liability under art. 79, that address some of the issues raised in the "travaux préparatoires", and that consider whether there are any gaps in this area that could be filled by national law. The concluding section of the paper suggests that there are insufficient reported decisions to draw more than tentative conclusions but that there is no sign that judges and arbitrators are consistently construing art. 79 in the light of the national law with which they are familiar.

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[3] *Bianca/Bonell(-Tallon)*, Commentary on the International Sales Law (1987) art. 79 para. 3.2.

[4] *Nicholas*, Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods, in: International Sales, ed. by *Galston/Smit* (New York 1984) § 5.01.

I. Drafting history[5]

Article 79 was drafted in response to the criticism of art. 74 of the 1964 Uniform Law on International Sales[6] that "a party could be too readily excused from performing his contract"[7]. It was objected that "grounds for such excuse were not limited to physical or legal impossibility, or to circumstances where performance had been radically changed, but might extend to situations in which performance had become unexpectedly onerous; one commentary had envisaged the possibility that a seller might claim exemption under art. 74 on the ground of an unforeseen rise in prices."[8] It was also alleged that art. 74 was insufficiently clear and excessively subjective[9]. The response was to substitute the word "impediment" for "circumstances", to narrow the conditions for exemption, and to make these conditions more objective. Reference to "fault" in a tentative draft was deleted and replaced by the phrase "beyond his control"[10].

For answers to specific questions, however, the "travaux préparatoires" are more useful for identifying issues than resolving them. On two important issues, for example, the drafting history is inconclusive: whether a seller can ever be exempt when he delivers defective goods and whether either party can be exempt if performance becomes significantly more difficult.

Concern that "strict" liability for breach should not be undermined by notions of fault lies behind the repeated insistence on the part of common law delegates that a seller of defective goods could not be exempt under art. 79. Barry Nicholas, in his capacity as a delegate from the United Kingdom, concluded that while the text of the 1964 Uniform Law might be read to cover exemption in very limited circumstances for latent defects the drafters of the

[5] The text was prepared under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). Two sessions of a Working Group prepared the initial drafts and its draft was revised by the Commission in 1977 before circulating a draft text to governments and international bodies. A diplomatic conference adopted a final text in Vienna in May 1980. These debates are reported in the UNCITRAL Yearbooks (cited as UNCITRAL Yb.) and the Official Records of the diplomatic conference.

[6] Convention relating to a uniform law on the international sale of goods, United Nations Treaty Series (1972) 107.

[7] Progress report of the Working Group on the International Sale of Goods on the work of its fifth session (A/CN.9/87) para. 108, reprinted in: UNCITRAL Yb. V:1974 (1975) 39.

[8] Progress report of the Working Group on the International Sale of Goods (previous note).

[9] Analysis of replies and comments by governments on the Hague Conventions of 1964, Report of the Secretary-General, para. 137 (comment of Argentine delegate) (A/CN.9/31), reprinted in: UNCITRAL Yb. I:1968/1970 (1971) 175.

[10] Report of Committee of the Whole I relating to the draft convention on the International Sale of Goods, (A/32/17, annex I) paras. 438–439, reprinted in: UNCITRAL Yb. VIII:1977 (1978) 56.

Uniform Law did not intend this result[11]. In a subsequent comment Nicholas contrasted the Anglo-American concept of "warranty" as a guarantee of fact as to which impossibility is irrelevant with the German law treatment of the promise to deliver goods of a particular quality as an aspect of the obligation to perform. He therefore feared that allowing a seller to show that defects were beyond his control would reintroduce the concept of fault[12]. John Honnold has echoed this fear[13]. The drafting history, however, is ambivalent[14]. At the diplomatic conference the objection was lost in confused debate about the standards for exemption when the failure to perform is due to the act or failure to act of a third party[15].

There was less discussion about whether a party should be exempt in cases of economic hardship. As already noted, art. 74 of ULIS (Uniform Law on the International Sale of Goods) was criticized because it might be read to provide for exemption in such cases. Nicholas also observed that exemption because performance has become unexpectedly onerous is "out of place" in a sales law[16]. At the time it reviewed the text that became art. 79, the Commission considered a proposed new article that would allow a party faced with events that created "excessive difficulties" or "threatened either party with considerable damage" to claim amendment of the contract or its avoidance[17]. The Commission's report sets out the arguments in support of the proposal but concludes laconically that it was not "retained". The proposal did not reappear.

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[11] Text of comments and proposals of representatives on the revised text of a uniform law on the international sale of goods as approved for further consideration by the Working Group at its first five sessions (A/CN.9/100, Annex II), reprinted in: UNCITRAL Yb. VI:1975 (1976) 87.

[12] *Nicholas* (supra n. 4) para. 5.02[2].

[13] *Honnold*, Uniform Law for International Sales under the 1980 United Nations convention[3] (Deventer 1999) paras. 423.3, 427.

[14] A proposed amendment was supported in the Commission because it would "lead to the desirable conclusion that it would prevent exemption from liability to supply conforming goods" but other delegates stated that such an exemption should be available in appropriate cases and the proposed amendment was not adopted. Report of Committee of the Whole I relating to the Draft Convention on the International Sale of Goods (supra n. 10) para. 440. See generally *Krüger*, Modifizierte Erfolgshaftung im UN-Kaufrecht, Die Haftungsbefreiung bei Lieferung vertragswidriger Ware gemäß Art. 79 CISG (1999).

[15] For general debate on the distinction between suppliers and sub-contractors, see First Committee Deliberations, 27th meeting, paras. 21–51, in: Official Records (supra n. 1) at pp. 378–381; 32rd meeting, paras. 66–74: ibid. at pp. 408–412; 33rd meeting, paras. 1–37: ibid. at pp. 410–412. For the interventions of Honnold and Nicholas, see 33rd meeting, para. 11 (*Honnold*) and para. 14 (*Nicholas*): ibid. at pp. 410–411.

[16] Progress report of the Working Group on the International Sale of Goods on the work of its fifth session (A/CN.9/87, Annex III) (supra n. 7) 66.

[17] Report of Committee of the Whole I relating to the draft Convention on the International Sale of Goods (supra n. 10) 57 (paras. 458–460).

II. Attributes of art. 79 decisions

The Internet has made uniform law research significantly easier. In the case of decisions of courts and arbitral tribunals, researchers have the advantage of three databases specializing in the Sales Convention and numerous websites collecting national decisions. The CLOUT database administered by UNCITRAL provides abstracts of these decisions in the six United Nations languages and, on request, the Secretariat supplies copies from of the full decision in the original language[18]. The UNILEX database maintained by Michael J. Bonell's Centre for Comparative and Foreign Law Studies also identifies relevant decisions, provides English-language abstracts, and frequently reproduces the decisions in the original language[19]. The Pace Law School website identifies relevant decisions, reproduces CLOUT abstracts, provides a link to UNILEX abstracts, and reproduces English-language translations of the full opinion if available[20]. The original language text of national court decisions are found on official and unofficial websites for western European jurisdictions[21].

As of 1. 12. 2003, a search of the Pace website identified 67 decisions citing or construing art. 79. These decisions include 13 indexed as art. 79 cases in the CLOUT database and 19 cases indexed as such in the UNILEX database. The additional decisions on the Internet database include more recent cases, cases only tangentially related to art. 79, and several cases erroneously identified. The texts of more than 60 per cent of the identified decisions were found in their original language on the Internet. If, as planned, decisions of the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry are posted to the Internet, over 80 per cent would have been available on the Internet.

The barrier of language has also been overcome in many cases. Approximately 60 per cent of all decisions have been translated into the English language by the Queen Mary Case Translation Programme and posted on the Pace website. Abstracts are available in the English language in over 30 per cent of the cases and those abstracts prepared for CLOUT are also available in the other five United Nations official languages.

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[18] The CLOUT (Case Law on UNCITRAL Texts) abstracts are published in paper form by the United Nations Commission and on the Internet at <http://www.uncitral.org>.

[19] The UNILEX database is published in paper form by Transnational Publishers and on the Internet at <http://www.unilex.info>.

[20] The Pace website is published on the Internet at <http://www.cisg.law.pace.edu>.

[21] See, e.g., the following Internet sites: <http://witz.jura.uni-sb.de/CISG/> (France); http://www.uc3m.es/CISG/> (Spain); <http://www.cisg-online.ch>. The last website continues the pioneering work of the University of Freiburg and includes many cases from jurisdictions other than Switzerland.

With the exception of a decision from China and one from Israel, the reported decisions are from fora in western Europe, eastern Europe and the Russian Federation. Slightly more than half are from courts in western Europe, including Austria. More than one half of the decisions are from only two jurisdictions, 19 from the Russian Federation and 16 from Germany. Six decisions are arbitral awards handed down under the auspices of the International Chamber of Commerce. No other jurisdiction has more than four decisions: Austria, Italy and Switzerland each have four decisions, while Belgium and Bulgaria each have three.

Virtually all the parties to the cases come from the same jurisdictions. None of the parties from eastern Europe and the Russian Federation is a party to cases in western European courts, while some of the parties before the east European and Russian tribunals are from western Europe, mostly Germany and Switzerland. Several parties have their places of business in common law countries – two from the United Kingdom, one from Canada – and a handful of others are located in such disparate countries as Chile, Egypt, Israel, Singapore and China.

Overall sellers made only slightly more claims of exemption than buyers did but there were significant regional variations. In Germany virtually all the claims were made by the seller, while in the Russian Federation buyers made over 50 percent of the claims – no doubt reflecting the financial upheavals in the transition from a centrally-planned socialist state following the events of 1989. Sellers have claimed exemption in the following cases: government action[22], changes in market prices[23], failure due to suppliers or subcontractors[24],

[22] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 6.6. 2000, Praktika meždunarodnogo kommerčeskogo arbitražnogo suda [Practice of the International Commercial Arbitration Court], ed.: *Rozenberg* (1999–2000) No. 57 (cited as Praktika MKAS) (increased taxes); Rechtbank (Rb.) 's-Hertogenbosch 2.10. 1998 *(Malaysia Dairy Industries Pte. Ltd.* v. *Dairex Holland BV)*, Nederlands Internationaal Privaatrecht (Ned. IPR) 17 (1999) 81 (food safety regulations); Bulgarian Chamber of Commerce and Industry 24.4. 1996, UNILEX(prohibition of exports)

[23] Oberlandesgericht (OLG) Hamburg 4.7. 1997, UNILEX (heavy rainfalls reduced production of tomatoes); 28.2. 1997, Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts (IPRspr.) 1997 No. 176; CLOUT case No. 277 (price trebled in speculative market). See also, Tribunale Civile (Trib. civ.) di Monza 14.1. 1993 *(Nuova Fucinati S.p.A.* v. *Fondmetal International A.B.)*, Giurisprudenza italiana (Giur. it.) 1994 I, 146; CLOUT case No. 54; ICC International Court of Arbitration 26.8. 1989, Arbitral award No. 6281, Yearbook Commercial Arbitration (Yb. Com. Arbitr.) XV (1990) 96; CLOUT case No. 102 (CISG not governing law).

[24] Bundesgerichtshof (BGH) 24.3. 1999, NJW 1999, 2440; CLOUT case No. 271 (supplier manufactured or supplied a defective product); Tribunal de commerce (Trib. com.) de Besançon 19.1. 1998 *(Flippe Christian* v. *SARL Donet Sport Collections)*, UNILEX (supplier manufactured or supplied a defective product); OLG Hamburg 28.2. 1997 (supra n. 23) (failure to receive goods from supplier); Schiedsgericht der Handelskammer Hamburg 21.3. 1996, NJW 1996, 3229; IPRspr. 1996 No. 212a; CLOUT case No. 166 (sup-

strike[25], inability to determine that the car sold had been stolen[26]. Buyers have made analogous claims: government action[27], changes in the market[28], currency revaluation[29], failure due to intermediaries[30], payment of price stolen from foreign bank transmitting the money[31], delay in taking delivery because of accident[32], problems with storage of goods[33], and delay in construction of plant in which purchased printer was to be installed[34].

With few exceptions, the sales contracts in these cases were concluded by parties in one-time or short-term relationships. The transactions involved relatively small amounts of money. The goods sold included raw materials (coal; ferrochrome; iron molybdenum; chemicals), construction materials (steel; construction panels; dividing walls; steel ropes), finished industrial

plier's financial and personal difficulties); (Austrian) Oberster Gerichtshof (OGH) 6.2. 1996, ZRvgl. 1996, 248; CLOUT case No. 176 (sale subject to supplier's prohibition on the export of the goods sold to a particular jurisdiction); Landgericht (LG) Ellwangen 21.8. 1995, CISG online No. 279; UNILEX (supplier manufactured or supplied a defective product); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 16.3. 1995, Praktika MKAS (1997) No. 24; CLOUT case No. 140 (emergency stoppage of production by supplier).

[25] Bulgarian Chamber of Commerce and Industry 24.4. 1996 (supra n. 22).

[26] LG Freiburg 22.8. 2002, UNILEX.

[27] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 11.6. 1997, CLOUT case No. 464; Arbitration Court of the Chamber of Commerce and Industry of Budapest 10.12. 1996, CLOUT case No. 163 (United Nations authorized trade embargo); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 15.5. 1995, Praktika MKAS (supra n. 22) No. 38, p. 108 (government regulation of foreign currency payments); ICC International Court of Arbitration, Arbitral award No. 7197, Schweizerische Zeitschrift für internationales und europäisches Recht (SZIER) 1996, 57; CLOUT case No. 104 (suspension of the payment of foreign debts).

[28] Cour d'appel Colmar 12.6. 2001 *(Romany AG* v. *SARL Behr France)*, CLOUT case No. 480 (change in demand of company for whom the goods were purchased); Bulgarian Chamber of Commerce and Industry 12.2. 1998 (unreported) (decrease of trade volume); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 11.6. 1997 (previous note) (supply exceeded demand for the goods purchased); Rb. van koophandel Hasselt 2.5. 1995 *(Vital Berry Marketing NV* v. *Dira-Frost)*, UNILEX (significant decline of market price).

[29] Bulgarian Chamber of Commerce and Industry 12.2. 1998 (previous note).

[30] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 17.10. 1995, CLOUT case No. 142 (failure of buyer's bank to make payment because insufficient freely-convertible funds in buyer's account); Amtsgericht (AG) Alsfeld 12.5. 1995, CLOUT case No. 410 (failure of agent to transmit payment).

[31] The High Arbitration Court of the Russian Federation, Information Letter No. 2, 16.2. 1998, para. 4.

[32] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 10.2. 1996, UNILEX.

[33] Bulgarian Chamber of Commerce and Industry 12.2. 1998 (supra n. 28).

[34] Corte di appello di Milano 11.12. 1998 *(Biellomi Castello S.p.A.* v. *EGO S.A.)*, UNILEX.

goods (textile sizing machine; diffractameter, printer device), agricultural products or materials used in agriculture (cotton; strawberries; onions; paprika; pork; butter; tomato concentrate; caviar; powdered milk; vine wax; fertilizer), and products to be sold to consumers (clothes; judo suits; art books; hearing aids; shoes; automobiles; caviar; flagstones). Questions about consumer goods were almost exclusively involved in disputes before western European courts, but otherwise the other classes of goods were heard in all fora.

These statistics are suggestive but should be read with caution. They are incomplete because not every decision identifies the nationality of the parties, the goods involved or details of the transaction. More importantly, the decisions include opinions that discuss art. 79 in detail, others that merely state that the conditions of art. 79 have not been satisfied[35],and some that refer to the article in a general statement about the remedial principles of the Convention[36]. In addition, several decisions cite the reference to the burden of proof in para. (1) ("A party is not liable ... if he proves that ...") as evidence of a general principle that a party making a claim or defense must prove the claim or defense[37]. A decision of the Russian Constitutional Court has even quoted art. 79(1) as evidence that international treaties to which the Russian Federation was a party enforce a party's liability strictly without the need to show fault unless that party shows it is exempt[38].

Nevertheless, several conclusions can be drawn from this survey of the reported decisions. First, in most jurisdictions there are insufficient decisions by the courts to assess the extent to which they use national law concepts and principles when construing art. 79. Second, in the absence of decisions by common law courts it is not possible to assess whether there is a more general difference in approach to exemptions in common law and civil law jurisdictions.

[35] See, e.g., the following decisions of the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 11.5. 1997; 13.5. 1997, UNILEX.

[36] OGH 29.6. 1999, UNILEX. See also Handelsgericht (HG) Zürich 26.4. 1995, SZIER 1996, 51; CLOUT case No. 196.

[37] See Trib. Pavia 29.12. 1999 *(Tessile 21 S.r.l.* v. *Ixela S.A.)*, CLOUT case No. 380; Italy: Trib. Vigevano 12.7. 2000 *(Rheinland Versicherungen* v. *S.r.l. Attarex and Allianz Subalpina s.p.a.)*, Guirisprudenza italiana (Giur. it.) 2001, 280; CLOUT case No. 378. See also OLG München 8.3. 1995, RIW 1996, 854; IPRspr. 1995 No. 187; CLOUT case No. 134; ICC International Court of Arbitration 26.3. 1993, Arbitral award No. 6653, Clunet 1993, 1040; SZIER 1996, 56; CLOUT case No. 103.

[38] Constitutional Court of the Russian Federation, Resolution No. 7-P, 27.4. 2001 (denying challenge to customs regulations that held enterprises responsible unless they showed they were without fault).

III. The art. 79 decisions

The following analysis focuses on three sets of decisions: those that have granted exemptions, those that have considered whether a seller of nonconforming goods may claim exemption under art. 79, and those that have considered whether economic hardship is a ground for exemption under art. 79. These decisions are analyzed because they are the most likely to reveal divergence in the approaches of judges and arbitrators.

1. Decisions exempting liability

There is little evidence that the principal criticism of the 1964 Uniform Act – that "a party could be too readily excused from performing his contrac" – is also applicable to the 1980 Convention. Five decisions have granted a party exemption from liability. Each comes from a different jurisdiction (Germany, France, Bulgaria, Hungary, and the Russian Federation) and all other decisions from each of the jurisdictions deny exemptions. In no jurisdiction, in other words, is there a trend to grant exemptions readily. Nor do most of the decisions establish precedents in the sense that they should be followed in order to maintain uniform interpretation of the Convention as directed by art. 7(1).

The German decision is of little significance. The German Local Court of Charlottenburg stated that a German buyer was not liable for damages arising for its delayed payment of the price when the Italian seller was unwilling to take back defective shoes[39]. On appeal the Regional Court Berlin affirmed the decision on the ground that the buyer had a right under the circumstances to suspend payment under art. 71[40]. The appellate opinion did not mention art. 79 at all.

The French decision is also that of the lowest court but it implicitly raises more significant issues. The Commercial Tribunal of Besançon reduced the amount a Swiss buyer could recover from a French seller of sweat suits that shrank excessively on washing[41]. The Court ruled that the manufacturer of the sweat suits who had supplied the suits to the French seller's supplier was beyond the seller's control and he was entitled, in the absence of bad faith on his part, to exemption under art. 79. As a consequence the Tribunal ordered the seller to return 35 per cent of the price to the buyer. The tribunal does not explain how it calculated the reduction but it is apparent that it is trying to do rough and ready justice. In addition to its reference to art. 79, the tribunal

[39] AG Charlottenburg 4. 5. 1994, UNILEX.
[40] LG Berlin 15. 9. 1994, UNILEX.
[41] Trib. com. Besançon 19. 1. 1998 (supra n. 24).

mentions, for example, that the buyer had failed to establish that all the suits were defective and that the buyer had made a profit on the resale of some of them.

The French tribunal's failure to analyze art. 79 more closely, however, reduces its value as a precedent. The tribunal assumes without discussion that a seller can be exempt if he is unable to deliver conforming goods – a matter about which there has been considerable debate as noted earlier and further elaborated below. It also does not consider whether the manufacturer of the sweat suits was engaged to perform part of the seller's obligations (or the seller's supplier) within the meaning of para. (2) with the consequent necessity to show that each of them satisfied the conditions of para. (1). The justification for the tribunal's reduction of the price is itself ambiguous. If the seller truly was exempt from liability for damages, then he would not have to pay damages at all. The tribunal may, however, think of the remedy as a reduction of price ("actio quanti minoris") which is preserved by para. (5) of art. 79. But if this is the tribunal's reasoning it fails to mention art. 50 of the Convention which adopts a very explicit formula that requires some attention to the calculation of the reduction. Finally, of course, the Court mentions that the seller had not acted in bad faith – a condition not mentioned explicitly in art. 79 but one found in art. 1147 of the French Code civil. This reference is the most overt suggestion in the five cases of a court implicitly interpreting art. 79 in the light of national law[42].

The Bulgarian decision, which is available only in an English-language translation, is so ambiguous that it too is problematic. The arbitration tribunal of the Bulgarian Chamber of Commerce relieved a buyer from the payment of damages for the delay in the return to the seller of the railway cars used to carry the goods[43]. Assuming arguendo that a buyer's obligation to return railway cars in which the goods are carried is governed by the Sales Convention and that the buyer is obliged to ensure that the cars promptly reach the seller, the opinion itself insists at several points that the seller had failed to establish that the buyer had breached a contract – in which case there would be no need for an exemption. The translation implies that the buyer is "deemed" to have duly returned the railway cars because the seller's failure to notify the buyer that it had not received back the cars meant that the buyer could make no claim against the carrier. Perhaps the Court reasons that earlier notice by the seller would have limited the damages for delay because the carrier would have instituted a search earlier and may not be obligated to do so once the prescription period elapses. If so, art. 80 ("A party may not rely on a failure of

[42] The Court does not, however, refer to the irrebuttable presumption that a merchant seller knows of defects in the goods he sells for the purposes of art. 1645 Code civil.

[43] Bulgarian Chamber of Commerce and Industry 19.3.2001, UNILEX.

the other party to perform, to the extent that such failure was caused by the first party's act or omission") would appear to be more relevant than art. 79.

By contrast the reasoning of a Hungarian tribunal sets out a clear case for a temporary exemption but provides a problematic analysis of the consequences of the exemption. The tribunal exempted a Hungarian buyer of caviar from the payment of damages for delay in payment of the price to a Yugoslav seller because economic sanctions imposed by Hungary in accordance with a United Nations resolution barred the buyer from making payment[44]. The government law implementing the embargo of trade with Yugoslavia is a traditional example of an unanticipated impediment beyond the buyer's control which the buyer could not avoid or overcome. The conditions of para. (1) therefore appear to have been met and the buyer was exempt from the payment of damages during the temporary impediment. The decision, however, awards interest only from the date on which the embargo ceased. Without reference to art. 78, the tribunal reasons that the Convention does not cover the issue of whether interest is due for delay and therefore applies Yugoslav law as the applicable law. Article 78, however, expressly entitles a seller to interest on the unpaid price and only leaves unanswered the issue of the rate of that interest. Moreover, under the Convention this right to interest is not a form of damages as art. 78 itself recognizes when it states that it does not prejudice any claim to damages under the general damage formula of art. 74. As a consequence, para. (5) of art. 79 preserves the seller's claim to interest under art. 78 notwithstanding the exemption from the payment of damages.

The fifth case is notable because the party entitled to exemption was not before the tribunal. In this case an arbitration court for the Moscow Region set aside a Customs Department fine of a Russian enterprise that had failed to deposit hard currency payments from its Ukrainian buyer in an authorized Russian bank within the prescribed time. The Court found that the Ukrainian buyer had delayed payment because the Ukrainian government had postponed a tender auction on numerous occasions. This delay, said the Court, was an unanticipated impediment beyond the Ukrainian buyer's control within the meaning of art. 79(1). The Court concluded that the Russian seller, not being at fault, was consequently excused from payment of the fine[45]. The decision implicitly suggests that if the Ukrainian buyer had not been exempt the Russian seller would have been subject to the fine. This may have been the intended implication because it encourages Russian sellers to

[44] Arbitration Court of the Chamber of Commerce and Industry of Budapest 10. 12. 1996 (supra n. 27).

[45] Arbitration Court for the Moscow Region 4. 2. 2002 *(Rimpi Ltd* v. *Moscow Northern Customs Department)*, UNILEX.

assert promptly any claims to payment of foreign currency but the decision itself does not state this policy explicitly.

Two other decisions have been indexed as art. 79 decisions but they are better explained as cases where the aggrieved party was unable to establish that the other party had failed to perform any of its obligations. In the first case[46] a Russian buyer had paid its German seller for 300 tons of table butter but was unable to take delivery because the butter did not satisfy government food safety standards. When sued by the Russian buyer, the German seller counterclaimed for damages caused by the buyer's failure to take delivery. The buyer had a certificate from a Russian institute certifying that the butter did not satisfy government standards. Although the seller disputed this finding with expert opinions of its own, the Russian tribunal ruled that the seller had not established that the buyer had breached the contract. In the second case[47] an Italian printer handed over to a carrier the art catalogues bought by a Swiss art gallery for an exhibit. When the carrier delivered the catalogues too late for the opening of the exhibit, the Swiss buyer claimed damages from the seller on the ground that the seller was responsible under para. (2) of art. 79. The Swiss Court, however, ruled that that paragraph was not relevant because the seller had fulfilled its obligations to deliver the catalogues by turning them over to the carrier and the carrier therefore was not carrying out any of the seller's obligations. Implicit in this ruling is the conclusion that the whole of art. 79 was not relevant.

2. Exemption for nonconforming goods

Critics who questioned whether delivery of defective goods may ever be an impediment should be cautiously reassured by several important German decisions addressing this issue.

The principal decision is the *black vine wax* decision of the Federal Supreme Court of Germany[48]. Although the Court expressly left open the issue of whether a seller could ever be exempt when delivering defective goods, the Court emphasized the seller's obligation to deliver and the irrelevance of the seller's fault[49]. The seller in that case agreed to supply vine wax to be used by the buyer on his own grafts of grape vines and to resell to others. The seller acquired the wax from his supplier, which manufactured it with raw materials

[46] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 22. 1. 1997, UNILEX.

[47] HG Zürich 10. 2. 1999, SZIER 2000, 111; CLOUT case No. 331. See *Schlechtriem (-Stoll)*, Kommentar zum Einheitlichen UN-Kaufrecht[3] (2000) art. 79 para. 13.

[48] BGH 24. 3. 1999 (supra n. 24), JZ 1999, 794 with note *Schlechtriem* (reproduced in English-language translation at <http://www.cisg.law.pace.edu/cases/990324g1.html>.

[49] BGH 24. 3. 1999 (supra n. 24).

supplied in part from a Hungarian source he had not used in previous years. The seller forwarded the wax from his supplier without opening the package. The wax was supposed to protect the vines from drying out and reduce the risk of infection but did not do so and the buyer made a claim for its losses. The Regional Appeal Court of Zweibrücken stated that, while in principle a seller could claim exemption when delivering nonconforming goods, in this case the seller was liable because he had failed to inspect the wax before sending it to the buyer[50]. The Federal Supreme Court explicitly left open the issue of principle and affirmed the seller's liability but on different reasoning. Unless the parties agree otherwise, as they did not do in this case, the seller undertakes the risk of acquiring conforming goods when he does not manufacture them himself. The seller's liability is one of guarantee and the failure of the seller to inspect is therefore not relevant[51].

Even if the *black vine wax* decision does not formally resolve whether a seller may ever be exempt for delivering defective goods, it reduces the number of possible cases to a few marginal ones. A later decision of the German Supreme Court implicitly recognizes that exemption may be available in principle but stresses the extremely heavy burden of proof that the seller faces[52]. In that case, the buyer of powdered milk had found the milk spoiled by lipase. The seller was unable to establish whether the lipase was introduced by his whole milk suppliers or during the seller's processing of the milk but he argued that inactive lipase could not have been detected by application of current testing techniques. To be entitled to an exemption under art. 79 the seller would have had to prove not only that properly administered testing techniques would not have detected lipase but that introduction of the lipase during manufacture of the powdered milk was beyond his control.

3. Economic hardship and the exclusivity of art. 79

Article 79(1) does not expressly exclude the possibility of economic hardship as an impediment that exempts a party's failure to perform. As noted earlier, the Commission rejected a proposed separate article that addressed hardship but in the absence of reported reasons for this rejection it is possible that the delegates acted on the assumption that the text that became art. 79 addressed the issue with appropriate, if limited, consequences. In jurisdictions that recognize economic hardship, such as Germany ("Wegfall der Geschäftsgrundlage") and Italy ("eccessiva onerosità sopravvenuta"), one might expect

[50] OLG Zweibrücken 31.3. 1998, CLOUT case No. 272.

[51] The Court's reasoning implicitly rejects the reasoning of LG Ellwangen 21.8. 1995 (supra n. 24); UNILEX (Spanish seller of paprika grown by its supplier could have inspected paprika before delivering it to German buyer).

[52] BGH 9.1. 2002, UNILEX.

judges either to read "impediment" in art. 79 to include economic hardship or to conclude that there was a gap within the Convention that is be filled by national law in accordance with art. 7(2).

No court, whether sitting in former socialist States or in west European States, has exempted a party from liability on the grounds of economic hardship[53]. Several courts have rejected the possibility that negative market developments constitute an impediment within art. 79(1). In one case, the Bulgarian tribunal ruled that the Bulgarian buyer, who had purchased steel rope from a Russian seller but had asked the seller not to ship the rope because the construction industry was depressed, was not exempt because of negative market developments. As the tribunal explained, the possibility of market fluctuations was a commercial risk that the buyer could reasonably be expected to take into account when he concluded the contract and did not constitute impossibility or force majeure[54]. In another case, a Russian seller sued his German buyer for failure to take over the goods. The buyer had asked the seller not to ship the goods because the supply of the goods on the west European market exceeded demand but the seller had shipped the goods anyway. The Russian tribunal rejected the buyer's request for an exemption, stating that no possible change in the market conditions could excuse the buyer from taking over the goods from the seller[55].

The decisions from west European courts differ, if at all, in being less categorical about whether market fluctuations could ever be an impediment. A Belgian buyer of strawberries who had asked its Chilean seller through a mediator to delay the delivery because of a substantial drop in the market price for strawberries was not entitled to an exemption. The Belgian Court explained that the buyer could have foreseen the possibility of fluctuations in the market price because such fluctuations are a normal risk of commercial activities[56]. A German court also rejected the claim of a French seller of tomato paste that it was exempted from the payment of damages because heavy rainfalls in France had led to an increase in the price of tomatoes. The Court stated that the seller had not established that no tomatoes were available, implying that if they had not been available on the market there might be an impediment[57]. This implication is stated expressly with respect to generic goods

[53] See also ICC International Court of Arbitration 26. 8. 1989, Arbitral award No. 6281, Yb. Com. Arbitr. XV (1990) 96; CLOUT case No. 102 (increase in market price for steel not sudden or substantial and therefore well within the customary margin so that Yugoslav law did not exempt the seller; suggestion that result would be the same if ULIS and CISG governed).

[54] Bulgarian Chamber of Commerce and Industry 12. 2. 1998 (supra n. 28).

[55] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 11. 6. 1997 (supra n. 27).

[56] Rb. van koophandel Hasselt 2. 5. 1995 (supra N. 28).

[57] OLG Hamburg 4. 7. 1997 (supra n. 23).

("Gattungskauf") by another German court, which declined to exempt a German seller of iron-molybdenum whose Chinese supplier failed to deliver the goods. The market price for iron-molybdenum had more than trebled and the English buyer had refused to renegotiate the purchase price. Noting that the market was a speculative one, the Court concluded that the price increase did not pass over the limits of sacrifice ("äußerste Opfergrenze") – suggesting that there might be circumstances where these limits might be surpassed[58].

The French Court of Appeals of Colmar also considered the circumstances of the particular contract when assessing the parties' allocation of risks for the purpose of determining whether a buyer was exempt from liability. The French buyer had concluded a long-term contract with a Swiss seller to supply crankcases that the buyer incorporated into automobile air conditioners he sold to a French car manufacturer. When the car manufacturer declined to order the air conditioners because of a downturn in the market for automobiles, the French buyer failed to take the minimum number of crankcases he had ordered from the Swiss supplier. The Court of Appeals ruled that the French buyer could have anticipated the possibility that the car manufacturer might not buy the finished air conditioners and could have negotiated a renegotiation clause with the Swiss seller. Having failed to include such a clause, the French buyer had to bear the risk of his failure to perform[59].

No court has adopted the alternative of finding a gap in the Convention and then filling that gap with national legal rules on hardship. A German court states briefly that art. 79 is exhaustive and therefore it is not appropriate to apply the national law doctrine of "Wegfall der Geschäftsgrundlage"[60]. Several Italian courts elaborate their reasoning. In a decision known as much for the court's conclusion that the Convention did not govern the contract, the District Court of Monza stated that even if the Convention had governed the contract an Italian seller of ferrochrome could not avoid the contract because of the increase in the market price (approximately 30 per cent between conclusion of the contract and the time for delivery). The Court focused on the remedy requested: neither the avoidance provisions nor art. 79 contemplates the right to avoid the contract under these circumstances. More importantly, the Court concluded that the Convention's remedies were exhaustive because art. 4 did not exclude the issue from the scope of the Convention[61].

A decision of the Appellate Court of Milan also concludes that the Convention supersedes national law although it goes on to point out that the

[58] OLG Hamburg 28. 2. 1997 (supra n. 23).

[59] Cour d'appel Colmar 12. 6. 2001 (supra n. 28), reversing Tribunal de grande instance (Trib.gr.inst.) de Colmar 18. 12. 1997.

[60] LG Aachen 14. 5. 1993, IPRspr. 1993 No. 141; CLOUT case No. 47.

[61] Trib. civ. Monza 14. 1. 1993 (supra n. 23).

exemption sought was not available under Italian law. A French buyer of a printing device failed to take delivery and pay for the device because there were delays in the construction of the building in which the device was to be placed. When sued by the Italian seller, the buyer alleged that the delay was an unanticipated impediment and that the parties had agreed to a delay in the delivery. The lower court found that the seller had breached art. 1375 of the Italian Civil Code, which requires good faith in the performance of a contract. When the seller appealed, the Court of Appeal ruled that the contract was governed by the Convention rather than national law and that the buyer was not entitled to the remedy he sought under the Convention. The Court goes on to note that the buyer was not entitled to the remedy sought under Italian law and that art. 1375 was displaced by the independent concept of good faith in art. 7(1) of the Convention[62].

IV. Conclusion

To date the reported court decisions and arbitral awards construing art. 79 do not bear out the fears that judges and arbitrators will refer to similar concepts in their national laws with resulting divergent interpretations and outcomes. The few decisions that might be said to exempt a party from damages under art. 79 are marginal. Most are from the lowest courts in jurisdictions where the higher courts have read art. 79 strictly. The fear that extending the exemption to delivery of nonconforming goods would reintroduce fault-based liability has been allayed by the decisions of the German Federal Supreme Court. The related fear that courts or tribunals might extend the art. 79 exemption to cases of economic hardship has also not been borne out by the reported decisions, although to be sure there have been no cases of extreme hardship. While this assessment of the present body of case law is reassuring it must be tempered by the recognition that there are insufficient reported decisions to draw more than tentative conclusions.

[62] Corte di appello di Milano 11. 12. 1998 (supra n. 34).