NOMINATING *MANFRED FORBERICH*: THE WORST CISG DECISION IN 25 YEARS?

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1 *INTRODUCTION*

Signed in Vienna on the eleventh day of April, 1980, the UN Sales Convention (CISG)[1] is now entering its 25th year. Given the widespread adoption and application of the Sales Convention, this Silver Anniversary will be celebrated as UNCITRAL's greatest success story[2] in Vienna,[3] and also at other gatherings of CISG aficionados around the world.[4]

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1 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 19 I.L.M. 668 (1980) [hereinafter 'CISG' or 'Convention'] (entered into force on Jan. 1., 1988), available in 15 U.S.C.A. app. at 49 (West Supp. 1996), 52 Fed. Reg. 6262-80, 7737 (1987), U.N. DOC. A/CONF. 97/18 (1980).

2 The (also highly successful) 1958 New York Convention (regarding the recognition and enforcement of foreign arbitral awards) was prepared by the United Nations prior to the existence of UNCITRAL, although the promotion of this Convention later became an integral part of the Commission's program of work.

3 See as regards UNCITRAL's 'Celebrating Success' Conference in Vienna, March 15 - 18, 2005, details available at: <http://www.uncitral.org/english/news/success.pdf>.

4 A Symposium celebrating the 25th Anniversary of the CISG will be held at the Center for International Legal Education, University of Pittsburgh School of Law, November 4-5, 2005.

A key part of these celebrations will focus on UNCITRAL's new *CISG Case Digest*[5] and on the numerous CISG decisions which are the focal point of that work.[6] The academics who participate in these case law discussions will surely address what they consider to be the 'best' CISG decisions and precedents, but there will also be occasion to highlight the 'worst', especially since the *Digest* itself is a (UN) politically correct and neutral document, totally devoid of praise and criticism of decisions rendered by national courts.[7]

Of course, we would hardly expect the organisers of these success-celebrations to present 'Oscars' for the best CISG cases, let alone 'Razzies' for the worst,[8] but in the present (academic) context, at least, we see good reason to single out *Raw Materials Inc. v. Manfred Forberich GmbH*[9] as a case which might vie for inclusion in the 'Worst (CISG) Case' group.

Working independently, we have previously outlined certain criteria for assessing the 'precedential value' of individual CISG decisions rendered by national courts;[10] in Section 2 below we combine our criteria in a short-list of five points. On that basis, we will explain why we would nominate the recent *Forberich* decision for the dubious worse-case distinction (Section 3). We will argue for the nomination even recognising that competition (at the bottom of the CISG barrel) is stiff, and that *Forberich* is no 'shoo-in' if we consider how the case might have been decided if better (more persuasive) reasoning had been applied (Section 4). Lastly, we will indicate how the more serious aspects of our (tongue-in-cheek) exercise might be of relevance for legal educators and the future practice of CISG law in the courts.

2 *ASSESSING THE QUALITY OF CISG DECISIONS*

Article 7(1) CISG requires those interpreting the Convention to have 'regard' for 'its international character and [...] the need to promote uniformity in its application'. It is

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5 Available online on the UNCITRAL website, <http://www.uncitral.org> (click the 'Case Law (CLOUT)' button, then click the link labeled 'NEW: UNCITRAL Digest of case law on the United Nations Convention on the International Sales of Goods'). A draft of the Digest is available in hard copy in *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (Franco Ferrari, Harry Flechtner and Ronald A. Brand, eds., Sellier, 2004).

6 Available online on the UNCITRAL website, <http://www.uncitral.org> (click the 'Case Law (CLOUT)' button).

7 See Sekolec, J., 'Digest of Case Law on the UN Sales Convention: The Combined Wisdom of Judges and Arbitrators Promoting Uniform Interpretation of the Convention', *The Draft UNCITRAL Digest and Beyond* (Ferrari, Flechtner & Brand (eds.), *supra* fn. 5, at p. 14.

8 Compare, in the anti-Hollywood context, <http://www.razzies.com/asp/directory/XcDirectory.asp>.

9 2004 WL 1535839 (U.S. District Court for the Northern District of Illinois, July 7, 2004).

10 See Lookofsky, J., 'CISG foreign case law: how much regard should we have?' in *The Draft UNCITRAL Digest and Beyond*, *supra* fn. 5, at pp. 216 and 218-19; Lookofsky, J., 'Digesting CISG Case Law: How Much Regard Should We Have?', (2004) 8 VJ 181, at p. 187; Flechtner, H.M., 'Recovering Attorneys' Fees as Damages Under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with comments on Zapata Hermanos v. Hearthside Baking', (2002) 22 *Nw. J. Int'l L. & Bus.*121.

now a truism of CISG scholarship that this provision requires judges and arbitrators applying the Convention to take into consideration CISG decisions by other tribunals, particularly 'foreign' tribunals.[11] While there is some uncertainty concerning the binding force that CISG decisions by courts from other jurisdictions should enjoy,[12] the better-reasoned position is that they should have persuasive, but not binding, authority.[13]

The obligation to consult foreign decisions, a novelty for tribunals, raises a number of interesting issues. One of the most is: what is the *appropriate* level of 'regard' for foreign CISG decisions? As has proven to be the case with many CISG matters,[14] on this issue we find ourselves in agreement about the factors to consider in assessing the deference due particular decisions that have applied the CISG. Thus each of us has, independently, identified *the stature of the tribunal* rendering the decision and *the extent to which the decision is in accord with other decisions* as factors that should affect the weight to be accorded a case.[15] Another highly pertinent factor, we agree, is *the persuasive force of the reasoning in the decision*[16] – in particular, *the extent to which the decision itself comports with the mandate of CISG article 7(1) to have regard for the international character of the Convention and the need to promote uniformity in its application and the observance of good faith in international trade.*[17] Finally, we agree that *the apparent soundness of the result of the decision* is a factor that should go into the equation.[18] Because these criteria focus on the respect that a particular CISG decision should command, we will use them to assess whether the *Martin Forberich* decision indeed deserves the title, 'Worst CISG Decision to Date'.

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11 *E.g.*, Lookofsky, J., *Understanding the CISG in the USA: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (2nd ed, 2004), at § 2.9; Flechtner, H.M., 'Recovering Attorneys' Fees', *supra* fn. 10, at pp. 122-23 and authorities cited in fn. 6.

12 See Flechtner, 'Recovering Attorneys' Fees', *supra* note 10, at p. 124.

13 See Lookofsky, 'How much regard should we have?', *supra* fn. 10, at pp. 186, 218; Flechtner, 'Recovering Attorneys' Fees', *supra* fn 10], at p. 124; *UNCITRAL Digest of case law on the United Nations Convention on the International Sales of Goods*, *supra* fn. 5, Art 7, ¶ 4 and decisions cited in fn. 13, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/V04/547/56/PDF/V0454756.pdf?OpenElement> (visited 10 February 2005).

14 See, e.g., Flechtner, H and Lookofsky, J., 'Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal', (2003) 7 *VJ* 93, at p. 94.

15 See Lookofsky, 'How much regard should we have', *supra* fn. 10, at pp. 218-19; Lookofsky, *Digesting CISG Case Law*, *supra* fn. 5; Flechtner, 'Recovering Attorneys' Fees', *supra* fn 10, at pp. 143-44.

16 See Lookofsky, 'How much regard should we have', *supra* fn. 10, at p. 218; Lookofsky, *Digesting CISG Case Law*, *supra* fn. 5; Flechtner, 'Recovering Attorneys' Fees', *supra* fn 10, at p. 141.

17 Flechtner, 'Recovering Attorneys' Fees', *supra* fn. 10, at pp. 145-46.

18 Lookofsky, 'How much regard should we have', *supra* fn. 10, at p. 218; Lookofsky, *Digesting CISG Case Law*, *supra* fn. 5. Flechtner would (tentatively) add another factor: the level of international trade in the jurisdiction of the tribunal rendering the decision. Flechtner, 'Recovering Attorneys' Fees', *supra* fn. 10, at pp. 144-45.

3 *NOMINATING MANFRED FORBERICH*

Given the more than 1,500 CISG cases reported thus far,[19] many of them much-criticised in the burgeoning CISG literature,[20]it might seem audacious to nominate any single CISG case for the 'Worse Case' award. Perhaps – but we nonetheless see good reason to nominate *Raw Materials Inc. v. Manfred Forberich GmbH*[21] because this particular decision by a U.S. federal court, the latest in an unfortunate series of highly *un*persuasive American CISG precedents,[22] seems to represent the very worst example of the 'homeward trend'. This is the tendency of those interpreting the CISG to project the domestic law in which the interpreter was trained (and with which he or she is likely most familiar) onto the international provisions of the Convention.[23] Indulging in the homeward trend, obviously, violates the mandate of Art. 7(1) (which requires that the CISG be interpreted with 'regard' for its international character of for 'the need to promote uniformity in its application') and constitutes a serious – quite possibly *the most* serous – threat to the main purpose of the CISG: progress toward a *uniform* regime of international sales law. In short, *Manfred Forberich* is our nominee as the Worst CISG Case because it represents the most extreme example of what is likely the most dangerous error that tribunals applying the CISG can make.

In making this nomination we should emphasise that we do *not* necessarily view the outcome in *Forberich* (i.e., the court's decision to deny plaintiff's motion for summary judgment)[24] as 'wrong'; indeed, the court might actually have reached the 'right' result.[25] Our 'beef' lies in the *way* the case was decided, since *Forberich* provides a glaring and most disturbing example of how national courts sometimes misuse domestic sales law to interpret and apply a treaty which demands an international interpretation.[26] As is more fully explained below, we think *Forberich* might deserve to win a CISG Silver Anniversary 'Razzie' solely by virtue of its 'achievement' with respect to just one of the factors we described in Section 2 above: its reasoning is completely *unpersuasive* because the court completely ignores, and even aggressively violates, the mandate of Art. 7(1) CISG. It most certainly does not

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19 See <http://cisgw3.law.pace.edu/cisg/text/casecit.html>.

20 For example, a number of U.S. decisions come in for criticism in Flechtner, H.M., 'The CISG in American Courts: The Evolution (and Devolution) of the Methodology of Interpretation', in Ferrari, F (ed), Quo Vadis CISG (Brussels/Paris/Munich, forthcoming, 2005).

21 2004 WL 1535839 (U.S. District Court for the Northern District of Illinois, July 7, 2004).

22 See Flechtner, 'The CISG in American Courts', *supra* fn. 20.

23 Honnold, J., 'General Introduction', in Honnold, J. (ed), *Documentary History of the Uniform Law for International Sales: The studies, deliberations and decisions that led to the 1908 United Nations Convention with Introductions and Explanations* 1, 1 (Kluwer Law and Tax Publishers, Deventer, 1989), hereinafter *Documentary History*. See also Honnold, J., 'The Sales Convention in Action – Uniform International Words: Uniform Application?', (1988) 8 *J.L. & Com.* 207, at p. 208 (noting 'the tendency to think that the words we see [in the text of the CISG] are merely trying, in their awkward way, to state the domestic rule we know so well').

24 See *infra*, text with fn. 27-37.

25 That is, the result might well have been the same if the court had interpreted and applied the CISG correctly: see *infra* Section 4.

26 See generally the discussion *supra* Section 2.

treat the CISG as an international text, and it most certainly does not strive to achieve (international) uniformity in its application. For this reason we believe this trial court decision represents the absolute nadir of CISG interpretation thus far.

The case in question was brought by an American plaintiff-buyer (Raw Materials, Inc.: 'RMI') which had purchased a quantity of used Russian railroad rail from a German seller (Manfred Forberich GmbH: 'MF'). Plaintiff claimed that MF was liable in damages because it had failed to make timely delivery in the United States. RMI moved for summary judgment, but MF defended on *force majeure* grounds, arguing that it was exempted from liability under CISG article 79[27] because its failure to deliver as agreed was due to unexpected adverse weather conditions.[28]

The parties agreed that 'the rail was to be shipped *from the port in St. Petersburg, Russia*'[29] and that MF's obligation under the original (written) contract was to *deliver* the rails at RMI's plant *in Chicago*.[30] The parties disagreed, however, as to the content of the contract as later orally amended[31] – in particular, whether the amended contract required the goods to arrive in the U.S. by the end of December, or whether the goods merely had to be shipped from St. Petersburg by that date.[32] Because the parties agreed that, whatever the delivery date, MF was to *ship from* St. Petersburg, the court directed its discussion of MF's *force majeure* defense to the *possibility* of shipment from that *particular port* and to the *foreseeability* of extreme weather conditions in *that area* at the relevant time.[33]

After noting that the parties agreed the CISG was the applicable law,[34] and that the defendant's *force majeure* defense was governed by Art. 79, the court endorsed the plaintiff's general assertion that caselaw on U.S. domestic sales law (found in Art. 2 of the Uniform Commercial Code ('UCC')) could be used for 'guidance' in applying the

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27 Although the court's Memorandum Opinion does not state directly that RMI sought damages for MF's failure to deliver, RMI asserted that MF 'chose not to ship the rail to RMI so that Forberich could, by subsequently entering into more lucrative contracts with other purchasers, take advantage of the rise in rail prices that occurred after RMI and Forberich had entered their contract'. Footnote 5 of the Opinion. If RMI could prove that assertion, it could recover damages, inter alia, for the difference between the contract price and the market or cover price: see Arts. 75 and 76 CISG.

28 Under the American scheme, found § 2-615 of the Uniform Commercial Code ('UCC'), a seller's failure to deliver by reason of impracticablity is *not a breach*. The direct effect of an exemption under Art. 79 CISG, in contrast, is to exempt the non-performing party from liability (damages). See Lookofsky, *Understanding the CISG in the USA*, *supra* note 11, at § 6.14, fns. 152-154 and accompanying text.

29 See 2004 WL 1535839 at *1 and fn. 1 (emphasis added).

30 See 2004 WL 1535839 at *1.

31 The original written contract did not contain a provision requiring modifications to be in writing and therefore, as the *Forberich* court correctly noted, the oral agreement to modify was sufficient under Art. 29 CISG. See 2004 WL 1535839 at *5 fn. 9.

32 See 2004 WL 1535839 at *4-*5 (section B of the 'Discussion' part of the opinion, under the heading 'Whether the Frozen Port Could Have Prevented Performance').

33 *Ibid.*

34 *Ibid*, at *3. Although the court does not spell out why the CISG is applicable, the reason – presumably – is because the parties' respective places of business were in different CISG Contacting States (Art. 1(1)(a) of the CISG), and because the parties had not agreed to contract out of the Convention (Art. 6).

CISG, e.g., 'where the relevant CISG provisions *track* that [*sic*] of the UCC.'[35] The court declared in particular that caselaw interpreting the UCC's excuse provision (§ 2-615) 'provides guidance for interpreting the CISG's excuse provision since it contains *similar requirements* as those set forth in Article 79.'[36] For these reasons, and emphasising that the *defendant agreed* to plaintiff's argument for this 'domestic-guidance' approach, the Court declared it would 'use as a *guide* caselaw interpreting a similar provision of § 2-615 of the UCC.'[37] That, in fact, was the court's final mention of Art. 79, and of the CISG. No reference is made to foreign CISG case law, CISG commentary, or to any other recognised source of guidance on the CISG. The court then spends several pages analysing U.S. cases applying s. 2-615 UCC before concluding that the plaintiff's summary judgment motion should be dismissed because it might be possible for the defendant, at trial, to establish the elements necessary in order to be exempted from liability for its non-performance.

The court's approach treats the exemption provision of Art. 79 as if it were indistinguishable from U.S. domestic law. Nay, it treats the CISG (which the court expressly found governed the transaction) as irrelevant – as if it were in some unexplained fashion superceded by U.S. domestic law – since the court ignores even the text of Art. 79 CISG, never mind the caselaw and commentary that has developed on the provision. As one of us says elsewhere,

> *Not one word of this discussion would have to be changed if UCC Article 2 had actually been the applicable law. A more flagrant and depressing example of a court ignoring its obligations under CISG article 7(1) and indulging – nay, wallowing in – the homeward trend is hard to imagine. The court's methodology should mean that its analysis will properly be ignored by other courts – both U.S. and foreign – that are called upon to apply CISG article 79.[...] The only good that could come of the Manfred Forberich decision, in this author's view, is if it became an example of what to avoid when interpreting the CISG.*[38]

We are in complete agreement that, simply because of its astonishingly wrong-headed interpretational methodology and its flagrant disregard of the mandate of Art. 7(1), the *Manfred Forberich* decision is due little deference by other courts, both U.S. and foreign, that are called upon to apply CISG article 79 – or, indeed, *any* provision of the CISG. In addition, *Forberich* commands little respect under several other factors we identified in Section 2 as relevant to assessing the deference due a CISG decision. The decision was rendered by a trial court – not a court of high authority in the U.S.

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35 *Ibid.* (emphasis added), quoting *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995).

36 *Ibid.* (emphasis added).

37 *Ibid.* (emphasis added).

38 Flechtner, H.M., 'The CISG in American Courts: The Evolution (and Devolution) of the Methodology of Interpretation', in *Quo Vadis CISG*, *supra* fn. 20.

legal system. And the decision is not in accord with other CISG decisions in its approach: while other U.S. cases have also suggested that cases on U.S. sales law can be used for guidance in interpreting the CISG,[39] none have actually employed the technique to the extreme degree that Forberich does (indeed, most expressly acknowledge (at least) that UCC case law 'is not per se applicable'[40]); cases outside the U.S., furthermore, have not apparently adopted this misguided approach.

We make this (very negative) assessment of *Forberich* notwithstanding the fact that 'apparent soundness of result' is entitled to at least some weight on our own precedential scale, i.e., even though the court might have reached the 'right' result in denying plaintiff's motion for summary judgment.[41] In fact, it seems in this (result-oriented) respect significant that the *undisputed facts* did *not* preclude the possibility that the frozen port in St. Petersburg might actually have 'prevented' the seller from performing its contractual obligation (to ship from that port, and to 'deliver' on time), *nor* did those facts show that the freezing of the port was 'foreseeable' (as claimed by the buyer). Indeed, since we shall now show why a very similar — though hardly 'identical' — set of (inherently elusive) factors might have led to the same result under a 'real' CISG (Article 79) analysis, it seems difficult to maintain that the result reached in Forberich was 'wrong'.

4 *ASSESSING MANFRED FORBERICH UNDER ARTICLE 79*

The CISG provisions collected under the 'Exemptions' heading (Part III, Chapter V., Section I of the CISG, comprising Arts. 79 and 80) deal with problems often discussed in domestic sales law under such labels as impossibility, impracticability, and *force majeure*. As applied to a seller's breach, Art. 79 provides a limited exception to the usual CISG rule, as set forth in Art. 45(1), that liability for damages is "strict".[42] Taken together, Arts. 45(1) and 79 constitute what a Civilian jurist might refer to as the CISG gap-filling 'liability base': they answer the question of whether the injured party is entitled to damages (at all).[43]

Article 79(1) contains the main 'exemption' provision applicable to either party's failure to perform. To determine whether the obligor in *Manfred Forberich* should be entitled to an Art. 79(1) exemption, we note what the court in *Forberich* glaringly failed to acknowledge – that the courts in all Contracting States are bound to 'have

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39 *Schmitz-Werke GmbH v. Rockland Industries, Inc.*, 2002 WL 1357095 (U.S. Ct. App. 4th Cir., 21 June 2002); *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.2d 1024, 1028 (2nd Cir. 1995); Chicago Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp.2d 702, at 709 ff. (N.D. Ill. 2004); *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 2003 WL 21254261 at *4 (U.S.D.C. N.D. Ill., 29 May 2003); *Claudia s.n.c. v. Olivieri Footwear Ltd.*, 1998 WL 164824 at *4 (U.S.D.C.S.D.N.Y., 7 April 1998).

40 *E.g.*, *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.2d 1024, 1028 (2nd Cir. 1995); *Claudia s.n.c. v. Olivieri Footwear Ltd.*, 1998 WL 164824 at *4 (U.S.D.C.S.D.N.Y., 7 April 1998).

41 *I.e.*, had the CISG been properly applied. See generally *infra*, Section 4.

42 *I.e.,*, such that liability is triggered by the obligor's failure to perform, without regard to the reasons or possible 'excuses' therefor. See Lookofsky, *Understanding the CISG in the USA*, *supra* fn. 11, at § 6-14.

43 *If* we find a 'basis' of liability, we then use Arts. 74-77 to *measure* compensation due.

regard' to the international character of the treaty and the need to promote its uniform application.[44]

Applying paragraph 1 of Art. 79 to the situation in *Manfred Forberich*, we see that the seller (MF) should remain liable to perform its delivery obligation *unless it proves* that *four conditions* are fulfilled.[45] First, MF (bearing the burden of proof) must convince the court of the existence of an *impediment* to performance, something that got 'in the [obligor's] way.' The kind of impediments most often alleged as exempting contingencies relate to the seller's obligation to make timely delivery (as in *Manfred Forberich*), although it is certainly possible to conceive of 'impediments' that might impact upon a given seller's obligation to deliver conforming goods.[46] In any event, it seems undeniable that the extreme winter conditions in St. Petersburg qualify as an 'impediment' in the Article 79 sense.[47]

The second condition for relief under Article 79 is that the party seeking an exemption must prove the impediment lies (or at least lay at the time for performance) *beyond his control*. Since, for example, a CISG obligor like MF should always be deemed 'in control' of his/her own business and financial condition in general, internal 'excuses' connected with business operations (poor quality control, etc.) or financial management would never be held 'beyond' that party's control.[48] Conversely, we might expect the buyer (RMI) in *Manfred Forberich* to acknowledge that the impediment to performance alleged in this case — the extreme weather leading to the freezing of the harbor in St. Petersburg — lay 'beyond [MF's] control'.

To this we add the third condition: the non-performing party (MF) must demonstrate that, at the time of the conclusion of the contract, the impediment *could not reasonably have been foreseen* (taken into account). Because nearly all potential impediments to performance — even wars, fires, embargoes and terrorism (let alone late trains and bad weather) — are increasingly 'foreseeable' in the modern commercial environment, this is often the most difficult Art. 79 element to prove.[49] And this seems fair enough: Article 79 is, after all, a gap-filling rule, and the party damaged by the fruition of a foreseeable contingency might have protected himself by a more lenient (express) *force majeure* clause that specifically granted exemption if

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44 Article 7(1) CISG.

45 See generally Lookofsky, 'Fault and No-Fault in Danish, American and International Sales Law: The Reception of the United Nations Sales Convention', (1983) 27 *Scandinavian Studies in Law* 109. Some combine the 'impediment' and 'control' factors, which are listed separately in the text of Art. 79(1), thus reducing the list of conditions to three.

46 Accord Lookofsky, *Fault and No-Fault*, *supra* fn. 45, at 2.4 and 3.3; Stoll in Schlechtriem, P., *Commentary/Kommentar*, Art. 79, Rd.Nr. 12, 45-47. But see Honnold, Uniform Law § 427. Professor Honnold's 'American' view notwithstanding, the decision rendered by the Supreme Court of Germany in 1999 in the 'Vine Wax' case lends clear and convincing support to this more expansive reading of Article 79. See Bundesgerichtshof, 24 March 1999, CLOUT Case 271. See also Schlechtriem, P., *Bundesgerichtshof* (available in English at <http://cisgw3.law.pace.edu/cases/990324g1.html>).

47 See Lookofsky, *Understanding the CISG in the USA*, *supra* fn. 11, at § 6-19.

48 *Accord* Schlechtriem, *Int. UN-Kaufrecht*, Rd.Nr. 289.

49 See para. 5 of *Secretariat Commentary* to Article 65 of the 1978 Draft Convention.

the (foreseeable) impediment occurred.[50] On the other hand, since the CISG foreseeability criterion (arguably) remains a *question of degree*, the fact that the (early winter) weather conditions in St. Petersburg were (as described by MF) the 'worst in 50 years', the district court might — consistently with foreign CISG precedents on the foreseeability issue — classify the impediment in question as 'unforeseeable' at the time of contracting. At least this would be the case if MF (at trial) were able to convince the trier of fact to accept its version of the *Forberich* facts.

Before pursuing that line of (foreseeablily) argument, we note the fourth and final Art. 79(1) exemption-condition, which requires that the non-performing party make reasonable efforts to *avoid or overcome* the impediment in question or its consequences. Since this requirement must be met even in cases where the impediment could *not* reasonably be foreseen, it represents a *potentially* formidable barrier to a would-be exemptee, particularly in the common case of generically defined obligations.[51] But since the parties in *Manfred Forberich* agreed that the seller's obligation under the contract was in fact to *ship the goods from St. Petersburg*,[52] it seems reasonable to conclude that — depending on which party's version of the (disputed) facts the trier-of-fact accepted — Manfred Forberich *might not* have been able to avoid or overcome the freezing of the port, assuming that impediment to have been an unforeseeable one.

Since paragraphs 2-5 of Article 79 do not seem relevant under the facts of *Manfred Forberich*,[53] we can summarise what we — by 'process of elimination' — see as the

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50 The District Court which decided *Manfred Forberich* was, of course, aware of this.

51 If, for example, RMI were not only able to establish that Manfred Forberich's obligation under the contract has been to deliver 'rails' (of the designated type), but also that Manfred Forberich's contractual obligation was *not limited to any particular source of supply*, then the fact that Manfred Forberich itself 'intended' to ship goods acquired from a source near St. Petersburg and make delivery from that port would not exempt that seller from liability under Art. 79(1). In that case the seller could have avoided or overcome the impediment simply by securing an alternative (non-St. Petersburg) source. *Accord* para. 5 of *Secretariat Commentary* to Art. 65 of the 1978 Draft Convention (party required to provide commercially reasonable substitute). See also Example 65B at *ibid* (delivery of replacement machine tools) and OLG Hamburg, 28 February 1997, CLOUT Case 227, also in CISGW3 and UNILEX (seller not exempt under Art. 79 or under standard force majeure clause, since 'seller's risk' covers non-delivery caused by its supplier; seller only exempt if impossible to find goods of similar quality on market).

52 See text *supra* with fn. 29.

53 Paragraph (2) of Art. 79 deals with the situation where a party's failure to perform is 'due to the failure by a third person whom he has engaged to perform the whole or a part of the contract'. In this case the party claiming the exemption is exempt from liability only if: (a) he is exempt under Art. 79(1) *and* (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him. Although Art.e 79(2) has provoked a good deal of discussion, the CISG rule should be interpreted as one having a limited range of application, and it would not seem to be relevant under the facts of the *Manfred Forberich* case. Under Art. 79(3), the exemption provided by Art. 79 has effect only for the period during which the impediment exists. Therefore, when a temporary impediment to performance abates, the non-performing seller becomes liable once again. On the other hand, since Art. 79 does not prevent the buyer from exercising any right other than to claim damages (Art. 79(5)), a serious delay (e.g.) by the seller will entitle the buyer to avoid, thus ending the contract by reason of fundamental breach. Finally, under Art. 79(4) the seller who fails to perform must give notice of the

key (sub)issues relevant to resolution of the exemption question in *Manfred Forberich*: Was the impediment to performance — the frozen harbor in St. Petersburg — one that the seller could reasonably have overcome? And if not, ought MF nonetheless have 'taken [that impediment] into account,' i.e., foreseen that possible contingency at the time of contracting?

Without undertaking an exhaustive analysis of these issues here, we submit that this particular case — if judged on the basis of (universally acknowledged) *sources of CISG law*, including CISG foreign case law — might 'go either way'.[54] If we are right about that, the district's court's decision in *Manfred Forberich*, while horrible in its essential approach, might have reached the correct result, and might not end up the hands-down winner of our 'worst case' award.

5 CONCLUSIONS

The patently improper approach to interpreting and applying the CISG taken by the U.S. District Court in *Manfred Forberich* is a depressing development that tends to bring international disrepute on the CISG jurisprudence of U.S. courts. We sincerely hope the case is soon buried and forgotten, except perhaps as an example of an interpretational methodology to be avoided at all costs. Perhaps our nomination for the CISG Silver Anniversary 'Razzie' will help further that goal.

Given the ignorance demonstrated not only by the *Manfred Forberich* court but also by both parties' counsel, we would underline the importance of educating law students and practicing lawyers about the CISG. Experienced commercial practitioners have explained that some lawyers who advise their clients to 'opt out' of the Convention do so to avoid the application of a rule-set which they never learned about in law school or elsewhere, and therefore do not understand.[55] But since parties with relatively equal bargaining power will seldom (knowingly) 'opt in' to the unlevel playing field of one party's domestic law, the CISG will continue to apply (by default or by agreement) to an increasingly large number of international sales contracts. So now — after 25 years of CISG success — it is high time that more law schools require (or at least encourage) their students to learn something about the Convention, just as those lawyers and judges already practicing in the real world must take the steps necessary to bring themselves up to CISG speed.

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impediment and its effects on his ability to perform. If the notice is not received by the buyer within a reasonable time after the seller knew or ought to have known of the impediment, the seller is liable for damages resulting from such non-receipt. See generally Lookofsky, *Understanding the CISG in the USA*, *supra* fn. 11, at § 6-19.

54 While one of us has argued that several existing non-U.S. decisions applying Art. 79 would have been 'relevant and useful' and provided 'important guidance' to the *Manfred Forberich* court had it been aware of those decisions (see Flechtner, 'The CISG in American Courts', in *Quo Vadis CISG*, *supra* fn. 20), we agree that none of those decisions would have been dispositive on the facts of *Manfred Forberich*, and thus none would have mandated a different result in the case.

55 For a persuasive argument along these lines, see Holdsworth, J., 'Practical Application of the CISG', available at: <http://www.dhlaw.de/eng/04_publi/documents/CISG.PDF>.