# The Duty to Cooperate in International Sales

**Beiträge zum Internationalen Wirtschaftsrecht**
**Contributions on International Commercial Law**

herausgegeben von Professor Dr. Klaus Berger, LL.M., Köln

Band 11

# The Duty to Cooperate in International Sales

## The Scope and Role of Article 80 CISG

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sellier european law publishers

ISSN 1618-2294
ISBN (print) 978-3-86653-220-5
ISBN (eBook) 978-3-86653-962-4

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de.



Production: Karina Hack, Munich. Typesetting: fidus Publikations-Service GmbH, Nördlingen. Printing and binding: AZ Druck und Datentechnik, Kempten. Printed on acid-free, non-ageing paper. Printed in Germany.

# Preface

I first caught interest in article 80 during the Willem C. Vis Moot in Vienna, where my team and I tried to claim that a duty to cooperate applied as part of the International Sales Convention (CISG). Little did we succeed in this particular argument, most probably since very little had been written on this specific provision at the time. A few commentaries mentioned that article 80 was, among other provisions, an expression of a general duty to cooperate.

Subsequently, I got a PhD position at the Centre for International Business Law at The Aarhus School of Business in Denmark. This gave me the chance to investigate the intrinsic potential, quality and characteristics of article 80. It was my belief that scholarly attention to article 80 in turn would raise awareness of the provision and be beneficial to practitioners and adjudicators.

On the 2nd of May 2011 I successfully defended my doctoral dissertation with the titel *An Exploration of Article 80 CISG*. The defence panel consisted of Professor Hans Henrik Edlund (chairman), Professor Ulrich Magnus and Associate Professor Camilla Baasch Andersen. I am very grateful for the comments I received from these people at the defence and naturally, I am very happy that they all decided to award me the doctorate. I welcome further comments on this material on tneu@asb.dk.

Before my final remark, I will mention that there of course are many more people than just the three mentioned above who have been of support during the three years of my doctorate. To these people I whish to say that; I appreciate the support I have received from all of you, be it with proofreading, a venison stew dinner or just a common interest in the human behind the research.

Finally, I express my gratitude to the foundation *Margot og Thorvald Dreyers Fond* who's kind donation enabled me to publish this work.

December 2011, Aarhus, Denmark *Thomas Neumann*

## Chapter

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## 6. Conditions for Exemption



## 7. Legal Consequences

# Abbreviations and Terminology

| | |
|---|---|
| *a maiore ad minus* | A logic inference from a claim about a stronger or general entity to a weaker or specific entity [latin] |
| ABGB | Allgemeines Bürgerliches Gesetzbuch (Austria) |
| Addressee | The one to whom a message is addressed |
| Addressor | The sender of a message |
| *amiable compositeurs* | [French] Agreement allowing arbitrators to decide a dispute according to what they believe is just principles instead of a particular national law. (ex aequo et bono.) |
| Archetype | An ideal example of a type |
| | |
| B/L | Bill of Lading |
| BGB | Bürgerliches Gesetzbuch (Germany) |
| | |
| CCI | Il Codice Civile Italiano (Italy) |
| CCL | Contract Law of the People's Republic of China, March 15, 1999 |
| CCP | Código Civil Português (Portugal) |
| CCRF | Civil Code of the Russian Federation, 23. December 2003 |
| CFR | Common Frame of Reference |
| CISG | United Nations Convention on Contracts for the International Sale of Goods, (adopted 10 March to 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 |
| CISG AC | CISG Advisory Council |
| Convention, the | See 'CISG' |
| | |
| DCFR | Draft Common Frame of Reference |
| | |
| ECJ | European Court of Justice |
| et seq. | *et sequential* [latin], and the following |
| | |
| FCR | Federal Court Reports, Australia |
| fn. | footnote |
| fn.s | footnotes |
| FSGA | Finnish Sale of Goods Act. Kauppalaki/Köplag, 27/3 1987, Number 355 |
| | |
| GBL | Gældsbrevsloven, Denmark, LBK nr 669 af 23/09/1986 |

| | |
|---|---|
| GDR | German Democratic Republic (Former East Germany or Deutsche Demokratische Republik). |
| GIW | Gesetz über internationale Wirtschaftsverträge, February 15 1976, GDR, (Law on International Commercial Contracts, Former German Democratic Republic.) |
| IMTA | Icelandic Merchant and Trade Act. Lög um lausafjárkaup, 2000 nr. 50 16. Maí |
| KBL | Købeloven, Denmark, LBK nr 237 af 28/03/2003 |
| L/C | Letter of credit |
| *lacunae intra legem* | A gap outside the scope of the Convention itself. A matter not governed |
| *lacunae preater legem* | A gap within the scope of the Convention itself. A matter governed but not settled |
| Mora Creditoris | Creditor's Delay [latin]. The situation that a promisor cannot perform for reasons imputable to the promisee |
| Nexus | Connection, for example between an act of the promisee and the promisor's failure to perform |
| *Non-cumul* | Court developed rule applied in France to exclude tort claims when there is a contractual relationship between the parties |
| NSGA | Norwegian Sale of Goods Act |
| OR | Schweizerisches Obligationsrecht (Switzerland) |
| p. | page |
| para. | paragraph |
| para.s | paragraphs |
| *Per se* | In itself [latin] |
| Polylingual | Consisting of several languages |
| pp. | pages |
| Promisee | The party who receives a promise from promisor, for example regarding delivery of goods or payment at a specific time (Creditor, Fordringshaver) |
| Promisor | The party making a promise to the promisee (Debitor) |
| SSGA | Swedish Sale of Goods Act |
| Synallagma | The inner structure of a contract consisting of reciprocal obligations and interdependence between the parties whom each is potentially liable |

| | |
|---|---|
| TCC | Tax Court of Canada |
| TLP | TransLex Principles |
| Tort-feasor | A person who commits a tort |
| UCC | Uniform Commercial Code, United States of America |
| ULF | Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 |
| ULIS | Convention relating to a Uniform Law on the International Sale of Goods, 1964 |
| VCLT | The Vienna Convention on the Law of Treaties from 1969 |

# 1. Introduction

The world consists of some 200 nations.[1] These are very different in their way of using legal rules to regulate affairs among its citizens and their relationship to the state. Many states have developed regulation for the relationship between trading parties in the form of rules on the formation and performance of contracts. Often parties are able and allowed to regulate their dealings through contracts as the principle of party autonomy is widely recognised.

However, when they fail to address a matter or one of the parties to a contract is of the opinion that the other party has not performed it, a method of solving disputes and enforcing the contract is required. These methods also vary between states and between parties.

The differences among nations in their legal environment, culture and traditions are considered a barrier for merchants who wish to trade with a partner from another nation. If the merchant considers the barriers too costly to overcome he may decide never to engage in cross-border transactions. Trade among states' citizens is a way of keeping peace and as the adage goes: If goods are not allowed to cross international borders, soldiers will.

Regulation and promotion of trade occurs at both the private and public levels and The United Nations (UN) recognises that trade is an important tool in keeping peace among nations.

One way to promote trade is to remove some of the barriers that exist for private trading parties. Such barriers are seen when the rules regarding the formation and performance of a contract differ among states. A merchant contemplating entering a foreign market would be faced with additional costs for assessing the legal risks in a new system or from failure to do so. Therefore, the United Nations has negotiated and agreed upon a common set of rules that are to be applied when private parties deals goods across

[1] 192 Nations are member of The United Nations according to United Nations Press Release, ORG/1469.

borders – The United Nations Convention on Contracts for the International Sale of Goods,[2] hereinafter the CISG or the Convention.

It is stated in the preamble of the Convention that its purpose is to unify the rules of the sale of goods between the ratifying nations, thus promoting trade and the development of friendly relations among states. Currently, 77 nations have ratified the Convention.[3] It is the Convention that is the subject of investigation of this dissertation with focus specifically on article 80, which is addressed immediately below.

## 1.1 Article 80 and the Goal of Uniformity

The Convention consists of a preamble and 101 articles and because it is an international Convention meant to apply to private trading parties it contains both provisions regarding the relationship between the ratifying states as well as the substantive rules regulating trade.

The substantive rules regulate the formation of contracts, the determination of rights and duties of the seller and buyer and remedies in case these are breached. One of the rules found in the Convention is article 80, which reads;

> '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.'

In other words, the provision states that for example a buyer has no case against a seller's breach of his promise if it was the buyer himself who made the seller breach his promise. This could happen for example if a buyer refuses to receive the package that he ordered from a seller, thus in theory making the seller failing in performing his promise to deliver the goods.

One could claim that the rule seems quite obvious and that it speaks to a feeling of fairness. It is easy to agree that the rule has '*… the seductive charm*

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2 United Nations Convention on Contracts for the International Sale of Goods, (adopted 10 March to 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.

3 United Nations Commission on International Trade Law (UNCITRAL), Status regarding the 1980 United Nations Convention on Contracts for the International Sale of Goods, as of 10th of October 2011.

*of a self-evident statement.'* [4] However, the provision becomes a dangerous siren as the words of the provision do not have equally self-evident contents.[5]

Words are open to interpretation and considering the Convention's goal of uniformity, the overall purpose of the present work is to clarify article 80's significance to the trading parties.

In theory all provisions of the Convention, including article 80, should promote international trade in goods as it replaces potentially different domestic rules with a common one. However, it may also be that article 80 in itself is so general that it does have independent legal significance. Even worse, it may also be that it encourages adjudicators to apply very different interpretations, thus undermining uniformity and making article 80 act as a barrier to trade in itself.

Considering that The United Nations did not establish an authority monitoring the Convention, the removal of barriers to trade is depending on the sharing of case law and scholarly works between the jurisdictions in which the CISG applies.[6] Such sharing facilitates a uniform development of the Convention on a more informal basis compared to the interpretive instructions that could be received from a supra-national court or monitoring body.

In regard to sharing of material regarding article 80, it is interesting that one of the most significant sources of shared material relating to the Con-

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4 Honnold, John, edited and updated by Flechtner, Harry M, *Uniform Law for International Sales under the 1980 United Nations Convention,* Wolters Kluwer, Austin, 2009, 4th edition, [Flechtner/Honnold, Uniform Law, 2009], p. 644.

5 Schäfer in Felemegas J., *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law,* Cambridge 2007. [Felemegas, An Int'l Approach, 2007], p. 248 is calling the provision 'elliptical'.

6 The '*… process of consultation which takes place across borders and legal systems with the aim of producing autonomous and uniform interpretations and applications of a given rule of a uniform law*' is described as the global jurisconsultorium according to Andersen, Camilla, *The Global Jurisconsultorium of the CISG Revisited,* Vindobona Journal of International Commercial Law & Arbitration, Issue 1, 2009, 43-70, p. 47. See also Baasch Andersen, Camilla, *The Uniformity of The CISG and Its Jurisconsultorium: An Analysis of The Terms and a Closer Look at Examination and Notification,* Department of Law, Aarhus School of Business, Denmark, 2006.

vention, the CISG W3 database, has very few articles registered as addressing article 80.[7] Commentaries on the Convention do not seem to devote a lot of pages for article 80 either, though this position has recently started changing.

Simultaneously, an increased number of cases are being registered on the CISG W3 database as being relevant to article 80. In this light, the present work is a contribution to the sharing of knowledge regarding the Convention as it is not convincing that article 80 has not been subject to extensive attention because it is clear enough as it is. In fact, it is the proposition of the present work that article is legally significant to the trading parties, but that article 80 suffers from having been overlooked by legal counsels and adjudicators. This position is changed with the present collective overview of the legal significance of article 80 and its underlying duty to cooperate.

## 1.2 Purpose and Relevance

A reading of the wording of article 80 generates questions regarding the more specific contents and legal consequences of words like *'rely on', 'caused' or 'to the extent'*. Interpretaion of these terms may be influenced by the reader's legal background and the interpretation style selected.

On one hand, the significance of article 80 changes if for example the placement of the provision under the heading 'exemptions' is used as reason for a particularly narrow interpretation.

On the other hand, it could be argued from the background, history and development of article 80 that a narrow interpretation would be inappropriate since it was meant to operate as a general rule expression overarching principles of international trade.

This work therefore contains considerations of interpretation style and selection of legal sources before turning to the clarification of article 80 itself. Doing so will facilitate a uniform development of the provision, raise awareness of the provision and consequently remove barriers to trade by levelling

7 Kern, Christopher, *Les droits de rétention dans la Convention de Vienne* in Rudolf Meyer zum abschied: Dialog Deutschland-Schweiz VII, Geneva 1999 and Vilus, Jelena, *Provisions Common to the Obligations of the Seller and the Buyer* in Sarcevic P. and Volken P. (eds.), International Sale of Goods: Dubrovnik Lectures, 1996.

out differences in the understanding of the provision. This is in the spirit of the United Nations, the purpose of the Convention and will assist future legislatures and practitioners when restating the law, creating law or arguing the application of the provision.

A clarification of article 80's scope and role has been called for.[8] This clarification is provided in this work, thus providing the knowledge needed to interpret and supplement the provision.

Research of the provision's history, background, underlying concepts, overlap to other provisions and application by adjudicators provides new knowledge to the scarce scholarly material and provides guidelines for future research, application and legislation.

Therefore, this work is relevant to practitioners and scholars who wish to argue, explore or develop the exemption from liability found in article 80. Future drafters of international sales instruments may consider the findings in this work when they consider whether or not to adopt, or where to place, a similar provision in a future instrument.[9]

The work is presented in the form of a monograph, as opposed to a collection of articles. The reason for this is that the legal analyses contained in this work are based on extensive work with closely interrelated working theses that underlies the dissertation. The monograph provides a more complete picture compared to the limits of a number of articles.

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8 For example Schäfer in Felemegas, *An Int'l Approach,* 2007, p. 247 and Neumann, Thomas, *Shared Responsibility under Article 80 CISG,* Nordic Journal of Commercial Law, Issue 2, 2009, 1, 1-22. [Neumann, *Shared Responsibility,* 2009].

9 For example in the ongoing projects the Global Principles of International Consumer Contracts (GPICC) or the TransLex Principles (TLP). See more, for example in Del Duca, Louis F.; Kritzer, Albert H. and Nagel, Daniel, *Achieving Optimal Use of Harmonization Techniques in an Increasingly Interrelated Twenty-First Century World Consumer Sales: Moving The EU Harmonization Process to a Global Plane,* Uniform Commercial Code Law Journal, 2008, 51-65, Berger, Klaus Peter, *The Creeping Codification of The New Lex Mercatoria,* Wolters Kluwer, Austin, 2010, [Berger, *Creeping Codification,* 2010].

## 1.3 Delimitation

The focus on removing barriers to trade is a very broad one and it contains many more aspects than can be addressed within the frames of this dissertation. The removal of barriers to trade occurs at many levels and by many institutions. It is not only legally that international trade can be encouraged, but also politically and financially.

The current dissertation is limited to the international sale of goods to which the CISG applies and specifically to the scope and role of article 80. Naturally, barriers to trade also exists within other areas of law, however, these are not addressed.

The Convention itself contains rules on its sphere of application in article 1 to 6. It applies to sales concerning goods when the parties are from two different contracting states. The Convention is only concerned with the formation of contract and the rights and obligations of the buyer and seller arising from such a contract. Questions of validity of contract, effect on property in the goods or the seller's liability for death or injury caused by the goods is outside the scope of the Convention.

## 1.4 Outline of Presentation

The clarification of article 80 and the analyses of its scope and role are presented in 9 chapters including the present one. It is important to stress that the chapters underpin each other and that the work is not an expression of a linear research process.

In chapter 2 the method appropriate for interpreting the Convention is considered. The method used has the implication that certain sources are relevant and some are not. Among the relevant legal sources it is to some extent possible to lay down an interpretation hierarchy.

Chapter 3 describes the development of article 80 and the underlying concept of it. Though the historical evidence of a Convention must be used with care, it is useful to know why article 80 was adopted, where it came from and how the concept that it expresses is dealt with today.

Chapter 4 analyses article 80 in relation to other specific provisions of the Convention. It is seen that article 80 is conceptually different to rules of

force majeure and mitigation and that it acts as a supplementary rule in combination with more specialised provisions, such as rules of conformity of the goods.

Chapter 5 analyses the principles underlying article 80 and the Convention as such. An overlap to other international instruments is seen and therefore it is argued that these may to some extent be used as interpretation aids. Furthermore, the identified underlying principles are suitable as gap-fillers according to article 7(2).

Chapter 6 analyses in detail each requirement that has to be fulfilled for article 80 to apply. A party seeking relief under article 80 must show that the conditions for the exemption's application are met.

Chapter 7 analyses the legal effects of having met the conditions of article 80. The chapter deals with both the promisor and the promisee's position. It is seen that the promisee may experience a loss or reduction of all remedies, no matter their basis in the contract or the Convention. On the other hand, the promisor cannot base a counter-claim directly on article 80 and the promisee's interference with his performance.

Chapter 8 analyses two ways of handling article 80, both showing trends of ethnocentrism. One concerns the method of incorporating the provision into domestic law as required for the state to fulfil its international obligation. The other concerns the application of article 80 and the Convention by adjudicators. The chapter links back to the methodology chapter (2).

# 2. Methodology Considerations

In order to carry out an analysis of the scope and role of article 80 and in order to provide profound knowledge of the conditions for, and consequences of, the provision's application, a technique of interpretation is required. This involves two interconnected issues. Firstly, how the provision is read and understood. Second, which sources are relied upon to shed light on the text. The interpretation method and sources relevant to the further analyses of article 80 is accounted for in the following.

## 2.1 The General Rules of Interpretation

The Vienna Convention on the Law of Treaties from 1969 (VCLT) has been described as the *'treaty on treaties'*[10] and contains among other things rules of interpretation in articles 31 to 33. Because the CISG is a treaty between nations, the principles for understanding and interpreting treaties[11] can serve as the starting point for a selection of sources and for finding an appropriate interpretation style.[12] The Vienna Convention is also relevant as a gap-filler when the more specific interpretation rule found in CISG is insufficient or contains gaps.

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10 Aust, Anthony, Modern Treaty Law and Practice, Cambridge University Press, Cambridge, 2nd edition, 2007, [Aust, Modern Treaty Law, 2007], p. 6.

11 See The Vienna Convention on the Law of Treaties (Adopted 23 May 1969. Entered into force on 27 January 1980) 1155 UNTS 331, Part III, *Observance, Application and Interpretation of Treaties*.

12 Baasch Andersen, Camilla, *The Interrelation of the CISG and Other Uniform Sources* in Meyer, Olaf and Janssen, André, *CISG Methodology,* Sellier, Munich, 2009, [Baasch Andersen, *Interrelation of CISG and Uniform Sources,* in Meyer/Janssen, 2009], pp. 255-258 suggests that VCLT has received too little attention in CISG context and that an unused potential exists here. See also Magnus, Ulrich, *Tracing Methodology in the CISG: Dogmatic Foundations,* in Meyer, Olaf and Janssen, André, *CISG Methodology,* Sellier, Munich, 2009. [Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in Meyer/Janssen, 2009], pp. 46-48.

If the interpretation rules of the Vienna Convention are to be used directly in a CISG context the Vienna Convention must be applicable in the first place. In this regard, two issues arise. First, not all CISG states have ratified the Vienna Convention. Secondly, since the CISG primarily regulate relation between private parties the relevance of the Vienna Convention, which regulate relation between states, become pertinent. These two issues are dealt with in turn immediately below.

### 2.1.1 Application as Customary Law

Some CISG states have not yet ratified the Vienna Convention[13] thus leaving the Vienna Convention inapplicable between these states. A similar issue arise for those states who subsequently to ratifying the CISG has ratified the Vienna Convention since the latter prohibits retroactive effect according to article 4.[14] This does not, however, render the interpretation principles of VCLT inapplicable for these states.

The Vienna Convention is likely to find use anyway since in practice it is applied to situations where it is obviously not applicable in principle.[15] This is justified by the view that the Vienna Convention expresses underlying customary law that is not bound by article 4 or the Vienna Convention text as such.[16] It has been argued that there has not yet been a case where the International Court of Justice has found that the Vienna convention does not express customary law[17] though scholars are divided also in regard to the interpretation rule found in article 31.[18] The antithesis is that regarding the CISG the matter is not likely to appear for the International Court of Justice but rather in national courts.

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13 The states being; Burundi, France, Iceland, Iraq, Israel, Mauritania, Norway, Romania, Singapore, Uganda and Venezuela.

14 The states being; China, Cuba, Ecuador, Georgia, Guinea, Hungary, Luxembourg, Poland and Switzerland.

15 International Court of Justice, *The Hague, Kasikili/Sedudu Island,* 13 December 1999 and Aust, *Modern Treaty Law,* 2007, pp. 12-13.

16 Villiger, Mark E., *Commentary On The 1969 Vienna Convention on The Law of Treaties,* Martinus Nijhoff, Leiden 2009, [Villiger, *Commentary on VCLT,* 2009], article 4, para. 4, p. 110 and Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in Meyer/Janssen, 2009, p. 47.

17 Aust, *Modern Treaty Law,* 2007, p. 13.

18 Villiger, *Commentary on VCLT,* 2009, article 31, para. 37, pp. 439-440.

The synthesis seems to be that; considering that the interpretation rules in articles 31, 32 and 33 today reflects customary law[19] they are likely to be applicable to the interpretation anyway, also of the CISG, thus making it less important whether the state has ratified the Vienna Convention or not. That said it is important to point out that this issue relates only to eleven CISG states and partially to another nine out of currently 74.[20]

### 2.1.2 Relevance of State to State Regulation

The second issue relates to the question whether VCLT meant for state to state regulation is appropriate for understanding the CISG that is addressing private parties. The problem springs from the two different faces of the CISG – as an international convention and as substantive sales law addressed towards trading parties.

Considering that the rules of interpretation in public international law are fit for establishing obligations of states the Vienna Convention may not always be the appropriate tool of interpretation since the CISG is directed towards private parties. The CISG is civil law in the contracting states[21] and has been incorporated into domestic law.

However, the CISG has the characteristics of international law as well as domestic law. So, even though the CISG is incorporated into domestic law[22] it is of international nature and it is independent from domestic systems[23]

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19 Roth, Marianne and Happ, Richard, *Interpretation of The CISG According to Principles of International Law,* International Trade and Business Law Annual, Volume 4, 1999, 1-11, [Roth and Happ, *Interpretation of CISG,* 1999], p. 5, Villiger, *Commentary on VCLT,* 2009, article 31, para. 37, pp. 439-440, article 32, para. 13, p. 448 and article 33, para. 16, p. 461.

20 See supra fn.s 13 and 14.

21 Schlechtriem in Schlechtriem, Peter and Schwenzer, Ingeborg, *Commentary on The UN Convention on The International Sale of Goods (CISG),* Oxford University Press, Oxford, 2nd edition, 2005, [Schlechtriem/Schwenzer, *Commentary on CISG,* 2005], article 7, para. 12, pp. 96-97 and Schwenzer and Hachem in Schwenzer in Schwenzer, Ingeborg (eds), *Commentary On The UN Convention On The International Sale Of Goods (CISG),* Oxford University Press, 3rd edition, 2010. [Schwenzer, *Commentary on CISG,* 2010], article 7, para. 23, p. 131.

22 For example, Denmark incorporated the Convention by law; Lov 1988-12-07, Nr. 733, 'Den Internationale Købelov'.

23 Felemegas in Felemegas, *An Int'l Approach,* 2007, p. 11.

of which it takes precedence.[24] To borrow interpretation principles from the law of the forum or the law pointed to by private international law will promote forum shopping and thus undermine a uniform application of the Convention.[25] One must be aware that article 7 in the CISG instructs us to avoid ethnocentricity[26] and that a mindset different to the one of domestic laws is required[27] when dealing with the convention. More *infra* section 2.2.

The rules of interpretation of the VCLT could help achieve such different and non-national mindset. However, it has to be considered that the CISG has been given its own interpretation rule in article 7, thus in principle making recourse to the Vienna Convention unnecessary when interpreting for example article 80. It has been asserted that the Vienna Convention is fit for sorting out obligations between states and not private parties, thus making it relevant mainly in regard to section IV of the CISG,[28] which deals with the ratifying states.

However, not only are the interpretation principles expressed in the VCLT useful in achieving the goals laid down in article 7 CISG[29] it is also unnecessary to distinguish between law making parts and contractual parts as they're both the product of political compromise.[30]

The focus of this dissertation is the exemption clause contained in article 80, which is placed in section III of the convention. This section is directed

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24 See Enderlein, Fritz and Maskow, Dietrich, *International Sales Law,* Oceana Publications, 1992, [Enderlein/Maskow, *International Sales Law,* 1992], p. 11 who also mentions the two exemptions to the precedence of CISG; Article 90 concerning other international conventions and article 94 concerning state reservations.

25 Felemegas in Felemegas, *An Int'l Approach,* 2007, pp. 10-11.

26 Zeller, Bruno, *Four-Corners – The Methodology for Interpretation and Application of The UN Convention on Contracts for The International Sale of Goods,* Pace Law School, New York, USA, 2003, [Zeller, *Four-Corners,* 2003], p. 775.

27 Baasch Andersen, Camilla, *The Uniformity of The CISG and Its Jurisconsultorium: An Analysis of The Terms and a Closer Look at Examination and Notification,* Department of Law, Aarhus School of Business, Denmark, 2006, p. 63.

28 Flechtner/Honnold, *Uniform Law,* 2009, pp. 148-150, Enderlein/Maskow, *International Sales Law,* 1992, p. 55 and Henschel, René F., *Varens Kontraktmæssighed I Internationale Køb – En Undersøgelse af Mangelsbegrebet i CISG Art. 35,* Department of Law, Aarhus School of Business, Denmark, 2003, [Henschel, *Mangelsbegrebet,* 2003], p. 23.

29 Roth and Happ, *Interpretation of CISG,* 1999, p. 2.

30 Roth and Happ, *Interpretation of CISG,* 1999, pp. 6-7.

towards the contracting parties and not the ratifying states, but this does not exclude the Vienna Convention and customary international law in the interpretation of the CISG as a treaty. The entire instrument as such is directed towards the ratifying states, and not incorporating, including its article 80, could be a breach of the state-to-state promise unless a proper reservation has been made. An example of this is seen regarding the transformation of CISG in Norway. See *infra* section 8.3 on pages 211 *et seq*.

The primary method of VCLT is to interpret in good faith in accordance with the ordinary meaning of terms in light of their context, object and purpose.[31] With outset in the primary source indicated by VCLT – the specific text of the CISG, its context, object and purpose are accounted for below, as it is required for an enlightened reading of the text of article 80.

### 2.1.3 Purpose and Political Nature of the CISG

The reference in VCLT to *'ordinary meaning'* refers to the current, normal, regular and usual meaning of words that may change over time.[32] It is presumed that the ordinary meaning was the intention of the drafting state parties unless the contrary is possible to establish.[33] Similarly when interpreting the CISG, the starting point is a literal and ordinary meaning of words.[34] The problem being, as indicated previously, that a literal approach to the words of article 80 is not enough to give it specific content.

The text and a literal intepretation of it is the starting point and such interpretation is offered *infra* section 2.3. However, the litteral interpretation is not the end point.[35] Conventions are not always *'beacons of clarity',* probably due to the fact that many parties negotiated the instrument, which subsequently has to be adapted to specific circumstances with the consequence, that *'… we end up with a camel rather than a horse.'* [36] Thus, sources other than the text itself is needed.

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31 VCLT article 31.

32 Villiger, *Commentary on VCLT,* 2009, article 31, para. 9, p. 426.

33 Aust, *Modern Treaty Law,* 2007, p. 235. See also Vienna Convention article 31(4.A).

34 Enderlein/Maskow, *International Sales Law,* 1992, p. 60.

35 Eiselen, Sieg, *Literal Interpretation: The Meaning of the Words,* in Meyer, Olaf and Janssen, André, *CISG Methodology,* Sellier, Munich, 2009, pp. 88-89.

36 Stated by Honourable Justice Campbell J. Miller regarding the interpretation of an OECD Model, however it holds equally true in the context of CISG. See Tax Court

Regard to *'object and purpose'* is a way of confirming that the interpretation is correct since an incompatible understanding of the words may be wrong.[37] The object and purpose is traditionally sought in the preamble, but all elements of article 31 and 32 VCLT may contribute in this regard.[38]

The preamble of the CISG indicates its overall aim to promote international trade and remove barriers to such by establishing a uniform law of sales.[39] This has been attempted before with two instruments, the ULIS and the ULF,[40] but these did not receive much recognition.[41] With the goal of establishing a uniform set of rules, the CISG replaces all domestic rules within its scope whether the domestic rules are in the form of statutes or case law.[42]

UNCITRAL is the UN body established to achieve worldwide harmonization and unification of the law of international trade,[43] hence the name of the UN body.[44] The idea of promoting the existing ULIS and ULF was considered and rejected by UNCITRAL who found it more likely to obtain

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of Canada, Canada, *Knights of Columbus v Her Majesty the Queen,* 16 May 2008, para. 82.

37 Aust, *Modern Treaty Law,* 2007, p. 235.

38 Villiger, *Commentary on VCLT,* 2009, article 31, para. 13, p. 428.

39 The preamble of CISG.

40 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague, 1 July 1964 [ULF] and Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964 [ULIS].

41 Less than ten states ended up adopting ULIS and ULF, see Schlechtriem and Schwenzer in Schwenzer, *Commentary on CISG,* 2010, p. 1 and Flechtner/Honnold, *Uniform Law,* 2009, pp. 5-6.

42 Bonell, Michael Joachim and Bianca, Cesare Massimo, *Bianca-Bonell Commentary On The International Sales Law,* Giuffrè, Milan, 1987, [Bianca/Bonell, *Commentary,* 1987], p. 73.

43 Flechtner/Honnold, Uniform Law, 2009, p. 6. See U.N. General Assembly, 1497th plenary meeting, 'Resolution 2205 (1966) [Establishment of the United Nations Commission on International Trade Law]' 17 December 1966 according to which UNCITRAL was established by the UN's General Assembly with the purpose of, among other things, '*… promoting the codification and wider acceptance …*' of international trade terms, provisions, practices etc., by way of uniform laws, conventions and model laws.

44 UNCITRAL is an abbreviation of United Nations Commission on International Trade Law.

more widespread adoption by creating a new instrument,[45] particularly in regard to eastern and developing states.[46]

To ensure that the laborious task of creating yet another uniform sales law has not to be repeated it is reasonable to assume that a long life of the Convention is desired. The Convention has been worded more generally with the intention of prolonging its life expectancy[47] and a broad and liberal interpretation will support such.[48]

The Convention is a political compromise between states. As such, the preparatory works, including the ULIS and the ULF, may be relevant to understand the setting and background for the Convention and the article 80 contained herein. Also in case there is doubt of the meaning of the text can it be relevant to look at the preparatory works.[49] Therefore, an investigation of the development and historical roots of article 80 is carried out in chapter 3 on page 59 *et seq.*

Looking into such historical documents may assist in finding the meaning of the text in order to get knowledge on the purpose and ways of understanding it,[50] but it must be used with care as the opinions expressed during the drafting of the Convention may not express the opinion of all countries and may not have been adopted in the final text.

In context of article 80 it is for example seen that some delegates believed that a rule similar to article 80 would flow from a general good faith requirement imposed on the trading parties while others considered good faith restricted.[51] Taking one side as support for a particular view would be a mistake.

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45 Flechtner/Honnold, Uniform Law, 2009, pp. 9-10.

46 Ramberg, Jan and Herre, Johnny, *Köplagen,* Fritzes, Stockholm, 1995. [Ramberg and Herre, *Köplagen,* 1995], p. 44.

47 Flechtner/Honnold, *Uniform Law,* 2009, pp. 150-151.

48 Felemegas in Felemegas, *An Int'l Approach,* 2007, pp. 12 and Bianca/Bonell, *Commentary,* 1987, p. 73.

49 Schwenzer and Hachem in Schwenzer, *Commentary on CISG,* 2010, article 7, para 22, pp. 130-131.

50 Zahle, Henrik, *Rettens Kilder,* Christian Ejlers Forlag, Copenhagen, 1999, p. 29.

51 Compare A/CONF.97/C.1/SR.28, Switzerland, para. 55, p. 386 to Denmark, para. 58, Netherlands, para. 59, p. 387 in A/CONF.97/19.

Thus, one should be careful not to place too much importance on the preparatory works on a Convention[52] as it is of supplementary character. Despite this, the preparatory works, consisting of among others treaty drafts and conference records they are often referred to in practice.[53] In context of the CISG, the historical sources are the ULIS, the ULF, the documents from the drafting process and negotiations, including the Secretariat Commentary.

Regarding article 80, no direct predecessor[54] is found in the ULF or the ULIS and therefore it was not included in the draft of the CISG, nor did the UNCITRAL Secretariat comment it upon.[55] Thus, these sources appear less relevant in the investigation of article 80, but relevant to the extent

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52 See the Vienna Convention on the Law of Treaties (Adopted 23 May 1969. Entered into force on 27 January 1980) 1155 UNTS 331, article 32, establishing that preparatory works are of a *supplementary* character. Further more, Charter of the United Nations and Statute of the International Court of Justice (Adopted 26 June 1945. Entered into force on 24 October 1945), article 38 (regarding the International Court of Justice) do not mention preparatory works as a source. See also Aust, *Modern Treaty Law*, 2007, pp. 244-245.

53 Aust, *Modern Treaty Law*, 2007, pp. 244-245.

54 A similar idea was expressed in article 74(3) according to Magnus, Ulrich, *Wiener UN-Kaufrecht (CISG)*, in Martinek, Michael (Eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Sellier – de Gruyter, Berlin, 2005, [Magnus, *Wiener UN-Kaufrecht*, 2005], article 80, para. 4, p. 792. The provision reads: *'The relief provided by this Article for one of the parties shall not exclude the avoidance of the contract under some other provision of the present Law or deprive the other party of any right which he has under the present Law to reduce the price, unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible.'*

55 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 1, p. 1088, Schwenzer Ingeborg and Fountoulakis, Christiana, *International Sales Law*, Routledge-Cavendish, 2007, [Schwenzer and Fountoulakis, *International Sales Law*, 2007], p. 577, Herber, Rolf and Czerwenka, Beate, *Internationales Kaufrecht: Kommentar Zu Dem Übereinkommen Der Vereinten Nationen Vom 11. April 1980 Über Verträge Über Den Internationalen Warenkauf*, Beck, München, 1991, [Herber and Czerwenka, *Internationales Kaufrecht*, 1991], article 80, para. 1, p. 359, Flechtner/Honnold, *Uniform Law,* 2009, pp. 644-645, Tallon in Bianca/Bonell, *Commentary*, 1987, p. 596, Audit, Bernard, *La Vente Internationale De Merchandises*, LGDJ, Paris, 1990, [Audit, *La Vente*, 1990], p. 179.

the provision reaches into other provisions that do have a longer historical background.

The goal of a uniform sales law is not merely achieved with the ratification of the CISG by states, but rather it is up to the adjudicators to complete the unification process in practice.[56] Thus, adjudicators must interpret and gap-fill the Convention in a uniform manner.[57] Therfore case law is a relevant source to investigate regarding article 80.[58]

## 2.2 The Specific Rule of Autonomous Interpretation

The *lex specialis* interpretation technique applies to the reading of conventions[59] as well as those specifically found in the CISG.[60] According to this principle the more specific interpretation rules laid down in the CISG are to be preferred over the general interpretation rules found in VCLT.

Further more, and considering that a supra-national court to rely on for interpretation guidance has not been established,[61] it becomes particular important to rely on article 7 to achieve a uniform application of the Convention, also of article 80. Article 7 aims to secure an autonomous interpretation of the Convention[62] and is thus *'taking on metaphorically the mantle of a supranational tribunal or court'* [63] and its aims are therefore relevant also when interpreting article 80. The provision of article 7 reads:

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56 Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 6.

57 Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 5.

58 For a critique of case law regarding article 80, see also section 8.4, p. 223 *et seq.*

59 Aust, *Modern Treaty Law*, 2007, pp. 248-249.

60 See for example United Nations Commission on International Trade Law, *UNCITRAL Digest of Case Law on The United Nations Convention on The International Sale of Goods*, United Nations, New York, 2008, article 78, para. 1, p. 246, Flechtner/Honnold, *Uniform Law,* 2009, pp. 416-417.

61 Should states disagree on the interpretation of the CISG, the dispute can only be settled by peaceful means as all CISG states are parties to the UN Charter. See United Nations, Charter of the United Nations, 1945, 1 UNTS XVI, articles 2(3) and 2(4).

62 Zeller, *Four-Corners*, 2003, p. 749 and Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 5, p. 122.

63 Zeller, *Four-Corners*, 2003, p. 749.

> '(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.'

Article 7 deals in section (1) with interpretation of the Convention itself and in section (2) with gaps. Both sections can be used to develop the CISG to meet new challenges and to cope with situations not foreseen by the draftsmen,[64] similarly to VCLT article 31 and 'ordinary meaning' that may change over time. It is thus possible that article 80 had one purpose when being drafted and that this view has to be modified or modernized to fit the current context.

However, modernization of the Convention has to happen within the limits of article 7(2) in which recourse to domestic law is obligatory. The balance here is between two considerations. One is the wish to prolong the life of the Convention by not letting it freeze in time, the other is to respect the limits of the underlying political agreement of the Convention. See also *infra* chapter 5, p. 107 *et seq,* in which possible underlying principles of article 80 is extrapolated and the danger of reading unfamiliar principles into the Convention is considered.

The starting point may be a literal interpretation, but it has to be enlightened, not only by the purpose of the treaty, but also its object and context[65] and in connection with the CISG, the drafting history, scholarly works and case law are relevant interpretation aids.[66] Also agreements of the private parties and widely recognized soft law are relevant as the context in which the Convention text is to be seen.[67] It is inconsistent with the general inter-

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64 Flechtner/Honnold, *Uniform Law,* 2009, p. 117 and Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 5, p. 122 and para. 28, p. 134.

65 VCLT article 31(1).

66 Eiselen, Sieg, *Literal Interpretation: The Meaning of the Words*, in Meyer, Olaf and Janssen, André, *CISG Methodology*, Sellier, Munich, 2009, pp. 88-89.

67 Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in Meyer/Janssen, 2009, pp. 48-49.

pretation principles of VCLT and the broad interpretation style called for to conduct a strict literal interpretation of the Convention.[68] With this in mind it is relevant to consider whether this is to be modified due to article 80's placement as a rule of exemption. These often call for more narrow interpretation.

Article 7(1) CISG establish the principle of autonomous interpretation of the Convention and elaborates that three factors must be considered when interpreting its text, including also article 80; the international character, the need to promote uniform application and the need to promote good faith in international trade. Because the Convention itself emphasises these three characteristics it is relevant to unfold them in the following as they provide the specific filling of the frames of the general methods of VCLT. Further, the three characteristics may provide insigt to the sources and interpretation of article 80.

### 2.2.1 Considering the International Character of CISG

The need to promote uniformity and having regard to the international character of the CISG are closely related and are each other's prerequisites.[69] First of all the requirement of having regard to the international character of the Convention is an instruction to see the Convention in an international light and to recognize that it exists in several official language versions.

Regarding the latter, it is not permitted to have recourse to a domestic understanding of one of the language versions of the CISG, as this is a violation of the autonomous interpretation method[70] and a neglect of the fact that the Convention exists in several language versions. Article 80 also exists in six equally authentic languages but a comparison of these does not seem to provide clarity to the general wording of the provision.

The requirement to read the Convention in an international light is an instruction to avoid domestic law even though the CISG has been incorpo-

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68 VLCT article 31(1) recognising party autonomy of states.

69 Bianca/Bonell, *Commentary*, 1987, p. 72, Flechtner/Honnold, *Uniform Law,* 2009, pp. 117-118 and Felemegas in Felemegas, *An Int'l Approach*, 2007, pp. 12-13.

70 Flechtner/Honnold, *Uniform Law,* 2009, p. 118, Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 8, p. 123 and para. 21, p. 130, Bianca/Bonell, *Commentary*, 1987, p. 74 and Enderlein/Maskow, *International Sales Law*, 1992, p. 55.

rated into domestic law in the ratifying states. Instead, the international character appears from the legislative history, the ULF, the ULIS, the developing case law and scholarly writings.[71]

Also widely recognized non-governmental codifications like INCOTERMS can be used to determine what is in conformity with the international character of the CISG[72] though they may not be used to introduce completely new rules.

Other international non-governmental codifications of principles can be found in for example UPICC and PECL.[73] It has even been stated that the principles of the CISG are elaborated in the UPICC this making the latter relevant for clarifying principles of the CISG.[74]

In order to promote uniformity and the international application of the CISG, international principles like the UPICC and the PECL could and should be used as aids to interpretation.[75] The international rules that can be looked into are the Draft Common Frame of Reference (DCFR),[76] the Principles of European Contract Law (PECL),[77] TransLex Principles (TLP)[78] and the Unidroit Principles (UPICC).[79] Particularly in relation to the identification of underlying principles of article 80 does these instruments become relevant. See further *infra* chapter 5, p. 107 *et seq.*

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71 Flechtner/Honnold, *Uniform Law,* 2009, pp. 118-120 and Bianca/Bonell, *Commentary*, 1987, pp. 90-91.

72 Enderlein/Maskow, *International Sales Law*, 1992, p. 55 and Michaels in Vogenauer, Stefan and Kleinheisterkamp, Jan, *Commentary on The Unidroit Principles of International Commercial Contracts (PICC)*, Oxford University Press, Oxford, 2009, [Vogenauer/Kleinheisterkamp, *Commentary on UPICC*, 2009], p. 57.

73 Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 10.

74 International Court of Arbitration, International Chamber of Commerce, *Food Products Case,* December 1996, no. 8817.

75 Felemegas, p. 33.

76 Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Interim Outline Edition (DCFR).

77 The Principles of European Contract Law, 1999, by the Commission of European Contract Law (PECL).

78 See Trans-Lex Principles as presented on Trans-Lex.org. Further, Berger, Klaus Peter, *The Creeping Codification of The New Lex Mercatoria*, Wolters Kluwer, Austin, 2010, [Berger, *Creeping Codification*, 2010].

79 UNIDROIT Principles of International Commercial Contracts (UPICC), which exists in a 1994, 2004 and 2010 version.

These international rules are not tied to a particular domestic legal system and therefore they are valuable sources of inspiration when the international character of the CISG is being considered. The UPICC in particular has added legitimacy, as it is a clear expression of general principles.[80]

Furthermore, soft law like the UPICC expresses truly internationally recognized rules, since the adoption of non-recognized rules would make contracting parties choose other rules to govern their contracts. The entire success of soft law depends on its ability to produce rules that are recognized by the contracting parties, as it would otherwise become obsolete or redundant.

As a consequence of the requirement to read the Convention in an international light, it is necessary to include sources beyond the text itself, including also foreign case law or the preparatory works which concerns article 80.

Similar to the method called for by VCLT,[81] there does not appear to be a hierarchy among the sources called for, thus requiring consideration of all of them,[82] though the supplementary sources may be used to confirm an interpretation and not as the primary outset.[83]

Primary sources regarding the CISG are the Convention text, the application of it and its object and purpose.[84] Secondary sources are the preparatory works,[85] but also international codifications and restatements like UPICC. The reason for placing the latter among the secondary sources is that taking outset in these instruments when interpreting the Convention contains a risk of introducing new rules unfamiliar to the Convention.

It may be that some jurisdictions, especially common law ones, are known for being reluctant to use foreign sources,[86] and the legislative history to interpret a domestic legal text, but the approach is different in international

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80 Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 34.

81 VLCT articles 31 and 32.

82 Aust, *Modern Treaty Law*, 2007, p. 231 and 234 and Villiger, *Commentary on VCLT*, 2009, article 31, para. 29, pp. 435-436.

83 Villiger, *Commentary on VCLT*, 2009, article 32, para. 11, p. 447.

84 See VCLT article 31.

85 See VCLT article 32.

86 Gutteridge, H.C., *Comparative Law*, University Press, Cambridge, 1946, [Gutteridge, *Comparative Law*, 1946], p. 38.

law.[87] Thus, it would be inappropriate for an adjudicator to ignore or neglect such sources.

Notwithstanding their domestic approach, common law courts have long recognized that international law calls for an approach different to the domestic one.[88] In *Fothergill v. Monarch Airlines*[89] the House of Lords concluded that the legislative history, foreign case law and scholarly writings should be considered when interpreting a convention and that the words of the text is to be understood independently from the established domestic English meaning. The approach is not only acknowledged by English,[90] but also American courts.[91]

Though the approach may be the appropriate, one and to some extent recognized by courts, it is important to be aware of domestic readings of the Convention when investigating case law. Ethnocentric interpretation of the CISG is not permitted and interestingly, this prohibition makes domestic law of further interest in the investigation of article 80. Knowing the domestic background makes it possible to evaluate whether a more hidden ethnocentric interpretation of the CISG has occurred in the cases studied. If so, this could reduce the value of the investigated case. See the analysis *infra* chapter 8, p. 205 *et seq,* where possible ethnocentrism is investigated further.

### 2.2.2 Promoting Uniform Application

It has already been mentioned that uniformity is to be completed in practice[92] and the interpretation of the Convention has to support the goal of unification.[93] It has, before the time of the CISG, been stated that; *'The*

87 Flechtner/Honnold, *Uniform Law,* 2009, p. 120-121.

88 Mann, Francis A., *Uniform Statutes In English Law*, Law Quarterly Review, 1983, 376-406.

89 House of Lords [1980] A.C. 251, England, *Fothergill v. Monarch Airlines,* 7 July 1980. See also Flechtner/Honnold, *Uniform Law,* 2009, pp. 119-123.

90 Notice that England is not a CISG state, but is relevant in this context as an example of the common law's recognition of the international character of conventions.

91 Bianca/Bonell, *Commentary*, 1987, pp. 73-74.

92 Felemegas in Felemegas, *An Int'l Approach*, 2007, pp. 5-6.

93 Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in Meyer/Janssen, 2009, p. 34.

*maintenance of uniformity in the interpretation of a rule after its international adoption is just as important as the initial removal of divergencies.'* [94]

In the European Union a uniform application is secured by the hierarchy of courts in which the European Court of Justice (ECJ) is in the top. The ECJ's style of interpretation and application will over time lead to uniformity in the member states since their domestic court awards are under the threat of being overturned by the ECJ.

The application of the CISG and its article 80 is decentralized as matters governed by it are to be decided by a multitude of domestic courts or by arbitration.[95] The requirement in article 7(1) to '*the need to promote uniformity in its application*' means that, considering the lack of a supra-national court, it is up to domestic courts to be persuaded by well-reasoned decisions from other jurisdictions as well as be reluctant to deviate from a foreign line of precedents.[96] In fact, there is a duty to take foreign decisions into consideration under the general interpretation principles of VCLT[97] and so must an investigation of article 80 also consider possible case law insofar as there is access to them, also language wise.

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94 Scott L.J. according to Friedmann, W., *Contributory Negligence – Last Opportunity*, The Modern Law Review, Volume 1, Issue 4, 1938, 318-321, p. 321 and Mann, Francis A.,*The Interpretation of Uniform Statutes*, Law Quarterly Review, 1946, 278-291, p. 278.

95 Honnold, John, *Uniform Words and Uniform Application – The 1980 Sales Convention and International Juridical Practice*, Journal of Law and Commerce, 1988, 207-212, [Honnold, *Uniform Words*, 1988], IV.A. Comparing to the European Court of Justice, see Zeller, *Four-Corners*, 2003, p. 749, Bianca/Bonell, *Commentary*, 1987, p. 88 and Schwenzer and Fountoulakis, *International Sales Law*, 2007, p. 65.

96 Flechtner/Honnold, *Uniform Law,* 2009, p. 124, Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 10, p. 124 and para. 13, p. 125-126 and Enderlein/Maskow, *International Sales Law*, 1992, p. 56. See also Henschel, René F., *The Conformity of Goods in International Sales*, Thomson/GADJura, Copenhagen, 2005, p. 304 who argues that an *ipso facto stare decicis* exists. Several cases refer to foreign case law, e.g. Tribunale di Rimini [District Court], Italy, *Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*, 26 November 2002 in which many cases from various jurisdictions are referred to throughout the award. See for further examples United Nations Commission on International Trade Law, *UNCITRAL Digest of Case Law on The United Nations Convention on The International Sale of Goods*, United Nations, New York, 2008, p. 28, fn. 8-12.

97 See VCLT articles 31(3)(b) and Roth and Happ, *Interpretation of CISG*, 1999, p. 9.

The adjudicator must take relevant court and arbitral decisions into consideration to the extent that they are available and only differ from them if there is good reason to do so.[98] This is not saying that an official stare decisis exists and the value of the foreign decisions still depends on their persuasive value.[99] For the present work, it means that cases in which international case law has been considered may be of more value than those who do not, since the latter may be affected by domestic rules.

An example of an inappropriate and ethnocentric approach to the CISG was seen in *Raw Materials Inc. v. Manfred Forberich GmbH*[100] concerning a sale of railroad rails. The U.S. District Court stated that domestic law could serve as guidance in understanding article 79 of the CISG. The court ignored all CISG case law and scholarly material and relied purely on domestic sources. This is not permitted under the requirements of internationality and uniform application found in article 7(1).

> 'A more flagrant and depressing example of a court ignoring its obligations under article 7(1) and indulging – nay, wallowing in – the homeward trend is hard to imagine.'[101]

Sometimes the ethnocentrism is less obvious and this is a more dangerous kind. In contrast, *Rheinland Versicherungen v. Atlarex*[102] has received credit[103] since the adjudicator, well aware that no formal stare decisis exists, took into consideration numerous foreign cases in its interpretation of the Convention.

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98 Roth and Happ, *Interpretation of CISG*, 1999, p. 10.

99 Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in Meyer/Janssen, 2009, p. 42 and Roth and Happ, *Interpretation of CISG*, 1999, pp. 10-11.

100 Northern District of Illinois, Eastern Division, United States, *Raw Materials Inc. v. Manfred Forberich GmbH,* 6 July 2004.

101 Lookofsky, Joseph and Flechtner, Harry, *Nominating Manfred Forberich: The Worst CISG Decision In 25 Years?*, Vindobona Journal of International Commercial Law and Arbitration, Volume 1, 2005, 199-208, p. 204.

102 Tribunale di Vigevano [District Court], Italy, *Rheinland Versicherungen v. Atlarex*, 12 July 2000.

103 See for example Ferrari, Franco, *Applying The CISG in a Truly Uniform Manner: Tribunale Di Vigevano (Italy), 12 July 2000*, Uniform Law Review – Revue De Droit Uniforme, 2001, 203-215. See Beit ha.M.ishpat ha'Elyon [Supreme Court], Israel, *Pamesa Ceramica v. Yisrael Mendelson Ltd.*, 17 March 2009 in which two approaches was accounted for before the adjudicator picked what it believed to be appropriate.

#### *2.2.2.1 Accessibility of Case Law*

The demand of taking into consideration foreign case law and scholarly works is challenged by a problem of access. It may not be possible to locate or achieve insight to cases, either because of unawareness of their existence or because of confidentiality.[104] Should it be possible to locate relevant material it may not be possible for the interpreter to read it, as it may not be in a language that he understands. One can imagine how many different languages the current 77 CISG states may produce awards in, in languages from Albanian to Uzbek.[105]

Various official and autonomous case databases and translation programs attempt to solve the issues of access and language.[106] Such sharing of legal material has been suggested to be a feasible and significant solution to reach uniformity[107] and such solution grows in strength as more online databases become available.[108]

The current work relies primarily on the cases made available through the publicly available databases. As pointed out previously it is intriguing to see that the CISG W3 database by Pace Law School, the most significant data-

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104 The latter is often a problem in regard to arbitral awards that may not be made public without consent by the parties. See Redfern, Alan; Hunter, Martin; Blackaby, Nigel and Partasides, Constantine, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, London, 4th edition, 2004, p. 30 *et seq.*

105 United Nations Commission on International Trade Law (UNCITRAL), Status regarding the 1980 United Nations Convention on Contracts for the International Sale of Goods, as of 10th of October 2011.

106 Flechtner/Honnold, *Uniform Law,* 2009, pp. 125-133, Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 11, pp. 124-125. The Institute of International Commercial Law provides on their CISG W3 database a list of locally focused databases and has together with University of London established the Queen Mary Case Translation Programme.

107 Baasch Andersen, Camilla, *Uniform Application of The International Sales Law – Understanding Uniformity, The Global Jurisconsultorium and Examination and Notification Provisions of The CISG*, Kluwer Law International, Netherlands, 2007, p. 229.

108 25 domestic databases exist with the CISGNordic.net as one of the more recent ones. The most significant of these must be the CISG W3 Database hosted by Pace Law School, New York; the UNIDROIT database; UNILEX at the Centre for Comparative and Foreign Law Studies; The Global Sales Law Database at the University of Basel and the CISG Advisory Council's website.

base of its kind,[109] recently has been categorizing and publishing translated cases related to article 80. Relying on these databases has the implication that an unknown amount of case law is not considered.

#### *2.2.2.2 Scholarly Works*

Not only foreign case law has to be considered in order to achieve uniform application of the CISG, but also foreign scholarly works can be of interest.[110] Considering that the significance of scholarly works as a source of law varies between jurisdictions it will be too hasty to reject any interpretation aid from a foreign state, merely because that state does not produce case law.

Especially when there is a lack of case law may scholarly works become an important source.[111] Hence, the goal of uniformity favour the use of international scholarly works as an interpretation aid before the adjudicator can turn to domestic interpretation aids.[112] Taking into consideration scholarly works regarding article 80 may also be a way to overcome issues of acces to case law and ability to perceive its foreign language.

Whether scholarly works belongs as primary or secondary source is not easily answered. On one hand, it is a primary source since it can provide the international context, object and purpose called for, especially due to lack of access to case law which is a primary source. On the other hand, it would not be correct to have primary outset in scholarly works, as they are not legal sources in the sense that they cannot establish rights or obligations.[113]

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109 To illustrate the impact by the database and particularly its founder, Albert Kritzer, see the tribute; Lookofsky, Joseph, *Online With Al K*, in *Sharing International Commercial Law Across National Boundries – Festschrift for Albert H Kritzer on the Occasion of His Eightieth Birthday,* Baasch Andersen, Camilla and Schroeter, Ulrich G. (eds), 287-302, Wildy, Simmonds & Hill Publishing, London, 2008.

110 Zweigert, Konrad and Kötz, Hein, *Introduction to Comparative Law*, Clarendon Press, Oxford, 3rd revision, 1998, [Zweigert/Kötz, *Comparative Law*, 1998], p. 21.

111 Gutteridge, *Comparative Law*, 1946, pp. 81-82.

112 Honnold, *Uniform Words*, 1988, IV.A.2.b.

113 Evald, Jens, *Retskilderne og den Juridiske Metode*, Jurist- og Økonomforbundet, Copenhagen, Denmark, 2nd edition, 2000, p. 47. The author's argument is presented in the context of the Danish legal system, but it holds true also in context of the CISG.

The demand of taking into consideration foreign case law and scholarly works raises a problem of access and a problem of language. It may not be possible to locate or achieve insight to cases, either because of unawareness of their existence or because of confidentiality.[114] A barrier exists insofar as the interpreter needs to be able to read the language of the cases considered.

In regard to the present work, the preparatory works, Convention text, its purpose, case law and scholarly works is appropriate sources for an interpretation of article 80. Investigation of these sources will show the current state of article 80. However, since adjudicators may not clearly follow the interpretation method outline above and not clearly use the sources relevant, it is appropriate to criticise, or at least be aware, that their approach is different. Thus, this work will have the character of criticising also the application of article 7 as this is one of the few benchmarks we have in a judicial pluralistic environment. As an example, the Chinese jurisdiction can be criticised for not stating a more clear legal basis for their decision, thus making it difficult to assess to what extent they are affected by their domestic system.[115]

### 2.2.3 Interpreting in Good Faith

The primary interpretation method under article 31 VCLT require the words of a convention to be read in good faith. The mentioning of *'Good faith'* refers to *pacta sunt servanda* and that interpretation is part of the state's performance of the treaty.[116] It prevents an excessively literal interpretation by requiring consideration of context, object and purpose,[117] thus making sure that the interpretation arrives at a fair and reasonable one.[118]

From good faith flows a number of requirements and presumptions, such as; terms were intended to have meaning rather than not, requirement to act honestly, fairly and reasonably, requirement to refrain from taking un-

[114] The latter is often a problem in regard to arbitral awards that may not be made public without consent by the parties. See Redfern, Alan; Hunter, Martin; Blackaby, Nigel and Partasides, Constantine, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, London, 4th edition, 2004, p. 30 *et seq.*

[115] See more *infra* chapter 8, p. 205 *et seq.*

[116] Aust, *Modern Treaty Law*, 2007, p. 234.

[117] Villiger, *Commentary on VCLT*, 2009, article 31, para. 8, p. 426.

[118] Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in Meyer/Janssen, 2009, pp. 42-43.

fair advantage, honouring of legitimate expectations, *venire contra factum proprium* and the prohibition of abuse of rights.[119] These presumptions resemble those applying to contract interpretation in international sales and to some extent also in article 80 according to chapter 5.

A good faith interpretation of article 80 is later provided as support for the view that the words *'to the extent'* are supposed to have meaning rather than not, thus allowing an application of article 80 to situations of shared responsibility with a *pro rata* apportionment of remedies.

At present a distinction can be made. Good faith can apply both as a requirement for the interpreter of the text to consider object, context and purpose. Or, it can apply as an obligation for the contracting parties to behave according to good faith in their contractual relationship. The latter is controversial and the approach varies from jurisdiction to jurisdiction.

In the current chapter, good faith is understood as an instruction not to read the Convention in a strict litteral or absurd way. This is less controversial and no matter that good faith is mentioned merely once in the CISG, this requirement would probably apply anyway by virtue of the general requirement of VCLT article 31.[120] With the purpose of achieving uniform application it is useful to include it in the Convention's article 7(1) anyway.

One might say that the good faith requirement is an instruction to see the rules of the Convention in the proper light with the proper background. This goes for all legal rules. One may not bring his trained and tame tiger in the public bus just because the prohibiting sign on the door illustrates a dog and not a tiger.[121] We know this from an enlightened reading of the sign, considering its context and purpose.

There are limits to good faith reading of a text, as it cannot override clear decisions made in a CISG provision. Where a concept needs clarification good faith becomes relevant,[122] and it may be used to expand or adapt pro-

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[119] Villiger, *Commentary on VCLT*, 2009, article 31, para. 7, pp. 425-426.

[120] In fact, it was suggested that the mentioning of good faith could be left out of the Convention. ICC suggestion, according to A/CONF.97/9, Comment on the Draft Convention in A/CONF.97/19, pp. 71-82.

[121] For more examples, including the present, see Evald, Jens, *At Tænke Juridisk*, Nyt Juridisk Forlag, 2001, pp. 30-32.

[122] Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 19, p. 129.

visions to suit new circumstances. The Convention is already limping behind compared to domestic law[123] and there os no reason to let it completely freeze in time.

Article 7 must be read broadly, thus allowing an analogical application of a specific provision before gap filling by reference to the general principles on which the convention is based.[124] Though there is an overlap between the two methods,[125] they are different insofar as analogical application means to extent a single provision and gap-filling is done by using general principles that are applicable on a wider scale.[126]

Analogical application of the Convention text is not only permitted from the VCLT and the requirement of interpreting the text in good faith according to a current understanding. It is also permitted by article 7 on a logical *a maiore ad minus* basis where prohibiting analogy would be to contradict the object and purpose of the CISG.[127]

However, before a rule is applied by way of analogy it must be determined whether the draftsmen would have chosen a similar solution for the situation or if the rule is restricted to its particular context, for example because it is of exceptional character.[128] It is thus relevant to consider whether an analogical application should be allowed of article 80 due to its general wording or it is to be restricted due to its character as a rule of exemption. The drafting history may reveal this.

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123 Lookofsky, Joseph, *Loose Ends and Contorts in International Sales: Problems in The Harmonization of Private Law Rules*, American Journal of Comparative Law, 1991, 403-416, [Lookofsky, *Loose Ends and Contorts*, 1991], p. 403.

124 Felemegas in Felemegas, *An Int'l Approach*, 2007, pp. 25-26, Bianca/Bonell, *Commentary*, 1987, p. 74, Schlechtriem, Peter and Butler, Petra, *UN Law On International Sales: The UN Convention on The International Sale of Goods*, Springer, Berlin, 2009, p. 51, Henschel, René F., *The Conformity of Goods in International Sales*, Thomson/GADJura, Copenhagen, 2005, pp. 42-43 and Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in Meyer/Janssen, 2009, p. 44.

125 Flechtner/Honnold, *Uniform Law,* 2009, pp. 145-147 and Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 29, p. 134.

126 Bianca/Bonell, *Commentary*, 1987, p. 79.

127 Roth and Happ, *Interpretation of CISG*, 1999, p. 4.

128 Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 26 and Bianca/Bonell, *Commentary*, 1987, pp. 78-79.

An example of an interpretation that modernises the Convention could be in regard to article 13, which reads:

> 'For the purposes of this Convention "writing" includes telegram and telex.'

Naturally, the draftsmen could not take into consideration the development of electronic communication. Electronic communication is equivalent to traditional written communication if it contains the *'possibility to save (retrieve) the message and to understand (perceive) it'*.[129] Thus, a broad interpretation of article 13 expands the provision to comprise new forms of communication without the need to revise the Convention – which would be practically impossible.[130]

The question is whether article 80 is supposed to be understood broadly due to this general character of the Convention. Alternatively, a narrow interpretation could be justified from the fact that the provision is an exemption clause. The choice between the two approaches depends on an evaluation of the sources pointed out.

## 2.3 Litteral Interpretation as the Starting Point

The first point of reference is the Convention text itself, which has been attempt worded in a more general way so to free it from domestic meanings, for example by referring to physical events instead of using domestic legal idioms.[131]

Despite this, it may happen that a word used in the Convention text resembles a domestic concept. However, foreign law is not appropriate un-

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[129] CISG AC Opinion no 1, *Electronic Communications under CISG*, 15 August 2003, Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden.

[130] B. Audit in Carbonneau, Thomas E., *Lex Mercatoria and Arbitration: A Discussion of The New Law Merchant*, Juris Publication, Yonkers, New York, 1998, [Carbonneau, *Lex Mercatoria and Arbitration*, 1998], p. 187 who also supports that article 7 can be used to develop the Convention.

[131] Flechtner/Honnold, *Uniform Law,* 2009, pp. 150-151, Honnold, *Uniform Words*, 1988, III.B., Zeller, *Damages*, 2009, p. 182.

der article 7(1) and the autonomous interpretation established there[132] and concepts should not be interpreted according to the meaning in the states whose language is used.[133] It would thus be inappropriate to for example apply a domestic causation test when interpreting article 80's words *'caused by'*.[134]

Not even when a concept or legal expression is inspired by a particular domestic system should the adjudicators fall back on that domestic law.[135] It would thus be inappropriate to interpret article 80 purely in the light of similar domestic concepts with the purpose of reading a similar understanding into the Convention.[136]

Instead, an international, uniform and autonomous interpretation must be attempted according to article 7, see *supra* section 2.2, p. 17 *et seq.* It has been suggested that the time for an International Sales Law Thesaurus has come[137] and such thesaurus may be of assistance to adjudicators.[138] Its development and success is still pending and will depend on the frequency of use.[139]

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132 Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 20, p. 130.

133 Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 8, p. 123.

134 For more on this specific issue, see section 6.2, p. 147 *et seq.*

135 B. Audit in Carbonneau, *Lex Mercatoria and Arbitration*, 1998, pp. 187-188, Felemegas in Felemegas, *An Int'l Approach*, 2007, pp. 20-22, Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 7, para. 23, p. 102 and Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 21, p. 130.

136 For an example of an inappropriate approach, see Northern District of Illinois, Eastern Division, United States, *Raw Materials Inc. v. Manfred Forberich GmbH,* 6 July 2004.

137 Rogers, Vikki M. and Kritzer, Albert H., *A Uniform International Sales Law Terminology* in Hager, Günter; Schwenzer, Ingeborg and Schlechtriem, Peter, *Festschrift Für Peter Schlechtriem Zum 70. Geburtstag*, Mohr Siebeck, Tübingen, 2003, p. 249.

138 A thesaurus project is currently in development by Professor Dr. Jur. Ingeborg Schwenzer, see www.globalsaleslaw.org.

139 Baasch Andersen, *Interrelation of CISG and Uniform Sources*, in Meyer/Janssen, 2009, p. 241.

#### *2.3.1.1 Discrepancies Between the Convention Texts*

The Convention exists in six equally authentic language versions[140] and in a number of inauthentic translations. These language versions may from time to time show discrepancies and the question thus is how to deal with these?

Regarding inauthentic language versions. These may appear because some countries have translated the CISG and made it an appendix to the domestic law ratifying the CISG or because of scholarly work. Norway and Iceland have chosen to translate and transform the CISG. This has been described as *'a major mistake'*, among other reasons, because it creates discrepancies between authentic and inauthentic language versions, which in turn questions whether the legislature intended to depart from the CISG rule or merely made a mistake.[141] In regard to article 80 it is noticed that a literal translation of the provision into Norwegian do not exist. Further dealt with *infra* section 8.3, p. 211 *et seq.* For now, it is beneficial to point out that in case of discrepancy between an authentic and an inauthentic[142] language version, the authentic prevails.[143]

Regarding discrepancies between the six authentic language versions of the Convention it becomes slightly more problematic. Starting with the literal approach means that the six authentic language versions of the Convention must be consulted.[144] Hence, article 80 CISG reads in its authentic versions;

المادة ٨٠

لا يجوز لأحد الطرفين أن يتمسك بعدم تنفيذ الطرف الآخر لالتزاماته في حدود ما يكون عدم التنفيذ بسبب فعل أو اهمال من جانب الطرف الأول (Arabic)

一方当事人因其行为或不行为而使得另一方当事人不履行义务时，不得声称该另一方当事人不履行义务。(Chinese)

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[140] The six official texts are those of the UN; Arabic, Chinese, English, French, Russian, and Spanish.

[141] Krüger, Kai, *Norsk Kjøpsrett*, Alma Mater, Bergen, 4th revised edition, 1999, [Krüger, *Norsk Kjøpsrett*, 1999], pp. 671-672.

[142] Of unauthentic CISG translations can be mentioned the Danish and the Finnish available on CISGNordic.net.

[143] VCLT article 33(2.A) *e contrario* and Villiger, *Commentary on VCLT*, 2009, article 33, para. 7, pp. 457-458.

[144] The official languages of the United Nations and therefore also the CISG is Arabic, Chinese, English, French, Russian and Spanish.

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. (English)

Une partie ne peut pas se prévaloir d'une inexécution par l'autre partie dans la mesure où cette inexécution est due à un acte ou à une omission de sa part. (French)

Сторона не может ссылаться на неисполнение обязательства другой стороной в той мере, в какой это неисполнение вызвано действиями или упущениями первой стороны. (Russian)

Una parte no podrá invocar el incumplimiento de la otra en la medida en que tal incumplimiento haya sido causado por acción u omisión de aquélla. (Spanish)

In the context of the present work the comparison of the six versions of article 80 demonstrates a very similar content, which do not seem to change the issues addressed in this work. However, it is noticed that the Chinese version of article 80 appears to neglect the words *'to the extent'*. Since all other authentic language versions include these words and considering the general low quality of the language in the Chinese version of the provision it is appropriate to neglect this version. The lower quality is probably due to the fact that the Convention was drafted and negotiated in English and subsequently translated into Chinese.[145] Thus, the comparison of the authentic language versions of article 80 does not lead to a deviation from the presumption that each version has the same meaning.[146]

It is the English language version that has primarily been used throughout the remainder of this work, though it is not self-evident that the English language version is always to be preferred. Rather a reconciliation of the languages in the context should be sought, taking into consideration also the language version the parties have used, since party autonomy has priority.[147]

If interpretation of the parties' agreement does not give preference to a particular language version, the VCLT contains a rule of interpretation in article 33. The rule presumes that equally authoritative language versions of

[145] The words 'to the extent' is to be found in the Arabic version. However, this version is confusing since it addresses both parties at once and not separately.

[146] See VCLT article 33(3).

[147] Interpretation according to CISG article 8, see *supra* 2.6.2 Interpretation of the Parties' Agreement, p. 49 *et seq.* Similarly can a particular language version be given preference under VCLT if the parties agree, see VCLT article 33(1). Also the contract between the parties may be of several languages. In such case it is advisable to give priority to one of them as done in China International Economic & Trade Arbitration Commission [CIETAC], China, *Steel Channels Case*, 18 November 1996.

a polylingual convention hold equal authority.[148] If a discrepancy between language versions cannot be removed by applying the primary and supplementary methods of VCLT articles 31 and 32, the meaning that reconciles the texts in light of object and purpose is the prevailing one.[149] In this situation the teleological interpretation has been given priority whereas no such hierarchy among interpretation methods exists when applying article 31.[150]

This approach may be different to the approach suggested specifically under the CISG. Here it has been said that in case of divergence between authentic languages, one language version may have to be neglected,[151] for example due to the trading parties preference, but also because the English language version is the version that best express the intention of the drafters as the negotiations and the drafting committee's work was carried out in the English language.[152]

Relying on this literal starting point, a further analysis of article 80 is carried out in this book, taking into consideration the autonomous interpretation rule found in article 7(1) and the general requirement not to apply an excessively literal or absurd approach to the Convention text. A salient characteristic of this method is that domestic interpretation methods and domestic sources are prohibited.

This leads to two questions. First, which sources are then relevant in case a gap exists in the Convention text? Second, is there a hierarchy between other sources, for example the parties' agreement and the Convention text? These two aspects are clarified in turn below.

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148 Villiger, *Commentary on VCLT*, 2009, article 33, para.s 5-6, pp. 456-457.

149 VCLT article 33(4).

150 Villiger, *Commentary on VCLT*, 2009, article 33, para. 12, p. 460.

151 Schlechtriem in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 7, para. 21, p. 101, Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 21, p. 130.

152 Schlechtriem in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 7, para. 22, p. 101, Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 21, p. 130 and Bundesgericht [Supreme Court], Switzerland, *Used Laundry Machine Case*, 13 November 2003. Differently, Kern, Christopher, *Les droits de rétention dans la Convention de Vienne* in Rudolf Meyer zum abschied: Dialog Deutschland-Schweiz VII, Geneva 1999, p. 105, who argues in context of article 80 that it the most appropriate version is the most precise one.

## 2.4 Supplementing the Convention Text

The Convention does not pretend to regulate all matters relevant to international trading parties. A scrutiny of articles 2-6 reveals that certain matters are excluded from the Convention, for example validity of the contract, effect on the property in the goods, liability for personal injury caused by the goods, effects of fraud, capacity of agents etc.[153] Such matters falling outside the scope of the CISG (*lacunae intra legem*) must be solved by another set of rules, be it international or domestic[154] and it is not appropriate to apply underlying principles.[155] A gap-filling tool in the CISG is not needed in such situation and neither is it needed if the matter if governed and settled entirely by the Convention.[156]

However the CISG govern matters, which it does not necessarily settle completely (*lacunae preater legem*). In these situations article 7(2) demand gap-filling by underlying principles before turning to the otherwise applicable law.[157] *Lacunae prater legem* appears either because the draftsmen decided not to regulate the matter, because they overlooked the issue or because the development since the drafting has presented new challenges.[158]

Gap-filling is relevant to article 80 as it is an example of such gap. The provision clearly calls for exemption when the cause of non-performance is the other party, but a number of related issues are not settled for example the

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153 Flechtner/Honnold, *Uniform Law,* 2009, pp. 140-142 and Bianca/Bonell, *Commentary*, 1987, p. 76 and Kröll, Stefan, *Selected Problems Concerning The CISG's Scope of Application*, Journal of Law and Commerce, 2005-06, 39-57, pp. 42-43.

154 Lookofsky, Joseph, *Understanding The CISG: A Compact Guide to The 1980 United Nations Convention on Contracts for The International Sale of Goods*, DJØF, Copenhagen, 3rd edition, 2008, [Lookofsky, *Understanding CISG,* 2008], p. 38.

155 Janssen and Claas Kiene, *The CISG and Its General Principles* in Meyer, Olaf and Janssen, André, *CISG Methodology*, Sellier, Munich, 2009, [Janssen and Claas Kiene, *General Principles*, in Meyer/Janssen, 2009], p. 267 and Zeller, Bruno, *The United Nations Convention on Contracts for The International Sale of Goods – A Methodology for its Interpretation and Application,* University of Melbourne, 2001, [Zeller, *Interpretation and Application*, 2001], p. 138.

156 Lookofsky, *Understanding CISG,* 2008, p.38.

157 Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 5, p. 122.

158 Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 30, pp. 134-135.

duty to avoid or overcome consquences, the duty to give notice or matters of burden of proof. It is thus necessary that any interpreter take into consideration underlying principles of the CISG in the interpretation of the provision before turning to domestic law. The underlying principles of article 80 are analysed further *infra* chapter 5, p. 107 *et seq.*

Article 7(2) is significant to the present work in two ways. First, gaps identified in regard to article 80 must be attempt solved by possible underlying principles before turning to otherwise applicable law. Second, the otherwise applicable law is a last resort, but it is also an obligatory last resort.[159] There is no room for another layer between applying underlying principles according to article 7(2) and recourse to the otherwise applicable law.

Regarding *lacunae praeter legem* the Convention adopts a combined approach where unsuccessful application of general principles leads to domestic law as opposed to a meta or true code approach.[160] This approach minimize diversity in the Convention's gap-filling since general principles on which the Convention is based is to be used before domestic law.[161] The idea of creating an instrument according to which all matters should be solved was deliberately left.

### 2.4.1 How to Identify Underlying Principles

Principles underlying the CISG can be extrapolated from the Convention's provisions, for example the requirement of reasonableness, which is mentioned almost fifty times throughout the text.[162] It has been argued that an underlying principle may be possible to derive from a single provision

[159] Schlechtriem in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 7, para. 35, p. 109, Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 42, pp. 142-143 and Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 37.

[160] Combined method refers to the combination of the true code approach and the meta code approach where the former has absolute independence from domestic law and the latter relies on external principles to fill gaps. The former was the method adopted in ULIS. See Felemegas in Felemegas, *An Int'l Approach*, 2007, pp. 24-25 and Enderlein/Maskow, *International Sales Law*, 1992, pp. 57-58.

[161] Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 23.

[162] Bianca/Bonell, *Commentary*, 1987, pp. 80-81.

in the Convention, for example the principle of party autonomy found in article 6.[163]

However, it seems insufficient to base an underlying principle on a single provision, as it may just as well be a specific rule – one swallow makes no summer. Rather, in the case of party autonomy the principle is expressed and given priority in several other provisions, such as articles 9(2), 29(2), 33(a), 35(1) and 41, thus allowing a principle to be extrapolated.[164] Finding a principle underlying the CISG by looking at specific provisions is like looking at rocks pointing up through the soil to figure out the type of bedrock underneath. Article 80 has been said to express several such underlying and related principles.

Additional sources may be case law and scholarly writings that can be of assistance in the process of identifying an underlying principle.[165] For the sake of uniformity one must not compare domestic law or use domestic law to identify the principles within the Convention.[166] Doing so would be contrary to the purpose and nature of the Convention. It is important in this regard to recall that the CISG is the result of a political compromise and that neither domestic law nor other international instruments can justify introduction of *new* rules or principles into the CISG. The nexus to the CISG in this regard is so to speak a one-way street. If the adjudicator cannot identify an underlying principle the matter is referred to domestic law by virtue of article 7(2).[167]

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163 Janssen and Claas Kiene, *General Principles*, in Meyer/Janssen, 2009, p. 271, Bonell in Bianca/Bonell, *Commentary*, 1987, p. 80, Schwenzer, *Commentary on CISG*, 2010, article 7, para. 32, p. 136.

164 Another example is *favor contractus* which appears from eleven articles according to Janssen and Claas Kiene, *General Principles*, in Meyer/Janssen, 2009, pp. 273-274, see also Schwenzer, *Commentary on CISG*, 2010, article 7, para. 35, p. 138 and Magnus, Ulrich, *General Principles of UN-Sales Law*, Rabels Zeitschrift for Foreign and International Private Law, Volume 59, Issue 3-4, 1995, 469-494, [Magnus, *General Principles*, 1995], (5)(b)(9).

165 Flechtner/Honnold, *Uniform Law,* 2009, pp. 146-148.

166 Felemegas in Felemegas, *An Int'l Approach*, 2007, pp. 27-29 and Enderlein/Maskow, *International Sales Law*, 1992, p. 60. Slightly different is Bianca/Bonell, *Commentary*, 1987, pp. 81-82 who argue that a domestic standard can be used if it is adopted in several legal systems.

167 Bianca/Bonell, *Commentary*, 1987, pp. 82-83, Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 42, pp. 142-143 and Felemegas in Felemegas, *An Int'l Approach*, 2007, pp. 37-38.

However, when a principle cannot *clearly* be extrapolated from the Convention, a proposed application may be tested against the applicable trade usage, contract practices and modern international rules for international transactions.[168] This approach is different to the process of identifying principles and is allowed since it takes into consideration the international character of the Convention, which is better than falling back on domestic law that is meant to be avoided.

### 2.4.2 Implications of Having Identified Underlying Principles

The identification of underlying principles in the CISG has significant effects in two aspects; First, it affects the application of the Convention according to article 7(2) and second, it expands the interpretation aids of the Convention.

#### *2.4.2.1 Expansion of Scope of the CISG*

The principles underlying the Convention are to be used to resolve matters governed, but not settled (*lacunae praeter legem*) according to article 7(2). In this way the identification of principles expands the scope of the Convention compared to not finding such principles.

Principles also have the effect that they apply throughout the Convention text and can be used in considering matters that are not expressly addressed in the provision being applied. This mirrors the suggestion by the drafters that article 80 as an exemption in principle could be dealt with in every provision of the Convention.[169]

As an example, article 36 establish that a seller is liable for non-conformities that appear after the risk has passed if they are due to the seller's breach of obligations, for example a guarantee that the goods will remain fit for a purpose for a period of time. It could also be that the contract includes a service obligation for the seller.[170]

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168 Flechtner/Honnold, *Uniform Law,* 2009, p. 148.

169 A/CONF.97/C.1/SR.28, Australia, para. 51, p. 386, Switzerland, para. 55, p. 386 in A/CONF.97/19.

170 Flechtner/Honnold, *Uniform Law,* 2009, p. 347.

This was the case in *Conservas La Costeña v. Lanín*[171] where the parties had agreed on a FOB sale of canned fruit, meaning that the buyer was to bear the transport risk. The cans deteriorated during the transport and as a starting point this would be the risk of the buyer.[172] However, the seller was found to be liable for the deteriorated cans since it was the seller's non-conforming packaging that caused it.

Article 36(2) does not protect the buyer from *his own* failure to maintain and protect the goods, for example the seller is not liable for a non-performance of a guarantee that the goods will remain fit for the first 10,000 miles if the buyer has not maintained and protected the goods. This solution does not appear from the wording of article 36(2), but follows from article 80 and its underlying principles[173] not to act inconsistently or not to derive benefit from own wrongdoing. Article 80 and its principles thus set a limit for any guarantee regarding the quality and fitness of the goods.

Had the deterioration been caused by the buyer's lack of protection of the goods in *Conservas La Costeña v. Lanín,*[174] the buyer should not have succeeded in asserting article 36.

#### *2.4.2.2 Expansion of Interpretation Aids*

An overlap between the underlying principles of the CISG and other international instruments can justify that the latter is used in the interpretation of the principles that also underlie the Convention. In regard to article 80 it has been stated that an overlap with PECL can provide valuable insight to terms, definitions and application of the CISG as a supplemental source.[175]

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171 Comisión pare la Protección del Comercio Exterior de México [Mexican Commission for the Protection of Foreign Trade], Mexico, *Conservas La Costeña S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A.*, 29 April 1996.

172 This was the solution followed in Amtgericht Duisburg [District Court], Germany, *Pizza Cartons Case*, 13 April 2000 where the buyer bore the risk of the pizza cartons being damaged in transport.

173 Flechtner/Honnold, *Uniform Law,* 2009, pp. 346-347.

174 Comisión pare la Protección del Comercio Exterior de México [Mexican Commission for the Protection of Foreign Trade], Mexico, *Conservas La Costeña S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A.*, 29 April 1996.

175 Butler in Felemegas, *An Int'l Approach*, 2007, p. 506.

However, if one is to gain new knowledge from using other international instruments as interpretation aids, the instruments must be slightly different to, or an elaboration of, the principles expressed also in the Convention. In regard to article 80 it has been suggested that the great similarity with UPICC limits it as an interpretation aid, however it can be used to confirm the interpretation under article 80 CISG.[176] The use of international restatements is addressed immediately below.

## 2.5 The Use of Soft Law as Interpretation Aid

The UPICC is probably the most significant international sales law instrument of the soft law character and its application in a CISG case can become relevant in numerous ways. First, the parties may choose it as the law relevant for filling the gaps of the CISG or the contract.[177] Second, it may apply as part of a practice between the parties or a usage in the trade.[178] Third, if the case is being solved by way of arbitration the adjudicator is typically less restricted and UPICC may apply under *ex aqae et bono, amicable compositeurs*, general principles of law or when the arbitrator is asked to be guided by fairness.[179]

At present, the focus is to clarify whether UPICC and other international instruments may serve as an interpretation aid. Article 7(2) CISG requires the adjudicator to attempt to locate underlying principles in case a *lacunae praeter legem* has been located. If the matter is outside the Convention, a *lacunae intra legem*, it is not permitted to apply general principles, but rather the matter has to be referred to domestic law.[180]

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176 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 252.

177 See for example ICC Model Form of International Agency Contract, 2nd edition, clause 24.1.A and ICC Model Distributorship Contract, 2nd edition, clause 24.1.A.

178 For example Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, 23 January 2008, No. T-9/07.

179 For example Arbitral Tribunal of the City of Panama, Republic of Panama, 24 February 2001, International Court of Arbitration, International Chamber of Commerce, Paris, France, December 1996, No. 8874 and International Court of Arbitration, International Chamber of Commerce, Paris, France, 2003, No. 11265.

180 Janssen and Claas Kiene, *General Principles*, in Meyer/Janssen, 2009, p. 267 and Zeller, *Interpretation and Application*, 2001, p. 138.

As a starting point, the adjudicator must identify underlying principles on an *ad hoc* basis. Whether the UPICC can be taken as an expression of autonomous principles called upon under article 7(2), thus providing the adjudicator with a convenient black-letter instrument, is not self-evident since the former may contain more principles than are underlying the CISG.

The question in focus is whether article 80 expresses a principle underlying the CISG or not and it is thus irrelevant whether a possible gap can be filled by external principles, such as UPICC and PECL – a controversial matter.[181]

On one hand it has been argued that UPICC cannot act as a *standard* gap-filler since not all provisions are compatible with those of the CISG.[182] It has also been advanced that the wording of article 7(2) demands that the principles used cannot be external or later in time[183] and that UPICC express predominantly continental European legal tradition that makes it different to the CISG.[184]

On the other hand it is provided that the principles of the CISG vastly correspond to and are expressed in UPICC.[185] Further, it has been argued that the CISG should constitute a basis for the creation of a general law of contracts, a work now continued in UPICC.[186]

This discussion is not followed further, but it is pointed out that the danger of blindly filling gaps with for example UPICC under the view that it is an expression of principles on which the CISG is based, is that new and unfamiliar rules are introduced to the CISG.

To make sure that a principle truly is one underlying the CISG, the identification of such principles must at first involve only the Convention text. For this reason the identification of underlying principles in the context

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181 Viscasillas, *The Role of the UNIDROIT Principles and the PECL,* in Meyer, Olaf and Janssen, André, *CISG Methodology*, Sellier, Munich, 2009, [Viscasillas, *The Role of UPICC and PECL*, in Meyer/Janssen, 2009], p. 288.

182 Baasch Andersen, *Interrelation of CISG and Uniform Sources*, in Meyer/Janssen, 2009, p. 249.

183 Viscasillas, *The Role of UPICC and PECL*, in Meyer/Janssen, 2009, p. 296.

184 Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 26, p. 133.

185 Magnus, *General Principles*, 1995, para. 6.b. and Viscasillas, *The Role of UPICC and PECL*, in Meyer/Janssen, 2009, pp. 296-297.

186 Magnus, *General Principles*, 1995, para. 6.b.

of article 80 will be based primarily on the text of the Convention and the scholarly works, preparatory works and case law related to it.

However, identifying principles underlying the CISG is a matter of interpretation of the Convention text, thus a matter of applying article 7(1). Again, the question of the role of instruments like UPICC arise, this time as interpretation aids and not as a possible gap-filler. Using a-national soft law instruments to confirm a possible interpretation of the CISG is a way of complying with the interpretation rule of VCLT,[187] acknowledging the trading community in which the CISG operates,[188] giving regard to its international character,[189] promoting autonomous interpretation and avoiding ethnocentrism.

### 2.5.1 Sources of Lex Mercatoria

Party autonomy is to a wide extent given priority within contract law and also within the CISG does the parties' agreement supersede the law. In theory, the parties would be allowed to regulate the relationship between them entirely by contract, thus rendering the law superfluous. Party autonomy and the trading community's self regulation has old historical roots and in many instances, national legislation regarding contracts and sales are codifications of the 'law' that developed among merchants over time.[190] One

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187 Bonell, Michael Joachim, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, Transnational Publishers, Ardsley, New York, 2005, [Bonell, *An Int'l Restatement*, 2005], p. 232.

188 Since UPICC express internationally acceptable rules, see Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 26, p. 133 and International Chamber of Commerce, International Court of Arbitration, Geneva, Switzerland, *Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*, 28 July 2000, No. 9797, Ad Hoc Arbitration, San José, Costa Rica, 30 April 2001 and International Chamber of Commerce, International Court of Arbitration, March 2000, No. 10114.

189 Enderlein/Maskow, *International Sales Law*, 1992, p. 55, Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 10, Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 25, pp. 132-133.

190 Lookofsky, Joseph and Ulfbeck, Vibe, *Køb: Dansk Indenlandsk Købsret*, Jurist- og Økonomforbundet, Copenhagen, 3rd edition, 2008, [Lookofsky and Ulfbeck, *Køb*, 2008], pp. 3-4.

can say that the law of merchants grows from below as opposed to being passed down from the top.

Recently, also the Commission has considered, and with the Common Frame of Reference (CFR) also decided on, a more soft approach to the harmonisation of contract law within the European Union[191] instead of passing hard law down from the top.

The CFR is available as a Draft (DCFR),[192] which is an academically, but not politically authorised text.[193] Its main part consists of model rules in the form of soft law similar to those found in the PECL, which in revised form has been incorporated.[194]

Also, at the international level, the trading parties regulate matters between themselves. The merchants law, *lex mercatoria*, has been defined as an *'international system of principles and rules generally accepted in international commerce.'* [195]

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191 COM(2001) 398 Final, Commission, Communication from the commission to the council and the european parliament on european contract law. COM(2003) 68 Final, Commission, Communication from the commission to the european parliament and the counsil, A more coherent european contract law: An action plan. COM(2004) 651 Final, Commission, Communication from the commission to the european parliament and the counsil: European contract law and the revision of the acquis: The way forward. COM(2005) 456 Final, Commission, Report from the commission: First annual report on european contract law and the acquis review. COM(2007) 447 Final, Commission, Report from the commission, Second progress report on the common frame of reference.

192 The authors of the DCFR states that it is based on a substantial amount of work which means that the DCFR will be able to stand on its own no matter the fate of the CFR, von Bar, Christian; Clive, Eric; Schulte-Nölke, Hans; Beale, Hugh; Herre, Johnny; Huet, Jérôme; Schlechtriem, Peter; Storme, Matthias; Swann, Stephen; Varul, Paul; Veneziano, Anna; Zoll, Fryderyk, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, European Law Publishers, 2008, [von Bar, et. al., *DCFR*, 2008], para. 7, p. 6.

193 von Bar, et. al., *DCFR*, 2008, para. 4, p. 5.

194 von Bar, et. al., *DCFR*, 2008, para. 8, p. 7 and para. 13, p. 10.

195 Ramberg, Jan, *International Commercial Transactions*, International Chamber of Commerce, Paris, Volume no. 691, 2004, p. 20.

Both UPICC and PECL have been said to apply and express *lex mercatoria*,[196] but the sources of *lex mercatoria* are not restricted to these instruments. However, restatements like UPICC and PECL make *lex mercatoria* more tangible to work with.

It should be noted that UPICC was drafted both with a restatement approach and with a 'better rule approach' and may therefore not entirely express existing *lex mercatoria*.[197] As such, UPICC is a combination of a restatement and pre-statement[198] of current law.[199] Over time, pre-statements may become accepted, especially when rules are repeated in new versions of the UPICC.

UPICC is an ongoing project that exists in a 1994, 2004 and a 2010 edition, thus providing an instrument which adapts, develops and expands, just as *lex mercatoria* does.

This ongoing codification is developed further in the TransLex Principles (TLP). First, the TransLex Principles is a codification of *lex mercatoria*[200] and does not follow a better-rule approach. Second, the codification is a constant daily development, where results are made available instantly on the Internet.[201]

This 'creeping codification method' serves the purpose of providing practitioners with a more convenient black letter instrument and at the same time, facilitated by the Internet, allows a constant modernization of the principles instead of freezing them in time.[202] The codification of *lex merca-*

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196 Viscasillas, *The Role of UPICC and PECL*, in Meyer/Janssen, 2009, p. 288, p 313, Berger, *Creeping Codification*, 2010, pp. 11-12,

197 Brower, Charles N. and Sharpe, Jeremy K., *The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective*, Virginia Journal of International Law, 2004, 199-221, pp. 203-204.

198 Michaels in Vogenauer/Kleinheisterkamp, *Commentary on UPICC*, 2009, p. 25.

199 Also the Restatement (second) from the United States of America has been said to express both rules derive from case law as well as rules as the drafters would like to see them. See Blum, Brian A., *Contracts: Examples and Explanations*, Aspen Publishers, 4th edition, 2007, pp. 30-31.

200 Berger, *Creeping Codification*, 2010, p. 12.

201 See www.trans-lex.org.

202 Berger, *Creeping Codification*, 2010, pp. 12-13, p. 270.

*toria* in the TransLex Principles is open-ended and dynamic, thus allowing constant updating and extension.[203]

### 2.5.2 Value of Soft Law and Interpretation Aid

Restatements of *lex mercatoria*, like UPICC, PECL and TLP, makes the vague notion of the merchant law possible and convenient to work with, just as the national sales acts which codified the merchant law. Such restatements are private and informal codifications and are not affected by a negotiation process or inertia of a state bureaucracy.[204]

In contrast, the CISG is a top-down instrument. It is a product of negotiations between states and hard law in the countries where it has been adopted. The CISG may not necessarily express what trading parties already consider being the law of merchants. It is precisely the soft law character of the international restatements that makes them valuable in relation to the CISG for the following reasons.

UPICC are applied and accepted in practice[205] only because of their persuasive value.[206] This argument is true for all soft law restatements, since the success of soft law depends on its ability to express what the trading parties consider to be appropriate. Only when this is true will the parties actively apply the instrument between them. The threat of not having the instrument accepted by the parties, together with its attempt to codify already existing *lex mercatoria* makes it suitable as an interpretation aid regarding the CISG.

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[203] Berger, *Creeping Codification*, 2010, p. 257.

[204] Brower, Charles N. and Sharpe, Jeremy K., *The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective*, Virginia Journal of International Law, 2004, 199-221, pp. 200-202.

[205] Holding that UPICC express international practice, see International Chamber of Commerce, International Court of Arbitration, Geneva, Switzerland, *Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*, 28 July 2000, No. 9797, Ad Hoc Arbitration, San José, Costa Rica, 30 April 2001 and International Chamber of Commerce, International Court of Arbitration, March 2000, No. 10114.

[206] Bonell, *An Int'l Restatement*, 2005, p. 173, Berger, *Creeping Codification*, 2010, p. 11.

Considering a-national restatements is a way of considering the trading community, the environment in which the CISG operates and the international character of the Convention.[207] It is a way of avoiding domestic law, thus giving regard to the need to promote uniform and autonomous application of the Convention[208] and it has been argued that the choice of *lex mercatoria* as the supplementary law in arbitration clauses is more in line with the Convention than domestic law.[209]

As such, the adjudicator may consider UPICC in order to determine which interpretation out of several is appropriate.[210] This is similar to the one under the VCLT's where confirmation can be sought in supplementary sources.[211]

### 2.5.3 Temporal Issue

It has been argued that principles in instruments outside the CISG cannot be used as interpretation aid since they are later in time and therefore cannot have had an impact on the CISG.[212] Though international principles or restatements may be later in time they are not deprived their interpretive value. When the CISG and the restatements have common intent, they should be used.[213]

It is exactly the difference in time that makes a-national restatements valuable as interpretation aids in relation to the CISG, since the former is not frozen in time like the Convention to some extent is.[214] Considering how the law in the present field grows from below, restatements like UPICC may

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207 Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 33 argues that both UPICC and PECL can and must be used in order to promote uniformity and international application of CISG.

208 Michaels in Vogenauer/Kleinheisterkamp, *Commentary on UPICC*, 2009, p. 57.

209 Lookofsky, *Loose Ends and Contorts*, 1991, p. 416.

210 Michaels in Vogenauer/Kleinheisterkamp, *Commentary on UPICC*, 2009, p. 57.

211 See the VCLT article 32.

212 Viscasillas, *The Role of UPICC and PECL*, in Meyer/Janssen, 2009, pp. 296.

213 Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 33.

214 Meaning, that the Convention is not being revised, but its modernisation is relying on interpretation and analogical application.

not only be an expression of the underlying principles also found in the CISG, they are an elaboration of them.[215]

The view sustained at present is one where existing international instruments are, to varying degree, expressions and elaborations of underlying principles and not consecutive, chronologically bound documents placed 'on top of each other'.

### 2.5.4 Limits to the Use of Soft Law

As already implied above the use of restatements as interpretation aids is not without limits. On one hand, the CISG must develop and adjust over time so that it is functional in the modern world and do not turn into a historical document. On the other hand, one must respect that delegates from states, probably with approval from their respective parliaments, have entered an agreement with each other. An agreement with certain limits that cannot necessarily be modified without renewed approval by the sovereign states party to the Convention.

The conflicting needs have been drawn up as a choice between a dynamic or a restrictive approach to the Convention.[216] In the present context there is not necessarily a conflict between a broad approach[217] to existing CISG rules justified by the need to develop and modernise, and respect for the borders of the Convention.

If the principles said to be underlying article 80 are identified by using only the Convention text itself, and not including international restatements, the danger of introducing new rules unfamiliar to the CISG is avoided. At the same time it is secured that a comparison to international restatements is more likely to reveal a true overlap in principles since the former did not affect the identification process in the CISG.

For these reasons, the identification of principles underlying the CISG should be, and have in the present context, been carried out prior to a con-

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[215] Michaels in Vogenauer/Kleinheisterkamp, *Commentary on UPICC*, 2009, p. 61, who makes the argument in regard to UPICC. However, it is equally applicable to other international soft law restatements.

[216] Henschel, *Mangelsbegrebet*, 2003, pp. 16-18.

[217] A broad approach is appropriate and extensive and application by way of analogy is permitted within the borders of CISG.

firmation of their interpretation by use of other international restatements. Only to the extent that an overlap is established may international restatements act as an interpretation aid and an elaboration of the same underlying principle.

## 2.6 Sources Superseding the Convention Text

The Convention regulates the contractual relationship between parties in international trade of goods. Consequently, it may be asked which relevance the parties' agreement will have on the present work. It can hardly be a surprise that also the CISG recognizes the party autonomy[218] and that the agreement of the parties has priority over the Convention. It is therefore relevant to clarify what actually constitutes agreement of the parties since it will take priority over the text of the Convention.

### 2.6.1 The Unequivocal Agreement by the Parties

Naturally, the unequivocal agreement is part of the contract between the parties and the very first step in solving a dispute is to determine and interpret the express agreement of the parties.[219]

The common intent of parties may be difficult to prove and should not be overestimated.[220] Fabricating a common intent of the parties or conducting a wide or analogous interpretation of their agreement is not appropriate because it is not secured by the mutual consent of the parties.[221] In this

[218] See article 6 CISG and Janssen and Claas Kiene, *General Principles*, in Meyer/Janssen, 2009, p. 271, Bonell in Bianca/Bonell, *Commentary*, 1987, p. 80, Schwenzer, *Commentary on CISG*, 2010, article 7, para. 32, p. 136.

[219] Lookofsky, Joseph, *Consequential Damages in Comparative Context: From Breach of Promise to Monetary Remedy in The American, Scandinavian and International Law of Contracts and Sales*, Jurist- og Økonomforbundets Forlag, Copenhagen, 1989, [Lookofsky, *Consequential Damages*, 1989], p. 259, Zeller, Bruno, *Damages Under The Convention of Contracts for The International Sale of Goods*, Oxford University Press, Oxford, 2nd edition, 2009, [Zeller, *Damages*, 2009], p. 60.

[220] Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 23, p. 156.

[221] Dietrich, Maskow, *On The Interpretation of The Uniform Rules of The 1980 UN Convention on Contracts for The International Sale of Goods*, National Reports for

regard, contract interpretation is very different from interpretation of the Convention where a broader interpretation style is called for.

If an unequivocal agreement or understanding of the contract is not possible to ascertain an interpretation of the contract is called for. The Convention contains a rule on this in article 8. The provision serves to overcome discrepancies between intent and communication and is only relevant to the extent that no unequivocal agreement exists between the parties. The interpretation method excludes domestic methods of interpretation[222] in accordance with the autonomous interpretation method called for by virtue of article 7(1).

If a common understanding is possible to identify, it may be that it contradicts the understanding of a reasonable person,[223] but in such case there will be no need for interpretation and the reasonable person standard in article 8(2) at all[224] and the common understanding must be respected.[225]

The interpretation rule of article 8 and article 9 is interesting in connection with article 80 since they point out relevant sources of interpretation of the agreement of the parties which in turn supercedes the Convention and is needed for example to identify whether there has been *'a failure to perform'* by the promisee seeking exemption according to article 80 CISG.

### 2.6.2 Interpretation of the Parties' Agreement

Article 8 applies to any legally relevant conduct by the parties, both in form of individual statements and the contract as a whole throughout the entire

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the XIIth International Congress of Comparative Law, 18-27 August 1987, 5-22, p. 9.

222 Schmidt-Kessel Schwenzer, *Commentary on CISG*, 2010, article 8, para. 1, p. 146.

223 Farnsworth in Bianca/Bonell, *Commentary*, 1987, p. 98.

224 Gyula Eörsi in Galston, Nina M. and Smit, Hans, (eds.) *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Matthew Bender, New York 1984, [Galston, *International Sales*, 1984], chapter 2, p. 17. A similar approach is followed in state relations under the Vienna Convention according to VCLT article 31(4).

225 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 42, p. 166.

life of the contract,[226] including pre- and post-contractual statements according to article 8(3).[227] It is irrelevant whether a party is conscious of the fact that it is making a statement of legal consequence.[228]

In principle, article 8 subsection (1) must be applied before the reasonable person standard in subsection (2).[229] This subsection concerns the issue of imputable knowledge and standard of care at the addressee. The words have been compared to the notion of gross negligence and it basically establishes that if the intention was easy to discern or the circumstances compelled an inquiry, the statement of the addressor is to be understood according to his intent.[230] The subsection has the effect that the unequivocal intent of the addressor is equivalent to the common intent of the parties[231] hence the addressee cannot pretend to have insufficient knowledge of the intent.[232]

If the addressee does not know or could be unaware of the intent of the addressor, subsection (2) applies.[233] Subsection (2) is the practical main

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226 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, paras. 2-3, pp. 146-147, Farnsworth in Bianca/Bonell, *Commentary*, 1987, pp. 97-98 and Enderlein/Maskow, *International Sales Law*, 1992, p. 61.

227 From its wording article 8 regulate the interpretation of *a* party's statements or conduct. However, it also applies to the interpretation of contracts as such though they in principle can be said to originate from *both* parties, according to Enderlein/Maskow, *International Sales Law*, 1992, p. 63 and Lookofsky, *Understanding CISG*, 2008, p. 42.

228 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, art. 8, para. 7, pp. 149-150.

229 Article 8(1) states; *'For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.'*

230 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 17, pp. 153-154.

231 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 24, p. 157.

232 Enderlein/Maskow, *International Sales Law*, 1992, p. 63.

233 Enderlein/Maskow, *International Sales Law*, 1992, p. 65 and Farnsworth in Bianca/Bonell, *Commentary*, 1987, pp. 99-100. Article 8(2) states; *'If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.'*

rule[234] because it is difficult to prove the intention of a party or the common intent of them both[235] – a problem that is exacerbated during a dispute. The interpretation introduces the test of a hypothetical understanding of a reasonable person of the same kind and in the same circumstances.[236]

The practical starting point when determining the content of a contract will be to employ both subsections.[237] Because the interpretation aids are the same under both subsection (1) and (2) the border between the two approaches are blurred.[238] The relevant interpretation aids are the same because article 8(3) applies to both previous sections.[239]

According to article 8(3),[240] all relevant circumstances must be taken into consideration when interpreting the parties' intentions.[241] The starting point is the wording of the statement itself, which is then enlightened by the circumstances.[242] The list of interpretation aids provided in the section is non-exhaustive[243] and basically, no circumstance is excluded as an interpretation aid as long as it may be relevant to the case.

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234 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 20, p. 155 and Farnsworth in Bianca/Bonell, *Commentary*, 1987, p. 99.

235 Flechtner/Honnold, *Uniform Law,* 2009, pp. 155-158.

236 Enderlein/Maskow, *International Sales Law*, 1992, pp. 65-66, Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 20, p. 155 and Farnsworth in Bianca/Bonell, *Commentary*, 1987, p. 99. Similar in UPICC article 4.1(2).

237 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 25, p. 157.

238 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 21, p. 155.

239 An effect of this is that the distinction between Article 35(1) and article 35(2)(b) seems practically irrelevant, see Neumann, Thomas, *Features of Article 35 in The Vienna Convention; Equivalence, Burden of Proof and Awareness*, Vindobona Journal of International Commercial Law and Arbitration, Volume 11, Issue 1, 2007, 81-98.

240 The provision reads; '*In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*'

241 Similar in UPICC article 4.3.

242 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 13, pp. 152-153.

243 Farnsworth in Bianca/Bonell, *Commentary*, 1987, p. 100.

### 2.6.3 Relevance of Practice and Usages

Usages, both local and international, as well as the practice between the parties can be relevant as interpretation aid when seeking out the intention of the parties under article 8(3).[244] In contrast, article 9 brings usages and practice of the parties to the level of agreement, thus trumping the CISG.[245] A trade usage is an autonomous concept and is understood as a rule regularly observed by parties in a particular trade or industry.[246]

Article 9(1) establishes that usages to which the parties have agreed have binding effect upon them.[247] Since the binding effect of the usage is derived from the agreement between the parties, any question related to its applicability is solved by the interpretation rule of article 8.[248] Consequently, also implied references to a usage may be enough for it to be invoked[249] if the addressee could not be unaware of the intent or a reasonable person would have recognized it according to article 8(1) and (2).

It also appears from the wording of the subsection that expectations may become binding through the conduct of the parties,[250] thus establishing a practice between them. The binding force of a practice requires that the practice is observed by the parties, that it is repeated more than just a few

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244 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 47, p. 169 and Bianca/Bonell, *Commentary*, 1987, p. 106.

245 This solution was also the one followed in ULIS, see Bonell in Bianca/Bonell, *Commentary*, 1987, pp. 103-104.

246 Enderlein/Maskow, *International Sales Law*, 1992, p. 69, Bianca/Bonell, *Commentary*, 1987, p. 111, Flechtner/Honnold, *Uniform Law,* 2009, pp. 169-170 and Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 9, para. 11, pp. 187-188.

247 The provision reads; *'(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.'* Similarly in UPICC art. 1.9.

248 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 9, para. 7, pp. 185-186.

249 Flechtner/Honnold, *Uniform Law,* 2009, pp. 168-169 and Bianca/Bonell, *Commentary*, 1987, p. 107. Regarding the use of article 8, see *supra* 2.6.2 Interpretation of the Parties' Agreement, p. 49 *et seq*.

250 Flechtner/Honnold, *Uniform Law,* 2009, pp. 169-170. Similarly in articles 19(2), 21(2), 35(2)(b), 47(2) and 73(2.

times,[251] that the parties have a preceding contractual relationship and the expectation must be that the practice will be followed in the future.[252] If a practice between the parties fulfils these requirements it binds the parties as an agreement between them.

In context of article 80 it could be that a promisor's excuse due to an alleged interference with the promisor's performance may depend on whether the conduct by the promisee is justified by an established practice or not.[253]

In addition to interpretation of the contract it is possible to supplement it[254] and in this regard usages are relevant according to article 9(2).[255] Supplementation of a contract may be needed because it is incomplete. The reason for this could be the practical difficulty it is for the parties to predict and answer all questions that can possibly arise from the contract or because the negotiating parties does not negotiate basics that they consider to go without saying.[256]

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[251] See for example Zivilgericht Basel [Civil Court Basel], Switzerland, *White Urea Case*, 3 December 1997, where a business relationship consisting of two simultaneous contracts did not establish a practice. Similar in Amtsgerich Duisburg [Petty District Court], Germany, *Pizza Cartons Case*, 13 April 2000, where a conduct repeated twice was not enough to establish a practice between the parties. Different in Cour d'appel Grenoble [Appeal Court], France, *Calzados Magnanni v. Shoes General International*, 21 November 1999, where the seller over years had delivered according to the buyers orders without express acceptance, thus establishing a binding practice deviating from CISG article 18(1).

[252] Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 9, para. 8, pp. 186-187 and Flechtner/Honnold, *Uniform Law,* 2009, pp. 169-170.

[253] See for example International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003 described further p. 156 *et seq.*

[254] Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 12, p. 152, and para.s 26-27, pp. 157-158.

[255] Besides of the inclusion of usages under article 9(2), supplementation can be justified by the implied duties of conformity under article 35(2) and the parties' reference e.g. to *ex aequo et bono* in accordance with article 6. See Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 27, p. 158. Regarding article 9(2), Enderlein/Maskow, *International Sales Law*, 1992, p. 64, states that inclusion of usages is a result of lack of agreement. Supplementation is in UPICC directly mandated in article 4.8

[256] Flechtner/Honnold, *Uniform Law,* 2009, p. 167.

Article 9(2) supplements the contract and its formation with usages and is independent from the parties' actual intent.[257] This pushes the default rules of the Convention further into the background.

If a usage meets the requirements of article 9(2), it is assumed to form part of the parties' expectations, though it may seem fictitious to do so.[258] According to the wording, the usage is implied if the parties at least ought to have known it and it as a minimum is known and regularly applied as an international rule in the trade or industry of the countries in which the parties have their place of business.[259] This means that also usages of local origin can be of relevance if they are observed and applied by parties in international transactions.[260]

A party cannot contest the applicability of a trade usage merely because that party was mistaken about its content or simply not aware of it.[261] With the wording *'ought to have known'*, the duty of care is stronger compared to article 8(1) and knowledge of a usage can be implied from the party's residency or activity in an area where the usage is observed.[262] Only very rarely will a party be able to successfully assert that it did not have to know a usage if that usage otherwise fulfils the other requirements.[263]

According to the words of article 80 a promisor is excused from a breach if it is caused by the other party's act or omission. However, the provision is silent on which specific act or omission that are prohibited and here the

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257 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 9, para. 1, p. 182 and para. 3, p. 183. Article 9(2) reads; *'(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.'*

258 Enderlein/Maskow, *International Sales Law*, 1992, p. 70 and Flechtner/Honnold, *Uniform Law,* 2009, p. 172.

259 Enderlein/Maskow, *International Sales Law*, 1992, p. 70 and Oberster Gerichtshof [Supreme Court], Austria *Wood Case*, 21 March 2000.

260 Flechtner/Honnold, *Uniform Law,* 2009, p. 173 and Bianca/Bonell, *Commentary*, 1987, pp. 108-109.

261 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 9, para. 13, p. 188.

262 Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 9, para. 19, p. 191.

263 Enderlein/Maskow, *International Sales Law*, 1992, pp. 69-70.

usages within a trade may be relevant for determining the reasonableness of the promisor's conduct in that particular trade.

An example of the effect that a trade usage may have is seen in *Steel Plates*.[264] Here the Helsinki Court of Appeal decided that according to a trade usage the buyer had to give the seller the opportunity to be present at inspection of the goods, a right that does not appear from the text of the Convention. By not doing so, the buyer weakened the credibility of the inspection and consequently the alleged non-conformity could not be proved.

Because both usages and practice is binding on the parties it can become relevant to determine the hierarchy between them if they are contradictory. According to the wording of the first part of article 9(2), usages and practice applied by virtue of section (1) takes precedence over those implied in accordance with section (2).[265] Within section (1) there may be a contradiction between the practice and usages of the parties. Here the practice between the parties is given priority over agreed usages since a practice is typically more specific and directed towards the specific parties.[266]

## 2.7 The Methodology and Sources Summarised

The present work involves sources of various languages[267] and translations of these sources. Not only does this act as a limit to the sources the present author can identify, read and understand, but it also adds a layer of insecurity, which may never be possible to remove in this field of research.

The present work is presented in the English language as it is believed to be the *lingua franca* of business and widely spoken within the CISG community. However, it is not the mother tongue of the present author.

A number of sources beyond the text of article 80 itself has been identified as relevant for acquiring further knowledge. The sources consist of

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264 Helsingin Hovioikeus [Helsinki Court of Appeal], Finland, 29 January 1998, CISGNordic.net ID: 980129FI.

265 Enderlein/Maskow, *International Sales Law*, 1992, p. 68 and Bianca/Bonell, *Commentary*, 1987, p. 108.

266 Enderlein/Maskow, *International Sales Law*, 1992, p. 68.

267 The present work involves sources in the Arabic, Chinese, Danish, English, French, German, Italian, Norwegian, Russian, Spanish and Swedish language.

the Convention, its underlying principles, drafting history, international soft law, domestic law, scholarly works, the trading parties' contract, their practice and usages.

Some of the sources exist in a hierarchy, thus providing an indicator of their comparative value. In order of priority, the parties' agreement, the Convention and domestic law form such hierarchy.[268]

When a state enters into a treaty it is for that state to ensure that all state organs, including the judiciary, as well as private persons are bound in a way so that the treaty is performed.[269] Not doing so, could be a breach of the treaty and the VCLT articles 26 and *pacta sunt servanda*, thus, any application of domestic law when the Convention is applicable would be inappropriate. The CISG therefore supersedes domestic law as a starting point.

Further more, the Convention acts as a gap-filler when the agreement between the parties is incomplete.[270] As indicated previously, the parties agreement, including to some extent practice and usages, supersedes the rules of the CISG.

Other sources do not form part of a hierarchy and will have to be evaluated on their persuasive value. The wording of the Convention is the starting point and from there, there is no order between context, legislative history and purpose.[271]

However, it is possible to group the sources in primary and secondary ones with VCLT as the framework around the aim and goals pointed towards specifically by the CISG. The primary sources constitute the starting point for an interpretation of the Convention text. Beside the text itself and its ordinary meaning, these sources are the purpose and context of the Convention as well as case law and to some extent scholarly works.[272]

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[268] See for example also Audit in Carbonneau, *Lex Mercatoria and Arbitration*, 1998, p. 193.

[269] Aust, *Modern Treaty Law*, 2007, p. 179.

[270] Lookofsky, *Consequential Damages*, 1989, p. 257.

[271] Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in Meyer/Janssen, 2009, p. 58.

[272] Such as the authentic language versions of CISG, the preamble, the rationale of the instrument, arbitration awards, court awards, scholarly articles, books and commentaries like the CISG Advisory Council's.

The secondary sources may be used to confirm an interpretation following from the primary sources and consists of the preparatory works, historical evidence, non-governmental restatements of similar principles and to some extent scholarly works.[273]

Domestic law may be used to explain the background for proposals or to reveal ethnocentrism. It can also be used to identify a common core, thus proving an already uniform area.

In the following chapters a complete picture of the scope and role of article 80 is provided with due consideration of the provision's drafting history, development, underlying principles and treatment by scholar's and by adjudicators. Taking these aspects into consideration makes it possible to develop and analyse the conditions for, and consequences of, being exempt by virtue of article 80.

[273] Such as ULIS, ULF, Documentary History, The Secretariat Commentary, UPICC, TLP, PECL and DCFR.

## 3. Development

When interpreting article 80 and its underlying principles, the historical and current development of the provision are useful sources.[274] The starting point of an interpretation may be literal, but the interpretation of an international instrument must be done in light of its object and context.[275] Specifically in regard to the CISG, the drafting history is a relevant interpretation aid, though it is not the only one.[276]

The drafting history, including the ULIS and the ULF, may be relevant to understand the setting and background for the Convention and the article 80 contained herein. It is from the historical development that the drafter's intentions with a provision may appear[277] and in turn it may assist the interpreter of the CISG when there is doubt as to the meaning of the Convention text.[278] Furthermore, considering also the legislative history is a way to take into account the international character of the Convention.[279]

In some domestic systems the legal tradition welcomes the use of historical drafting documents, as it is considered useful in finding the meaning of the text and in order to acquire knowledge on its purpose and the way it is to be understood.[280] Similarly in the reading of international instruments it is often seen that the drafting history in the form of treaty drafts and conference records are referred to in practice.[281]

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274 See for more on methodology chapter 2, p. 9 *et seq.*

275 VCLT article 31(1).

276 Eiselen, Sieg, *Literal Interpretation: The Meaning of the Words*, in Meyer, Olaf and Janssen, André, *CISG Methodology*, Sellier, Munich, 2009, pp. 88-89. In addition, scholarly works and case law are important sources.

277 Honnold, *Documentary History,* 1989, p. 2.

278 Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para 22, pp. 130-131.

279 Flechtner/Honnold, *Uniform Law,* 2009, pp. 118-120 and Bianca/Bonell, *Commentary*, 1987, pp. 90-91.

280 Zahle, Henrik, *Rettens Kilder*, Christian Ejlers Forlag, Copenhagen, 1999, p. 29.

281 Aust, *Modern Treaty Law*, 2007, pp. 244-245.

Also in jurisdictions that are known for being reluctant in the use of for example the legislative history is it recognized that reading an international instrument may require a different approach to the domestic one.[282]

In *Fothergill v. Monarch Airlines*[283] the House of Lords concluded that the legislative history, foreign case law and scholarly writings should be considered when interpreting a convention and that the words of the text is to be understood independently from the established domestic English meaning.[284]

Having pointed out the possible benefits of the drafting history, it is important to point out that this source is not of primary character. Care is due in the use of it as a source of law since the Convention is a political compromise and so is the comments made by the delegates during the drafting of it. An unchallenged opinion expressed by a country's delegate cannot be taken as the common view of the drafters. Though one must be careful not to place too much importance on the preparatory works alone[285] it is of supplementary character and may assist in clarifying the interpretation of for example article 80.

## 3.1 ULIS and ULF

The purpose of regulating cross-border contracts is both to reduce the costs induced by different uncoordinated domestic laws, to develop international

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[282] Gutteridge, H.C., *Comparative Law*, University Press, Cambridge, 1946, [Gutteridge, *Comparative Law*, 1946], p. 38; Flechtner/Honnold, *Uniform Law,* 2009, p. 120-121; Mann, Francis A., *Uniform Statutes In English Law*, Law Quarterly Review, 1983, 376-406 and Bianca/Bonell, *Commentary*, 1987, pp. 73-74.

[283] House of Lords [1980] A.C. 251, England, *Fothergill v. Monarch Airlines,* 7 July 1980. See also Flechtner/Honnold, *Uniform Law,* 2009, pp. 119-123.

[284] Notice that England is not a CISG state, but is relevant in this context as an example of the common law's recognition of the international character of conventions.

[285] See the Vienna Convention on the Law of Treaties (Adopted 23 May 1969. Entered into force on 27 January 1980) 1155 UNTS 331, article 32, establishing that preparatory works are of a *supplementary* character. Further more, Charter of the United Nations and Statute of the International Court of Justice (Adopted 26 June 1945. Entered into force on 24 October 1945), article 38 (regarding the International Court of Justice) do not mention preparatory works as a source. See also Aust, *Modern Treaty Law*, 2007, pp. 244-245.

trade and promote friendly relations among nations.[286] Several instruments seek to unify rules and The CISG is one such instrument. It contains rules of both contract formation and sales. It has previously been attempted to unify these rules in the ULF and the ULIS,[287] but these instruments never won great acceptance among states.[288]

In order to achieve a more widespread acknowledgement of uniform rules the ULIS and ULF was considered in the creation of the new instrument, The CISG.

There is no direct equivalent of article 80 to be found in ULIS and ULF, though a similarity in principle is seen in ULIS article 74(3) that is found under the heading 'Exemptions'. The provision reads:

> '3. The relief provided by this Article for one of the parties shall not exclude the avoidance of the contract under some other provision of the present Law or deprive the other party of any right which he has under the present Law to reduce the price, unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible.'[289]

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286 CISG Preamble, Basedow Jurgen, *Lex Mercatoria And The Private International Law Of Contracts In Economic Perspective*, Uniform Law Review – Revue De Droit Uniforme, Volume XII, Issue 4, 2007, 697-713, p. 713 and Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in Meyer/Janssen, 2009.

287 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague, 1 July 1964 and Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964.

288 Merely 9 states adopted the instruments, see Honnold, John, *Documentary History Of The Uniform Law For International Sales: The Studies, Deliberations And Decisions That Led To The 1980 United Nations Convention With Introductions And Explanations*, Kluwer, Deventer, 1989 [Honnold, *Documentary History,* 1989], p. 1.

289 The full text of article 74 ULIS is: *'1. Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended.*

*2. Where the circumstances which gave rise to the non- performance of the obligation constituted only a temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation if, by reason of the delay,*

The essence of article 74(3) ULIS is that a party may be excused from a failure to perform due to impediments beyond control, though the aggrieved party retains his right to price reduction. However, the aggrieved party looses also the right to price reduction if the cause of the failure to perform was that party itself. The underlying principle of this rule is similar to, and elaborated in, article 80 CISG where it has found its own unique expression.

## 3.2 The Drafting of CISG and Article 80

The CISG is a child of UNCITRAL, which was composed of eminent international trade law persons from 29 countries and later increased to 36, according to a plan of distribution.[290]

The Convention was created in a three-stage process; First, a working group consisting of 14 states prepared two draft conventions, one on sales and one on formation of contract. Second, the Commission reviewed the two drafts and combined them into one. Third, the UN General Assembly reviewed and finalised the Commission's draft in two committees.[291] The UNCITRAL Secretariat commented on the 1978 draft convention by the Commission and this document may in general provide valuable information on the considerations made during the drafting.

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*performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.*

*3. The relief provided by this Article for one of the parties shall not exclude the avoidance of the contract under some other provision of the present Law or deprive the other party of any right which he has under the present Law to reduce the price, unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible.*'

290 U.N. General Assembly, 1497th plenary meeting, 'Resolution 2205 (1966) [Establishment of the United Nations Commission on International Trade Law]' 17 December 1966, section II. Seven delegates from African states, Five from Asian, Four from Eastern European, Five from Latin American and Eight from Western European states. See also U.N. General Assembly, 2197th plenary meeting, 'Resolution 3108 (1973) [Report of the United Nations Commission on International Trade Law]' 12 December 1973.

291 Honnold, *Documentary History,* 1989, pp. 2-4.

However, since article 80 has no direct predecessor in the ULIS[292] and it was not included in the draft[293] by the UNCITRAL Working Group or the Commission, it was not commented upon by the Secretariat of UNCITRAL. In fact, article 80 was suggested very late in the drafting process and not before the discussions of article 79 at the Diplomatic Conference did the provision appear for the first time.

Therefore, only the reports of the negotiations by the First Committee at the Diplomatic Conference in 1980 give insight to the background and reasons for article 80, known as 'article 65 bis' during the drafting. The original proposal were:

> 'A party may not rely on a failure of the other party to perform insofar as the first party by his own act or omission caused the failure to perform.' [294]

A minor rephrasing of the suggested provision was made and it got adopted without controversy at the 11th plenary meeting by 39 votes to none with 7 abstentions. The rephrasing made no change in the substance of the article compared to the original proposal.

### 3.2.1 Wording and Placement

Article 80 is a very short provision consisting of only one sentence. This is not in itself puzzling. In fact, almost 30 % of the CISG provisions consist of just one sentence,[295] but article 80 is not obviously part of a larger set of rules dealing with one common issue as other very shortly drafted provisions are. For example, article 40 and 44 may both be of just one sentence, but they address the common issue of conformity of the goods together

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[292] Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 1, p. 1088, Schwenzer and Fountoulakis, *International Sales Law*, 2007, p. 577, Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 1, p. 359.

[293] Flechtner/Honnold, *Uniform Law,* 2009, pp. 644-645, Tallon in Bianca/Bonell, *Commentary*, 1987, p. 596, Audit, *La Vente*, 1990, p. 179.

[294] Flechtner/Honnold, *Uniform Law,* 2009, pp. 644-645 and A/CONF.97/C.1/L.234 in A/CONF.97/19, p. 134.

[295] Of the first 88 substantial provisions the following have a maximum length of one sentence in one section: Articles 5, 6, 13, 17, 22, 23, 24, 25, 26, 27, 28, 30, 40, 44, 53, 54, 55, 59, 62, 70, 75, 78, 83 and 87.

with another eight articles. Article 80 addresses exemption together with merely one other provision.

The legislature of course has the prerogative to design the provisions according to the style they find appropriate. The choice between either a longer, perhaps more detailed rule, like article 79 or a shorter, more open, standard like article 80 may depend on predictions of case frequency or factual diversity of the cases expected to fall under the rule.[296] However, in relation to article 80, no such considerations can be traced in the historical documents. Neither is the wording due to influence by a particular interest group, though such were allowed and encouraged to participate in the drafting process.[297]

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[296] For example frequency of cases, goal of informing individuals and factual character of cases under the rule, see, Kaplow Louis, *Rules versus Standards: An Economic Analysis*, Duke Law Journal, Volume 42, Issue 3, 1992, 557-629., p. 573, p. 577 and p. 595.

[297] U.N. General Assembly, 1497th plenary meeting, 'Resolution 2205 (1966) [Establishment of the United Nations Commission on International Trade Law]' 17 December 1966, section II, para. 8(g), U.N. General Assembly, 1746th plenary meeting, 'Resolution 2421 (1968) [Report of the United Nations Commission on International Trade Law]' 18 December 1968, U.N. General Assembly, 1809th plenary meeting, 'Resolution 2502 (1969) [Report of the United Nations Commission on International Trade Law]' 12 November 1969, U.N. General Assembly, 1903rd plenary meeting, 'Resolution 2635 (1970) [Report of the United Nations Commission on International Trade Law]' 12 November 1970, U.N. General Assembly, 1986th plenary meeting, 'Resolution 2766 (1971) [Report of the United Nations Commission on International Trade Law]' 17 November 1971 and U.N. General Assembly, 2197th plenary meeting, 'Resolution 3108 (1973) [Report of the United Nations Commission on International Trade Law]' 12 December 1973, U.N. General Assembly, 2091st plenary meeting, 'Resolution 2928 (1972) [Report of the United Nations Commission on International Trade Law]' 28 November 1972, U.N. General Assembly, 2319th plenary meeting, 'Resolution 3316 (1974) [Report of the United Nations Commission on International Trade Law]' 14 December 1974, U.N. General Assembly, 2440th plenary meeting, 'Resolution 3494 (1975) [Report of the United Nations Commission on International Trade Law]' 15 December 1975, U.N. General Assembly, 99th plenary meeting, 'Resolution 31 (1976) [Report of the United Nations Commission on International Trade Law]' 15 December 1976, U.N. General Assembly, 105th plenary meeting, 'Resolution 32 (1977) [Report of the United Nations Commission on International Trade Law]' 16 December 1977, U.N. General Assembly, 86th plenary meeting, 'Resolution 33 (1978) [United Nations Conference on Contract for the International Sale of Goods]' 16 December

The provision started as a proposal by one of the members of UNCITRAL without evidence that such proposal was encouraged by other than the representative's own intellect and the belief that the provision would deal with a gap in the draft convention.[298] In fact, the provision seems more inspired by the proposer's home law, the domestic law of GDR than the particular interests of a group.

An example of an elaborate exemption clause is seen in article 79 CISG and a similar elaborate drafting is seen in other domestic systems, such as the one from which the proposer of article 80 came from.[299]

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1978, U.N. General Assembly, 105th plenary meeting, 'Resolution 34 (1979) [Report of the United Nations Commission on International Trade Law]' 17 December 1979 and U.N. General Assembly, 81st plenary meeting, 'Resolution 35 (1980) [Report of the United Nations Commission on International Trade Law]' 4 December 1980, Yearbook of the United Nations Commission on International Trade Law, 1980, Volume XI, p. 149.

298 Proposal by the German Democratic Republic: A/CONF.97/C.1/L.217 in A/CONF.97/19, p. 135 and A/CONF.97/C.1/L.234 in A/CONF.97/19, p. 134. A/CONF.97/C.1/SR.28, Denmark, para. 58, Netherlands, para. 59. p. 387, A/CONF.97/19.

299 Article 79 CISG reads; *'(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.'*

Though some delegates found the provision to be too broadly worded[300] there was no real attempt to elaborate or clarify it. An elaborate drafting style of article 80 was never suggested and though it may seem to be a weakness of the provision, it is in its open wording that one finds its strength. The reasons why article 80 found its expression as a short, broad and open provision are several and they affect the interpretation and application of the provision. The four reasons and their effect are dealt with in turn in the following.

### 3.2.2 Motivation to Maximise Adoption

When the working group of UNCITRAL set out to prepare a draft with outset in the ULIS and the ULF it was with the goal of creating legislation that would '*… facilitate acceptance of the uniform rules …*' in states with different legal, social and economic background.[301]

The work was done in the light of the previous attempts to unify the law of sales and formation. An attempt that failed since the ULIS and the ULF did not receive much recognition in the form of adoption by states.[302] In fact, the ULIS and the ULF were only adopted by 9 states.[303] This is in striking contrast to the CISG that currently is adopted by 76 states.[304]

One way that the motivation by the drafters, to maximise adoption of the CISG by states, has affected the text is in the overall wording of the instrument. The text of the CISG itself is more general so to free it from domestic meanings, for example by referring to physical events instead of using domestic legal idioms.[305]

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[300] A/CONF.97/C.1/SR.28, Australia, para. 51, Sweden, para. 53, Argentina, para. 54. p. 386 in A/CONF.97/19.

[301] Honnold, *Documentary History,* 1989, p. 3 and Yearbook of the United Nations Commission on International Trade Law, 1976, Volume VII, para. 1, p. 87.

[302] Hagstrøm, Viggo, *Kjøpsrett*, Universitetsforlaget, Oslo 2005. [Hagstrøm, *Kjøpsrett*, 2005], p. 24, Ramberg and Herre, *Köplagen*, 1995, p. 44.

[303] Honnold, *Documentary History,* 1989, p. 1.

[304] United Nations Commission on International Trade Law (UNCITRAL), Status regarding the 1980 United Nations Convention on Contracts for the International Sale of Goods, as of 26th of January 2011.

[305] Flechtner/Honnold, *Uniform Law,* 2009, pp. 150-151, Honnold, *Uniform Words*, 1988, III.B., Zeller, *Damages*, 2009, p. 182.

Another reason for the more general wording is that it will ensure that the laborious task of creating yet another uniform sales law has not to be repeated. It is reasonable to assume that a long life of the Convention is desired and therefore The CISG has been worded more generally with the intention of prolonging its life expectancy.[306] In turn, a broad and liberal interpretation of the text will support such[307] also in regard to article 80.

### 3.2.3 A Last-Minute Inclusion

In order to deal with what was believed to be a gap in The Convention,[308] Article 80 was inserted in the *'last-minute'*,[309] thus leaving very little time for further deliberations and considerations.

The UN Conference at which the CISG was negotiated took place from the 10th of March to the 11th of April 1980. During this time, the First Committee discussed article 80 in their 28th, 30th and 37th meetings out of a total of 38.[310]

The Conference were the culmination of a process that had been started again with the UNCITRAL Working Group in 1970 and even earlier with the ULF and ULIS. It is reasonable to assert that the delegates were aware that a decade long process was near completion.

In this light, it is imaginable that the enthusiasm for a lengthy discussion was not present as the delegates felt they had already achieved the great compromise of a new instrument and since article 80 expressed a concept

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306 Flechtner/Honnold, *Uniform Law,* 2009, pp. 150-151.

307 Felemegas in Felemegas, *An Int'l Approach*, 2007, pp. 12 and Bianca/Bonell, *Commentary*, 1987, p. 73.

308 A/CONF.97/C.1/SR.28, Denmark, para. 58, Netherlands, para. 59. p. 387, A/CONF.97/19.

309 Schwenzer, Ingeborg and Manner, Simon, *The Pot Calling the Kettle Black: The Impact of the Non-breaching Party's (non-)behavior on its CISG-remedies,* in Andersen, C.B. and Schroeter U.G. (eds.), Sharing International Commercial Law Across National Boundries – Festschrift for Albert H Kritzer on the Occasion of His Eightieth Birthday, 470-488, Wildy, Simmonds & Hill Publishing, London, England, 2008. [Schwenzer and Manner, *The Pot Calling the Kettle Black*, 2008], p. 472.

310 Meetings held on 28/3 at 15.00, 31/3 at 15.00 and 7/4 at 10.00.

based on fairness and appeared self-evident it did not give rise to extensive negotiations.

### 3.2.4 An Expression of an Underlying Principle

In addition to the two previous reasons, the short and open wording of article 80 is due to the fact that the provision is an expression of underlying principles based on more broad concepts of fairness.

It was argued that no adjudicator would decide contrary to what the provision establishes since it states the obvious.[311] Some delegates even argued that it was not necessary to even include article 80 in the text of the CISG as it would apply as a principle underlying the Convention.[312]

Though principles underlying also article 80 must be used as a gap-filler, this does not deprive article 80 its importance in achieving a uniform application of the Convention. Instead of referring matters to underlying principles or good faith, thus overextending these concepts,[313] the text of article 80 can form the clearest basis for a result in many cases. With the text of article 80 there is now, for example, no room for diverse opinions on whether a duty to cooperate is included in the Convention.[314]

Some delegates indicated that the provision expressed an important principle,[315] for example in the form of a duty not abuse rights[316] or even good faith.[317] Other delegates did not find the provision to be an expression of the good faith, since they believed good faith had been adopted in the Convention text in a more restricted way.[318] Though article 80 is an

311 A/CONF.97/C.1/SR.28, Ireland, para. 60, p. 387 and Canada, para. 57, p. 387 in A/CONF.97/19.

312 A/CONF.97/C.1/SR.28, Ireland, para. 60, p. 387 in A/CONF.97/19.

313 Enderlein/Maskow, *International Sales Law*, 1992, p. 335. See also regarding underlying principles chapter 5, p. 107 *et seq.*

314 See for more on specific underlying principles chapter 5, p. 107 *et seq.*

315 A/CONF.97/C.1/SR.28, Soviet Union, para. 52, Sweden, para. 53, Switzerland, para. 55, p. 386, Italy, para. 56, p. 387 in A/CONF.97/19.

316 A/CONF.97/C.1/SR.28, Italy, para. 56, p. 387 in A/CONF.97/19.

317 A/CONF.97/C.1/SR.28, Switzerland, para. 55, p. 386, Italy, para. 56, p. 387, Romania, para. 61, p. 387 in A/CONF.97/19.

318 A/CONF.97/C.1/SR.28, Denmark, para. 58, p. 387, Netherlands, para. 59, p. 387 in A/CONF.97/19.

expression of a duty for the parties to act in good faith the discussion of the role of good faith in CISG context remains controversial.[319] Again, the text of article 80 is useful insofar as it is unneccesary to refer matters to a controversial principle of good faith. Instead, it is possible to rely directly on the wording of article 80.

The versatile characteristic of article 80 bears witness to it being an expression of underlying principles. Consequently, the provision's placement under the heading *'Exemptions'* is not necessarily its systematically correct home.

During the negotiations it was stated that there was no reason to insert article 80 specifically under 'exemptions'.[320] It was suggested that it would be possible to place it alongside other general provisions[321] or as part of rules on the establishment of breach.[322] It was suggested that after a revision it would also be possible to place it with rules of mitigation.[323]

Only the first suggestion was considered and it was left to the Drafting Committee to decide the placement of the provision either as a general provision or under exemptions.[324] The Drafting Committee was not generally authorized to make substantive decision, but the decision of the First Committee to authorize the Drafting Committee was never challenged.[325] With the Plenary's approval, the provision is now found under 'Exemptions'.[326]

### 3.2.5 Broad Interpretation Appropriate

The effect of article 80's short and open wording as well as it being an expression of a more general principle is that a broad interpretation of it is appropriate.

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[319] For more on good faith in context of article 80, see *infra* section 5.2 and 5.3 from page 116 *et seq.*

[320] A/CONF.97/C.1/SR.28, Canada, para. 57, p. 387 in A/CONF.97/19.

[321] A/CONF.97/C.1/SR.30, Denmark, para. 4 and 5, p. 393 in A/CONF.97/19.

[322] A/CONF.97/C.1/SR.28, Sweden, para. 53, p. 386 in A/CONF.97/19.

[323] A/CONF.97/C.1/SR.28, Denmark, para. 58, p. 387 in A/CONF.97/19.

[324] A/CONF.97/C.1/SR.30, GDR, para. 2, p. 393 in A/CONF.97/19.

[325] Flechtner/Honnold, *Uniform Law,* 2009, p. 645, fn. 7.

[326] The provision got adopted by 39 votes to none with 7 abstentions.

Often, the presumption is that exemption clauses must be subjective to a narrow interpretation and article 80 is found under the heading 'Exemptions'. The presumption is that also headings of the CISG has to be considered in the interpretation of the instrument as they form part of the instrument and has been subject to consideration of the drafters.[327]

This presumption is rejected in regard to article 80 where the drafting history demonstrates that the placement was considered insignificant. Such understanding is in line with the fact that the provision is an expression of underlying principles applying throughout the Convention.

A broad interpretation of the provision is in line with the general rule of interpretation of the Convention and supports the flexibility of the provision, for example to conduct apportionments of the responsibility for one party's failure to perform.[328]

## 3.3 Developments Compared to the Pre-CISG Rule

The preparatory works reveals that article 80 started as a proposal from the German Democratic Republic (GDR) during the discussion of what is now article 79.[329] It was argued by the proposer that a clause addressing the situation where a failure to perform is caused by the other party should be adopted since article 79 addressed only failure to perform caused by impediments beyond control.[330] The provision was most likely inspired by GIW[331] § 294[332] – the Law on International Commercial Contracts from the proposer's home jurisdiction.[333]

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327 Flechtner/Honnold, *Uniform Law,* 2009, pp. 644-645.

328 A/CONF.97/C.1/SR.30, p. 393, para. 7 in A/CONF.97/19.

329 Proposal by the German Democratic Republic: A/CONF.97/C.1/L.217 and A/CONF.97/C.1/L.234.

330 A/CONF.97/C.1/SR.28, GDR, para. 50, p. 386 in A/CONF.97/19.

331 Gesetz über internationale Wirtschaftsverträge, 15 February 1976, Deutsche Demokratische Republik, [Law on International Commercial Contracts, Former German Democratic Republic].

332 Schwenzer in Schwenzer, *Commentary on CISG*, article 80, p. 1088, n. 1.

333 Compare also to for example the Hungarian Civil Code (1959) § 4(4) and the Civil Code of the Russian Federation article 404(1) where the rule has existed since 1964 according to Забарчук Е.Л. [Zabarchuk Eds.], Комментарий к Гражданскому кодексу Российской Федерации с постатейными материалами [Commen-

It is important to point out that article 80 is not to be interpreted in a way that makes it conform to the old GIW. Even when concepts in the CISG can be traced back to particular domestic systems there is a duty to apply an autonomous interpretation to secure the uniform application of the Convention according to article 7(1).[334]

However, a clarification of the historical roots of article 80 may serve as explanation for it being suggested during the drafting. Further, a historical overview demonstrates a development in the textual adoption of principles similar to those underlying article 80 CISG.

The inspiration for article 80 CISG came from GIW § 294 and the two provisions have both similarities and differences. A striking difference is the drafting style. The GIW § 294 is much more word-heavy[335] and deals directly with matters that are left for other provisions or for interpretation in the CISG.[336] A much more simple and flexible wording has been adopted in the Convention's article 80.

Both § 294 and article 80 will exempt a promisor from failure to perform the contract if the reason for doing so is the other party. Also the systematic placement of § 294 and article 80 is similar. They are both placed under

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tary to the Civil Code of the Russian Federation with itemized materials], 2009, Экзамен [Publisher], p. 656.

334 See *supra* section 2.2, p. 17 *et seq.*

335 The GIW § 294 read in the author's translation: *'1) If the promisee has caused the delay of the promisor, the promisor is entitled not to perform until after the hindrance has been removed. 2) If an act by the promisee makes the performance by the promisor impossible or unreasonable, the promisor's duty to perform ceases to exist. The promisor still has a right to consideration, taking into account the costs saved by him through the discharge from performance. 3) Insofar as an act by the promisee causes another breach of contract by the promisor, the promisee cannot derive any claim from this. 4) Further claims of the promisor remain unaffected. 5) In the case pursuant section 1 the following additional effects will accrue, notwithstanding the existence of causes of exculpation on the part of the promisee: a) The promisor is entitled to claim compensation for costs caused by an unsuccessful offer, storage and preservation of the subject of the agreement. b) The duty of the promisor to return or compensate for use of the subject of the agreement is limited to the profit which promisor has received. c) The promisee is not entitled to claim interest of money in arrears.'*

336 For such interpretation, see chapter 6, p. 143 *et seq* and chapter 7, p. 181 *et seq.*

headings of exemption and both instruments distinquish between force majeure reasons for exemption and interference by the promisee.[337]

A very important development is seen in the fact that article 80 CISG adopts the words *'to the extent'*. These words provide the basis for a *pro rata* apportionment of the responsibility when both parties appear to have caused the promisor's failure to perform the contract. Naturally, each party should bear the consequences of its own actions, but from time to time the parties' acts and omissions cannot be separated and an apportionment of the responsibility is due.[338]

It was the intention by the proposer of article 80 that the provision should be sufficiently flexible to determine each party's share of the responsibility, in case both parties had contributed to the failure to perform.[339] Alternatively, an either-or approach could be followed, but this could either over- or under-compensate the party who is partly responsible for the other party's failure to perform.

It is in the words, *'to the extent'*, that one of the new strong developments is seen and a broad and flexible approach to the words is consistent with the interpretation method called for as well as the underlying principles of the provision.[340]

GIW § 294 does not contain words that have effect like *'to the extent'* and appears to follow a less flexible either-or approach to being exempt from failure to perform the contract.[341] In this regard a unique development in the CISG is seen. It should be noted that in cases where the promisee is the sole cause for the promisor's failure to perform, the two provisions provide for the same result – a total exemption from the responsibility for not having performed. Issues of causation and apportionment are dealt with in section 6.2, p. 147 *et seq* and section 7.1.5.2, p. 196 *et seq*.

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337 § 294 was placed together with § 293 regarding 'Unavoidable Forces' and § 295 regarding 'Changed Circumstances' in chapter 2 (Discharge from Legal effects of Breach of Contract) of part 10 (Breach of Contract).

338 See further below in section 7.1.5.2, p. 196 *et seq*.

339 A/CONF.97/C.1/SR.30, Norway, para. 6, p. 393 and GDR, para. 7, p. 393 in A/CONF.97/19.

340 See further chapter 2, p. 9 *et seq*.

341 Wagner/Maskow, *Kommentary zum GIW*, 1983.

## 3.4 Latest Developments in Other Instruments

A number of regional and international instruments have adopted provisions that are similar to article 80 CISG insofar as they express similar underlying principles.[342] Under certain circumstances, and as accounted for previously, such instruments may be used as aids for interpreting and understanding article 80 CISG.[343]

At present it is pointed out that the development from a more specific and elaborate rule in GIW to a simple and open-worded provision in article 80 CISG is a development that is carried on in more recent instruments too.

As an example, the general wording of the provisions on *Cooperation Between the Parties*[344] and *Interference by the Other Party*[345] has been maintained in all editions of the UNIDROIT Principles. Later developments included from 2004 a provision on *Inconsistent Behaviour*[346] and latest in 2010 another provision on *Interference with Conditions*.[347] A close resemblance with article 80 CISG is seen particularly articles 7.1.2 and 5.3.3 UPICC 2010.

> ARTICLE 7.1.2 (Interference by the other party)
> A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk.

> ARTICLE 5.3.3 (Interference with conditions)
> (1) If fulfilment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the non-fulfilment of the condition.
> (2) If fulfilment of a condition is brought about by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the fulfilment of the condition.

Also other instruments have adopted provisions specifying the consequences of interferring with the other party's performance as well as expressions

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342 Regarding underlying principles, see *infra* chapter 5, p. 107 *et seq.*

343 See *supra* chapter 2, p. 9 e*t seq.*

344 Article 5.3 in UPICC 1994 and article 5.1.3 in UPICC 2004 and UPICC 2010.

345 Article 7.1.2 in UPICC 1994, 2004 and 2010.

346 Article 1.8 in UPICC 2004 and UPICC 2010.

347 Article 5.3.3 in UPICC 2010.

of the duty to cooperate[348] and prohibition of inconsistent behaviour.[349] All of these recent adoptions follow a more general wording, which in turn confirm the general nature of the underlying principles being expressed. See further regarding article 80 and its underlying principles *infra* chapter 5, p. 107 *et seq.*

Another close resemblance to article 80 CISG is seen in DCFR[350] and PECL.

> PECL 8:101: Remedies Available
> (3) A party may not resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party's non-performance.

At present, it is concluded that article 80 was a new development when it was drafted and that its general and fundamental importance in international sales law is confirmed by the widespread acknowledgement of its underlying principles. The latest development is seen in the proposal for a common European sales law where a duty to cooperate, which is also expressed in article 80, has been given its own provision.[351]

An important feature to be noticed is the widespread use of the words *'to the extent'* which allows for partial exemption from the failure to perform the contract. This is addressed futher *infra* chapter 7, p. 181 *et seq.*

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[348] See for example TLP IV.6.9 [Duty to Notify/To Cooperate], PECL Article 1:202 [Duty to Co-operate], ACQUIS Principles 7:104 [Duty to co-operate], DCFR III.1:104 [Co-operation].

[349] TLP I.1.2 [Prohibition of Inconsistent Behaviour], UPICC 2010 article 1.8 [Inconsistent Behaviour], PECL articles 2:105(4) [Merger CLause] and 2:106(2) [Written Modification Only].

[350] DCFR, III. 3:101 Remedies Available reads *'(3) The creditor may not resort to any of those remedies to the extent that the creditor caused the debtor's non-performance.'*

[351] COM(2011) 635 Final, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Suggested article 3 in part I, chapter 1, section 1, reads: *'The parties are obliged to co-operate with each otherto the extent that this can be expected for the performance of their contractual obligations'.*

## 3.5 Concluding Argument

The background and development of article 80 supports that the provision is an expression of a general principle. Despite its systematic placement as an exemption clause the presumption, that the provision is subject to a more narrow interpretation, is dismissed. A broad interpretation is in line with the drafting history and recent developments of similar provisions at international level.

The principle of article 80 has found its expression in several other international instruments, thus demonstrating its widespread recognition. It is supported that an international sales instrument would contain a gap if it did not contain an equivalent to article 80.

Inconsistent behaviour and conduct contrary to the duty to cooperate can in an international sales transaction lead to a loss of rights according to article 80 CISG. This is further developed throughout this work.

# 4. Comparison to Other Provisions

During the drafting it was suggested to deal with the issue addressed in article 80 in particular provisions and that this to some extent had already been done.[352] If article 80 is entirely dealt with by other more specialised provisions of the Convention, the effect may be that it basically has no independent scope, but rather is an empty declaration. This is not the case.

In the following it is shown how article 80 expresses a concept that is unique from the rules of force majeure in article 79 and the duty to mitigate loss in article 77. Where an overlap with more specialised provisions, such as articles 35, 42 and 50 are seen, article 80 acts as a supplementary rule. When more specialised rules regulates a case that is possible to subsume also under article 80, the principle of *lex specialis* gives preference to the more specialised rule.

## 4.1 A Unique Concept of Contribution to Failure to Perform

Article 80 is found together with article 79 under the same heading and article 79 is in this regard conspicuous. Further more, it was during the discussion of article 79 that article 80 was suggested and it has been asked whether the latter is a derived form of article 79 or a more general obligation.[353]

During the drafting it was proposed to place article 80 with mitigation rules like article 77.[354] This was rejected, but scholars have subsequently suggested article 80 is not appropriate for *pro rata* apportionments in cases of shared responsibility, but that such matters should be referred to article 77.[355]

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352 A/CONF.97/C.1/SR.28, Australia, para. 51, p. 386, Switzerland, para. 55, p. 386 in A/CONF.97/19.

353 Proposal by the German Democratic Republic: A/CONF.97/C.1/L.217 in A/CONF.97/19, p. 135; A/CONF.97/C.1/L.234 in A/CONF.97/19, p. 134 and Flechtner/Honnold, *Uniform Law,* 2009, p. 644 and pp. 446-447.

354 A/CONF.97/C.1/SR.28, Denmark, para. 58, p. 387 in A/CONF.97/19.

355 Huber in Huber and Mullis, *The CISG*, 2007, pp. 267-268. Piltz, Burghard, *Internationales Kaufrecht: das UN-Kaufrecht (Wiener Übereinkommen von 1980) in*

For these reasons article 80 is contrasted with these two provisions, also in order to review the position taken previously, that the provision is conceptually different to articles 77 and 79.[356]

### 4.1.1 Systematic Context

Interpretation takes it outset in the text of the provisions and their placement in the Convention. It has been stated that the placement of the articles cannot be ignored since headings are considered a part of the Convention and since the placement of the article was given consideration during the drafting of the Convention.[357]

The literal and systematic view is merely the starting point. Taking into consideration the analyses regarding drafting history (section 3.2, p. 62 *et seq*), it appears that article 80 has a wider application and contains more flexibility than the literal interpretation alone can support.

However, the literal approach can support the special focus of the provisions. Articles 79 and 80 are placed under the heading 'exemptions', whereas article 77 is placed under 'damages'. The significance of placing article 79 and 80 under a common heading is not to be overestimated in light of the discussions of the drafting and the fact that article 80 expresses underlying principles found throughout the Convention.

Article 77 concerns the calculation of damages and typically applies when a breach has occurred. However, it may apply already when a breach is threatening,[358] in a pre-breach situation. Articles 79 and 80 are both placed under 'exemptions' thereby presupposing that the two articles apply at a point in time where a breach or non-performance has been established[359] and attributed to a party, thus making article 79 and 80 possibilities for being excused from liability.

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*praxisorientierter Darstellung*, Beck, München, 1993, § 4, para. 214. See also Stoll and Gruber in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, Article 80, para. 7, n. 24, p. 841 where the authors in support of this view are listed as: Piltz, Schmid, Koziol, Soergel/Lüderitz/Dettmeier.

356 Neumann, *Shared Responsibility,* 2009.

357 Flechtner/Honnold, *Uniform Law,* 2009, pp. 644-645.

358 Schwenzer and Manner, *The Pot Calling the Kettle Black*, 2008, p. 481.

359 See also *infra* section 6.1, p. 143 *et seq.*

A literal and systematic view supports the assertion that the CISG differentiates between avoidance of loss and contributory negligence.[360] Article 77 concerns avoidance of loss and regulates situations where the aggrieved party has not *mitigated* loss caused by the other party whereas article 80 regulates a promisee's *own interference* with the promisor's performance.

Such a distinction largely corresponds to the rules in UPICC and PECL.[361] As an example, the UPICC 2010 in article 7.1.2 restricts the exercise of remedies and article 7.4.7 limits on a basis of fairness the right to damage to the extent that the aggrieved party has contributed to the harm.[362] According to the official UPICC commentary, these provisions must be delimited from articles concerning mitigation of loss[363] as this is dealt with in article 7.4.8.

In comparison, the focus of article 79 is whether an impediment exists that was outside the failing party's sphere of control, unforeseeable and unavoidable. The exemption appears very narrow, also from its detailed wording.[364] In comparison, article 80 has a broader application, not only from its wording, but also its history, underlying principles and case law. Further support is found in the fact that the provision comprises both direct and indirect causation as well as sole and shared responsibility.

### 4.1.2 The Cause of the Detriment

It appears directly from the wording of article 80 that the presupposed failure to perform must have been *'caused by the first party's'* conduct.[365] The requirement of causation is one of the distinct factors from which it is to be decided whether a situation falls under article 77, 79 or 80.

To illustrate the difference in a primitive way; Article 79 says a party must wait for the delayed delivery of the boxes at the foot of the cliff when the

[360] Stoll and Gruber in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 77, para. 6, pp. 1044-1045 and Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 77, para. 6, pp. 1044-1045.

[361] Schwenzer and Manner, *The Pot Calling the Kettle Black*, 2008, p. 472.

[362] UNIDROIT, *Principles*, 2004, p. 242, para. 1.

[363] UNIDROIT, *Principles*, 2004, pp. 242-243, para.s 2 and 4.

[364] The exemption typically addresses war and catastrophes according to Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 79, para 1, p. 1063 and para. 10, p. 1067 and Enderlein/Maskow, *International Sales Law*, 1992, pp. 321-322.

[365] Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 8, p. 793.

stairs have been washed away by storm. Article 77 says a party must put out the fire in the non-conforming boxes that you have received. Article 80 says a party must accept the destroyed boxes that you yourself threw over the edge. Each provision is accounted for separately in the following.

The distinction between the three provisions is supported by the different causation situations falling under them. This difference gives independent meaning to article 80. Each causation situation is described in turn to describe the contrast between them.

#### *4.1.2.1 Impediments Beyond Control*

The situation where a party fails to perform because of an *impediment* beyond its control falls within the scope of Article 79.[366] It is a requirement that an impediment exists, that it is outside the defaulting party's sphere of control and that it is unforeseeable and unavoidable. The exemption is very narrow and typically comprised of catastrophes, war, government bans, boycotts, etc.[367]

In contrast, article 80 covers a failure caused by an act or omission by the *other party*, not impediments beyond the parties' control in the sense of article 79. Notwithstanding the placement in the Convention's text and the fact that it was during discussions of article 79 that article 80 was suggested, the latter is not to be applied or interpreted in a narrow way. Rather, article 80 expresses a concept different to that of article 79[368] and in that sense it is sustained that the two articles supplement each other.[369]

In a simplistic way one could say; one clause for each cause. This was followed in *Yellow Phosphorus Case*,[370] where the seller argued that it made

366 Tallon in Bianca/Bonell, *Commentary*, 1987, p. 597.

367 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 79, para. 1, p. 1063 and para. 10, p. 1067, and Enderlein/Maskow, *International Sales Law*, 1992, article 79, para. 3.1, p. 321 and para. 3.6. p. 322.

368 Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 2, p. 359 and Tallon in Bianca/Bonell, *Commentary*, 1987, pp. 596-597.

369 Tallon in Bianca/Bonell, *Commentary*, 1987, p. 597 and Schwenzer in Schwenzer, *Commentary on CISG*, 2010, Article 80, para. 2, pp. 1088-1089.

370 China International Economic & Trade Arbitration Commission [CIETAC], China, *Yellow Phosphorus Case,* 9 August 2002.

incomplete deliveries due to both force majeure and the buyer's interference by issuing a non-contractual L/C. Each cause was treated separately and the seller was found not to be excused due to force majeure, but had the claims against him lowered due to interference.

#### *4.1.2.2 Mitigation of Loss*

Article 77 addresses the promisee's failure to prevent or mitigate loss and 80 address the promisee's responsibility for the promisor's non-performance.[371] The former applies to situations where a party has not mitigated loss *solely caused* or triggered by the promisor's failure to perform[372] and not by an impediment (article 79) or the promisee himself (article 80).

A key distinction between article 77 and article 80 is the distinction between the duty to mitigate potential or actual loss on one hand and the question of contributory negligence on the other.[373]

Again, such distinction corresponds with international soft law,[374] for example article UPICC 2010 7.1.2 that restricts the exercise of remedies and article 7.4.7 thereof limits, on the basis of fairness, the right to damages to the extent that the aggrieved party has contributed to the harm.[375] Distinguished from this is mitigation of loss,[376] which is dealt with separately in article 7.4.8 of the UPICC.

From this view, the shared responsibility type case can be criticised, not so much for the result of the case, but the basis for it.[377] In *Sensitive Russian*

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371 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 2, p. 1088-1089.

372 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article article 77, para. 6, pp. 1044-1045 and article 80, para. 2, pp. 1088-1089 and Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 251.

373 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 77, para. 6, pp. 1044-1045.

374 Schwenzer and Manner, *The Pot Calling the Kettle Black*, 2008, p. 472.

375 UNIDROIT, *Principles*, 2004, p. 242, para. 1, Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 251 and Schelhaas in Vogenauer/Kleinheisterkamp, *Commentary on UPICC*, 2009, p. 737.

376 UNIDROIT, *Principles*, 2004, pp. 242-243, para.s 2 and 4.

377 See also criticism, *infra* p. 228 *et seq*.

*Components*[378] the buyer was blamed for not having enquired about the appropriate inspection method and the seller was blamed for not having informed about it. The court refers among other provisions to article 77 as the basis for lowering the buyer's claim by 1/3.

If the court were of the opinion that the buyer should have mitigated the loss by asking for an appropriate inspection method, the goods would not have been affected by the buyer's alleged wrong inspection at all. Assuming that the goods were not faulty from the factory, the loss would have been zero since it could have been prevented in completely.[379] An application of article 77 would thus have lead to either the buyer's complete loss or complete victory.

Approached as a question of contributory negligence the solution that the court reaches is possible. However it would no longer be correct to base it on article 77, but rather article 80, which applies to such situations of shared responsibility.

#### *4.1.2.3 The Promisee's Contribution to Promisor's Non-Performance*

Article 80 becomes relevant when the cause of the promisor's failure to perform is the promisee himself. The promisee's contribution to the promisor's non-performance can take several forms. These are described in more detail *infra* section 6.2, p. 147 *et seq.*

First, the archetypical case of article 80 is one where the promisor's failure to perform is caused solely by the promisee, for example when a buyer sues the seller for damages because of non-delivery caused by the buyer's persuasion of state officials to deny the seller a licence needed for it to deliver.[380]

An example of the archetype and sole causation is seen in *Propane Case*[381] where the parties had agreed on a delivery of gas against payment by letter of credit. It was expressly agreed that the seller would name the place of loading – a piece of information needed for the buyer's opening of the letter of credit.

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[378] International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003.

[379] Similarly, Enderlein/Maskow, *International Sales Law*, 1992, p. 309.

[380] Example from Flechtner/Honnold, *Uniform Law,* 2009, p. 645.

[381] Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996.

The seller did not inform the buyer of the place of loading despite several requests from the buyer. Consequently the buyer could not open the letter of credit in due time, which in itself is a breach of an obligation by the buyer with the consequence that the seller can rely on the remedies established by the article 61 CISG. However, by virtue of article 80 the seller could not rely on the buyer's breach since the seller himself caused it by not naming the place of loading.

Typically the promisee's cooperation is inadequate or missing followed by the promisor's failure to perform.[382] Therefore it is conveivable that the contribution to the failure to perform may originate from both parties. This leads to the second and third case type, the mixed and shared responsibility cases.

The characteristic feature of mixed causation is that the consequences of each contribution can be delimited, for example when the promisor's breach of contract in the form of late delivery is prolonged due to interference by the promisee. In such cases the promisor is excused for the latter period, but the promissee retains his right to remedies regarding the former.[383] Naturally, as the exemption under article 80 can only go as far as the causation by the promisee.[384]

Basically, the mixed causation type is a matter of clarifying the facts so it becomes clear which failures the promisor can be excused from. There is a significant resemblance to cases of sole interference by the promisee.

An example of mixed causation is seen in *ATT v. Armco*[385] where the seller stopped delivering goods and the buyer stopped paying, each blaming the other as being the cause of their conduct. The situation looks like a stalemate, but is in fact a mixed causation case since each party's causation and the effect of it can be delimited. The reason the buyer stopped paying was lack of success with reselling the goods. In turn the seller stopped deliver-

382 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 247.

383 Enderlein/Maskow, *International Sales Law*, 1992, p. 338 and Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 17, p. 795.

384 Trachsel, Heribert, *Die Vollständige und Teilweise Haftungsbefreiung sowie die Haftungsreduktion nach UN-Kaufrecht (Art. 79, 80 und 77 CISG)*, in Baudenbacher, Carl, *Aktuelle Probleme des Europäischen und Internationalen Wirtschaftsrechts*, Helbing Lichtenhahn, Basel, 2003, p. 389.

385 Belarusian Chamber of Commerce and Industry International Court of Arbitration, Belarus, *ATT v. Armco*, 5 October 1995.

ing further goods, conduct which may look like a breach of contract. The buyer's alleged damage was a result of the non-delivery was dismissed by virtue of article 80 since the buyer itself had triggered the suspension of performance.

The buyer advanced a second argument for not paying, based on non-conformity of some of the already delivered goods. The adjudicator accepted the argument and reduced the seller's claim for payment accordingly.

It is seen that two potential breaches of contract by the seller are delimited and treated separately. The failure to deliver is excused whereas the non-conformity is not, simply because the cause of each failure is different and possible to distinguish.

Another situation is the shared responsibility[386] one, which is different from the archetype, though the failure of performance is in both cases imputable to *both* parties. The difference lies in the *cause* and not the imputation. In a case of shared responsibility the conduct of the parties are so *'closely interwoven'* that their effects cannot be delimited.[387] Here a different approach is called for.

It is appropriate to reduce the legal consequences for each party, thus, a *pro rata* apportionment according to each party's causation share is called for. The view is supported, not only by the wording *'to the extent'*, but also because application only to sole causation cases would be an inappropriately narrow interpretation of the provision.[388]

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386 The term is derived from Tallon in Bianca/Bonell, *Commentary*, 1987, pp. 596-597 who describes that article 80 applies to the issue of '*sharing liability*' and Huber and Mullis, *The CISG*, 2007, p. 267, who describe the situation as 'joint responsibility'.

387 Enderlein/Maskow, *International Sales Law*, 1992, p. 339. The shared responsibility situation resembles the thought experiment 'Copenhagen interpretation' and 'Schrödinger's cat' insofar as the actual cause cannot be established. For more, see Walter J., Moore, *Schrödinger: Life And Thought*, Cambridge University Press, Cambridge, 1992, pp. 306-309. The thought experiment by Schrödinger roots in discussions with Einstein in 1935. The Copenhagen interpretation implied that a cat in a box would to the outside world be both dead and alive at once. Only by opening the box would the state of the cat be revealed, a possibility we do not have in the legal situation of shared responsibility.

388 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 250.

This interpretation is also confirmed by the drafting history where it was clarified that in case of causation from both parties the provision would be sufficiently flexible to determine each party's share of the responsibility.[389] An approach similar to other international soft laws, for example UPICC article 7.1.2 that applies to such situations by virtue of article 7.4.7.[390]

Some argue that the provision follows an 'all-or-nothing' approach inappropriate for cases of shared responsibility.[391] Under such view it is suggested that article 77 or underlying principles of article 80 are the appropriate tools for adjudicating cases of shared responsibility[392] and that article 80 is only fit for cases where the failure to perform is caused *solely* by the other party.[393]

This view is rejected for three reasons. First, referring shared responsibility cases to article 77 is to ignore the mitigation/causation distinction accounted for above. Second, it is to leave the words *'to the extent'* without meaning, contrary to common interpretation principles. Third, referring shared responsibility cases to the underlying principles of article 80 is possible, but unnecessary. Doing so contains a higher risk of non-uniform application since there is more room for interpreters to find, or not find, principles to be used before turning to domestic law compared to relying on the wording of the provision.

### 4.1.3 Foreseeability and Duty to Avoid/Overcome the Cause of Detriment

From the wording of article 80 there is no express condition that the interference by the promisee be unforeseeable, unavoidable or possible to overcome by the failing promisor for him to be excused. This is to the advantage

389 A/CONF.97/C.1/SR.30, GDR, para. 7, p. 393 in A/CONF.97/19.

390 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 251.

391 Huber in Huber and Mullis, *The CISG*, 2007, pp. 267-268 and Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 14, pp. 794-795. See also Stoll and Gruber in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, Article 80, para. 7, n. 24, p. 841 where the authors in support of this view are listed as: Piltz, Schmid, Koziol, Soergel/Lüderitz/Dettmeier.

392 Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 15, p. 795 and Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 7, p. 1091-1092.

393 Piltz, Burghard, *Internationales Kaufrecht: das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung*, Beck, München, 1993, § 4, para. 214.

of the promisor since requirements of foreseeability and the unavoidability act as restrictions to him being excused from liability.

The provision is in this regard different from articles 77 and 79. Despite not being addressed in the wording, the promisor has a duty to cooperate and to overcome easily remediable interference that does not contain additional unreasonable risks or costs. By comparison, the limitations in articles 77 and 79 have a different threshold.

The less strict the limitation is, the greater the benefit to the failing party and vice versa for the aggrieved party whose benefit is reduced. Article 77 is different from the two other provisions insofar as it place a burden of reasonableness on the promisee, whereas the other two places a burden on the promisor. However, the three provisions are similar since they all contain a qualification for the promisor's access to lower his liability burden. The threshold of this qualification is different in the three provisions and is accounted for in turn immediately.

#### *4.1.3.1 Strict Conditions under Article 79*

The access to being excused from liability due to impediments beyond control is limited to those impediments that the promisor could neither foresee nor avoid or overcome.

The determination of whether the promisor could be expected to take the impediment into account at the conclusion of the contract is based on the standard of a reasonable person in the same circumstances as the specific promisor.[394] If the impediment was foreseeable to a reasonable person and the promisor took no reservations against it he has assumed the risk.[395]

An example of an impediment that a party should have acted against if he did not want to assume the risk of it is seen in *Vital Berry Marketing v. Dira-Frost*.[396] Here a sharp drop in the market price between conclusion of contract and delivery was seen as a foreseeable circumstance in international trade, which could not excuse the buyer's failure to open a letter of credit.

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394 Schwenzer, *Commentary on CISG*, 2010, article 79, para. 13, p. 1068.

395 Schwenzer, *Commentary on CISG*, 2010, article 79, para. 13, p. 1068.

396 Rechtbank van Koophandel, Hasselt [Commercial Court], Belgium, *Vital Berry Marketing v. Dira-Frost*, 2 May 1995.

Even though an impediment is not possible to foresee, the promisor is only excused if it was also not possible or not reasonable to avoid or overcome the impediment or its consequences. This imposes on the promisor a duty to consider alternatives despite considerable increase in costs.[397]

An example is seen in *Tomato Concentrate Case*[398] where it was decided that the seller could not be excused from non-delivery due to heavy rainfall that had destroyed the tomato harvest that year. The seller could have overcome the consequences since the entire tomato harvest was not destroyed, thus he could have purchased some of the remaining products, though at a significantly higher price.

The combination of the three qualifications creates a very high threshold for shifting the liability burden from the failing promisor to the promisee under article 79.

#### *4.1.3.2 Less Strict Conditions under Article 77*

The wording of Article 77 is less strict than article 79. According to the former the aggrieved party claiming damages must take *'… such measures as are reasonable …'* in order to mitigate loss occurring from the other party's breach.

For example, in *Cushion Case*[399] a buyer breached the contract by unrightfully cancelling the contract. However, the seller's continued performance and production in spite of the cancellation exacerbated the damages, which in turn could not be recovered by the seller by virtue of the duty to mitigate loss.

Only damages that the aggrieved party could not reasonably have mitigated can be covered according to article 77. What is a reasonable measure is determined from the practice between the parties, trade usages and the reasonable person standard.[400]

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397 Schwenzer, *Commentary on CISG*, 2010, article 79, para. 14, p. 1069.

398 Oberlandesgericht Hamburg [Appellate Court], Germany, *Tomato Concentrate Case,* 4 July 1997.

399 China International Economic & Trade Arbitration Commission [CIETAC], *Cushion Case*, 29 September 2000.

400 Schwenzer, *Commentary on CISG*, 2010, article 77, para. 7, p. 1045. See also the CISG articles 9 and 8 as well as *infra* chapter 2, p. 9 *et seq.*

Measures incurring disproportionate costs are not required by the aggrieved party.[401] This is different to the increase of costs that can be accepted under article 79.

To illustrate the difference in threshold between article 77 and 79 the *Tomato Concentrate Case*[402] and the *Cloth Wind Coats Case*[403] can be compared. In the former, it was required that the seller acquired tomatoes in a market with very low supply and heavily increased prices. In the latter, the tribunal stated that it was at least not easy for the seller to re-sell goods that were custom-made to the buyer's specifications, thus the seller had not omitted to take reasonable mitigation measures against the occurrence of damages.

#### *4.1.3.3 Lowest Restriction under Article 80*

The starting point in article 80 is that foreseeability on part of the promisor does not limit his access to be excused due to the promisee's interference.[404] Also, exemption according to article 80 does not presuppose that the promisee's interference was unavoidable or could be overcome[405] by the promisor as he cannot generally be expected to overcome the promisee's interference with performance.[406]

This is different to the limitation contained in article 79 and is illustrated in the *Yellow Phosphorus Case*.[407] Here a seller made incomplete deliveries and consequently the buyer had to procure substitute goods at a higher price. The seller claimed to be exempt from liability as the incomplete deliveries were caused partly by natural disaster in the seller's region and partly by the buyer's issuance of a non-contractual letter of credit.

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401 Schwenzer, *Commentary on CISG*, 2010, article 77, para. 7, p. 1045.

402 Oberlandesgericht Hamburg [Appellate Court], Germany, *Tomato Concentrate Case,* 4 July 1997.

403 China International Economic & Trade Arbitration Commission [CIETAC], *Cloth Wind Coats Case*, 1989.

404 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 249.

405 Schwenzer and Manner, *The Pot Calling the Kettle Black*, 2008, p. 475.

406 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 5, p. 1090-1091, Enderlein/Maskow, *International Sales Law*, 1992, p. 336 and Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 249.

407 China International Economic & Trade Arbitration Commission [CIETAC], China, *Yellow Phosphorus Case*, 9 August 2002.

Regarding the first cause, the tribunal stated that the seller could have overcome the impediment of the natural disaster by acquiring substitute goods. By choosing not to, the seller was fully liable. Regarding the second cause, it was stated that a contractual letter of credit is a '*… precondition for the seller to deliver the goods, but not the necessary condition for the seller to prepare the goods*' thus making the seller responsible.

However, since the buyer did cause inconvenience, the claims made against the seller were reduced so that 70 % of the buyer's costs were recovered.[408] It is seen that the 'inconvenience threshold' is not being applied in regard to article 79 according to which the seller is not excused at all, but in regard to article 80 it is.

The reason why there is no general duty for the promisor to overcome the promisee's interference may be found in the mutual and reasonable expectation that each party will perform as promised (*pacta sunt servanda*) and because it is 'less worse' that the promisor fails in his performance compared to the promisee's causation of the failure and subsequent attempt to derive a benefit from it.[409]

A similar comparison to find the 'least worst' is conducted in *Used Car Case*[410] where the court stated that a grossly negligent buyer deserved more protection than a fraudulent seller. In the case the seller did not disclose to the buyer that a car was 2 years older than indicated and the mileage much higher. The buyer should have detected these facts himself, but did not and thus suffered a loss when the car was resold to a party who discovered the non-conformity.

Even though article 35(3) directly indicate that a party may not rely on a non-conformity if he should be aware of it, this provision was inapplicable due to the sellers fraudulent behaviour according to article 7(1) (good faith) and the principle underlying article 40. The latter denies the seller access to rely on rules of examination and the deadline for giving notice.

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408 The legal basis for the reduction is not indicated, but matches the solution called for under article 80 and cases of shared responsibility. See also *infra* section 7.1.5.2, p. 196 *et seq.* and Neumann, *Shared Responsibility,* 2009.

409 Application of article 80 requires that the failure to perform is *imputable* to *both* parties. See *infra* 6.1.1, p. 145 *et seq.*

410 Oberlandesgericht Köln [Appellate Court], Germany, *Used Car Case*, 21 May 1996.

Similarly, in light of the connection between article 80 and good faith[411] and the underlying principles requiring cooperation and performance enabling steps by the parties, a requirement for the promisor to attempt to overcome easily remediable interference may exist.[412]

Especially in the situation where the promisee's interference is not the only possible logical cause of the failure of performance it has to be determined on a case-by-case basis whether the promisor could have been expected to overcome the promisee's conduct.[413]

### 4.1.4 Burden of Proof

The discussion of burden of proof touches upon the discussion of the scope of the Convention. It is argued *infra* section 6.4, p. 172 *et seq* that the Convention does in fact deal with the issue. At present, the burden of proof for each of the three articles investigated are compared to show similarities and differences between them.

The promisor has the burden of proof under article 79.[414] The wording of article 79 states expressly that the burden to prove the existence of an impediment beyond control rests with the promisor with the words '*… if he proves that…*'.

The same express regulation of the burden of proof is not found in article 80 or article 77. Article 80 presumes that a failure of the promisor has been established on a no-fault basis, thus placing the liability burden on him. If the promisor wants to shift the presumption that he is liable for the non-performance he must, under the view provided in section 6.4 below, bring proof to the contrary, also because he will derive a benefit from the provision being applied.[415]

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411 See for good faith *infra* section 5.2.1, p. 119 *et seq*.

412 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 5, p. 1090-1091, Enderlein/Maskow, *International Sales Law*, 1992, pp. 336-337, Magnus in Honsell/Karollus, *UN-Kaufrecht*, 1997, article 80, para. 5, p. 995 and para. 13, pp. 997-998 and Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 249.

413 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 249.

414 Lookofsky, *Consequential Damages*, 1989, p. 263.

415 Similarly Janssen and Claas Kiene, *General Principles*, in Meyer/Janssen, 2009, p. 278, arguing that the party relying on an exemption clause must prove its factual prerequisites.

This is also supported by the systematic placement of article 80 as an exemption clause. However, it conflicts with the view presented earlier, that the placement of article 80 is less significant and that it calls for a more broad interpretation under which direct and indirect causation is enough to activiate the provision. This is still sustained, but the starting point is that the burden of proof rests on the promisor.

Because article 80 is an exemption clause it is for the promisor to prove the promisee's sole or shared interference with his performance of the contract.[416] Similarly under articles 77 and 79 where it is for the failing promisor to prove that the promisee either did not take reasonable measures to prevent loss occurring or that an unforeseeable and unavoidable impediment beyond control existed.[417]

Which party has the burden of proof can seem particularly relevant in cases of shared responsibility. However, if a situation of shared responsibility is boiled down to a matter of burden of proof it seems to become an either/or solution contrary to the wording and built in flexibility of article 80.

*Sensitive Russian Components*[418] could have been approached purely as a matter of burden of proof since no party could prove the cause of the defect goods, thus leaving the promisor with the entire liability burden. Doing so would be to ignore the partial causation by the promisee and the flexibility of article 80. A more lenient approach to the burden of proof is appropriate.

A parallel is in this regard noticed when it is asserted that compensation for expected profits should be allowed since the promisor should not be able to escape liability merely because the lost amount cannot be proved.[419]

The burden of proof thus becomes a requirement of considering who carries the liability before applying article 80, and thus, mentally, that the adjudicator is to be convinced to lower the liability of the promisor, and not to add to the liability of the promisee.

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416 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 11, p. 1094.

417 Schwenzer, *Commentary on CISG*, 2010, article 77, para. 13, p. 1048 and the wording of article 79.

418 International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003.

419 Lookofsky, *Consequential Damages*, 1989, p. 222.

### 4.1.5 Duty to Give Notice

According to the wording of article 79, exemption requires that the party who seeks relief gives notice of the impediment and its effect to the other party. The effect of not giving notice is that the promisor remains liable for damages that could have been mitigated by giving notice.[420]

In contrast, there is no express duty to inform the other party under articles 77 and 80. However, in some cases a party may bear the consequences of not giving notice under these two provisions anyway.

First, when a notice in itself is a way of mitigating, there is a duty to do so under article 77. In *Video Recorders Case*[421] it was stated that if the buyer had the right to manuals in other languages than German, it should under article 77 have notified the seller of this in order to get other language versions instead of paying considerable amounts for translation elsewhere and then claiming the costs back from the seller.

Second, if the causation by the promisee under article 80 amounts to a breach of contract, the promisor may raise counter-claims[422] which can require notice to be given. This is the case if the promisor wishes to avoid the contract,[423] to rely on a non-conformity,[424] to rely on defects in title,[425] to suspend performance[426] or if he wishes to resell the goods.[427]

It is the starting point there is no duty to give notice in case of interference by the promisee under article 80. It is reasonable not to demand that the failing promisor gives notice to the promisee that interference is occurring since the promisee would or should be aware of it already. Similarly under article 79(4) it is not necessary to give notice of impediment when the promisee is aware of the existence of such.[428]

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420 Schwenzer, *Commentary on CISG*, 2010, article 79, para. 47, pp. 1081-1082.

421 Landgericht Darmstadt [District Court], Germany, *Video Recorders Case*, 9 May 2000.

422 See regarding counter claims *infra* section 7.2.2, p. 201 *et seq*.

423 Article 29 CISG.

424 Article 39 CISG.

425 Article 43 CISG.

426 Article 71 CISG.

427 Article 88 CISG.

428 Schwenzer, *Commentary on CISG*, 2010, article 79, para. 46, p. 1081.

Two modifications to this starting point are conceivable. First, it has been stated that if the interference by the promisee is easy to avoid or overcome there may be a duty for the promisor to do so in light of the underlying principles of article 80 and the duty to cooperate.[429] It could be that the promisor's notice to the promisee that he is interfering with performance is enough to avoid further problems. However, this has to be weighed in each case against the presumption that the promisee already knows, or should know, of the effects of his own act and omissions.

Second, as provided elsewhere, the application of article 80 presupposes a non-performance by a party.[430] Withholding or suspending performance can be a breach, but is not necessarily so. See *infra* section 6.5, p. 177 *et seq* for more details.

### 4.1.6 Remedies Affected

With the words *'may not rely on'* article 80 excludes any remedy by the promisee that would normally be available[431] and not only damages as just accounted for. This is similar to both PECL and UPICC under which the promisor is barred from seeking any remedy including damages, specific performance, price reduction, avoidance and interest.[432]

The exclusion of remedies may be either total or partial. A total loss of remedies may be due in situations where the promisee is the sole cause of the promisor's failure to perform and a partial exclusion of remedies is due in mixed cases and shared responsibility cases.

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429 See infra chapter 5, p. 107 *et seq*.

430 See *infra* section 6.1, p. 143 *et seq*.

431 Audit, *La Vente*, 1990, p. 180, Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 6, p. 360, Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 251, Enderlein/Maskow, *International Sales Law*, 1992, p. 336, Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 2, p. 1088-1089 and para. 8, pp. 1092-1093, Magnus in Honsell/Karollus, *UN-Kaufrecht*, 1997, article 80, para. 14, p. 998, Tallon in Bianca/Bonell, *Commentary*, 1987, p. 598, Schwenzer and Manner, *The Pot Calling the Kettle Black*, 2008, p. 475 and p. 478.

432 Butler in Felemegas, *An Int'l Approach*, 2007, p. 506, Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 8, p. 1092-1093, Schwenzer and Fountoulakis, *International Sales Law*, 2007, p. 577, Schäfer in Felemegas, *An Int'l Approach*, 2007, pp. 251-252.

The remedies normally available according to the Convention[433] are the right to performance/payment, the right to delivery of substitute goods, the right to repair, the right to avoid the contract, the right to price reduction, the right to refuse to take delivery, the right to make specifications, the right to suspend performance, the right to damages and the right to interest. Article 80's effect on remedies is accounted for in detail see *infra* sections 7.1.1 to 7.1.4, p. 182 *et seq.*

In contrast to article 80, articles 77 and 79 affect only claims for damages.[434] Article 79 affects only the liability to pay damages. This appears directly from the wording of subsection (5). This is similarly to the wording of article 77 from which it also follows that it applies only to claims of damages. It has been suggested that a broad interpretation can justify applying article 77 to all remedies.[435] However, the wording and systematic placement suggests that article 77 affects only damages.[436] This approach is seen also in case law[437] and confirmed in the drafting history where a proposal to apply article 77 to all remedies was expressly rejected.[438]

## 4.2 A Supplementary Rule

Compared to 77 and 79, article 80 expresses a unique concept and is thus filling what would be a gap in the Convention text. However, in some cases, there is an overlap between the more general article 80 and specialised provisions. This is accounted for below.

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433 Tallon in Bianca/Bonell, *Commentary*, 1987, p. 598. See articles 45-52, 61-65 and 71-73.

434 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 2, p. 1088-1089, Audit, *La Vente*, 1990, p. 180, Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 6, p. 360.

435 Enderlein/Maskow, *International Sales Law*, 1992, pp. 308-309 suggests to apply article 77 to all remedies.

436 Schwenzer, *Commentary on CISG*, 2010, article 77, para. 4, pp. 1043-1044.

437 Oberste Gerichtshof [Supreme Court], Austria, *Roofing Material Case*, 9 March 2000 and United Nations Commission on International Trade Law, *UNCITRAL Digest of Case Law on The United Nations Convention on The International Sale of Goods*, United Nations, New York, 2008, article 77, para. 1, p. 240.

438 Proposal A/CONF.97/C.1/L.228 by the United States, p. 133 in A/CONF.97/19. Rejected by 24 votes to 8.

Though it was suggested during the drafting that article 80, at least to some extent, could be dealt with in more specific provisions, article 80 still plays a role as a supplementary rule.[439]

The concept of article 80 is to bar the promisee's claim if the promisor's non-performance can be said to have been caused by the promisee. The exclusion can be either total or partial since article 80 allows, in theory, for an apportionment of remedies in situations of shared responsibility. These two functions are looked for in other provisions in the CISG in the following.

Several provisions attempt, naturally, to avoid the effects of actions inconsistent with the mutual expectation of performance of the contract[440] and for example article 60(a) requires that the buyer at a minimum does not place in obstacles in the seller's path of performance of the contract.[441] In this way there is a resemblance to article 80.

Three specific provisions are picked up in the following to demonstrate overlap to article 80 as well as similarity and differences in outcome of the provisions.

### 4.2.1 Conformity, Article 35

In regard to the Nordic sales acts it has been stated that a seller is not responsible for non-conformities that are due to the buyer's defective instructions or material.[442] In fact, Norway chose to incorporate article 80 into the rules of conformity.[443]

Also within the CISG there is a similarity between the rule on conformity and article 80. It has been suggested that a seller is not liable for defect machinery according to article 80 if it is due to faulty blueprints from the skilled

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439 A/CONF.97/C.1/SR.28, Australia, para. 51, p. 386, Switzerland, para. 55, p. 386 in A/CONF.97/19.

440 Such as articles 45-52, 61-65, 71-78 according to Flechtner/Honnold, *Uniform Law,* 2009, pp. 647-648.

441 Flechtner/Honnold, *Uniform Law,* 2009, p. 646. Similarity also pointed out by Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 10, p. 794.

442 Ramberg and Herre, *Köplagen*, 1995, p. 376.

443 See *infra* section 8.3, p. 211 *et seq.*

buyer.[444] This resembles article 35(2)(b) and the requirement of reliance on the seller's skill and judgement insofar as the seller is not liable for alleged non-conformities caused by the buyer's instructions regarding the goods.

To illustrate, the archetype case is returned to. As will be recalled, the archetype case is one where the promisor's failure to perform is caused solely by the promisee.

In the *Propane Case*[445] the buyer was to pay for a delivery of gas 3 days after its loading into the ship named by the buyer. Due to the seller's omission to name the port of loading, the buyer could not nominate a ship and not open a L/C as agreed. The adjudicator found that the seller could not rely on the buyer's 'non-conforming' payment, since it was the seller who solely caused such 'non-conformity'. The buyer was dependent on the seller's naming of the place of loading to open his L/C.

In this case, the buyer relies on the seller to provide a piece of information needed for the buyer to perform his obligation. Since the seller does not provide this information, he causes the buyer to breach. Had it been opposite, so that the buyer did not rely on the seller's naming of a port[446] there would be no reliance and thus no loss of rights on the seller – a similarity to article 35(2)(b) under which a seller is not liable for alleged non-conformities that are due to the buyer's interference in the manufacturing process or instructions regarding specifications.[447] It can be argued that any instruction from the buyer to the seller can render the seller free from liability under article 35(1) as well as article 35(2)(a) and (b) since an instruction from the buyer would at the same time mean that the buyer must be aware of a potential non-conformity compared to his intended use.[448]

A similarity between article 80 and article 35 is seen in *Check Valves*.[449] In the case, the delivered valves failed when used in gas stations where the

444 Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 9, pp. 793-794.

445 Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996.

446 For example if a different INCOTERM than FOB had been been agreed so that it was for the seller to ship the goods.

447 Schwenzer, *Commentary on CISG*, 2010, article 35, para, 24, pp. 581-582.

448 See article 35(3). See also Vestre Landsret [Western High Court], Denmark, *Check Valves*, 21 December 2004, CISGNordic.net ID: 041221DK in which the court refers to both article 35(1) and article 35(2)(a) in its decision.

449 Vestre Landsret [Western High Court], Denmark, *Check Valves*, 21 December 2004, CISGNordic.net ID: 041221DK.

petrol being pumped contained a particular additive. The court found that the additive was commonly used, not just in the Nordic region, and found that the seller should have delivered valves capable of operating with the additive. Thus the seller was liable according to article 35.[450]

The seller had several valve types available and was the party selecting the particular valve type for the sale. Had the buyer interfered and specifically requested a certain valve model, it is possible that the seller would not have been liable since the buyer got what he wanted according to article 35(1), he did not rely on the seller's skill and judgement according to article 35(2)(b) or since the buyer caused the alleged non-conformity by interfering in the manufacturing according to article 80.

Both because of *lex specialis* and the placement[451] of article 80 as an exemption rule it seems more correct to apply article 35 in cases of overlap and the outcome is the same in the archetype case. The example above shows that several roads may be taken from the same problem. If the outcome is the same it is less significant which one is chosen, other than the consideration of uniformity.

However, in regard to the shared responsibility type case, the similarity between the two provisions comes to an end. It will be recalled that the shared responsibility case type, like in *Sensitive Russian Components*,[452] is one where *both* parties are likely to have caused the promisor's failure to perform. In these situations article 80 allows for a *pro rata* apportionment of the remedies so that neither party is either over- or under-compensated.

Similar to the system in the Nordic region,[453] article 35 seem to work as an 'either-or' rule; Either the parties agreed on something or not according

[450] Case has rightfully been criticised for not considering international case law, such as Bundesgerichthof [Federal Supreme Court], Germany, *New Zealand Mussels Case*, 8 March 1995. See Henschel, René F., *Danske domstoles anvendelse af udenlandsk retspraksis, som i sager om mangler i internationale køb reguleret af CISG,* Erhvervsjuridisk Tidsskrift, no. 2, 2006, 234-241.

[451] See *supra* section 3.2.5, p. 69 *et seq* where it is questioned how much weight is to be given to this fact.

[452] International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003. International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Bilateral Commission Case*, 29 December 2004.

[453] See *infra* section 8.3, p. 211 *et seq.*

article 35(1), either the goods are fit for purpose or not according to article 35(2)(a) and (b) and either the buyer relied on the seller or he did not according to article 35(2)(b). Naturally, parts of the non-conforming goods may be due to the buyer's lack of reliance and other parts due to the seller's faulty production. Such a situation is however not a shared responsibility situation, but a cased of mixed causation, in which case each party bears the consequences of their interference.[454]

Also article 35(3) supports that the issue of conformity is supposed to be decided on an either-or basis. The section states that a seller is not liable for non-conformities if they concern facts, which the buyer knew or could not be unaware of. In *Used Car Case*[455] two professional car dealers traded a used car. When the car was re-sold it was discovered that the car had been registered for the first time earlier than the seller indicated and that the actual mileage was much higher. The adjudicator found that the seller knew about the facts and that he would be liable accordingly. Even though the buyer was also a professional car dealer and able to detect the characteristics of the car, the adjudicator did not find that article 35(3) could be applied due to the seller's fraudulent behaviour. Had it been applied, the buyer could be said to be, at least, not unaware of the characteristics and thus bear the responsibility himself.

Had article 80 been applied, it could be that the burden was shared like it was in *Sensitive Russian Components*.[456] In this case both parties were found to be professionals and both blameworthy for the situation that had developed. Considering this it was decided that each party should share the burden with 1/3 to the buyer and 2/3 to the seller. In light of that case, it seem possible to advance a claim in the *Used Car Case*[457] that the buyer at least should bear *some* responsibility, however, this seems to follow article 80 more than article 35. Considering that article 35 is relevant when establishing whether there has been a breach it could have been relevant to follow up with a partial exemption according to article 80.

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454 See *infra* section 6.2.1.2, p. 150 *et seq*.

455 Oberlandesgericht Köln [Appellate Court], Germany, *Used Car Case*, 21 May 1996.

456 International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003. International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Bilateral Commission Case*, 29 December 2004.

457 Oberlandesgericht Köln [Appellate Court], Germany, *Used Car Case*, 21 May 1996.

### 4.2.2 Price Reduction, Article 50

A concept like the one in article 80 appears to be expressed also in article 50. Whether or not there is a directly underlying principle in the Convention is dealt with *infra* chapter 5, p. 107 *et seq.*

Article 50 directly states that the buyer's right to reduce the price is lost if the buyer refuses to accept performance. Article 50 reads;

> 'If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.'

Under certain requirements the seller has opportunity to remedy non-conformities according to article 37 (before delivery date) and article 48 (after delivery date). However, if the buyer refuses to allow the seller to do so, he loses the right to reduce the price according to article 50.

In this regard there is an overlap to article 80 insofar as both provisions bar a party from deriving a benefit if this seems to be based on a non-performance caused by that party himself. In the case of article 50, the buyer should not be able to benefit by reducing the price if he denied the seller access to remedy the non-conformity, presuming this could happen without causing inconvenience.

An example of the application of article 50 and *lex specialis* is seen in *Acrylic Blankets Case.*[458] The buyer did not pay since it believed that three rolls of the ordered acrylic blankets were missing in the delivery. The seller sued for the purchase price and the buyer counter claimed reduction of the price as well as damages for lost profit. The court found that the buyer had rejected the seller's offer to cure the non-conformity, which appears from article 48(1) CISG. By rejecting the seller's right to cure, the buyer was not entitled to a price reduction according to article 50(2nd sentence). Neither was the buyer entitled to damages by virtue of article 80.

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[458] Oberlandesgericht Koblenz [Appellate Court], Germany, *Acrylic Blankets Case*, 31 January 1997.

The adjudicator thus found that article 50 (2nd sentence) bars a claim due to interference and at the same time a damage claim is barred by article 80. In theory, it seems possible to subsume both situations under article 80. Since article 50 (2nd sentence) is more specific it is, in the light of *lex specialis*, correct to apply it before turning to the more vague article 80.

The case is of the archetype as it is solely the buyer who denies the seller its right to perform.[459] Because article 50 addresses only the buyer's right to price reduction, and not the seller's right to reduce the delivered amount, it can already be concluded that the provision does not completely pre-empt article 80 which is neutral regarding the parties. Furthermore, article 80 allows for a *pro rata* apportionment, which does not appear possible according to the words of article 50.

However, in light of possible underlying principles resembling article 80 a partial lowering of price reduction due to interference may be the appropriate view. Even though we do not find the words '*… to the extent …*' as in article 80, article 50 has been used to proportionally lower a price reduction in practice.[460]

### 4.2.3 Third Party Rights, Article 42

The seller is under an obligation to deliver goods that, under more specific requirements, are free from third party's rights according to article 42(1) if the seller knew or could not be unaware of such. However, the existence of such rights is not to be considered a non-conformity if the buyer either instructed the seller to produce in a way that conflicted with such rights or the buyer also knew or could not be unaware of third party's rights, according to article 42(2)(a)-(b).

The exemption regarding the buyer's instruction is similar to that of the reliance requirement under article 35(2)(b) as well as article 35(3)[461] described

[459] See more on the archetype *infra* section 6.2.1.1, p. 148 *et seq.*

[460] In Oberlandesgericht Koblenz [Appellate Court], Germany, *Acrylic Blankets Case*, 31 January 1997 the same interference by the buyer meant loss of price reduction according to article 80 and loss of damages according to article 80. Compare to China International Economic & Trade Arbitration Commission [CIETAC], *Diaper Machine Case,* 8 August 1996 where the price reduction according to article 50 were lowered due to joint causation.

[461] Schwenzer, *Commentary on CISG*, 2010, article 42, para. 17, p. 669.

*supra* 4.2.1. It overlaps with article 80 insofar as the buyer's instruction to the seller to for example reproduce goods in breach of a trademark etc., causes a discrepancy with the rule that the goods have to not contradict such rights. The instruction from the buyer makes the buyer the sole cause of the discrepancy. The situation could as well be subsumed under article 80 with a similar outcome and it has been asserted that article 42(2)(b) in fact is a concrete manifestation of article 80.[462]

It has been stated that when both the seller and the buyer are aware of a third party's claims in the goods, the seller does not bear the responsibility[463] – meaning that the existence of third party's rights is not to be considered a non-conformity. The decision whether it is for the buyer or the seller to bear the risk of third party claims is an 'either-or' approach.[464] There does not seem to be the possibility to reach a *pro rata* solution in case both parties could not be unaware of third party's rights.

In *Printed Textile Fabric Case*[465] the buyer had bought fabric with patterns that infringed the rights of a third party. In the case, the adjudicator seemed to find it irrelevant whether the seller was aware of third party's rights and found that since the buyer could not be unaware of the infringement the seller is not under an obligation to deliver goods free of such third party rights according to article 42(2)(a).

Had the case been subsumed under article 80 it would, in the light of the shared responsibility type, be relevant to discuss awareness on both the side of the buyer and seller. The similarity with *Sensitive Russian Components*[466]

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462 Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 5, pp. 792-793, Enderlein/Maskow, *International Sales Law*, 1992, p. 336. Similar, Schwenzer, *Commentary on CISG*, 2010, article 42, para. 20, p. 670.

463 Reich, *A Need for Revision*, 1997.

464 Cour d'appel de Colmar [Appelate Court Colmar], France, *Printed Textile Fabric Case*, 13 November 2002 and Cour de Cassation [Supreme Court], France, *Footware Case*, 19 March 2002, though the French cases have been criticised for letting the buyer become liable too quickly they follow an 'either-or' approach, see Schwenzer, *Commentary on CISG*, 2010, article 42, para. 18, pp. 669-670.

465 Cour d'appel de Colmar [Appelate Court Colmar], France, *Printed Textile Fabric Case*, 13 November 2002.

466 International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003. See also International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Bilateral Commission Case*, 29 December 2004.

is found in the fact that both parties to some extent were aware of a fact. In the *Printed Textile Fabric Case*[467] the parties may be aware that the textile was not clean of third party rights and in *Sensitive Russian Components* the parties knew that a certain inspection method had to be followed in order not to damage the goods.

However, in the specific situation of third party rights in article 42, an 'either-or' approach is to be followed.[468] This is different to the *pro rata* approach possible under article 80. Following *lex specialis* it would be correct to solve cases falling under both article 42 and 80 with the former article.

## 4.3 Lex Specialis

As demonstrated just above, there may at times be an overlap between a more specialised provision of the Convention and article 80. Since the two overlapping provision not necessarily will produce the same result, it is of importance to clarify which one is the applicable one.

To the extent that specialised provisions has an overlap to the more general article 80, it can be argued that following the *lex specialis* principle, the former supersedes the latter. Such approach eats away the independent scope of article 80 and if there is a 100 % overlap to a more specialised rule, article 80 is rendered empty and insignificant.

The *lex specialis* interpretation technique applies to the reading of convention provisions[469] as such also specifically to those in the CISG.[470] The technique is particularly relevant when there is a discrepancy between a specialised rule and a general one, where the former prevails over the latter.

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467 Cour d'appel de Colmar [Appelate Court Colmar], France, *Printed Textile Fabric Case*, 13 November 2002.

468 Differently Beit ha.M.ishpat ha'Elyon [Supreme Court], Israel, *Eximin S.A. v. Textile and Footwear Italstyle Ferarri Inc.,* 22 August 1993.

469 Aust, *Modern Treaty Law*, 2007, pp. 248-249.

470 See for example United Nations Commission on International Trade Law, *UNCITRAL Digest of Case Law on The United Nations Convention on The International Sale of Goods*, United Nations, New York, 2008, article 78, para. 1, p. 246, Flechtner/Honnold, *Uniform Law,* 2009, pp. 416-417.

Also in the light of the system laid down in article 7 CISG, it seems logic to apply a specialised rule before a general one. Even when two rules lead to a similar outcome it is important for the uniform development of the Convention to apply a specialised rule before a more general one. It has been provided that article 80 useful in this regard instead of referring matters to underlying principles or good faith, thus overextending these.[471] Despite this, it is seen from the above that there is room for article 80 to play an independent role.

## 4.4 Concluding Argument

The comparisons carried out above between articles 77, 79 and 80 show that article 80 is conceptually unique.[472] The results of the comparisons are tabulated in the chart below.

Illustration number 1.

| | **Article 77** | **Article 79** | **Article 80** |
|---|---|---|---|
| **Placement in CISG** | Under 'damages' | Under 'exemptions' | Under 'exemptions' |
| **Focus** | Promisee's duty to mitigate | Impediments beyond control | Interference by promisee |
| **Breach by Promisor presupposed** | Yes | Yes | Yes |
| **Initial cause of promisor's non-performance** | Solely the promisor | Impediment beyond control | Solely the promisee or both parties |
| **Access to lowered burden limited** | Medium – Reasonableness of measures | Strict – Beyond control, could not foresee and could not avoid | Low – easily remediable interference |
| **Duty to give notice** | No.<br>Though it may be a measure in itself | Yes | No.<br>Unless a way to remedy interference or avoid circumvention |
| **Remedies affected** | Damages | Damages | All |

[471] See regarding article 7 supra section 2.2, p. 17 *et seq*, good faith *infra* section 5.2, p. 116 *et seq* and the dangers of using general provisions instead of specific ones *infra* section 5.3.1, p. 134 *et seq*.

[472] The domestic laws of China and Russia are inspired by, among others, the Convention and distinguish between rules of mitigation and force majeure. See *infra* p. 235.

Though article 80 conceptually is unique compared to the rules of force majeure and mitigation, an overlap to more specialised provisions are seen. The claim that article 80 is pre-empted by other provisions in the Convention is therefore sustained, but only to some extent.

There is a similarity between article 80 and articles 35, 42 and 50. Following the *lex specialis* principle, these overlapping provisions pre-empt article 80. However, insofar as the outcomes of the provisions are the same, it is less significant which one is applied. In light of *lex specialis* and the goal of uniform application, it is to be encouraged to apply more specific provisions before a general one like article 80.

A concept similar to that of article 80 in its archetype form is expressed in articles 35, 42 and 50. All of these follow an either/or approach to the promisor's liability for having failed to perform.

Regarding article 35 and the archetype situation, the promisor's liability is excluded under the view that that the promisor had no duty to perform (35(1)), the requirement of reliance is not fulfilled (35(2)) or the buyer could not be unaware of the relevant fact (35(3)).

Article 80 supplements article 35 in shared responsibility situations where article 35 does not provide the flexibility of a *pro rata* solution. If the promisor is held liable according to article 35 he has the possibility of a partial exemption according to article 80. The two provisions are different since article 35 focuses on the time of conclusion of contract and article 80 on the entire period of the parties' relation and this difference makes it relevant to use article 80 as a supplement for article 35.

Regarding article 42, a specific regulation of the promisor's duty to deliver free of third party rights is found. Again, the approach is in the archetype the same, an either/or one. Article 42 makes significant to the promisor's duty whether the buyer also was aware or could not be unaware of the third party rights.

This, however, is attached to the time of conclusion of the contract. If at that time the buyer did not know, but later became aware of the rights, article 80 can be used as a supplement to for example reduce the seller's responsibility. It could be that the buyer later became aware, but continued receiving delivery in the hope that authorities would not impair the sale at a later stage.

Regarding article 50, a specific regulation of access to the remedy of price reduction is found. In the archetype situation the two provisions are similar. However, article 50 has a more limited use as only price reduction is addressed, whereas article 80 modifies all remedies.

In the archetype situation they both follow an either/or approach, but article 50 does not provide a solution for shared responsibility cases and article 80 can once again be used to supplement.

For these reasons it is sustained that a concept similar to that of article 80's archetype is to be found in more specific provisions, such as articles 35, 42 and 50. However, there is still independent room for article 80 to be used as a supplement, also in cases of shared responsibility. Identifying these similarities in concept across several provisions leads to the thesis dealt with in the following chapter – that article 80 is but one expression of an underlying principle of the Convention.

## 5. Underlying Principles and Good Faith

It is provided in the previous chapter that the reason why similarities are seen between article 80 and for example articles 35, 42 and 50, is that they to some extent are expressions of the same underlying principles. This is elaborated further in the present chapter.

Both scholars and case law suggests that article 80 expresses one or more underlying principles.[473] Considering the methodology discussed *supra* chapter 2, p. 9 *et seq* it is significant to clarify which, if any, principles are expressed in the provision. Also During the drafting of the provision did some delegates consider the provision to be a reflection of an important principle,[474] however, as accounted for previously, the delegates had different views on how to incorporate such a principle if necessary at all. The delegate from GDR, who suggested the new article 80, has later stated that it was useful to adopt the provision instead of referring to principles, thus overextending them.[475]

Not only scholars and drafters see article 80 as an expression of a principle. The rather general and short drafting style also suggests that this is the case as well as the discussion of where to systematically place the provsion. See in this regard *supra* section 3.2.1, p. 63 *et seq*. In contrast, specific rules seem more elaborate and follow a "if … then …" structure that is not seen to the same degree in article 80.[476] The question remains though, which specific principle(s) are reflected in article 80?

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[473] Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 2, p. 359 calls it a *'Grundsatz'* and *'allgemeines Prinzip'* (maxim and common principle). See also China International Economic & Trade Arbitration Commission [CIETAC], China, *Possehl Limited v China Metlas & Minerals Import & Export Corporation*, 2005.

[474] A/CONF.97/C.1/SR.28, USSR, para. 52, Sweden, para. 53, Argentina, para. 54, Switzerland, para. 55, p. 386 and Italy, para. 56, Canada, para. 57, Ireland, para. 60, p. 387 in A/CONF.97/19. Honnold notes that most delegates saw no danger in stating the obvious and seemed to feel that article 80 had value, see Flechtner/Honnold, *Uniform Law,* 2009, p. 645.

[475] Enderlein/Maskow, *International Sales Law*, 1992, p. 335.

[476] Compare for example article 64 CISG (rule) and article 6 CISG (standard).

Principles underlying the CISG can be extrapolated from the Convention's provisions as accounted for *supra* section 2.4.1, p. 36 *et seq.* Additional sources may be case law and scholarly writings,[477] but for the sake of uniformity, domestic sources are to be excluded.[478] Several principles are possible to extrapolate from the Convention, such as reasonableness[479] and party autonomy.[480] In regard to the discussion of good faith below, domestic law is relevant insofar as if it is possible to indentify a universally accepted rule or principle, it can be applied alongside the CISG.

It is recalled that if it is not possible to extrapolate a principle from the CISG, the matter in question is referred to domestic law according to article 7(2).[481] It is not permitted to read into the Convention new principles from soft law instruments. However, a proposed application may be tested against the applicable trade usage, contract practices and modern international rules for international transactions.[482] This approach is different to the process of identifying principles and is allowed since it takes into consideration the international character of the Convention, which is better than falling back on domestic law that is meant to be avoided.

In regard to article 80, it is seen that a number of underlying principles are expressed in the provision and these can be grouped in two. First, principles

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477 Flechtner/Honnold, *Uniform Law,* 2009, pp. 146-148.

478 Felemegas in Felemegas, *An Int'l Approach*, 2007, pp. 27-29 and Enderlein/Maskow, *International Sales Law*, 1992, p. 60. Slightly different is Bianca/Bonell, *Commentary*, 1987, pp. 81-82 who argue that a domestic standard can be used if it is adopted in several legal systems.

479 Bianca/Bonell, *Commentary*, 1987, pp. 80-81.

480 Janssen and Claas Kiene, *General Principles*, in Meyer/Janssen, 2009, p. 271, Bonell in Bianca/Bonell, *Commentary*, 1987, p. 80, Schwenzer, *Commentary on CISG*, 2010, article 7, para. 32, p. 136 and articles 9(2), 29(2), 33(a), 35(1) and 41. Another example is *favor contractus* which appears from eleven articles according to Janssen and Claas Kiene, *General Principles*, in Meyer/Janssen, 2009, pp. 273-274, see also Schwenzer, *Commentary on CISG*, 2010, article 7, para. 35, p. 138 and Magnus, Ulrich, *General Principles of UN-Sales Law*, Rabels Zeitschrift for Foreign and International Private Law, Volume 59, Issue 3-4, 1995, 469-494, [Magnus, *General Principles*, 1995], (5)(b)(9).

481 Bianca/Bonell, *Commentary*, 1987, pp. 82-83, Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 42, pp. 142-143 and Felemegas in Felemegas, *An Int'l Approach*, 2007, pp. 37-38.

482 Flechtner/Honnold, *Uniform Law,* 2009, p. 148.

containing instructions to conduct certain behaviour. Second, principles instructing to refrain from certain conduct. These are accounted for *infra* in section 5.1, p. 109 *et seq.*

It is also seen that there is a close connection between article 80 and the concept of good faith and fair dealing. Since a requirement for the parties to act in good faith is not clearly included or excluded in the Convention and remains controversial, this aspect is accounted for separately *infra* section 5.2, p. 116 *et seq.*

Identifying the principles underlying article 80 is significant in three aspects. First, by providing an account of the principles they become more palpable and the adjudicator applying the provision and its underlying principles can omit conducting the laborious task of extrapolating the principles on ad hoc basis.

Second, it expands the amount of interpretation aids since an overlap in underlying principles between the Convention and other international instruments justifies using the latter to confirm proposed interpretations under the CISG.[483]

Third, if an underlying principle exists, it essentially expands the scope of the Convention since an underlying principle is to be used prior to domestic law in the solution of a substantial matter according to article 7(2).[484]

## 5.1 Principles Underlying Article 80

Article 80 has also been considered to express a general principle of justice and fairness,[485] which may be just as equivocal as the notion of good faith. It has been argued that it would be contrary to good faith and fairness if the promisee should have a remedy when it is responsible for the non-performance.[486] Similarly in cases of shared respsonsibility it would

[483] See *supra* section 2.5, p. 40 *et seq.*

[484] See *supra* section 2.4, p. 35 *et seq.*

[485] International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Bilateral Commission Case*, 29 December 2004.

[486] Liu in Felemegas, *An Int'l Approach*, 2007, p. 369.

be contrary to fairness to follow an either-or approach since it will over- or under-compensate the parties.[487]

As will be seen in the text below, a number of loosely related principles have been read into article 80. More specifically, these can be grouped in positive and negatively phrased duties and principles.

### 5.1.1 Positively Phrased Duties

A positively phrased principle is one that requires a party to engage in a certain conduct and in this regard article 80 expresses a common duty to cooperate with the other party.[488]

The principle of cooperation between the parties exists in the Convention[489] and is expressed in many provisions. At least three groups of provisions require or presuppose certain cooperation, recognising that a sales transaction is a series of interrelated steps by each party.[490]

First, rules of communication of information in the interest of the other party are found in articles 19(2), 21(2), 26, 39(1), 48(2), 65, 68, 71(3), 72(2), 79(4) and 88(1).[491] An example could be that article 21(2), which requires an addressee to notify the addressor when he realises that the otherwise late acceptance would have been received in due time. If he does not, the addressee is bound by the acceptance even though it may technically be late. This requirement of notification is in the other party's interest and imposes a duty for the addressee to cooperate.

Second, rules regarding the preservation of goods in articles 85-88 impose on a party a duty to cooperate by acting in the interest of the other party.[492]

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[487] Also noticed in another context by Green, Sarah, *The Risk Pricing Principle: A Pragmatic Approach To Causation and Apportionment of Damages*, Law, Probability & Risk, Volume 4, 2005, 159-175.

[488] Flechtner/Honnold, *Uniform Law,* 2009, pp. 646-648.

[489] Enderlein/Maskow, *International Sales Law*, 1992, pp. 336-337, p. 351 and Magnus, *General Principles*, 1995, (5)(b)(11).

[490] Flechtner/Honnold, *Uniform Law,* 2009, pp. 144-145, p. 424, pp. 428-430.

[491] Flechtner/Honnold, *Uniform Law,* 2009, pp. 144-145, p. 424, pp. 428-430. Regarding 79(4), see also Schwenzer, *Commentary on CISG*, 2010, article 79, para. 43, p. 1081.

[492] Enderlein/Maskow, *International Sales Law*, 1992, p. 351.

An example could be article 86(1) requiring the buyer to preserve goods that he has received though he may wish to reject them. He may not, so to speak, let the delivered horse run away.

Third, there are rules requiring steps in order to enable the other party's performance, i.e. articles 54 and 60(a).[493] These provisions again recognise that a sales transaction presupposes a series of interrelated steps to be taken by each party.[494]

An example of a step required to enable the other party's performance could be the naming of a particular place under FOB INCORTERMS.[495] Such a situation is seen in the archetype case *Propane Case*.[496] The case addressed that the buyer was supposed to nominate a ship since the parties had agreed to FOB delivery terms. However, the seller omitted to name the place of loading as agreed and consequently the buyer could not open a L/C, nor nominate a ship for the seller to load to the goods into. The adjudicator stated that by virtue of article 80 CISG the seller could not rely on the buyer's non-performance to avoid the contract since it was the seller himself who caused the buyer not to issue the L/C.[497]

Another case illustrates the duty to cooperate and that attempts to do so must be real. In *Steel Channels Case*[498] the goods were detained by customs under the suspicion of smuggling. This caused the buyer to claim damages and the contract avoided due to seller's fundamental failure to deliver. The court found that the seller had delivered the goods correctly and that it was

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493 Flechtner/Honnold, *Uniform Law,* 2009, pp. 464-465 and pp. 487-488 and Bonell in Bianca/Bonell, *Commentary*, 1987, p. 81.

494 Flechtner/Honnold, *Uniform Law,* 2009, pp. 487-488.

495 Flechtner/Honnold, *Uniform Law,* 2009, pp. 487-489.

496 Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996.

497 See also Bundesgerichtshof [Federal Supreme Court], Germany, *Machinery Case*, 31 October 2001 confirming a duty to cooperate in CISG, but rejecting that it impose on a buyer a duty to inquire about standard terms.

498 China International Economic & Trade Arbitration Commission [CIETAC], China, *Steel Channels Case*, 18 November 1996. Notice that the tribunal wrongly considers Portugal a CISG state. See also China International Economic & Trade Arbitration Commission [CIETAC], China, *Hot-rolled Coils Case*, 15 December 1997 regarding a typo in shipping documents regarding the vessels name and Landgericht Kassel [District Court], Germany, *Wooden Poles Case*, 21 September 1995 where the seller made unreasonable demands.

for the buyer to deal with customs. The buyer's claim of damages and avoidance were therefore rejected.

However, the seller knew that customs had questioned the goods twice before and in the case at hand the seller made it difficult to solve the problems with customs since it forwarded to the buyer irrelevant documents. The tribunal therefore decided that the purchase price should be lowered by 30 %, thus placing the burden between buyer and seller in a 70/30 ratio. A similar fraction was used regarding the arbitration fee and inspection costs.

The duty to cooperate is well recognized in international trade. Both case law applying general principles of law[499] and international instruments have adopted rules regarding the duty to cooperate,[500] for example UPICC 2010 Article 5.1.3[501] (Co-operation between the parties);

> 'Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.'

Also TLP has adopted a principle addressing the duty to cooperate in No. IV.6.9(b) [Duty to Notify/To Cooperate];

> '(b) Each party is under a good faith obligation to cooperate with the other party when such cooperation can reasonably be expected for the performance of that party's obligations.'

An underlying principle requiring cooperation between the parties can thus be extrapolated from the CISG, is expressed also in article 80 and is possible to confirm in international soft law.

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499 International Court of Arbitration, International Chamber of Commerce, Paris, France, *Bleached Pizza Paper*, 3 October 2003, No. 12111, International Chamber of Commerce, International Court of Arbitration, Geneva, Switzerland, *Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*, 28 July 2000, No. 9797, Ad Hoc Arbitration, San José, Costa Rica, 30 April 2001 and Camera Arbitrale Nazionale ed Internazionale di Milano [Chamber of Arbitration of Milan], Italy, *Steel Wire Case,* 28 September 2001.

500 See for example TLP IV.6.9 [Duty to Notify/To Cooperate], PECL Article 1:202 [Duty to Co-operate], ACQUIS Principles 7:104 [Duty to co-operate], DCFR III.1:104 [Co-operation].

501 In UPICC 1994 the article is numbered 5.1.3.

Thus, though the Convention does not contain a provision *expressly* stating a duty to cooperate as it is done in UPICC, TLP, PECL, DCFR and ACQUIS Principles, it is underlying the Convention and article 80.

### 5.1.2 Negatively Phrased Duties

The flipside of a duty to cooperate is the duty to refrain from not cooperating. Stated in another way, there is conduct, which cannot be permitted.

In relation to article 80 it has been argued that it is an expression of the principle that a party should not benefit from its own fault[502] and that a party may not abuse its rights.[503] The promisee is under a common duty not to impair the performance,[504] also because a contract necessarily implies a mutual expectation of performance according to which it would be inconsistent to prevent the other party's performance.[505] According to these principles, a party must refrain from conduct falling under the above, as this would be contrary to the duty to cooperate.

In particular, the argument of consistency supports that article 80 has been said to express the *venire contra factum proprium* principle,[506] according to which a party may not contradict its own previous conduct. It would self-contradicting if a party enters into an agreement with one hand and prevent its performance with the other.

The principle underlying article 80 has also been compared to estoppel, remediation, missbrauchseinwand and the doctrine of waiver.[507] However,

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502 Audit, *La Vente*, 1990, p. 179.

503 A/CONF.97/C.1/SR.28, Italy, para. 56, p. 387 in A/CONF.97/19.

504 Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 5, pp. 792-793 and Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 3, p. 360.

505 Flechtner/Honnold, *Uniform Law,* 2009, pp. 467-468.

506 Enderlein/Maskow, *International Sales Law*, 1992, p. 335, Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 247, Viscasillas, *El Contrato*, 2001, 180. Exemption and Butler in Felemegas, *An Int'l Approach*, 2007, p. 506.

507 Kee, Christopher and Opie, Elisabeth, *The Principle of Remediation,* in Andersen, C.B. and Schroeter U.G. (eds.), Sharing International Commercial Law Across National Boundries – Festschrift for Albert H Kritzer on the Occasion of His Eightieth Birthday, 470-488, Wildy, Simmonds & Hill Publishing, London, England, 2008, [Kee and Opie, *Principle of Remediation*, 2008], pp. 234-240 and Eiselen in Felemegas, *An Int'l Approach*, 2007, p. 165.

it should be noted that the notion *venire contra factum proprium,* which is said to be expressed in article 80, is used in an autonomous and international meaning free from domestic idiosyncrasies. Presently it is used as an expression of the prohibition to act contrary to previous conduct on which the other party relied. Article 80 forbids such contradictory behaviour.[508]

It is one thing to say that certain principles have been read into article 80. It is another to say whether these principles are underlying the Convention. It has been stated in *Rolled Metal Sheets*[509] that the prohibition of *venire contra factum proprium* is a principle underlying the CISG.[510]

Further, the principle and the protection of the other party's reliance is commonly said to be expressed in articles 16(2), 29(2) and 80.[511] However, a number of other articles have been mentioned in addition to those, for example articles 2, 7, 8(3), 9(2), 14(2), 18(2), 19(2), 21(2), 25, 33, 35(2)(b), 39(2), 41, 42(2)(b), 46(1), 47(2), 48(2), 49(2), 62, 63(2), 64(2), 66.[512]

An example of *venire contra factum proprium* expressed in the CISG is article 16(2)(b). The provision establishes that an offer cannot be revoked as it normally could be, if the offeree reasonably relied on the offer being irrevocable.

The underlying principle was applied in *Rolled Metal Sheets*[513] where the parties had agreed that notice of non-conformity should happen in writing

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508 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 247.

509 Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitration], Austria, *Rolled Metal Sheets*, 15 June 1994.

510 Compare, Arrondissementsrechtbank Amsterdam [District Court], Netherlands, *Tuzzi Trend Tex Fashion v. Keijer-Somers,* 5 October 1994, finding estoppel to be outside the Convention.

511 Kee and Opie, *Principle of Remediation*, 2008, p. 232, p. 241, Enderlein/Maskow, *International Sales Law*, 1992, p. 67, p. 210, p. 335, Mather, Henry, *Firm Offers Under The UCC and The CISG*, Dickson Law Review, 2000, 31-56, p. 48, Viscasillas, Maria del Pilar Perales, *Modification And Termination of The Contract*, Journal of Law and Commerce, 2005-2006, 167-179, p. 176, Magnus, *General Principles*, 1995, (5)(b)(4), Flechtner/Honnold, *Uniform Law,* 2009, pp. 142-145, pp. 422-423 and Lookofsky, *Understanding CISG,* 2008, p. 38.

512 Kee and Opie, *Principle of Remediation*, 2008, p. 232, p. 241, fn. 36, Enderlein/Maskow, *International Sales Law*, 1992, p. 67, p. 335, Flechtner/Honnold, *Uniform Law,* 2009, pp. 142-145, pp. 422-423 and Magnus, *General Principles*, 1995, (5)(b)(4).

513 Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitration], Austria, *Rolled Metal Sheets*, 15 June 1994.

immediately after the delivery of the goods. The buyer sent a notice of non-conformity six months after delivery, which according to the contract was too late. However, the adjudicator found that the seller's conduct led to the seller being estopped from raising the defence. After having received the late notice the seller did not object, but rather entered into negotiations and enquired about the status of the complaints from the buyer's buyer with the purpose of finding a solution.

Considering the many articles expressing the principle it is well-founded to claim that it underlies the Convention.[514] The interpretation is confirmed with the principle of *venire contra factum proprium* or the prohibition of inconsistent conduct, being applied in practice as general principles of law.[515] Further, it has been adopted in international restatements[516] and may then act as interpretation aids for particular provisions in the CISG.[517] See for example;

UPICC 1.8 [Inconsistent behaviour];

> 'A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.'

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514 Bazinas, Spiros V., *Uniformity in The Interpretation and The Application of The CISG: The Role of CLOUT and The Digest*, Collation of Papers at UNCITRAL SIAC Conference 22-23 September 2005, p. 25, Kee and Opie, *Principle of Remediation*, 2008, pp. 244-246 and Enderlein/Maskow, *International Sales Law*, 1992, p. 210.

515 International Chamber of Commerce, Geneva, Switzerland, 14 January 1970, No. 1512, Iran-US Claims Tribunal, *Abrahim Rahman Golshani v. The Government of The Islamic Republic of Iran*, 2 March 1993, No. 812 and Court of Arbitration of Sport, *The Gibraltar Football Association (GFA)/Union des Associations Européennes de Football (UEFA)*, 7 October 2003, CAS 2002/O/410.

516 See TLP No. I.1.2 [Prohibition of inconsistent behaviour], No. I.1.3 [Forfeiture of rights], No. I.1.4 [Abuse of rights], UPICC Article 1.8 [Inconsistent behaviour], PECL Articles 2:105(4), 2:106(2), 202(3)(c), DCFR II.4:202(3)(c).

517 For the use of UPICC article 2.4(2)(b) and PECL article 2:202(3)(c) in relation to CISG article 16(2)(b), see Vincze in Felemegas, *An Int'l Approach*, 2007, p. 91 and Akseli in Felemegas, *An Int'l Approach*, 2007, p. 307. For the use of UPICC article 2.18 in regard to article 29(2) CISG see Eiselen in Felemegas, *An Int'l Approach*, 2007, p. 166, who is more reserved regarding the use of PECL in this regard, according to Eiselen in Felemegas, *An Int'l Approach*, 2007, pp. 342-345.

TLP No. I.1.2 [Prohibition of inconsistent behaviour];

> '(a) A party cannot set itself in contradiction to its previous conduct vis-à-vis another party if that latter party has acted in reasonable reliance on such conduct ("venire contra factum proprium"; "l'interdiction de se contredire au détriment d'autrui").
> (b) Violation of this Principle may result in the loss, suspension, or modification of rights otherwise available to the party violating this Principle or to the creation of rights otherwise not available to the aggrieved party.'

The principles of *venire contra factum proprium*, duty not to abuse rights and not to derive a benefit from own wrong is underlying the Convention and is expressed in article 80.

## 5.2 A General Duty of Good Faith and Fair Dealing

It has been suggested that article 80 is related to the concept of good faith. Some delegates suggested that it would be useful to include the provision as an express example of good faith in commercial contracts[518] and that a similar rule would be achievable under the concept of good faith in article 7.[519] In contrast, other delegates were not convinced that good faith in article 7 covered the situation addressed in article 80, since the former is drafted more restrictively.[520]

Scholars and to some extent case law have confirmed that article 80 springs from good faith.[521] However, it is controversial whether a general duty for the parties to act in good faith has been adopted in the Convention.

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518 A/CONF.97/C.1/SR.28, Italy, para. 56, Romania, para. 61, p. 387 in A/CONF.97/19.

519 A/CONF.97/C.1/SR.28, Switzerland, para. 55, p. 386 in A/CONF.97/19.

520 A/CONF.97/C.1/SR.28, Denmark, para. 58, Netherlands, para. 59, p. 387 in A/CONF.97/19.

521 Enderlein/Maskow, *International Sales Law*, 1992, p. 335, Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 246, Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 2, p. 359, Magnus in Honsell, Heinrich and Karollus, M., *Kommentar zum UN-kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über der Internationalen Warenkauf (CISG)*, Springer, Berlin, 1997, [Honsell/Karollus, *UN-Kaufrecht*, 1997], article 80, para.s 1-2, pp. 994-995, Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 1, p. 1088, Audit, *La Vente*,

Considering the controversy and the fact that article 80 rests on a general duty of good faith, it is of interest to clarify whether the attitude towards good faith is significant to the application of article 80. If both trading parties are from jurisdiction that have a restricted view on good faith it may be asked whether this in turn could restrict the use of article 80.

Furthermore, if the trading parties are from jurisdictions with a broad view on good faith, it is of interest whether it then is possible to define the content of the concept and let the concept of good faith inform the application of article 80.

Before elaborating the issues of good faith in relation to article 80 it is pointed out that several different roles of good faith within the CISG exist.[522] The first is, as a criterion for interpreting the Convention text. The requirement precludes absurd interpretations by requiring consideration of context, object and purpose.[523] This is dealt with *supra* section 2.2.3, p. 27 *et seq.*

The second is, as a general principle underlying the Convention. Though it is not directly mentioned in article 7(2), good faith has been said to be a principle underlying the CISG,[524] thus making it a principle that can be used for gap-filling.[525] If good faith is to be a workable underlying principle it must be possible to give it some specific content from which solutions can be derived. This is dealt with *infra* section 5.3, p. 133 *et seq.*

The third role is, as a general requirement imposed on the parties. This could follow from article 7(1) CISG in which good faith is mentioned. It is of interest whether a possible concept of good faith would return similar results as article 80 or if a different approach is called for.

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1990, p. 179, Viscasillas, Maria del Pilar Perales, *El Contrato De Compraventa Internacional De Mercancias (Convención De Viena De 1980)*, Pace Law School, New York, USA, 2001, [Viscasillas, *El Contrato*, 2001], 180. Exemption, Oberlandesgericht München [Appellate Court], Germany, *Automobiles Case*, 8 February 1995.

522 Keily, Troy, *Good Faith and The Vienna Convention on Contracts for The International Sale of Goods (CISG)*, Vindobona Journal of International Commercial Law and Arbitration, Issue 1, 1999, [Keily, *Good Faith and CISG*, 1999], pp. 22-23.

523 Villiger, *Commentary on VCLT*, 2009, article 31, para. 8, p. 426.

524 Enderlein/Maskow, *International Sales Law*, 1992, p. 56 and Bianca/Bonell, *Commentary*, 1987, pp. 80 and 85.

525 Schlechtriem in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 7, para. 7.

It has been argued that '*[i]t is logically impossible to apply good faith to the Convention as a whole without influencing or affecting the behavior of the parties.*'[526] This may be true, but this is not the same as saying that a general good faith requirement for the parties exists. If no such duty exists, there is no access to for example censoring agreements of the parties by reference to good faith or for the parties to exclude it through 'entire agreement clauses'. This may too affect whether the adjudicator is obliged to *ex officio* apply good faith and in turn article 80. Further more, the possible underlying concept of good faith may give indications whether the parties may be permitted to exclude the application of article 80 and its underlying principles. The present chapter provides contribution to the discussion of the understanding of good faith under the Convention and the understanding of the connection between article 80 and good faith.

It may be difficult to distinguish the implications of each approach and it would be outside the scope of this work to exhaustively clarify the concept of good faith.[527] The current work is restricted to the aspects accounted for above.

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526 Zeller, *Interpretation and Application*, 2001, p. 102. See also Keily, *Good Faith and CISG*, 1999, p. 24.

527 For discussions of good faith, see for example: Beatson, Jack and Friedmann, Daniel, *Good Faith and Fault in Contract Law*, Clarendon Press, Oxford, 1995, [Beatson/Friedmann, *Good Faith and Fault,* 1995]; Farnsworth, Allan E., *Duties of Good Faith and Fair Dealing Under The UNIDROIT Principles, Relevant International Conventions, and National Laws*, Tulane Journal of International and Comparative Law, Volume 3, 1995, [Farnsworth, *Duties of Good Faith*, 1995]; Farnsworth, Allan E., *The Concept of "Good Faith" in American Law*, Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies], April 1993, [Farnsworth, *Good Faith in American Law*, 1993]; Flechtner, Harry, *Comparing The General Good Faith Provisions of The PECL and The UCC: Appearance and Reality*, Pace International Law Review, 2001; Keily, *Good Faith and CISG*, 1999; Lando, *Is Good Faith an Overarching General Clause in the Principles of European Contract Law?*, in Andenæs, Mads T. (eds), *Liber Amicorum Guido Alpa: Private Law Beyond The National Systems*, British Institute of International and Comparative Law, London, 2007, [Andenæs, *Private Law Beyond National Systems*, 2007]; Schlechtriem, Peter, *Good Faith in German Law and in International Uniform Laws*, Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies], February 1997. [Schlechtriem, *Good Faith in German and Uniform Laws*, 1997] and Zeller, Bruno, *The Observance of Good Faith in International Trade,* in Meyer, Olaf and Janssen, André, *CISG Methodol-*

### 5.2.1 Article 80's Connection to Good Faith

At the drafting of article 80 some delegates suggested that it would be useful to include the provision as an express example of good faith in commercial contracts[528] and that a similar rule would be achievable under the concept of good faith in article 7.[529] Though some delegates were more reserved in this regard,[530] numerous scholars have subsequently noticed a connection between article 80 and the concept of good faith.[531]

The connection to good faith has also been noted in case law.[532] In *Eleven Automobiles Case*[533] between a German seller and an Italian buyer regarding a sale of cars, the buyer refused to take delivery of eleven cars due to a disadvantageous exchange rate between the German and Italian currency. For this reason the buyer did not inform the seller of a date of pick-up and did not send a carrier. This caused the seller to fail in providing the necessary documents, which the buyer claimed to be a breach allowing avoidance of the contract.

The court concluded that the buyer caused the seller to fail to perform by not cooperating. A subsequent claim of avoidance of the contract was seen as an act against good faith and the underlying principle of article 80

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*ogy*, Sellier, Munich, 2009, [Zeller, *Observance of Good Faith*, in Meyer/Janssen, 2009].

528 A/CONF.97/C.1/SR.28, Italy, para. 56, Romania, para. 61, p. 387 in A/CONF.97/19.

529 A/CONF.97/C.1/SR.28, Switzerland, para. 55, p. 386 in A/CONF.97/19.

530 A/CONF.97/C.1/SR.28, Denmark, para. 58, Netherlands, para. 59, p. 387 in A/CONF.97/19.

531 Enderlein/Maskow, *International Sales Law*, 1992, p. 335, Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 246, Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 2, p. 359, Magnus in Honsell/Karollus, *UN-Kaufrecht*, 1997, article 80, para.s 1-2, pp. 994-995, Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 1, p. 1088, Audit, *La Vente*, 1990, p. 179, Viscasillas, *El Contrato*, 2001, 180. Exemption and Butler in Felemegas, *An Int'l Approach*, 2007, p. 506.

532 See also Schiedsgericht der Handelskammer Hamburg [Arbitral Tribunal], Germany, *Chinese Goods Case*, 21 March 1996 in which it is stated that a general principle of good faith applies in international sales and would be relevant under e.g. article 80.

533 Oberlandesgericht München [Appellate Court], Germany, *Automobiles Case*, 8 February 1995.

CISG.[534] Since the seller's failure to perform was caused by the buyer, the latter lost any rights derived from the seller's non-performance.

In *Surface Protective Film Case*[535] the buyer had failed to inspect the goods and consequently also failed to give timely notice of a non-conformity of the goods. However, when the buyer's own customer complained about the product the buyer had to compensate his customer for damages caused by the non-conformity. The seller subsequently entered into negotiation with the buyer regarding the damages, but without objecting to the fact that the notice of non-conformity from the buyer was 24 days after delivery instead of the maximum 8 days according to the contract. The buyer argued that the seller had therefore impliedly waived its right to rely on the untimely notice.

The adjudicator stated that a principle of good faith applies through articles 7(1) and 80 CISG, but that in this case it would not be an impermissible exercise of rights to let the seller object to the lateness of the notice. The Supreme Court later reversed the decision on other grounds.[536]

Connections to good faith have also been made in regard to the equivalent of article 80 found in PECL, article 8:101(3), and UPICC 2010 article 7.1.2, where it has been stated that it would be contrary to good faith to provide the promisee with a remedy when the non-performance of the promisor is caused by the promisee.[537]

However, contrary to the CISG, both these instruments contains express provisions that impose a general duty of good faith on the parties, according

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[534] Notice the slight difference between the English and German version of the decision. The English translation indicate that article 80 was applied by analogy where the original German version refer to the *Rechtsgedanken des art. 80* (the underlying idea of art. 80).

[535] Bundesgerichthof [Federal Supreme Court], Germany, *Surface Protective Film Case*, 25 November 1998.

[536] The concern of the adjudicator in the first instance, that a waiver would discourage parties to negotiate, was not agreed upon under the specific circumstances by the Supreme Court.

[537] Lando, Ole; Beale, Hugh and Commission on European Contract Law, *Principles of European Contract Law*, Kluwer Law International, The Hague, Combined and Reviewed edition, 2000, article 8:101, para. B(iii), p. 360 and Schelhaas in Vogenauer/Kleinheisterkamp, *Commentary on UPICC*, 2009, article 7.1.2, para. 2, p. 735.

to PECL article 1:201(1) and UPICC 2010 article 1.7(1). It is, however, noticed that these instruments are similar to the CISG since neither attempts to define the content of good faith.

Article 7(1) of the CISG states that the Convention text is to be interpreted in good faith. The provision reads;

> 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.'

This is the only article in which good faith is mentioned, and this raises doubt whether the parties to the contract are under a general requirement to act in good faith. The Convention contains in article 8 a provision regarding interpretation of the parties' agreement, and here there is no mention of good faith. In contrast, a general good faith obligation is directly addressed in other international instruments. PECL article 1:201(1) reads;

> 'Each party must act in accordance with good faith and fair dealing.'

UPICC 2010 article 1.7(1) reads;

> 'Each party must act in accordance with good faith and fair dealing in international trade.'

The TLP also adopts such an obligation. Article I.1.1.(a) reads;

> 'Parties to international business transactions must act in accordance with good faith and fair dealing in international trade. This standard applies to the negotiation, formation, performance and interpretation of international contracts.'

Though other international instruments clearly support that a general obligation for trading parties to act in good faith exists, this is not the same as saying that such an obligation is included in the CISG. It can be argued that if article 80 is an expression of good faith, the mere existence of article 80 and the fact that it addresses the relations between the parties, is evidence that the CISG also imposes on the parties an obligation to act in good faith.

Another difference that must be noticed is that PECL and UPICC 2010 expressly states that the duty to act in good faith is mandatory and cannot

be restricted by the autonomy of the parties.[538] To the extent that one finds the underlying concept of good faith to be the same in the Convention, the duty may be considered mandatory there too.

The reason why the concept of good faith as a general duty imposed on the parties is controversial is to be found in the drafting history. Further, the arguments that a consensus on good faith subsequently has developed cannot be sustained in full and neither can the argument that a common core regarding the duty to act in good faith exists. These three aspects are elaborated in turn immediately below.

### 5.2.2 Controversy During the Drafting

Good faith is one of the most debated issues of the CISG. The discourse affects whether a general good faith obligation can be said to have been adopted in the Convention and thus also whether it is likely that a rule similar to article 80 would flow from it.

The predecessors of the Convention, the ULF and the ULIS, did not contain an article with a general obligation of good faith.[539] In the UNCITRAL Secretariat's commentary on the 1978 draft convention it is stated, in regard to what became article 7(1), that the Convention is supposed to be both interpreted and applied in a way that promotes good faith. A grammatical and linguistic approach to the provision confirms that good faith is to be promoted.

The Secretariat also noted that there are several manifestations of good faith throughout the Convention, for example articles 16(2)(b), 21(2), 29(2), 37, 38, 40, 49(2), 64(2), 82, 85 and 88. The Secretariat did not, and could not, mention article 80 in this context since it was inserted later in the drafting process.[540] The omission to mention article 80 can therefore not be taken as an indication that it does not express good faith. The Secretariat pointed out that the principle of good faith is broader than the mentioned examples and that it applies to all aspects of the Convention's interpretation and application.[541]

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538 PECL article 1:201(2) and UPICC 2010 article 1.7(2).

539 Bianca/Bonell, *Commentary*, 1987, p. 68. Good faith is mentioned merely once in the two instruments, being in article 5(2) ULF regarding revocation of offer.

540 See also *supra* section 3.2.3, p. 67 *et seq.*

541 A/CONF.97/5, Commentary on The Draft Convention on Contracts for The International Sale of Goods, Prepared By The Secretariat, para.s 1-4, pp. 17-18 in A/CONF.97/19.

Whether this means that a general requirement of good faith is imposed on the parties by the Convention cannot be confirmed in the drafting history, since the delegates did not reach agreement in this regard.

The controversy during the drafting of article 7 was between those in favour of adopting a general good faith obligation applying to the parties and their contract and those against it. The compromise between the two views is seen in the text of article 7 and the controversy continues to some extent today.

#### *5.2.2.1 Arguments Contrary to a General Duty*

The role of good faith was discussed for considerable time in the working group[542] and the majority of its members supported that the Convention should contain provisions relating to good faith and fair dealing, though there was considerable controversy as to the specific formulation of such a provision.[543]

The working group members noted that a clause requiring observation of good faith and fair dealing by the parties is vague, imprecise and that its content would depend on a long period of judicial interpretation, which could vary greatly from case to case.[544] The concern was repeated during the negotiations in the Commission where it was also pointed out that no effect of a breach of good faith was indicated.[545] In comparison, article 80 indicate the effect of conduct contrary to good faith in the sense of the provision, namely the loss of the right to rely on the other party's non-performance.

It has been argued that under the compromise reached, the parties have no general duty to act in good faith. Instead, good faith is an interpretative tool

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542 A/CONF.97/C.1/SR.5, Italy, para. 40, p. 257 in A/CONF.97/19.

543 Yearbook of the United Nations Commission on International Trade Law, 1978, Volume IX, para.s 71-72, p. 66. The members of the working group were Austria, Brazil, Czechoslovakia, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Philippines, Sierra Leone, Soviet Union, United Kingdom, Northern Ireland and USA, see ibid. para. 2, p. 61.

544 Yearbook of the United Nations Commission on International Trade Law, 1978, Volume IX, para.s 74-76, p. 67.

545 A/CONF.97/C.1/SR.5, United Kingdom, para. 47, p. 258 and United States of America, para. 50, p. 258 in A/CONF.97/19, Flechtner/Honnold, *Uniform Law,* 2009, pp. 133-134.

that courts must attempt to advance when they interpret the Convention, meaning that the adjudicator is to discourage bad faith, which is conduct contrary to the requirements of the Convention.[546]

Article 7(1) is seen as an interpretive tool for adjudicators to neutralize the danger of reaching inequitable results and that it does not apply to the individual contract.[547] There does not appear to be any objection under this view to apply good faith in the interpretation of the Convention text, as is accounted for *supra* section 2.2.3, p. 27 *et seq.*

It has further been asserted that the Convention should be read literally and that an obligation of good faith between the parties cannot be established from the Convention text, nor can it be extracted from underlying principles, thus leaving only possible domestic good faith obligations applying by way of private international law.[548] If it can be proved that a common good faith core exists at a global level its application would be unproblematic, as a uniform concept has already been achieved.

To summarize the resistance against a good faith obligation, it has been stated that it would be '*… a perversion of the compromise to let a general principle of good faith in by the back door.*' [549]

#### *5.2.2.2 Arguments in Favour of a General Duty*

During the drafting of article 7, several delegates suggested different ways of emphasising that the concept of good faith should apply to the interpretation and performance of the parties and not to the interpretation of the Convention or the determination of the parties' intent.[550] However, all these suggestions were in vain.

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546 Hillman, Robert A., *Applying The United Nations Convention on Contracts for The International Sale of Goods: The Elusive Goal of Uniformity*, Cornell Review of the Convention on Contracts for the International Sale of Goods, 1995, 21-49, p. 29.

547 Schlechtriem in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 7, para. 7, p. 95.

548 Farnsworth, *Duties of Good Faith*, 1995, p. 56 and article 7(2) CISG.

549 Farnsworth, *Duties of Good Faith*, 1995, p. 56.

550 A/CONF.97/C.1/SR.5, Norway, para. 6, p. 255 and para. 41, pp. 257-248, Italy, para. 14, p. 255, Republic of Korea, para. 43, p. 258 and Sweden, para. 45, p. 258 and Iraq, para. 44, p. 258 in A/CONF.97/19.

It has later been asserted that good faith governs not only the meaning of abstract rules, but also the parties' individual contract and conduct towards each other[551] and that it is '*… logically impossible to apply good faith to the Convention as a whole without influencing or affecting the behavior of the parties*', thus making the drafting history of mere historical interest.[552]

Under this view it is suggested that interpreting the provisions of the Convention in the light of good faith will make it inconsistent to permit situations where a party speculates at the other party's expense[553] and that a party may be prevented from invoking rights and remedies in particular circumstances.[554]

The latter appears to fit article 80 since it forbids self-contradictory or inconsistent behaviour, thus imposing an obligation between the parties to observe good faith.[555] In this light it is not surprising that many have pointed out a connection between good faith and article 80, but can article 80 and its regulation of the relationship between the parties be taken as support of a general good faith obligation in the Convention? In light of the drafting history the answer must be in the negative. Some see the drafting history as a direct rejection of the idea that good faith should extend to an obligation for the parties.[556]

Thus, in light of the negotiation history it cannot be confirmed that a general good faith obligation should be contained in the CISG. Consequently, it would be inappropriate to interpret article 80 as a sign of a general good faith duty. Neither can it be concluded that interpreters would derive a rule similar to article 80 from good faith, had article 80 not been adopted.

#### *5.2.2.3 Subsequent Development*

A compromise between the two opposing views on the inclusion of good faith resulted in article 7(1), which according to its wording concerns in-

551 Magnus in Felemegas, *An Int'l Approach*, 2007, pp. 45-46, Bianca/Bonell, *Commentary*, 1987, p. 84 and Zeller, *Interpretation and Application*, 2001, p. 255-256.

552 Zeller, *Interpretation and Application*, 2001, p. 102.

553 Flechtner/Honnold, *Uniform Law,* 2009, pp. 135-136.

554 Bianca/Bonell, *Commentary*, 1987, p. 84.

555 Schäfer in Felemegas, *An Int'l Approach*, 2007, pp. 246-247.

556 Schlechtriem, Peter and Butler, Petra, *UN Law On International Sales: The UN Convention on The International Sale of Goods*, Springer, Berlin, 2009, pp. 49-50.

terpretation of the Convention. A later suggestion to revise the text was rejected, leaving article 7(1) as it is.[557]

The current compromise reached in article 7 has been described as a '*… statesmanlike compromise …*'[558] in which the discussion was given '*… an honourable burial …*'[559] Since no decision was clearly made regarding the content and role of the concept it is impossible to say whether the '*… potentially mischievous concept is part of the final product.*'[560]

However, it has also been stated that subsequent development of the CISG shows that good faith governs both the interpretation of the Convention and the rights and duties of the parties.[561]

Considering that the goal of the Convention is to establish a uniform sales law, it is persuasive when it is argued that the Convention should not be confined to its historical vacuum, but be understood autonomously and be allowed to reflect an internationally recognized concept of good faith.[562] However, there are limits to the development that can be allowed. It is one thing to modernise the interpretation of the text in light of for example technological developments, but it is another to introduce new rules and concepts, which the negotiating states never agreed upon. See *supra* section 2.2, p. 17 *et seq* concerning modernising and reading new rules into the Convention.

Adjudicators have subsequently implied a general obligation of good faith,[563] though a study of all publicly available cases relating to article 7

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557 Bianca/Bonell, *Commentary*, 1987, p. 71.

558 Farnsworth, *Duties of Good Faith*, 1995, p. 55.

559 Keily, *Good Faith and CISG*, 1999, p. 20.

560 Rosett, Arthur, *Critical Reflections on The United Nations Convention on Contracts for The International Sale of Goods*, Ohio State Law Journal, Volume 45, 1984, p. 290.

561 Zeller, Bruno, *The Observance of Good Faith in International Trade,* in Meyer, Olaf and Janssen, André, *CISG Methodology*, Sellier, Munich, 2009. [Zeller, *Observance of Good Faith*, in Meyer/Janssen, 2009], p. 148.

562 Keily, *Good Faith and CISG*, 1999, pp. 39-40. Also positive towards applying good faith to the parties; Lookofsky, *Understanding CISG,* 2008, p. 37, Bonell in Bianca/Bonell, *Commentary*, 1987, p. 84 and Enderlein/Maskow, *International Sales Law*, 1992, pp. 56-57.

563 DiMatteo, Larry A.; Dhooge, Lucien J.; Greene, Stephanie; Maurer, Virginia G. and Pagnattaro, Marisa Anne, *International sales law: A Critical Analysis of CISG Jurisprudence*, Cambridge University Press, 2005, p. 27.

between 1980 and 2004 concludes that there is little to suggest that a clear pattern regarding the concept of good faith is developing in international case law.[564] Good faith in the CISG still needs time to crystallize,[565] if it will ever do so.

In the light of the drafting history and the lack of clear development by courts, two arguments are investigated. Arguments that, if they prove correct, could support that a rule similar to article 80 *now* can flow from a general good faith concept *within* the CISG.

First, as accounted for above, the Convention text is a compromise between the signatory nations regarding international sales law. It has primarily been representatives from common law jurisdictions who have put forward objections to a general good faith obligation in the CISG.

It has, interestingly, been asked, *'if the domestic law of these nations is changing to now recognise good faith in contractual relations, should this change be reflected in CISG?'*[566] To put it in another way, perhaps the civil law approach to good faith has 'won'? This is not so, despite it being possible to trace a development in the common law view on good faith, for two reasons. Firstly, since the development in common law regions have not reached full acceptance of the concept of good faith and secondly, since the countries in the civil law region does not accept the concept the same way, thus rejecting the view that a common core exists. This is further elaborated below.

#### *5.2.2.4 Common Law Development*

If a change in the common law view on good faith is to support a shift in the view on good faith in the CISG it must be confirmed in two ways. First, that there is a development at all and second, that the development has reached a stage where a general good faith obligation is recognized.

The main argument is that the position since the drafting of the CISG has changed, so common law courts and scholars now increasingly recognize

564 Sheehy, Benedict C., *Good Faith in The CISG: Interpretation Problems in Article 7*, Bepress Legal Series, 2004.

565 Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 14.

566 Keily, *Good Faith and CISG*, 1999, p. 17.

good faith, thus suggesting that international acceptance is possible.[567] Common law jurisdictions like The United States of America and Canada now recognize good faith and developments are also seen in Australia.[568]

In regard to Australia, it is noteworthy that the country now is free to develop independent of the English legal system, with the right to appeal to the English Privy Council having been abolished.[569] Very little CISG specific case law has come out of Australia, not so much because of objections to the concept of good faith possibly contained it, but more because Australian practitioners almost automatically exclude its application.[570]

Canada has also abolished their right to appeal to the English Privy Council,[571] though here the discussion of good faith has concerned what standard of good faith should be adopted, whereas in Australia the focus has been on the viability of good faith. There is a risk that the High Court of Australia will overturn the developments towards accepting a principle of good faith in contractual dealings.

It has been stated that good faith is no longer merely implicitly used, but directly referred to by courts in Australia.[572] In *Hughes Aircraft Systems v. Airservices Australia,*[573] the Federal Court of Australia confirmed the existence of an implied pre-contractual duty of good faith and fair dealing. The reason for this was that it is recognized in foreign jurisdictions and is to be honoured in international commercial contracts according to UPICC

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567 Keily, *Good Faith and CISG*, 1999, p. 36.

568 Keily, *Good Faith and CISG*, 1999, pp. 37-38.

569 Act of the Australian Parliament, 1985, Act No. 142 and Farnsworth, Allan E., *The Concept of "Good Faith" in American Law*, Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies], April 1993, [Farnsworth, *Good Faith in American Law*, 1993].

570 The automatic exclusion and misapplication of CISG in Australia is criticised by Spagnolo, Lisa, *The Last Outpost: Automatic Cisg Opt Outs, Misapplications and The Costs of Ignoring The Vienna Sales Convention For Australian Lawyers*, Melbourne Journal of International Law, Volume 10, 2009, 2-76.

571 Act of the Canadian Parliament, 29 March 1982.

572 Zeller, Bruno, *Good faith – the scarlet pimpernel of the CISG*, Pace Law School, New York, USA, 2000, in Part 1.

573 Federal Court of Australia, *Hughes Aircraft Systems v. Airservices Australia*, 30 June 1997.

article 1.7. By breaching this duty in a call for tenders, Airservices Australia was liable to pay damages.[574]

This line is followed in the more recent case of *GEC Marconi v. BHP*[575] where the Federal Court of Australia by reference to PECL and UPICC decided that there is an implied duty of good faith and fair dealing in Australian law and that it cannot be excluded by an 'entire agreement' clause.[576]

It has been pointed out in an Australian context that '*…the contractual duty of good faith is here to stay…*'[577] However, even though a movement towards acceptance of a general good faith duty can be traced,[578] final approval, either by the legislature or the High Court of Australia, is being awaited. It would be too hasty to say that Australia, as a common law jurisdiction, has now adopted a general good faith principle as it may for example only be developing in particular states within the Australian federation.

Turning to the United States of America, we again see some acceptance of the concept. Good faith in the United States of America is likely to be adopted after German inspiration, though it is restricted primarily to the performance of the contract and does not extend to the period of negotiation.[579] The concept is to some extent defined in both UCC[580] and the Re-

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574 The case has been approved by the Supreme Court of New South Wales, Australia, 1 October 1999.

575 Federal Court of Australia, *GEC Marconi v. BHP,* 12 February 2003, FCA 50.

576 See also Supreme Court of Western Australia, Australia, *Central Exchange v. Anaconda Nickel*, 23 April 2002, WASCA 94. The Supreme Court of Western Australia avoided deciding whether the good faith concept is a part of the Australia contract law. Assuming that the duty of good faith would apply it was found to be irrelevant to the facts at hand.

577 Judge of the Supreme Court of New South Wales, Australia, McDougall, Robert, *The Implied Duty of Good Faith in Australian Contract Law*, Australian Construction Law Newsletter, Volume 108, 2006, 28-36, p. 36.

578 See also New South Wales Court of Appeal, Australia, *Renard Constructions (ME) Pty Ltd v Minister for Public Works,* 12 March 1992, 26 NSWLR 234; Supreme Court of New South Wales, Australia, *Alcatel Australia Ltd. V Scarcella*, 16 july 1998, 44 NSWLR 349. Differently and more reserved is Supreme Court of Tasmania, Australia, *Asia Pacific Resources Pty Ltd v Forestry Tasmania*, Unreported, 4 September 1997.

579 Farnsworth, *Good Faith in American Law*, 1993.

580 UCC § 2-103 reads; '*"Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.*'

statement (Second) of Contracts[581] but three approaches, all recognized by courts, have been developed by scholars,[582] thus demonstrating that there is no clear consensus on the content of the concept. Though the UCC is influenced by the civil law approach, US legal practice still has a preference for more narrow doctrines.[583]

Turning now to English law, it may be that a development is seen, but it is restricted insofar as no positive duty of good faith is found[584] and that good faith does not bar a party's pursuit of self-interest, even if it inflicts harm. It appears to be limited to a requirement of lack of bad faith.[585] The continental European concept of good faith has a much wider application than what is recognized in England.[586] The scepticism in English common law towards good faith, the preference for the contract and thus also less flexible approach is demonstrated for example in *Union Eagle v Golden Achievement*[587] where the adjudicator refused to enforce a sale since payment was made ten minutes after what was required by the contract.[588]

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581 Restatements (Second) of Contracts § 205 reads; *'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.'* The Restatement may be derived from case law, but may also express rules as the drafters would like to see them, according to Blum, Brian A., *Contracts: Examples and Explanations*, Aspen Publishers, 4th edition, 2007, pp. 30-31.

582 Farnsworth, *Good Faith in American Law*, 1993.

583 Flechtner, Harry, *Comparing The General Good Faith Provisions of The PECL and The UCC: Appearance and Reality*, Pace International Law Review, 2001, 295, pp. 336-337.

584 Musy, Alberto M., *The Good Faith Principle in Contract Law and The Precontractual Duty To Disclose: Comparative Analysis of New Difference in Legal Cultures*, Global Jurist Advances, Volume 1, Issue 1, 2001, 1-21, [Musy, *Good Faith – Comparative Analysis*, 2001], p. 10.

585 McKendrick, *The Meaning of 'Good Faith'*, in Andenæs, *Private Law Beyond National Systems*, 2007, p. 698.

586 Gutteridge, *Comparative Law*, 1946, p. 96. Rather, good faith translates to English law into honesty and fair dealing, according to Gutteridge, *Comparative Law*, 1946, p. 97.

587 Judicial Committee of the Privy Council [Court of appeal for the UK overseas territories, Crown dependencies, and Commonwealth countries that have retained the appeal right], England, *Union Eagle Ltd. V. Golden Achievement Ltd.*, 3 February 1997.

588 Lando, *Is Good Faith an Overarching General Clause in the Principles of European Contract Law?*, in Andenæs, *Private Law Beyond National Systems*, 2007, p. 608.

In contrast, a similar case under for example Danish law is likely to have the opposite outcome. In Denmark the evaluation whether the seller should be allowed to avoid the contract can be affected by subjective elements,[589] despite the fact that Denmark has not adopted a general good faith clause like for example Germany.[590]

The view on good faith in England is naturally affected by the fact that the United Kingdom traditionally is the centre of international commodity trade in which the certainty of English law is well suited.[591] Introducing a vaguely defined concept such as good faith introduce overall uncertainty in the law.

As seen, there may be some acceptance of the concept of good faith and some development in common law jurisdictions, however, there is no reason to believe that the development has reached the level of acceptance of a general uniform obligation of good faith. Consequently, it is not essential to enter the discussion whether the subsequent development of good faith can permit a change in the concepts application under the CISG within the borders of the state compromise.[592]

#### *5.2.2.5 A Common Core*

The final argument to be made against the view that a common domestic core of good faith has developed is that civil law jurisdictions do not have the same good faith core. One may think that the opposition is primarily between the civil law and common law jurisdictions, however it is seen

589 Gomard, *Obligationsret,* 2003, pp. 97-98.

590 See Højesteret [Supreme Court], Denmark, 19 May 1976 in which the buyer's two-day delay providing a bank quarantee could not permit the seller to avoid the contract. See also Gomard, *Obligationsret,* 2003, pp. 97-98. Differently Højesteret [Supreme Court], Denmark, 29 April 1998 where avoidance of contract was possible due to late payment after a nachfrist.

591 Mullis, *Twenty-Five Year On – The United Kingdom, Damages and the Vienna Sales Convention* in Zimmermann, Reinhard, *Symposium: CISG -- the 25th Anniversary: Its impact in the past and its role in the future*, Rabels Zeitschrift für Ausländisches und Internationales Privatrecht, 2007, pp. 36-37.

592 See for example also Henschel, *Mangelsbegrebet*, 2003, pp. 16-18 discussing the dynamic and restrictive doctrine in this regard.

that the continental codes do not deal with the concept of good faith in the same way.[593]

As an example, one could mention that both France and Germany have general provisions on good faith. The French Civil Code, under the heading 'General Provisions' in a chapter regarding 'Effect of Obligations', reads in article 1134(3);

> 'They must be performed in good faith.'[594]

The German Civil Code, under the heading 'Duty to Perform', reads in article 242;

> 'The obligor must perform in a manner consistent with good faith taking into account common usage.'[595]

However, the two countries' approaches to the concept are different. Germany embraces their good faith called 'Treu und Glauben', which has been developed over a century.[596] The concept has been used by German courts to fill gaps in the civil code and to develop rules which subsequently have been codified by the legislature, for example in regard to rules of hardship, possibility to end contracts if there is good reason to do so and unenforceability of unfair standard terms.[597] In contrast, the courts of France have a strong preference for the party autonomy[598] and are suspicious towards judicial discretion being too broad.[599]

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593 Gutteridge, *Comparative Law*, 1946, p. 97 and Musy, *Good Faith – Comparative Analysis*, 2001, p. 2.

594 Translated by Georges Rouhette, Professor of Law, with the assistance of Anne Berton, Research Assistant in English.

595 Translation by Dr. Ulrike Aschermann-Henger, Maria Bühler, Dr. Paul Conlon, Alison Mally, Dr. Margaret Marks, Katharina Schmalenbach, Gabriele Schuster and André Wahab.

596 Schlechtriem, *Good Faith in German and Uniform Laws*, 1997.

597 Lando, *Is Good Faith an Overarching General Clause in the Principles of European Contract Law?*, in Andenæs, *Private Law Beyond National Systems*, 2007, p. 604 and Musy, *Good Faith – Comparative Analysis*, 2001, p. 6.

598 Lando, *Is Good Faith an Overarching General Clause in the Principles of European Contract Law?*, in Andenæs, *Private Law Beyond National Systems*, 2007, p. 606.

599 Musy, *Good Faith – Comparative Analysis*, 2001, p. 4.

Consequently, it does not appear well founded to claim that there has subsequently been a development of good faith in domestic law to an extent that would create a uniform good faith concept. Two reasons for the rejection are seen. Firstly, that the development in common law jurisdictions appear not that ripe, though an ongoing process is possible to detect. Secondly, that the civil law jurisdictions do not treat the concept of good faith in the same way, thus rejecting that a uniform civil law approach exists.

What can be said about a general good faith obligation is that it is problematic at domestic level and that the problems are exacerbated at international level[600] where the many views on it have to be reconciled.

## 5.3 Article 80 as a Solution to the Dangers of Good Faith

The fact that neither an international core of good faith, nor a common domestic core, can firmly be established is not the same as rejecting principles that could be contained within some definitions of good faith. The CISG does rest on principles that in turn arise from thoughts of fairness or perhaps good faith. The general duty for the parties to act in good faith is too vague as described above and since it suffers from being ill defined. Therefore it is proposed that article 80 and the principles underlying the provision can be used as an alternative basis for decisions that could otherwise fall under the notion of good faith.

The proposition rests on two arguments accounted for below. First, the notion of good faith is near impossible to define and therefore it contains a proportionately higher risk for non-uniform application or perhaps misdirected application. Second, when the duty of good faith and underlying principles are being referred to, the solution could as well have followed from article 80 CISG. In the interest of uniformity, one should apply the latter.

The benefit of utilising article 80 and its underlying principles instead of the notion of good faith is that the provision cannot easily be ignore since it appears directly in the text of the Convention. When the practitioner can reason from the primary source, there is less room an ethnocentric reading of the Convention, thus uniformity is promoted.

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[600] Keily, *Good Faith and CISG*, 1999, p. 16.

### 5.3.1 Definition and Dangers of Good Faith

Even if a duty of good faith is considered to be contained in the CISG, the question of its definition remains. Neither the CISG, nor any of the instruments cited above, defines the concept any further. The lack of definition is also seen, and criticised, in the Directive on Unfair Terms in Consumer Contracts.[601]

In the search for the content of good faith in the Convention, one must find the relevant sources of such a concept. In the interest of uniformity and considering the autonomous character of the Convention, it is not permitted to read a domestic concept of good faith into the Convention's article 7(1).[602]

It has been stated that there is no autonomous source of the principle of good faith, but that it can be observed, among other places, in international principles, case law, usages, standard contracts and that it is up to the adjudicator to evaluate whether they are expressions of good faith.[603] Naturally, one may say, the character of good faith is tied standards of morality,[604] which change over time, which are different depending on whom holds the interest and which may be nearly impossible to or ill-suited to being controlled by law.[605] An attempt to put down a legal definition of good faith would perhaps defy the purpose of the concept.

The notion of good faith can generally be defined as;

> 'A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable com-

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601 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, see article 3(1) and Collins, Hugh, *Good Faith in European Contract Law*, Oxford Journal of Legal Studies, 1994, 229-254, pp. 249-251.

602 Zeller, Bruno, *Good faith – the scarlet pimpernel of the CISG*, Pace Law School, New York, USA, 2000, in introductory remarks.

603 Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 7, para. 18, pp. 128-129 and Schlechtriem in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 7, para. 18, pp. 100-101.

604 Keily, *Good Faith and CISG*, 1999, p. 15.

605 Andersen, John Peter, *Om at Lovgive for Moralen*, in Werlauff, Erik; Nørgaard, Jørgen; Iversen, Torsten and Hedegaard, Kristensen Lars, *Hyldestskrift til Jørgen Nørgaard*, Jurist- og Økonomforbundets Forlag, Copenhagen, 2003.

> mercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.'[606]

It is seen that a positive definition becomes rather vague. To assist us, we can look at the other side of the coin. *'Good faith is defined by what it is not. The concept of bad faith can be relied upon to show what is not good faith performance.'* [607]

An example of bad faith was seen in *Dulces Luisi v. Seoul International*[608] between a Mexican seller and a Korean buyer regarding a sale of sweets. The buyer had requested the seller to label the purchased sweets with an expiry date that was *two years* after production date. The buyer was to pay by a L/C. However, the buyer indicated in the letter of credit that the expiry date was *one year* after production date and told the seller that this was due to local Korean rules. The discrepancy meant that payment was not initiated.

The sweets, with a value of one million US dollars, were already produced and ready for delivery at destination. The buyer then suggested payment by bank transfer, thus avoiding paying taxes, as he could rely on a corrupt customs officer to release the goods. The seller then discovered that there was no local rule of expiry date and that the buyer either did not have the capacity to enter into the contract on behalf of the alleged companies or that those companies did not exist at all.

The adjudicator stated that the buyer had deceived the seller and acted fraudulently, probably with the purpose of receiving the sweets without paying. This was acting in bad faith and therefore a gross violation of the principle of good faith imposed on the parties according to article 7.

First of all it is noticed that in case a party deceives the other party the contract may be invalid under domestic law.

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606 *Black's Law Dictionary*, Thomson West, 8th edition, 2004. Similarly, Merriam-Webster's Dictionary of Law via www.lawyers.com; *'(1) Honesty, fairness, and lawfulness of purpose or (2) absence of any intent to defraud, act maliciously, or take unfair advantage.'*

607 Powers, Paul J., *Defining The Undefinable: Good Faith and The United Nations Convention on Contracts for The International Sale Of Goods*, Journal of Law and Commerce, 1999, p. 351.

608 Comisión para la Protección del Comercio Exterior de México, Compromex [Mexican Commission for the Protection of Foreign Trade, Arbitration], Mexico, *Dulces Luisi v. Seoul International,* 30 November 1998.

Secondly, it is seen in the case that a firm definition of good faith is not apparent. The obligation of good faith requires certain behaviour by the parties and demands of them that they refrain from behaviour that is in bad faith. Article 80 is compatible with such general definitions and more abstract content. Article 80 clarifies the vague character of an abstract good faith concept, by denying a party benefit from a behaviour, which may be seen as contrary to good faith that is, preventing the other party's performance of the contract.

As such, it is correct that the adoption of article 80 in the Convention provides a clearer basis for a just result[609] and that its adoption could counteract reference to an abstract notion of good faith. The latter contains the risk that good faith is watered down by too many references, thus giving the adjudicator arbitrary powers.[610] There are probably many rules that could flow from good faith alone, but it would abandon certainty of law to only refer to a broad concept like good faith.[611] Regarding article 80, an example of this may be seen in cases from primarily China. See further *infra* section 8.4, p. 223 *et seq*.

Another risk connected with the undefined and very volatile concept of good faith, is that it may contain nothing more than what the interpreter puts into it. Such a notion may be empty and cannot *per se* generate solutions to problems at hand since it does not provide anything new to the legal system.[612]

In more extreme situations adjudicators can use the concept of good faith when they cannot find other authority. The use of general clauses has been warned against[613] also in the light of the *'misdirected use'* during the Nazi

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609 Flechtner/Honnold, *Uniform Law,* 2009, pp. 646-647.

610 Tallon in Bianca/Bonell, *Commentary*, 1987, p. 596.

611 Schlechtriem, Peter, *Good Faith in German Law and in International Uniform Laws*, Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies], February 1997, [Schlechtriem, *Good Faith in German and Uniform Laws*, 1997].

612 For an interesting illustration, see Ross, Alf, *Tu-tu*, Harvard Law Review, Volume 70, Issue 5, 1957, 812-825.

613 Hedemann, Justus Wilhelm, *Die Flucht in Die Generalklauseln Eine Gefahr Für Recht und Staat*, Mohr, Tübingen, 1933, pp. 66-73 points out that the comfort of using *generalklausuln* (general clauses) leads to uncertainty and arbitrariness in the application of the law.

period where German courts used the good faith principle to discriminate against Jews.[614]

An aspect of the good faith concept is that it contains an element of blame – there is behaviour that we wish to avert, for example, fraud or taking unfair advantage. As accounted for above, bad faith plays a role in the definition of the good faith requirement. It may be considered if a concept tied to a notion of blameworthiness and which resembles a concept of fault has room within the CISG since it raises questions regarding the no-fault liability system of the CISG.

The likelihood that a rule similar to article 80 would flow from a general obligation to act in good faith in the CISG is dependant on the view one may have on the good faith obligation in the Convention. A general good faith obligation could contain a rule similar to article 80, but if no such general concept is adopted in the Convention, no rules can flow from it.

Not only is the concept of good faith troubled by a lack of definition as just provided, but the very adoption of a general good faith obligation was controversial during the drafting of the Convention and it remains so.

### 5.3.2 Overlap in Application of Article 80, Underlying Principles and Good Faith

Since the duty of good faith, as a duty imposed on the parties, is controversial in context of the CISG since and it suffers from being very difficult to define and is looked upon very differently between jurisdictions, it may never achieve uniform application.

The proposition that article 80 has been overlooked is confirmed by the fact that cases applying good faith or more general principles in fact could have arrived at the same result with article 80 as its legal basis.

In this light, the argument that article 80 is a useful example, possibly of good faith, is sustained. There is no need to fall back on a vague, indefinable,

614 Lando, *Is Good Faith an Overarching General Clause in the Principles of European Contract Law?*, in Andenæs, Mads T. (eds), *Liber Amicorum Guido Alpa: Private Law Beyond The National Systems*, British Institute of International and Comparative Law, London, 2007, [Andenæs, *Private Law Beyond National Systems*, 2007], p. 604.

controversial concept when the words of article 80 can be referred to.[615] The provision expresses a prohibition of impairing performance and contains a duty to cooperate in achieving the common goal of the contract, see *supra* section 5.1, p. 109 *et seq.*

When good faith *is* applied it follows the general definition focused on reprehensibility of the conduct and not the probability that conduct would lead to harm. In this view article 80 is an expression of good faith, just as many other provisions and underlying principle can be said to be, and overlaps to such degree that article 80 could have been applied in order to render the controversy of good faith irrelevant.

The focus on reprehensibility is illustrated in *Used Car Case* where the adjudicator with reference to article 7(1) CISG stated that a very negligent buyer should be protected for the reason that he deserves it more than a fraudulent seller.[616] Fraudulent intentions and deceiving behaviour have been found to be bad faith and a violation of a good faith principle.[617]

The concept of good faith has also been used to require parties to cooperate and to make the best possible efforts to achieve the object of the contract and not obstruct its execution, just as would be possible under article 80.[618]

Disrupting business opportunities and hiring the personnel of a contractual partner may be contrary to such a duty of cooperation, fairness, reasonableness and *venire contra factum proprium* – to which good faith has also been connected.[619]

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615 Schlechtriem, *Good Faith in German and Uniform Laws*, 1997 and Schlechtriem in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, art. 7, para. 18, supports that it is inappropriate to fall back on good faith if there is a workable rule or no need for clarification.

616 Oberlandesgericht Köln [Appellate Court], Germany, *Used Car Case*, 21 May 1996.

617 Comisión para la Protección del Comercio Exterior de México, Compromex [Mexican Commission for the Protection of Foreign Trade, Arbitration], Mexico, *Dulces Luisi v. Seoul International,* 30 November 1998.

618 Arbitration Centre of the Costa Rican Chamber of Commerce, Costa Rica, 1 June 2003.

619 Keily, *Good Faith and CISG*, 1999, pp. 17-18, International Chamber of Commerce, International Court of Arbitration, Geneva, Switzerland, *Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*, 28 July 2000, No. 9797. See also International Chamber of Commerce, International Court of Arbitration Arbitration,

Sometimes the adjudicator refers to several rules and principles and not good faith in order to achieve a result possible to arrive at by reference to article 80. In the shared responsibility type case, *Sensitive Russian Components*[620] the adjudicator was of the opinion that both parties failed to perform their obligations under the contract since they failed to set an inspection procedure. The parties agreed that the goods were defect, but disagreed what caused the defects. The seller was of the opinion that it was the inspection method of the buyer that had been destructive. Contrarily, the buyer was of the opinion that the components were shipped with the defect. As a result, the adjudicator found both parties to be responsible and lowered the buyer's claim with 1/3.

The adjudicator blamed the buyer, being an expert regarding those types of components, for not showing due care in the making and performance of the contract and for not insisting on specifying the proper inspection method in the contract.

The primary responsibility was found to be the seller's. This is consistent with the fact that the parties agreed that the goods had a defect, thus placing the responsibility on a no-fault basis on the seller. Furthermore, in a comparison of blameworthiness of the parties the adjudicator pointed out that the seller did not provide the buyer with a document of the results of the 100 hour test and did not provide for an inspection method.

The adjudicator evaluated the conduct of the parties on the basis of articles 74 and 77 CISG, UPICC article 7.4.7 and a domestic principle of joint liability according to article 404(1) of the Russian Civil Code. It would be possible to reach the same solution as in the case by reference to article 80 and the words *'to the extent'*.[621]

In the archetype case, *Propane Case*,[622] the court found by virtue of article 80 CISG that the seller could not rely on the buyer's non-performance to

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May 1999, No. 9753, in which the parties were ordered to continue collaboration according to *pacta sunt servanda* and the duty to cooperate derived from good faith.

620 International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003. See also *infra* p. 195 *et seq.*

621 See *infra* 7.1.5.2, p. 196 *et seq.*

622 Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996. See also *infra* p. 195 *et seq.*

avoid the contract since it was the seller who caused the non-issuance of the L/C by not naming the place of loading. The parties had agreed on a FOB sale, thus making it the buyer's duty to nominate a ship, but this was hindered by the seller's failure to name to port of shipment.

In the case the seller did not name the place of loading which would be required for the buyer, both as part of the opening of the L/C and in naming the ship in which the seller had to load the propane gas.

It appears from the facts that the buyer several times requested the seller to indicate the place, but the seller did not do so, since he had encountered problems in his procurement of gas. Allowing the seller to rely on the buyer's non-issuance of the L/C would be allowing a benefit from non cooperation.

The principle of *venire contra factum proprium* underlying the CISG would be possible to apply. In light of case law,[623] according to which a party cannot be allowed to affirm and deny at the same time, it appears that the archetype *Propane Case*[624] would have had similar outcome had the principle been applied.

Just as it was the case with the archetype *Propane Case*,[625] the principles underlying CISG and article 80 itself would have the same outcome in the other cases mentioned above. The guiding questions when applying article 80 in those cases could have been; Did the parties cooperate? Did they act consistently? Did they hinder performance? Are they about to derive a benefit from their own wrong-doing?

As argued previously, when both parties have caused one party's failure to perform, an either-or approach would lead to either over- or under-compensation of a party's claim.[626] The concept of article 80 is that each party must bear the consequences of their conduct, thus the consequences

[623] International Chamber of Commerce, Geneva, Switzerland, 14 January 1970, No. 1512. See also Iran-US Claims Tribunal, *Abrahim Rahman Golshani v. The Government of The Islamic Republic of Iran*, 2 March 1993, No. 812 and Court of Arbitration of Sport, *The Gibraltar Football Association (GFA)/Union des Associations Européennes de Football (UEFA)*, 7 October 2003, CAS 2002/O/410.

[624] Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996.

[625] Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996.

[626] Green, Sarah, *The Risk Pricing Principle: A Pragmatic Approach To Causation and Apportionment of Damages*, Law, Probability & Risk, Volume 4, 2005, 159-175.

will have to be divided between them according to the respective degree of causation.[627] It has been stated that when the *'failures of the two parties are so closely interwoven that their effects cannot be delimited and attributed to the breach of contract which is the result'* it is appropriate to reduce the legal consequences, both quantitative (damages) as well as qualitative (avoidance) ones.[628]

Looking to similar principles in other international instruments it is seen that UPICC article 7.4.7, according to the words *'to the extent'*, scholars and case law,[629] allows an evaluation of the contributions by the parties and an adaptation of the consequences of the promisor's non-performance.[630] It is therefore likely that the case would have had a similar, also *pro rata*, outcome had article 80 or the underlying principles of article 80 been applied. The difference being that an application of article 80 avoids the controversial notion of good faith and promotes a uniform development of the provision.

## 5.4 Concluding Argument

From the analyses above, three salient characteristics can be observed. First, that article 80 expresses several underlying principles. Not only does article 80 express more general concepts of fairness, justice and good faith, but it also expresses more specific principles; the duty to cooperate, the prohibition of inconsistent behaviour, the duty not to abuse rights or to derive a benefit from one's own wrong.

These principles are similar to those found in other international instruments, thus permitting one to use these as interpretation aid when reading the Convention. At the same time, the similarity confirms the universal acceptance of the principles among merchant according to the methodology considerations *supra* section 2.5.2, p. 45 *et seq.*

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627 Tallon in Bianca/Bonell, *Commentary*, 1987, p. 598, Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 250, Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 7, p. 1091-1092.

628 Enderlein/Maskow, *International Sales Law*, 1992, p. 339.

629 Besides International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003, see also World Intellectual Property Organization Arbitration and Mediation Center, Geneva, Switzerland, 25 January 2001.

630 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 251.

Though a similarity between the principles underlying article 80 and the general duty to act in good faith is seen, article 80 cannot be taken as evidence that such general good faith duty exists within the Convention. Concerning good faith, the other international instruments investigated proved to have *expressly* incorporated a general good faith duty of the parties. Since this is different to the Convention, the former may not be used as interpretation aid in understanding the Convention since this contains the risk of introducing concepts that are not necessarily included in the Convention, according to *supra* section 2.5.4, p. 47 *et seq*.

Second, it is seen that the opinion that article 80 was a useful provision to adopt in the CISG proves correct. In light of the goal of uniform application and the controversy of good faith, it is less likely that jurisdiction within reasonable time would achieve a common approach to the discussion of whether a general duty to act in good faith has been incorporated in the Convention. In this context, article 80 is very useful since reference to the provision or the more specific principles underlying it is less controversial than good faith.

It is therefore proposed that a uniform development is better facilitated by applying article 80, alternatively its underlying principles, instead of a general duty of good faith, even though such may be thought to be applicable in the case at hand.

Further, the notion of good faith is seen to be so ill-defined and vague that it cannot in itself generate positive obligations for the parties.[631] Article 80, however, is specific enough to do so, for example by requiring a party to take performance-enabling steps.

Third, *if* an adjudicator is of the opinion that a general duty of good faith applies to the case at hand, it is seen that the principles underlying the concept has an overlap to article 80. Considering this and the fact that the duty to act in good faith cannot be restricted by party autonomy in the instruments where it is clearly included, such as UPICC, it would not be surprising if the same adjudicators consider it prohibited to restrict the application of article 80.

[631] See also Ferrari, Franco, *Uniform Interpretation of The 1980 Uniform Sales Law*, Georgia Journal of International and Comparative Law, Volume 24, 1994-1995, pp. 214-215.

# 6. Conditions for Exemption

The text of article 80 describes a number of requirements that have to be fulfilled before the promisor may be excused from the responsibility of failing to perform the contract. Three requirements arise from the words *'rely on'*, *'caused'* or *'act or omission'*. Neither article 80 itself nor the CISG instrument as such describes in detail how causation is to be established or which acts or omissions that can lead to exemption. The appropriate interpretation is provided in the present chapter along with examples from case law.

Two requirements for the applicability of article 80 arise from factors outside the text of article 80 itself, being a duty to give notice and that the burden of proof rests on the promisor. These too are accounted for in the present chapter.

Each requirement is elaborated in turn in the chapter below. All of the requirements have to be fulfilled for article 80 to apply directly. Cases that do not fulfill each requirement of the provision may be solved by considering also the underlying principles of the provision. See *supra* chapter 5, p. 107 *et seq*.

## 6.1 Non-performance by the Promisor

The first condition for applying article 80 is that the promisor has not performed. This requirement appears from the wording of the provision: *'failure of the other party to perform'*. Further more, the requirement is supported by the fact that article 80, with its current wording and placement, works as an exemption clause, thus presupposing a non-performance by the party seeking exemption. Logically it must be so, since exemption makes very little sense if there is no failure to perform from which responsibility to be exempt from can flow.

It has previously been provided that the placement of article 80 should not be relied upon as support for a particularly narrow interpretation of the provision. In situations where a party has *not* failed to perform the contract article cannot be directly applied. Instead the underlying principles of the

provision may be relied upon to provide for either total or partial modification of legal consequences since the underlying principles does not require a non-performance of contract to apply.

The term 'non-performance' is used here for the requirement that the promisor has not performed an obligation. The term is used since the non-performance may be entirely due to the promisee's act or omission. In such situation the promisor should be exempt in total from responsibility. The use of the term 'breach' could at a preliminary stage imply that the promisor's non-performance is blameworthy, which it may not be. The use of the term 'breach' is reserved for sitations where a non-performance leads to some remedies for the aggrieved party.

Liability for failure to perform is, as a starting point in the Convention, established on a no-fault basis,[632] meaning that if there is a breach of *any* obligation the aggrieved party has access to remedies. The focus is on the actual performance, thus rendering the parties' negligence and state of mind irrelevant.[633] This follows *e contrario* from articles 45 and 61 in which the remedies of the seller and buyer are catalogued. It can therefore be asserted that the Convention adopts an approach resembling common law more than civil law, as it does not mention fault as a prerequisite for the failing promisor to become liable.[634]

Claiming that the other party is liable for a non-performance does not depend on proving their fault, lack of good faith or breach of an express term,[635] but merely that a non-performance has occurred. A similar no-fault

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632 Müller-Chen in Schwenzer, *Commentary on CISG*, 2010, article 45, para. 5, p. 691, para. 8, p. 692, Mohs in Schwenzer, *Commentary on CISG*, 2010, article 61, para. 5, p. 869, Lookofsky, Joseph, *Fault and No-Fault in Danish, American and International Sales Law: The Reception of The United Nations Sales Convention*, Scandinavian Studies in Law, 1983, 109-138, [Lookofsky, *Fault and No-Fault*, 1983], p. 130, Flechtner/Honnold, *Uniform Law,* 2009, pp. 18-19, pp. 592-593, pp. 618-619, Enderlein/Maskow, *International Sales Law*, 1992, pp. 174 and 320, Lookofsky, *Loose Ends and Contorts*, 1991, p. 406, Nicholas in Beatson/Friedmann, *Good Faith and Fault,* 1995, p. 352, Regarding no-fault liability for consequential loss, see Lookofsky, *Consequential Damages*, 1989, p. 293.

633 Mohs in Schwenzer, *Commentary on CISG*, 2010, article 61, para. 5, p. 869.

634 Zeller, *Damages*, 2009, p. 47.

635 In regard of damage claims, see Zeller, *Damages*, 2009, pp. 60-61.

starting point for establishing liability for breach of contract is followed in PECL and UPICC.[636]

Establishing whether a party has failed to perform an obligation is then a matter of interpretation of the parties' agreement and the default obligations following from the CISG.[637]

In relation to the requirement for applying article 80, that the promisor has not performed, it is worth noticing two characteristics. First, that often it may appear as if both parties have failed to perform. However, this does not necessarily call for a proportionate apportionment of remedies. Second, that suspension of performance is not always a breach or non-performance of the contract, thus leaving article 80 irrelevant if the suspension was legitimate.

### 6.1.1 Non-performance Imputable to Both Parties

The no-fault liability of the CISG can be rather burdensome. The effects of a breach of contract are softened, however not by the notion of fault, but by article 79 and 80.[638] In this regard it is worth noticing that article 79 only exempts from the liability to pay damages whereas article 80 affects all remedies available.[639] Article 79 excludes damages that are due to unforeseeable impossibility according to which fault is irrelevant.[640] Furthermore, access to remedies is limited for each type of remedy, thus softening the burden of the no-fault liability. It is for example seen that avoidance of contract has the further requirement that the breach committed is fundamental according to CISG article 49(1)(a).

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636 Chengwei Liu in Felemegas, *An Int'l Approach*, 2007, p. 368 and McKendrick in Vogenauer/Kleinheisterkamp, *Commentary on UPICC*, 2009, article 7.4.1 para. 1, p. 867. See also PECL article 8:101 and UPICC article 7.4.1. Negligence may increase a party's liability under PECL according to Butler in Felemegas, *An Int'l Approach*, 2007, p. 508.

637 CISG, e.g. articles 30-44 and 53-60.

638 Zeller, *Damages*, 2009, p. 181.

639 Müller-Chen in Schwenzer, *Commentary on CISG*, 2010, article 45, para. 8, p. 692 and Mohs in Schwenzer, *Commentary on CISG*, 2010, article 61, para. 5, p. 869 and *supra* 7.1, p. 181 *et seq.*

640 Lookofsky, *Consequential Damages*, 1989, p. 263.

In regard to article 80 it is seen that the promisor who fails to perform the contract may be exempt from responsibility if the promisor can make probable that the cause of the non-performance was the promisee. Here, any causation is relevant and the promisee's assertion that he is without fault is immaterial and not a defence against the application of article 80. It is therefore no defence against applying article 80 that the promisee's act or omission was due to an impediment beyond control. As such, the promisee will on a no-fault basis loose the right to rely on the promisor's failure to perform if it is caused by the promisee.

The combined effect of the promisor's no-fault liability for non-performance and the no-fault causation requirement for activating article 80 is that the promisor's failure to perform becomes *imputable* to both parties,[641] also in the archetype situation where the promisee is the sole cause for the promisor's failure to perform the contract.

This situation is to be distinguished from cases of shared responsibility where both parties have *caused* the promisor's failure to perform. This is not necessarily the case under the archetype case since the promisor's no-fault liability is not the same as having established causation.

Consequently, even though the failure to perform the contract is imputable to both parties there is no ground for apportioning the responsibility of the parties. Access to such *pro rata* solution must be based either on the fact that both parties *caused* the promisor's failure to perform or because the causal link to to promisee's act or omission is relatively weak.

### 6.1.2 Suspension of Performance as Breach of Contract

The failure to perform the contract by the promisor may take many forms, among those a suspension of performance. Since suspension of performance may be permitted at times it is important to clarify this issue before discussing exemption according to article 80. If the promisor's suspension of performance is legitimate it does not constitute a breach or non-performance of contract and thus the prerequisites for applying article 80 is not met.

According to article 71 performance can be suspended and if the requirements of the provision are fulfilled the non-performance is not considered

641 Tallon in Bianca/Bonell, *Commentary*, 1987, p. 597.

a breach. It can already be seen that for that reason the other party cannot derive claims from a rightful suspension of performance and article 80 is therefore irrelevant. However, if a party attempt to circumvent the requirements of article 71 by asserting article 80 it is appropriate to modify the requirements for applying article 80 accordingly, so that a duty to give notice applies. See *infra* section 6.5, p. 177 *et seq.*

In *ATT v. Armco*[642] the buyer consistently did not pay, thus causing the seller to stop further deliveries until the debt was paid or assurance of performance provided. The adjudicator found that the seller could rightfully stop deliveries. The buyer suffered a loss of profit from the deliveries being stopped and claimed compensation for this from the seller. The adjudicator rejected the claim with reference to article 80, but this presupposes that the suspension of performance was a breach – which it was not. The result would follow from article 71 and the fact that no breach of contract can be established.

## 6.2 Causal Link to the Promisee

The second requirement for application of article 80 is that the presupposed failure to perform must have been *'caused by the first party's'* conduct.[643] The requirement touches on two important questions. Firstly, whether article 80 can be applied also when there are other competing causes for the promisor's failure to perform. Secondly, how strong a connection there has to be between the failure to perform and the promisee's act or omission. These two questions are addressed in turn below.

### 6.2.1 Sole Causation and Competing Causes

It is not a requirement for the application of article 80 that the promisor demonstrates that the conduct by the promisee is the only reason for his failure to perform. It may be that reasons of force majeure or perhaps the promisor himself *also* contributed to the promisor's failure to perform. Ar-

642 Belarusian Chamber of Commerce and Industry International Court of Arbitration, Belarus, *ATT v. Armco*, 5 October 1995.

643 Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 8, p. 793 and Audit, *La Vente*, 1990, p. 179.

ticle 80 is applicable in such sitations as well as the archetype situation where it is the promisee that is the sole reason for the promisor's failure to perform.

Looking more specifically at the cause of the promisor's failure to perform, the situations to which article may be applicable can be grouped in three: sole causation, mixed causation and shared responsibility.

#### *6.2.1.1 Promisee's Sole Interference*

The archetype case of article 80 is one where the promisor's failure to perform is caused solely by the promisee, for example when a buyer sues the seller for damages because of non-delivery caused by the buyer's persuasion of state officials to deny the seller a licence needed for it to deliver.[644]

Another example could be that the buyer refuses to pick up the goods as happened in *Automobiles Case,*[645] or that the contract has been made conditional upon the fulfilment of a future uncertain condition. If the promisee then prevents the condition from being fulfilled and at the same time relies on the non-fulfilment, any benefits should be precluded due to the promisee's sole interference.[646]

The notion *'sole causation'* has been used about the archetype.[647] Notwithstanding that the promisor's failure to perform must be *imputable* to both parties under article 80[648] the description is correct since the triggering *cause* is the promisee alone.

An example from case law is seen in *Propane Case*[649] where the parties had agreed on a delivery of gas against payment by letter of credit. The adjudicator found that an agreement had been reached and that the buyer had an obligation to pay by L/C within 3 days after delivery. The seller were obliged to deliver gas of a certain amount and quality under the term FOB.

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644 Example from Flechtner/Honnold, *Uniform Law,* 2009, p. 645.

645 Oberlandesgericht München [Appellate Court], Germany, *Automobiles Case*, 8 February 1995.

646 See UPICC 2010 article 5.3.3 [Interference with conditions].

647 Neumann, *Shared Responsibility,* 2009.

648 See *supra* section 6.1.1, p. 145 *et seq.*

649 Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996.

The only issue that was left open was the port of loading, which is significant under the FOB term since the buyer has to name a ship that the seller has to load the goods into.[650] Further more, the buyer needed the name of the loading port for the opening of the L/C. The seller recognized this and upon request from the buyer the seller promised to provide the place name within two hours. This never happened, despite numerous requests from the buyer.

As a result, the buyer could not open the L/C, which in itself is a breach of the obligation to pay. At the same time, the seller did not deliver any gas, which is also a breach.

The buyer claimed damages for loss of profit and expenses regarding a cover purchase. The seller denied that an agreement existed between the parties, but the court was of the contrary opinion.

The adjudicator investigated whether the buyer was liable for not having paid and found by virtue of article 80 that the seller could not rely on the buyer's non-performance to avoid the contract, and thus avoid liability, since it was the seller who caused the buyer to fail in opening the L/C by not naming place of loading. The buyer's claim for damages was granted since the seller breached the contract by not delivering gas as agreed.

The archetype example given here shows that the seller looses the right to rely on what seems like a breach because of his own omission to name the port. In other cases, adjudicators have applied article 80 to deny claims where the claimant: failed to pay the price;[651] failed to take delivery;[652] failed to designate port of shipment;[653] failed to deliver goods in conformity with

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650 International Chamber of Commerce, *Incoterms 2000*, Publication No. 560, ICC Publishing, 1999, FOB B3.

651 Oberlandesgericht München [Provincial Court of Appeal], Germany, *Leather Goods Case*, 9 July 1997; Belarusian Chamber of Commerce and Industry International Court of Arbitration, Belarus, *ATT v. Armco*, 5 October 1995, and Oberlandesgericht München [Provincial Court of Appeal], Germany, *Shoes Case II*, 1 July 2002.

652 Oberlandesgericht München [Provincial Court of Appeal], Germany, *Automobiles Case*, 8 February 1995.

653 Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996.

the contract;[654] withheld delivery;[655] unlawfully avoided the contract;[656] and denied the promisor to cure lack of conformity.[657]

It should be noticed that also in case of sole causation by the promisee, it is not a requirement that the promisee has made performance impossible for the promisor. The promisee has, also in the case elaborated above, made it unreasonable to demand performance. It would have been possible for the buyer in the *Propane Case* to open a blank letter of credit, though it would be unreasonable to damand such a change in obligations. See further *infra* section 6.2.2, p. 157 *et seq* and section 6.3, p. 162 *et seq.*

#### *6.2.1.2 Mixed Causation*

A situation of mixed causation is at hand when there is more than one interfering factor causing the promisor's failure to perform the contract, though it has to be distinguished from the shared responsibility situations described further below.

It is a requirement that one of the causes of the promisor's non-performance is the promisee himself for article 80 to apply. Additional reason may be found in impediments beyond control, the promisor himself or third parties engaged by the promisor. In such situations a mix of causes exists.

The characteristic feature of mixed causation is that the consequences of each contribution can be delimited, for example when the promisor's breach of contract in the form of late delivery is prolonged due to interference by the promisee. In such cases the promisor is excused for the latter period, but the promissee retains his right to remedies regarding the former.[658]

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654 Tribunal of International Commercial Arbitration, Ukrainian Chamber of Commerce & Trade, Ukraine, *Equipment Case*, 21 June 2002.

655 Landgericht Kassel [District Court], Germany, *Wooden Poles Case*, 21 September 1995.

656 Oberlandesgericht Düsseldorf [Appellate Court], Germany, *Shoes Case I*, 24 April 1997.

657 Oberlandesgericht Koblenz [Appellate Court], Germany, *Acrylic Blankets Case*, 31 January 1997.

658 Enderlein/Maskow, *International Sales Law*, 1992, p. 338 and Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 17, p. 795.

In case of mixed causation '*… the consequences of the different causes can be delimited from one another, [and] every cause has to be attributed its legal remedy.*'[659] Naturally, as the exemption under article 80 can only go as far as the causation by the promisee.[660]

Basically, the mixed causation type is a matter of clarifying the facts so it becomes clear which failures the promisor can be excused from. There is a significant resemblance to cases of sole interference by the promisee.

An example of mixed causation is seen in *ATT v. Armco*[661] where the seller stopped delivering goods and the buyer stopped paying, each blaming the other as being the cause of their conduct. The situation looks like a stalemate, but is in fact a mixed causation case since each party's causation and the effect of it can be delimited.

The reason the buyer stopped paying was lack of success with reselling the goods. In turn the seller stopped delivering further goods, conduct which may look like a breach of contract. The buyer's alleged damage resulting from the non-delivery was dismissed by virtue of article 80 since the buyer itself had triggered the suspension of performance.

The buyer advanced a second argument for not paying, based on non-conformity of some of the already delivered goods. The adjudicator accepted the argument and reduced the seller's claim for payment accordingly.

It is seen that two potential breaches of contract by the seller are delimited and treated separately. The failure to deliver is excused whereas the non-conformity is not, simply because the cause of each failure is different and possible to distinguish.

Similarly in cases containing a mix between the promisee's interference and impediments beyond control must each cause be delimited. This was done

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659 Enderlein/Maskow, *International Sales Law*, 1992, p. 338. For the task of apportioning remedies, see *infra* section 7.1.5.2, p. 196 *et seq.*

660 Trachsel, Heribert, *Die Vollständige und Teilweise Haftungsbefreiung sowie die Haftungsreduktion nach UN-Kaufrecht (Art. 79, 80 und 77 CISG)*, in Baudenbacher, Carl, *Aktuelle Probleme des Europäischen und Internationalen Wirtschaftsrechts*, Helbing Lichtenhahn, Basel, 2003, p. 389.

661 Belarusian Chamber of Commerce and Industry International Court of Arbitration, Belarus, *ATT v. Armco*, 5 October 1995.

in the *Yellow Phosphorus Case*[662] where the seller had made incomplete deliveries. As a consequence the buyer had to acquire substitute goods at a higher price. The seller asserted that he was exempt from liability to pay damages because of natural disasters and due to the promisee's own interference by not having issues L/C strictly in compliance with the contract.

The adjudicator found the force majeure argument immaterial since the seller should have, and could have, acquired substitute goods. Thus, the seller was liable for the incomplete deliveries. Regarding the buyer's issuance of a L/C which was not strictly in compliance with the contract, the adjudicator stated that a L/C is a '*… precondition for the seller to deliver the goods, but not the necessary condition for the seller to prepare the goods*' thus not deviating from the starting point, that the seller was responsible.

However, since the buyer did cause inconvenience by issuing the L/C later than stated in the contract and by changing details regarding times and delivery amounts, the buyer's claim for costs for replacement goods and freight was lowered by 30 %. The arbitration fees were required to be paid 30 % by the buyer and 70 % by the seller.

It is seen that the two different causes were dealt with separately and with good reason. Article 79 and article 80 as relevant in this case has different prerequisites.[663]

#### *6.2.1.3 Shared Responsibility*

The situation of shared responsibility[664] is different from the one where the promisee is the sole cause though the failure of performance is in both situations *imputable* to both parties.[665] The difference between the two situations lies in the *cause* and not the imputation.

There are two requirements for qualifying a situation as shared responsibility. First, the promisor's failure to perform must be *caused* by both parties,

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662 China International Economic & Trade Arbitration Commission [CIETAC], China, *Yellow Phosphorus Case,* 9 August 2002.

663 See the comparisons carried out *supra* in chapter 4, p. 77 *et seq.*

664 The term is derived from Tallon in Bianca/Bonell, *Commentary*, 1987, pp. 596-597 who describes that article 80 applies to the issue of '*sharing liability*' and Huber and Mullis, *The CISG*, 2007, p. 267, who describe the situation as 'joint responsibility'.

665 See *supra* section 6.1, p. 143 *et seq.*

not merely imputed to them. Second, it must *not* be possible to delimit the consequences of each party's causation. If the consequences can be delimited the case is of the mixed causation type.[666]

In a case of shared responsibility the conduct of the parties are so *'closely interwoven'* that the effects of each party's conduct cannot be delimited.[667] A different approach is therefore called for. A *pro rata* apportionment of remedies based on a comparative evaluation of the parties is the appropriate approach compared to an either-or one.

An example of shared responsibility is seen in *Sensitive Russian Components*.[668] The case between a Russian seller and a South Korean buyer concerned the sale of highly sensitive components needed in the production of another good.[669] The adjudicator found that the CISG applied with Russian domestic law as the relevant background law.

When the buyer received the components it conducted an inspection, which showed that the components were defect. Consequently the buyer claimed damages consisting of the price of the components, manufacturing expenses, lost profits and cost of transport for the return of the components. The seller rejected the claims of the buyer arguing that it was the inspection of the component in itself that had damaged the components.

The adjudicator noted two things regarding the contract. First, that the components could be used in numerous ways and the parties had not defined in the contract the quality characteristics needed for the future use

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666 See *supra* section 6.2.1.2, p. 150 *et seq*.

667 Enderlein/Maskow, *International Sales Law*, 1992, p. 339. The shared responsibility situation resembles the thought experiment 'Copenhagen interpretation' and 'Schrödinger's cat' insofar as the actual cause cannot be established. For more, see Walter J., Moore, *Schrödinger: Life And Thought*, Cambridge University Press, Cambridge, 1992, pp. 306-309. The thought experiment by Schrödinger roots in discussions with Einstein in 1935. The Copenhagen interpretation implied that a cat in a box would to the outside world be both dead and alive at once. Only by opening the box would the state of the cat be revealed, a possibility we do not have in the legal situation of shared responsibility.

668 International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003. See also International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Bilateral Commission Case*, 29 December 2004.

669 The specific component type is not revealed in the case.

of the components. Second, the parties had not defined in the contract an inspection method regarding the quality of the goods.

However, before the contract was signed the seller had sent a document to the buyer describing the quality characteristics of the goods. The buyer's claim was entirely based on the view that the buyer's own inspection and testing of the components showed results not matching the document from the seller.

The seller had indicated to the buyer that 100 % of the components would be tested prior to shipping as well as being subject to a 100 hour test. The result would be stated in a document that was to be handed to the buyer together with the components. This did not happen. Perhaps this issue could have been solved by article 35 alone, but the adjudicator did not do so.[670]

Since the contract did not specify an inspection method and the test document from the seller were not provided, the buyer choose to inspect and test the goods himself.

The buyer inspected and tested the same way as previously done with components from the same seller, though the previous components had been different. The buyer also sent the computer program and terms of inspection to the seller together with samples of components that were believed to be both good and defect. The seller did not object to any of this and did not suggest an alternative inspection method.

The parties to the dispute agreed that the goods were defect, but disagreed what had caused the defects. Since it could not be proved what the cause of the defect was and since both buyer's and seller's conduct were likely to have been the cause, the situation is one of shared responsibility. It is not possible to delimit the consequences of each party's conduct.

The seller was of the opinion that it was the inspection method of the buyer that had been destructive. Contrary, the buyer was of the opinion that the components were shipped with the defect. Without admitting any liability the seller took back all components awaiting a resolution of the case.

The adjudicator pointed out that both parties failed to perform their obligations under the contract since they failed to set an inspection procedure. The buyer, being an expert regarding that type of components, did not show

[670] Further regarding overlap with article 35, *infra* section 4.2.1, p. 95 *et seq.*

due care in the making and performance of the contract. Neither did the buyer insist on specifying the proper inspection method in the contract.

Though the legal basis and methodology of the adjudicator in the case can be questioned,[671] the *pro rata* apportionment of the responsibility is the appropriate solution and can be based directly on article 80. The buyer's claim was lowered with 30 %. A similar problem of sorting out the cause of defects, *Bilateral Commission Case*.[672]

In case of shared responsibility it would be unwise to follow a categorical either-or rule since it would either over or under compensate the parties, neglecting the fact that they both caused one party's failure to perform.[673] Further, a flexible approach is needed to soften the effects of the very low threshold regarding the causal link as accounted for *infra* section 6.2.2, p. 157 *et seq.* It would be inappropriate to fully exempt a promisor from liability of having failed to perform the contract merely because the promisee to a small extent contributed to the failure.

The actual apportionment of remedies is dealt with *infra* section 7.1.5, p. 195 *et seq.* At present it is provided that the wording *'to the extent'* supports a *pro rata* apportionment in shared responsibility cases. Restricting article 80 to cases of sole causation would be an inappropriately narrow interpretation of the provision.[674]

The interpretation is possible to confirm in the drafting history where it was clarified that in case of causation from both parties the provision would be sufficiently flexible to determine each party's share of the responsibility.[675] Furthermore, the interpretation is similar to other international soft laws,

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671 See for criticism *infra* chapter 8.4, p. 223 *et seq.* The legal basis for the result is indicated to be articles 74 and 77 CISG, UPICC article 7.4.7 and the principle of joint liability according to article 404(1) of the Russian Civil Code.

672 International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Bilateral Commission Case*, 29 December 2004.

673 Similarly in regard to damages Lookofsky, *Consequential Damages*, 1989, pp. 233-234 and p. 248 and in torts see Green, Sarah, *The Risk Pricing Principle: A Pragmatic Approach To Causation and Apportionment of Damages*, Law, Probability & Risk, Volume 4, 2005, 159-175.

674 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 250.

675 A/CONF.97/C.1/SR.30, GDR, para. 7, p. 393 in A/CONF.97/19.

for example UPICC 2010 article 7.1.2 that applies to such situations by virtue of article 7.4.7.[676]

Though it is the view that article 80 does apply to such situations of shared responsibility,[677] some argue that the provision follows an 'all-or-nothing' approach.[678] Under this alternative view it is suggested that article 77 or underlying principles of article 80 are the appropriate tools for adjudicating cases of shared responsibility[679] and that article 80 is only fit for cases where the failure to perform is caused *solely* by the other party.[680]

This view can be rejected for three reasons. First, referring shared responsibility cases to article 77 is to ignore the mitigation/causation distinction accounted for previously.[681] Second, it is to leave the words *'to the extent'* without meaning, contrary to common interpretation principles, among those good faith.[682] Third, referring shared responsibility cases to the underlying principles of article 80 is possible, but unnecessary. Doing so contains a higher risk of non-uniform application since there is more room for inter-

676 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 251.

677 Also, Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para.s 7 and 8, pp. 360-362, Schwenzer, *Commentary on CISG*, 2010, article 80, para 7, pp. 1091-1092, Stoll and Gruber in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 80, para. 7, p. 841-842, Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 250, Enderlein/Maskow, *International Sales Law*, 1992, p. 339, Tallon in Bianca/Bonell, *Commentary*, 1987, p. 598, Audit, *La Vente*, 1990, p. 180, Saenger in Bamberger, Heinz Georg and Roth, Herbert, *Kommentar zum Bürgerlichen Gesetzbuch*, C.H. Beck, München, 2nd edition, 2008, §§ 1-610 CISG, Article 80, para. 3, pp. 2233-2234.

678 Huber in Huber and Mullis, *The CISG*, 2007, pp. 267-268 and Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 14, pp. 794-795. See also Stoll and Gruber in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, Article 80, para. 7, n. 24, p. 841 where the authors in support of this view are listed as: Piltz, Schmid, Koziol, Soergel/Lüderitz/Dettmeier.

679 Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 15, p. 795 and Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 7, p. 1091-1092.

680 Piltz, Burghard, *Internationales Kaufrecht: das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung*, Beck, München, 1993, § 4, para. 214.

681 See *supra* chapter 4, p. 77 *et seq.*

682 See *supra* sections 2.1 to 2.2, p. 9 *et seq.*

preters to find, or not find, principles to be used before turning to domestic law compared to relying on the wording of the provision.[683]

### 6.2.2 Requirements to the Strength of the Causal Link

Since there has to be a causal link between the promisor's non-performance and the promisee's conduct for the promisor to be excused under article 80, it is relevant to ask how strong the connection has to be.

Before addressing this issue, it is worth noticing that if there is a causal link between the promisee's conduct and the promisor's failure to perform it is irrelevant whether this link was due to the promisee's fault or not. The promisee is thus, one may say, under a no-fault obligation not to interfere with the performance of the other party.[684] However, fault becomes relevant in sitations of shared responsibility.

The effect of having a no-fault liability rule for breach of contract in the CISG and a no-fault based excuse from that liability in case of interference by the promisee is that at a first glance all cases falling under article 80 are *imputable* to both parties.[685]

Three slightly different views on the causal link issue has been provided. One view is that the failure to perform must be the characteristic consequence of the other party's conduct that can be expected in international trade,[686] thus excluding situations with an unusual chain of cause and effect.

A second view is that the conduct must have caused the failure to perform in a logical sense and that it objectively must be of such nature that it prevents performance.[687] Under this view the cause cannot be attributed

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683 See supra section 5.3.1, p. 134 *et seq.*

684 See *supra* chapter 5, p. 107 *et seq;* A/CONF.97/C.1/SR.30, GDR, para. 7, p. 393, in A/CONF.97/19; Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 3, p. 1089-1090; Schwenzer and Fountoulakis, *International Sales Law*, 2007, p. 577; Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 247; Enderlein/Maskow, *International Sales Law,* 1992, p. 337; Herber and Czerwenka*, Internationales Kaufrecht*, 1991, article 80, para. 4, p. 360 and Audit, *La Vente*, 1990, p. 179.

685 Similar, Tallon in Bianca/Bonell, *Commentary*, 1987, p. 598.

686 Enderlein/Maskow, *International Sales Law*, 1992, article 80, para. 5.1.

687 Stoll and Gruber in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 80, para. 4.

to a party's conduct if it did not impair the ability to fulfil the contract.[688] Indirect causation is enough if the conduct created a risk within that party's sphere of influence and that risk has been realized.[689]

A third view[690] is that the requirements of the causal link changes focus whether an objective or a subjective approach to the comparative evaluation is chosen. Under an objective approach, the decisive criterion is the degree of probability that the conduct would entail the failure to perform whereas the focus of the subjective method is the behaviour of the parties. Since the latter would entail reverting to the notion of fault, the former is preferred. However, the two approaches are under this view related *'… insofar as the more reprehensible the behavior of one party is, the more likely it is to have played an important causal role in the other party's failure to perform.'*[691]

The approach supported in this work is that, as just accounted for *supra* section 6.2, p. 147 *et seq*, the promisee does not have to be the sole cause of the promisor's non-performance for article 80 to apply. The only prerequisites for applying article 80 is that there is a causal link of some kind between the promisee's conduct and the promisor's failure to perform.[692]

Since total exemption from liability would be unjust in cases where the promisee's causal link is weak or not the only possible cause of the promisor's non-performance, it is possible to rely on the words *'to the extent'* to reach a partial exemption.[693]

The causation can be either direct or indirect and it is not a requirement that the promisee's act or omission directly prevented the promisor's performance. Naturally, if the promisee is the sole cause of the non-performance and has directly prevented or made performance impossible, article 80 provides for an exemption from liability.

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688 Stoll and Gruber in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 80, para. 6.

689 Stoll and Gruber in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 80, para. 4. In support that indirect causation is enough to loose remedies according to article 80 is also Schäfer in Felemegas, *An Int'l Approach*, 2007, article 3.a.

690 Tallon in Bianca/Bonell, *Commentary*, 1987, article 80, para. 2.5.

691 Tallon in Bianca/Bonell, *Commentary*, 1987, article 80, para. 2.5.

692 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 249.

693 More on partial exemption and apportionment of remedies *infra* section 7.1.5, p. 195 *et seq*.

However, in many situations the promisee's cooperation is inadequate or missing followed by the promisor's failure to perform.[694] Therefore, the threshold for activating article 80 is rather low.

Turning to case law[695] it is seen that a promisee lost remedies according to article 80 even though the interference of the promisee did not make the promisor's performance *impossible,* thus supporting a less strict requirement of the causal link.

In the *Propane Case*[696] between a German seller and an Austrian buyer, the court found that the seller could not rely on the failure of the buyer to open a letter of credit. The seller did not name the place of loading, as it was agreed he should and the buyer chose not to open the letter of credit. The cause of the buyer's failure to perform was found to be the seller's omission of naming the place of loading, but opening the letter of credit would in fact still be *possible* despite the seller's failure. However, the court did not follow a requirement of the omission being *necessary* for the failure to perform and stated that the buyer could not be obliged to open a blank letter of credit.

A similar result was achieved in the *Soinco v. NKAP Case*[697] where the court stated that no reasonable businessperson would initiate payment when the seller breaches a primary obligation concerning the delivery. In the particular case it was still possible to initiate payment despite the act of the seller.

It is not required for applying article 80 that the interference by the promisee was unforeseeable or unavoidable for the promisor.[698] The promisor cannot generally be expected to overcome the promisee's interference with performance[699] as a starting point. The duty to cooperate also rests on the

694 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 247.

695 For an example of direct causation see: Oberlandesgericht München [Provincial Court of Appeal], Germany, *Automobiles Case*, 8 February 1995, where a buyer refused to take delivery.

696 Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996.

697 Zürich Chamber of Commerce, Switzerland, *Soinco v. NKAP*, 31 May 1996.

698 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 249 and Schwenzer and Manner, *The Pot Calling the Kettle Black*, 2008, p. 475.

699 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 5, p. 1090-1091, Enderlein/Maskow, *International Sales Law*, 1992, p. 336 and Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 249.

failing promisor and cooperation may require the promisor to attempt to overcome interference if it is easy to do so.

Regarding the threshold of being excused under article 80 it is seen that having caused inconvenience to the promisor can be sufficient to exempt the promisor from responsibility, at least in part.

Such 'inconvenience threshold' is in contrast to the exemption clause found in article 79. The different threshold is illustrated in the *Yellow Phosphorus Case*.[700] Here a seller made incomplete deliveries and consequently the buyer had to procure substitute goods at a higher price. The seller claimed to be exempt from liability as the incomplete deliveries were caused partly by natural disaster in the seller's region and partly by the buyer's issuance of a non-contractual letter of credit.

Regarding the first cause, the tribunal stated that the seller could have overcome the impediment of the natural disaster by acquiring substitute goods. By choosing not to, the seller was fully liable. Regarding the second cause, it was stated that a contractual letter of credit is a '*… precondition for the seller to deliver the goods, but not the necessary condition for the seller to prepare the goods*' thus making the seller responsible.

However, since the buyer did cause inconvenience, the claims made against the seller were reduced so that 70 % of the buyer's costs were recovered.[701] It is seen that the 'inconvenience threshold' is not being applied in regard to article 79 according to which the seller is not excused at all, but in regard to article 80 it is.

The reason why there is no general duty for the promisor to overcome the promisee's interference may be found in the mutual and reasonable expectation that each party will perform as promised *(pacta sunt servanda)* and because it is 'less worse' that the promisor fails in his performance compared to the promisee's causation of the failure and subsequent attempt to derive a benefit from it.[702]

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[700] China International Economic & Trade Arbitration Commission [CIETAC], China, *Yellow Phosphorus Case*, 9 August 2002.

[701] The legal basis for the reduction is not indicated, but matches the solution called for under article 80 and cases of shared responsibility. See also Neumann, *Shared Responsibility,* 2009.

[702] Application of article 80 requires that the failure to perform is *imputable* to *both* parties. See *supra* section 6.1.1, p. 145 *et seq.*

A similar comparison to find the 'least worst' is conducted in *Used Car Case*[703] where the court stated that a grossly negligent buyer deserved more protection than a fraudulent seller. In the case the seller did not disclose to the buyer that a car was 2 years older than indicated and the mileage much higher. The buyer should have detected these facts himself, but did not and thus suffered a loss when the car was resold to a party who discovered the non-conformity.

Even though article 35(3) directly indicate that a party may not rely on a non-conformity if he should be aware of it, this provision was inapplicable due to the seller's fraudulent behaviour according to article 7(1) (good faith) and the principle underlying article 40. The latter denies the seller access to rely on rules of examination and the deadline for giving notice.

Similarly, in light of the connection between article 80 and good faith,[704] the underlying duty to cooperate and to take steps enabling performance, may require the promisor to attempt to overcome easily remediable interference.[705]

Especially in the situation where the promisee's interference is not the only possible logical cause of the failure of performance it has to be determined on a case-by-case basis whether the promisor could have been expected to overcome the promisee's conduct.[706]

The legal position can be summarized as; if the promisee has interfered with the promisor's performance in a way that makes it unreasonable to allow the promisee to assert the non-performance of the promisor, the promisor is excused. It is unreasonable to demand performance if the promisee's conduct breaks the synallagma of the contract or increases the risks or costs predicted by the parties by the contract.

There is no requirement as to the type of interference. At present it is important to point out that the conduct does not have to amount to breach

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703 Oberlandesgericht Köln [Appellate Court], Germany, *Used Car Case*, 21 May 1996.

704 See for good faith *supra* section 5.2, p. 116 *et seq.*

705 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 5, p. 1090-1091, Enderlein/Maskow, *International Sales Law*, 1992, pp. 336-337, Magnus in Honsell/Karollus, *UN-Kaufrecht*, 1997, article 80, para. 5, p. 995 and para. 13, pp. 997-998 and Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 249.

706 Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 249.

of contract or be qualified as contractual as such. Also tort committed, for example by the promisee's employees, can justify application of article 80.[707]

Examples of the type of conduct on behalf of the promisee that can lead to excuse of the promisor's non-performance under article 80 is provided immediately below.

## 6.3 Act or Omission by the Promisee

The third requirement that must be fulfilled in order to apply article 80 is that the non-performance by the promisor is due to *'the first party's act or omission*'. The requirement appears directly from the wording of article 80.

With such wording there is no doubt that also omissions can trigger article 80.[708] Similarly under UPICC 2010 article 7.1.2 where both acts and omissions are directly mentioned.[709] In PECL article 8:101(3) it is seen that only 'acts' are mentioned as the relevant cause. However, by reading in the light of article 1:301(1) it is seen that acts are understood as including also omissions.

As accounted for previously, no particular test of causation has to be applied when establishing a link between the promisor's non-performance and the promisee. Rather it is seen that *any* conduct in the specific circumstances may be relevant under article 80 as long as it is possible to establish a connection. Thus, it is indeed to a large extent up to the adjudicator's discretion to evaluate all relevant circumstances to assess whether an impermissible interference has occurred.

Any conduct by the promisee can in principle be enough to activate article 80 and it is not necessary that the promisee's act or omission is in itself is a breach of contract.[710] However, the conduct may often be a breach of the

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[707] Enderlein/Maskow, *International Sales Law*, 1992, p. 337.

[708] Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 3, p. 1089-1090.

[709] Article 7.1.2 of UPICC 2010, 2004 and 1994.

[710] Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 247. Similarly under article 7.1.2 UPICC.

promisee's own duties[711] and this affects the promisor's possible counterclaim.

The promisee's acts or omissions under article 80 cannot be excused by article 79 and the former provision is in this way superior to article 79.[712] Whether or not the conduct is excused by article 79 or a breach of contract affects only the promisor's counter claim and not the application of article 80. For the promisor's counterclaims see *infra* section 7.2, p. 200 *et seq.*

Due to the vague phrasing of article 80 it is possible to imagine many situations that may fall under it. A number of specific cases are provided immediately below to give an impression of the many types of acts and omissions that may trigger the excuse of the promisor's failure to perform and to demonstrate both the direct and indirect nature causation may have.

### 6.3.1 Direct Interference and Breach of Duties

The act or omission by the promisee covers violations of obligations following from law or contract.[713] Often direct interference by the promisee also qualifies as a breach of promisee's own duties.

In the *Leather Goods Case*[714] the seller raised a claim for payment that had not been received. The adjudicator sustained this view and found that the buyer had breached its obligation to pay according to article 53 CISG. What had probably happened was that the payment had been lost in transmission. Transmission meaning here that the money was sent by courier in the form of cash.

The buyer raised a counter claim for damages since the seller did not want to perform a subsequent order now that the buyer was in arrears with the payment. The court found that the buyer had to accept that the seller was entitled not to perform subsequent orders and the buyer thus lost its right to claim damages by virtue of article 80.

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711 Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 3, p. 360.

712 Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 7, p. 793 and Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 3, p. 1089-1090, Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 4, p. 360.

713 Tallon in Bianca/Bonell, *Commentary*, 1987, pp. 597-598.

714 Oberlandesgericht München [Provincial Court of Appeal], Germany, *Leather Goods Case*, 9 July 1997.

Similarly in *Automobiles Case*[715] where the seller according to agreement informed the buyer that it was ready to deliver a number of cars. The buyer did not want to take delivery due to fluctuations between the German and the Italian currency and thus breached article 53 CISG and the contract.

The buyer indicated that it would take delivery at a later stage, but never did so. In fact, 2½ years later the buyer himself claimed avoidance of the contract and claimed damages for loss of profit. Not only was there no reason for avoidance as the seller had fulfilled its duties and was ready to deliver, but any right to terminate the contract and claim damages was lost by virtue of article 80 since it was the buyer itself who caused the non-delivery of the cars.

In *Acrylic Blankets Case*[716] the buyer did not pay since it believed that three rolls of the acrylic blankets that were ordered were missing in the delivery. The seller sued for the purchase price and the buyer claimed reduction of the price as well as damages for lost profit.

The court found that the buyer had rejected the seller's offer to cure the non-conformity. The right to cure appears from article 48(1) CISG and by rejecting the seller this right, the buyer was neither entitled to a reduction of the price according to article 50(2nd sentence) nor damages according to article 80. Furthermore, because the seller was able and willing to remedy the non-conformity, the breach was not found to be fundamental, thus the buyer did not have the right to avoid the contract according to article 49(1)(a).

These examples demonstrate how a promisee are precluded from asserting claims that are caused by the promisee's own breach of duties following from either the contract or the default rules of the CISG.

### 6.3.2 Indirect Interference

It is in line with the internationally recognized duty to cooperate and good faith to include under article 80 conduct by the promisee that indirectly interfered with the promisor's performance. In *French-Japanese License Agree-*

[715] Oberlandesgericht München [Appellate Court], Germany, *Automobiles Case*, 8 February 1995.

[716] Oberlandesgericht Koblenz [Appellate Court], Germany, *Acrylic Blankets Case*, 31 January 1997.

*ment*[717] the tribunal found it to be contrary to the principle of good faith to *'indirectly [do] what the contract prevents from doing directly.'*

Relevant conduct under article 80 could be when the seller's performance is impaired because the buyer does not give the necessary specifications or the buyer cannot pay in due time because the seller does not provide the necessary documents.[718]

In the previously described *Propane Case*[719] the parties had agreed that to a delivery of gas against payment by letter of credit. The buyer breached its obligation to open the letter of credit as it did not receive information about the place of loading from the seller. The seller was found to be the cause of the buyer's failure to open the L/C and the former therefore lost the right to rely on that failure according to article 80.

The case can be seen both as a direct interference if the place of loading is necessary for the buyer's payment, or as indirect interference if it is believed that opening a blank letter of credit was a reasonable alternative for the buyer. No matter the view, indirect causation is enough to bring article 80 in to play.

Another example of an indirect interference is seen in *Food Products Case.*[720] In the case a Danish seller and a Spanish buyer entered into a sole distributor agreement regarding some food products. The parties agreed in the contract that termination should require a one-year notice. They also agreed that immediate termination could happen in case of a substantial breach of contract and in case of *'substantial modification in the ownership, organization or management of the distributor'*.

When the general manager of the Spanish party was dismissed, the Danish party claimed immediate termination according to the contract because of a substantial change in the management of the distributor. The reason for the manager's dismissal was the fact that the general manager had illegally

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717 March 2000, ICC International Court of Arbitration, *French-Japanese License Agreement*, No. 9875.

718 Audit, *La Vente*, 1990, p. 179.

719 Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996.

720 International Court of Arbitration, International Chamber of Commerce, *Food Products Case,* December 1996, no. 8817. Article 80 CISG is not directly referred to, but the case can be subsumed under it and the solution expresses a principle underlying the provision.

set up another company competing with the one in which he was employed. The adjudicator found that because the Danish party had *'facilitated [the general manager's] clandestine activity by delivering to him'* the right to terminate without notice could not be relied upon.

The general manager's conduct was illegal according to Spanish law, but the behaviour of the Danish company was in comparison merely disloyal. The interference is indirect since it is the seller who dismissed the manager, thus breaching the contract clause promising a stable management team.

In *Yellow Phosphorus Case*[721] a seller made incomplete deliveries and as a consequence, the buyer had to procure substitute goods at a higher price. The seller claimed to be exempt from liability as the incomplete deliveries were caused partly by natural disaster in the seller's region and partly by the buyer's issuance of a non-contractual letter of credit.

Excuse due to natural disaster was rejected as the seller could have overcome this by procuring substitute goods. Regarding the non-conforming L/C, the adjudicator sustained the argument insofar as the buyer had caused inconvenience to the seller. The seller was however the one primarily liable since he should have prepared for delivery, but the mere inconvenience meant that the claims made against the seller were reduced to 70 %. The legal basis may not have directly been article 80, but the CISG was applied and the *pro rata* apportionment is fit for the provision.

### 6.3.3 Breaking the Synallagma of Contract and Lack of Cooperation

Acts and omissions which demonstrate a lack of cooperation in achieving the common goal of the contract or conduct that breaks the synallagma of the contract are relevant under article 80.[722]

A contract necessarily implies that the parties have a common goal and that they are under a duty to make performance enabling steps as well as

[721] China International Economic & Trade Arbitration Commission [CIETAC], China, *Yellow Phosphorus Case*, 9 August 2002.

[722] See for more on the concept Golecki, Mariusz Jerzy, *Synallagma and Freedom of Contract – The Concept of Reciprocity and Fairness in Contracts from the Historical and Law and Economics Perspective*, German Working Papers in Law and Economics, Berkeley Electronic Press, 2003, 1-29.

not impairing performance. This is in line with the underlying principles of article 80, *supra* section 5.1, p. 109 *et seq.*

A contract is synallagmatic in the sense that it is based on mutuality and contains a certain exchange ratio. Creating additional risks,[723] making unreasonable demands,[724] not cooperating or directly preventing performance breaks this synallagma. Doing so is reason for either total or partial exemption for the other party under article 80.

An example of lack of cooperation is seen in *Steel Channels Case*.[725] Here the goods were detained by customs under the suspicion of smuggling and this caused the buyer to claim damages and avoid the contract based on an argument that the seller fundamentally failed to deliver. The court found that the seller had delivered the goods correctly and that it was the buyer's duty to deal with customs. The buyer's claim for damages and avoidance was therefore rejected – as a starting point.

However, the seller knew that customs had questioned his goods twice before. In the case at hand the seller made it difficult to solve the problems with customs since he, upon request for help from the buyer, forwarded irrelevant documents. The tribunal therefore decided that the purchase price should be lowered by 30 %, thus dividing the burden between the buyer and seller in a 70/30 ratio. A similar proportion was used regarding the arbitration fee and inspection costs.

The Convention applied to the case, though the legal basis was not indicated. However, the case suits article 80 since the seller broke the synallagma of the contract by not cooperating. It is reasonable to demand cooperation from the seller in this case since it would not be difficult, risky or costly for the seller to fax the relevant documents that could convince customs that the goods were not being smuggled. Instead, the seller faxed entirely

723 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 4, p. 1090.

724 As in Landgericht Kassel [District Court], Germany, *Wooden Poles Case*, 21 September 1995 where the seller suddenly making delivery dependant on a bank guarantee being presented within 3 days as supplement to the agreed L/C. Also, worsening the legal position of the other party is unreasonable according to Enderlein/Maskow, *International Sales Law*, 1992, p. 338.

725 China International Economic & Trade Arbitration Commission [CIETAC], China, *Steel Channels Case*, 18 November 1996. Notice that the tribunal wrongly considers Portugal a CISG state.

irrelevant documents, thus making it difficult for the buyer to achieve the common goal of the contract – delivery against payment.

An example of lack of cooperation where article 80 was directly applied was seen in *Hot-rolled Coils Case*.[726] In this case a typographical error in the B/L had left the seller with the impression that the goods were to be loaded in the vessel "Fin", where it in fact was in the vessel "Jin". The typographical error caused the shipping agent to refuse to release the goods upon arrival. Neither party took any measures to remedy the spelling error. Consequently, the goods were neither delivered nor paid for.

The tribunal stated that the seller should have revised the B/L and buyer should have revised the L/C. By not doing so, they were both in breach and as a consequence the tribunal dismissed the buyer's claim for lost profit and the seller's claim for the purchase price pursuant to article 80 CISG and the duty to cooperate.

### 6.3.4 Omissions

Omissions by the promisee may also cause the promisor's failure to perform.[727] The relevance of omissions under article 80 follows directly from the wording of article 80 and is similar to the approach under for example article 1:301 PECL.[728]

Conduct by the promisee that interferes with the promisor's performance often takes the form of an omission. Examples of omissions have already been mentioned above, such as omission pay,[729] omission to take delivery,[730] omission to name the place of loading,[731] omission to open L/C in strict

[726] China International Economic & Trade Arbitration Commission [CIETAC], China, *Hot-rolled Coils Case*, 15 December 1997.

[727] Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 3, p. 1089-1090.

[728] Butler in Felemegas, *An Int'l Approach*, 2007, p. 506.

[729] Oberlandesgericht München [Provincial Court of Appeal], Germany, *Leather Goods Case*, 9 July 1997.

[730] Oberlandesgericht München [Appellate Court], Germany, *Automobiles Case*, 8 February 1995.

[731] Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996.

compliance with the contract[732] or omission to cooperate in reaching the common goal of the contract.[733]

Another example of an omission was seen in *Shoes Case II*[734] where a buyer claimed damages because the seller stopped delivering the goods. The court dismissed the buyer's claim for damages by virtue of article 80 since it was the buyer's omission to pay that caused the seller to stop delivery. In this regard it should be noticed that suspension of deliveries has to be rightful according to article 71 CISG. If the suspension is not legitimate, it should be considered whether it is appropriate to exclude claim by virtue of article 80. See *supra* section 6.1.2, p. 146, *et seq.*

### 6.3.5 Conduct by Employees, Third Parties and Agents

The act or omission by the promisee can in fact be by any person whose conduct can be imputed to the promisee because that person has been engaged by the promisee. This is natural as legal entities cannot behave independently, but consists of people who can act on their behalf. This is recognized also in the ULIS article 74(3)[735] and international soft law.[736]

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[732] China International Economic & Trade Arbitration Commission [CIETAC], China, *Yellow Phosphorus Case*, 9 August 2002.

[733] China International Economic & Trade Arbitration Commission [CIETAC], China, *Hot-rolled Coils Case*, 15 December 1997. China International Economic & Trade Arbitration Commission [CIETAC], China, *Steel Channels Case*, 18 November 1996. Notice that the tribunal wrongly considers Portugal a CISG state.

[734] Landgericht München [District Court], Germany, *Shoes Case II*, 20 February 2002 affirmed Oberlandesgericht München [Provincial Court of Appeal], Germany, *Shoes Case II*, 1 July 2002.

[735] '*… were caused by the act of the other party or of some person for whose conduct he was responsible.*' according to ULIS article 74(3).

[736] Under PECL article 1:305 the knowledge and intentions of persons and subcontracters whom a party has entrusted performance is imputed to the party according to Butler in Felemegas, *An Int'l Approach*, 2007, p. 508.

Determining whether a person or third party's conduct is imputable to the promisee is a matter of determining to whose sphere of risk[737] that person belongs to, who is he answerable to[738] and in whose interest he is acting.

The determination is often straightforward regarding employees within the companies of the promisor and the promisee. A party is responsible for its employee's conduct under article 80.[739] Similarly under the rules regarding impediments beyond control or the duty to mitigate damages.[740] Regarding independent third parties or agents it can be useful to consider the guidelines above.

An example of involvement of a third party was seen in *Tetracycline Case*.[741] Here the goods delivered by the seller contained a non-conformity, insofar as the micronization of the ordered tetracycline was wrong.[742] The parties agreed that the goods should be sent back to the seller who would attempt to cure the non-conformity.[743] The seller instructed the buyer to return the goods to a particular agent using a specified haulage contractor identified by name. The seller was to bear the costs of the return and re-delivery of the goods.

The buyer then engaged the haulage contractor and handed the goods to him. However, the haulage contractor did not return the goods to the seller. When it became apparent that the tetracycline had not been returned, but was still awaiting transport in the local area, the buyer chose to cure the non-conformity by hiring a local company to correct the micronization, thus incurring expenses that it sought recovered from the seller. The sell-

737 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 3, p. 1089-1090, Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 5, p. 360.

738 Audit, *La Vente*, 1990, p. 179, Tallon in Bianca/Bonell, *Commentary*, 1987, p. 597.

739 Enderlein/Maskow, *International Sales Law*, 1992, p. 337, Butler in Felemegas, *An Int'l Approach*, 2007, p. 508 and Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 11, p. 794.

740 Schwenzer, *Commentary on CISG*, 2010, article 79, para. 20, p. 1072 and article 77, para. 2, p. 1043.

741 Amtsgericht München [Petty District Court], Germany, *Tetracycline Case*, 23 June 1995.

742 Tetracycline is a broad-spectrum antibiotic used for medicinal purposes.

743 Under certain circumstances the seller has a right to cure according to article 48 CISG.

er claimed to be excused from responsibility since the failure to cure was caused by the buyer's failure to return the goods to him as agreed.

The court stated, among other things, that the seller's failure to perform could not be excused under article 80. The buyer *'did not thwart'* the seller's possibility to cure the non-conformity within a reasonable time, since the failure of the haulage contractor was not imputable to the buyer. Rather, the buyer followed exactly the instructions by the seller, indicated the correct pickup place of the goods and acted on the seller's behalf for the performance of the seller's obligation. The seller was therefore responsible for the omission of the third party, even though the buyer also interacted with this party.

A party is thus responsible for the acts and omissions of third party contractors and agents if they can be said to belong to that party's sphere of risk, are answerable to that party or act in their interest. In such cases the conduct and knowledge of the third party may be imputed to the party who engaged him.

Granted, the CISG does not address issues of agency,[744] however, it does address the issue of imputable knowledge[745] and in the context of article 80 agents are thus governed by the Convention. Similarly in articles 77 and 79 under which the knowledge[746] of the person that a party use to perform the contract is imputed the latter.[747]

### 6.3.6 Contractual Behaviour and Conditions

The promisee's conduct, which is a fulfilment of a contractual obligation, cannot excuse the promisor's failure to perform. Notwithstanding that the promisee's acts may have some causal link to the promisor's performance it should not be a disadvantage for a party to behave according to the contract. This is so also under UPICC and PECL.[748]

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744 CISG article 4 *e contrario* and e.g. Kammergericht Berlin [Appellate Court], Germany, *Wine Case*, 24 January 1994.

745 Butler in Felemegas, *An Int'l Approach*, 2007, p. 509

746 Understood as actual knowledge or knowledge that the person should have had.

747 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 77, para. 2, p. 1043 and article 79, para. 9, p. 1066.

748 Schäfer in Felemegas, *An Int'l Approach*, 2007, pp. 247-248 who also writes that the *conditio sine qua non*, or the 'but for' test does not change this. For more on

However, it is necessary to consider whether the promisee is relying on contractual rights or whether he is abusing such rights. It is possible to conceive situations where contractual rights can be abused. For example, if a contract provides for the buyer to unilaterally approve documents to be shipped together with the goods on a certain date, the buyer may not reject the documents purely to cause a delay in shipment so he can rely on penalty clauses in the contract.

Especially with the latest change in UPICC 2010 there can be little doubt that interference with a condition brings article 80 to play even when that behaviour at first glance appears to be permitted by the contract.[749]

In *Food Products Case*,[750] which has been described previously, a party was precluded from asserting a contractual right to terminate the contract without notice since the condition allowing this had been triggered by the promisee himself.[751]

## 6.4 Burden of Proof

The fourth requirement for being exempt from responsibility under article 80 is that the non-performing promisor can make probable that the reason for his non-performance was the promisee's act or omission. The burden to prove the causal link is not directly regulated in the wording of article 80. In contrast, the words '*if he proves that*' found in article 79 places the burden of proof on the promisor who claims to be exempt from responsibility.[752]

At present, the burden of proof is dealt with in two aspects. First, by clarifying to what extent the CISG instrument governs burden of proof. Second, by considering burden of proof specifically in the context of article 80 where a more lenient approach is deemed appropriate.

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the test see for example Zimmermann, Reinhard, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Juta, Cape Town, 1990, pp. 988-989.

749 See UPICC article 5.3.3.

750 International Court of Arbitration, International Chamber of Commerce, *Food Products Case,* December 1996, no. 8817. Article 80 CISG is not directly referred to, but the case can be subsumed under it and the solution expresses a principle underlying the provision.

751 The case is further described *supra* section 6.3.2, p. 164 *et seq.*

752 Lookofsky, *Consequential Damages*, 1989, p. 263.

### 6.4.1 Burden of Proof Governed by Presumptions and Principles

Before entering into considerations of burden of proof in context of article 80, it is significant to determine whether burden of proof is governed by CISG. Though the Convention is meant to create a uniform and autonomous international sales law, it must be recognized that it does not govern all matters. If burden of proof is considered not to be governed at all by the Convention, the matter must be resolved by reference to the otherwise applicable domestic law. See for more on methodology, *supra* chapter 2, p. 9 *et seq*.

Article 4 states that the Convention governs the formation of the contract, and the rights and obligations of the parties. In addition, the provision expressly excludes questions of validity and property in the goods. As seen, the burden of proof is neither expressly included nor excluded from the scope of the Convention, according to article 4.

In such case, where the matter is neither clearly included nor excluded from the Convention, it has to be determined whether the Convention indirectly governs the matter anyway.

On one hand, there is no express regulation of the burden of proof in article 80. The Convention expressly mentions the burden of proof merely in two articles, 11 and 79. It may be argued that the express regulation of burden of proof in articles 11 and 79 cannot support a general regulation of burden of proof in the Convention as a whole, thus leaving the matter to domestic law – 'One swallow does not make a summer.'

Article 79 may be taken as the strongest indication of a direct regulation of burden of proof since it is *expressly* dealt with.[753] The prevailing view, however, is that the Convention *impliedly* governs the burden of proof, thus making the issue a *lacunae praeter legem*.[754]

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[753] Kröll, Stefan, *Selected Problems Concerning The CISG's Scope of Application*, Journal of Law and Commerce, 2005-06, 39-57, p. 48.

[754] Ferrari, Franco, *Burden of Proof under the CISG*, Review of the Convention on Contracts for the International Sale of Goods, Kluwer Law International, 2000-2001, 1-8, section II to III, Schwenzer and Hachem in Schwenzer, *Commentary on CISG*, 2010, article 4, para. 25, pp. 85-86 and Schmidt-Kessel in Schwenzer, *Commentary on CISG*, 2010, article 8, para. 67, pp. 180-181. For more on *lacunae intra legem*, see *supra* section 2.4, p. 35 *et seq*.

The position supported here is that the burden of proof should be considered within the scope of the CISG to the extent that the substantive issue is governed by the Convention.[755]

It makes sense that the burden of proof is regulated by the CISG insofar as some provisions of the Convention contain a legal presumption. A provision containing a legal presumption is an indirect regulation of the burden of proof, as one of the parties must bring proof to shift the presumption.[756]

Such underlying principle of burden of proof is confirmed in case law. The concept of presumption was relied upon in *Rheinland Versicherungen v. Atlarex.*[757] In the case it was stated that burden of proof is a *lacunae praeter legem* and the general principle is that the party who raises a claim also bears the burden of proof.[758] Said in another way, it is the one who wish to derive a legal benefit from a provision who has to prove the existence of the factual prerequisites of the provision.[759]

Similar approach to the burden of proof is found in TLP No. XII.1, which reads;

> 'The burden of proof rests on the party who advances a proposition affirmatively ("actori incumbit probatio").'

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755 Zeller, *Damages*, 2009, pp. 75-77 and Kruisinga, *Conformity in CISG*, 2004, p. 186 and Schwenzer, Ingeborg and Hachem, Pascal, *The CISG – Successes and Pitfalls*, The Amercian Journal of Comparative Law, Volume 57, 2009, 457-478, pp. 471-472 argues that distinction between procedural and substantive law is unproductive and outdated.

756 Henschel, René F., *The Conformity of Goods in International Sales*, Thomson/GADJura, Copenhagen, 2005, p. 111.

757 Tribunale di Vigevano [District Court], Italy, *Rheinland Versicherungen v. Atlarex*, 12 July 2000.

758 Mazzotta, Francesco G., *The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example*, Pace International Law Review, 2003, 437-452, p. 451, Handelsgericht Zürich [Commercial Court], *Art Books Case*, 10 February 1999.

759 Similarly in Amtsgerich Duisburg [Petty District Court], Germany, *Pizza Cartons Case*, 13 April 2000 in which it is presumed that it is the buyer claiming a practice that also has to prove it.

It should be pointed out that only to the extent that the substantive matter falls within the Convention, can the principle of burden of proof be used. A similar approach is followed in for example matters of agency.[760] If the substantive matter falls outside the scope of the Convention, so does the principle regarding burden of proof.

### 6.4.2 Failing Promisor's Burden to Prove Interference

Having established that to the extent that the substantial matter falls within the Convention, so does the burden of proof, it is relevant to put the topic in context of article 80.

Article 80 presumes that a non-performance of the promisor has been established. Consequently, that party carries the liability burden according to the no-fault liability system of the Convention. If the promisor wants to shift the presumption that he is liable for the non-performance he must, under the view just provided above, bring proof to the contrary, also because he will derive a benefit from the provision being applied.[761]

This is also supported by the systematic placement of article 80 as an exemption clause. However, it conflicts with the view presented earlier, that the placement of article 80 is less significant and that it calls for a more broad interpretation under which direct and indirect causation is enough to activiate the provision. This is still sustained, but the starting point is that the burden of proof rests on the promisor.

Because article 80 is an exemption clause it is for the promisor to prove the promisee's sole or partial interference with his performance of the contract.[762] Similarly under articles 77 and 79 where it is for the failing promisor to prove that the promisee either did not take reasonable measures to prevent loss occurring or that an unforeseeable and unavoidable impediment beyond control existed.[763]

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760 See *supra* section 6.3.5, p. 169 *et seq*.

761 Similarly Janssen and Claas Kiene, *General Principles*, in Meyer/Janssen, 2009, p. 278, arguing that the party relying on an exemption clause must prove its factual prerequisites.

762 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 11, p. 1094.

763 Schwenzer, *Commentary on CISG*, 2010, article 77, para. 13, p. 1048 and the wording of article 79.

Which party has the burden of proof can seem particularly relevant in cases of shared responsibility.[764] However, if a situation of shared responsibility is reduced to a matter of burden of proof it appears to become an either/or solution contrary to the wording and built in flexibility of article 80.

A parallel is in this regard noticed when it is asserted that compensation for expected profits should be allowed since the promisor should not be able to escape liability merely because the lost amount cannot be proved.[765]

From case law it is seen that *Sensitive Russian Components*[766] could have been approached purely as a matter of burden of proof. In the case none of the parties could prove the cause of the defect goods, thus leaving the promisor with the entire liability burden according to the no-fault principle. However, letting the promisor carry the entire burden would be to ignore the partial causation by the promisee and the flexibility of article 80. Therefore, a more lenient approach to the burden of proof is appropriate when applying article 80.

It is in line with the words *'to the extent'*, the underlying principles of article 80 and the general nature of the provision to require the promisor to make probable that a sole or partial interference with the non-performance has occurred. Systematically, the adjudicator must be aware that the responsibility burden rests on the promisor and that the discussion in relation to article 80 concerns a lowering of that responsibility.

Consequently, it is observed that the burden of proof shifts from one party to another. First, it is for the promisee to make probable that a non-performance has occurred, thus making the promisor responsible. Second, the promisor can reduce the responsibility by making probable that the non-performance was due to reprehensible interference by the promisee himself. Third, as a defence against total exemption and in an attempt to win at least parts of the claims advanced, the promisee can make probable that the interference was not total, but partial, thus calling for an apportionment.

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764 For more on shared responsibility, see *supra* section 6.2.1.3, p. 152 *et seq.*

765 Lookofsky, *Consequential Damages*, 1989, p. 222.

766 International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003.

## 6.5 Duty to Give Notice

The fifth requirement for successful exemption from responsibility under article 80 is that the non-performing promisor has fulfilled his duty to give notice to the promisee.

According to the wording of article 79, exemption requires that the party who seeks relief gives notice of the impediment and its effect to the other party. The effect of not giving notice is that the promisor remains liable for damages that could have been mitigated by giving notice.[767]

In contrast, there is no *express* duty to inform the other party under articles 77 and 80. However, in some cases a party may bear the consequences of not giving notice under these two provisions anyway.

First, when a notice in itself is a way of mitigating, there is a duty to do so under article 77. In *Video Recorders Case*[768] it was stated that if the buyer had the right to manuals in other languages than German, it should under article 77 have notified the seller of this in order to get other language versions instead of paying considerable amounts for translation elsewhere and then claiming the costs back from the seller.

Second, if the causation by the promisee under article 80 amounts to a breach of contract, the promisor may raise counter-claims[769] which can require notice to be given. This is the case if the promisor wishes to avoid the contract,[770] to rely on a non-conformity,[771] to rely on defects in title,[772] to suspend performance[773] or if he wishes to resell the goods.[774]

The two examples just provided demonstrate duties to give notice for other reasons than article 80. Under article 80 there is no *express* duty of giving notice. It is reasonable not to demand that the failing promisor gives notice

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767 Schwenzer, *Commentary on CISG*, 2010, article 79, para. 47, pp. 1081-1082.

768 Landgericht Darmstadt [District Court], Germany, *Video Recorders Case*, 9 May 2000.

769 See regarding counter claims, *infra* section 7.2, p. 200 *et seq* and regarding interference in the form of breach of contract *supra* section 6.3.1, p. 163 *et seq*.

770 Article 29 CISG.

771 Article 39 CISG.

772 Article 43 CISG.

773 Article 71 CISG.

774 Article 88 CISG.

to the promisee that interference is occurring since the promisee would or should be aware of it already. Similarly under article 79(4) it is seen that it is not necessary to give notice of impediment when the promisee is aware of the existence of such.[775]

However, an *implied* duty to give notice appear in two situations to which article 80 is applicable. First, it has been stated that if the interference by the promisee is easy to avoid or overcome there may be a duty for the promisor to do so in light of the underlying principles of article 80 and good faith. It could be that the promisor's notice to the promisee that he is interfering with performance is enough to avoid further problems. However, this has to be weighed in each case against the presumption that the promisee already knows, or should know, of the effects of his own conduct. A duty for the promisor to give notice arise from the duty to cooperate, the duty to mitigate harm and good faith.

Second, as provided elsewhere, the application of article 80 presupposes a breach by a party. Withholding or suspending performance may be a breach, but is not necessarily so. According to article 71 performance can be suspended and if the requirements of the provision are fulfilled, the non-performance is not considered a breach. It can already be seen that for that reason the other party cannot derive claims from a rightful suspension of performance since it is permissible behaviour and thus article 80 is irrelevant.

However, circumvention of article 71 seems possible unless a duty to notify is read into article 80 for situations resembling those falling under article 71.

In *ATT v. Armco*[776] the buyer consistently did not pay and thus caused the seller to stop further deliveries until the debt was paid or assurance of performance provided. The adjudicator found that the seller could rightfully stop deliveries.

The buyer suffered a loss of profit from the deliveries being stopped and claimed compensation from the seller. The adjudicator rejected the claim with reference to article 80, but this presuppose that the suspension of performance was a breach or a non-performance – which it was not. However, the result would in this case probably have been the same following

[775] Schwenzer, *Commentary on CISG*, 2010, article 79, para. 46, p. 1081.

[776] Belarusian Chamber of Commerce and Industry International Court of Arbitration, Belarus, *ATT v. Armco*, 5 October 1995.

article 71, but this only because the seller notified the buyer as required by article 71.

Had the seller not given notice the suspension would not have been rightful according to article 71, thus demonstrating a breach of the duty to deliver. The situation perhaps calls for exemption under article 80 where no duty to notify exists as a starting point, but merely the requirement that the other party interfered with performance. The problem here would be that the outcome of article 80 could be an excuse of the promisor's, now, failure to deliver, but at the same time a circumvention of the duty to give notice for the suspension to be rightful according to article 71.

Considering that the duty to give notice in article 71 is a way of protecting the other party's interests, it would seem inappropriate to allow circumvention of article 71 by applying article 80 since this provision is also based on underlying principles of cooperation and consideration of the other party's interests.[777]

Having said this, an unrightful suspension of performance in the sense of article 71 may call for a partial exemption under article 80 and in this way the latter supplements the former. However, if application of article 80 points towards total excuse due to unrightful suspension in the sense of article 71, it is appropriate to arrive at the same result under article 80 to prevent circumvention.

## 6.6 Concluding Argument

Though article 80 has a short and open wording it is possible to summarise the requirements for directly applying the provision: The promisor must make probable that his non-performance to some degree was caused by an act or omission of the promisee and that notice has been given if the circumstances so require.

Three of the requirements appear directly from the wording of article 80. First, a non-performance of the promisor must be established. Second, there must be a causal link between non-performance and the promisee's conduct. Third, the reason for the non-performance must be an act or omission of the promisee.

[777] See supra section 5.1, p. 109 *et seq*.

Two other requirements appear from the underlying principles of article 80. Therefore, the fourth requirement is that the promisor must make probable that the reason for his non-performance is the other party. The burden of proof is to be applied considering the broad and flexible nature of article 80. The fifth and final requirement is that the promisor has given notice. However, this requirement exists only if considerations of circumvention of article 80 or the underlying principles of the Convention can justify it.

# 7. Legal Consequences

When the prerequisites for applying article 80 are fulfilled the legal consequences of its application becomes relevant. Both parties, and not only the exempt promisor, may experience effects of the application of article 80.

On one hand, the promisee, who is the key reason why article 80 is applicable, will experience a loss of either some or all remedies. This feature is salient for article 80 and its underlying principles. The promisee's legal position is accounted for below in two aspects. First, in regard to the modification of remedies. Second, in regard to the extent of such modification.

On the other hand, the promisor, who under article 80 is exempt from the responsibility of not having performed, may have incurred costs or derived a benefit from being exempt. The promisor's position is dealt with below in three aspects. First, in regard to the promisor's right to still receive performance from the promisee despite the promisor himself being permitted not to perform in full. Second, the prerequisites for the promisor to raise claims in addition to a claim of exemption under article 80. Third, how to deal with saved costs or benefits following from being exempt.

## 7.1 The Promisee's Position

With the words *'may not rely on'*, article 80 excludes any remedy by the promisee that would normally be available[778] and not only damages as is the case with for example article 79. This is similar to both PECL and UPICC

[778] Audit, *La Vente*, 1990, p. 180, Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para. 6, p. 360, Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 251, Enderlein/Maskow, *International Sales Law*, 1992, p. 336, Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 2, p. 1088-1089 and para. 8, pp. 1092-1093, Magnus in Honsell/Karollus, *UN-Kaufrecht*, 1997, article 80, para. 14, p. 998, Tallon in Bianca/Bonell, *Commentary*, 1987, p. 598, Schwenzer and Manner, *The Pot Calling the Kettle Black*, 2008, p. 475 and p. 478.

under which the promisor is barred from seeking *any* remedy including damages, specific performance, price reduction, avoidance and interest.[779]

The exclusion of remedies may be either total or partial. A total loss of remedies may be due in situations where the promisee is the sole cause of the promisor's failure to perform. A partial exclusion of remedies is due in mixed cases and shared responsibility cases[780] or if the interference by the promisee is temporary.

### 7.1.1 Remedies Following from the Convention

The remedies normally available according to the Convention are the right to performance/payment, the right to delivery of substitute goods, the right to repair, the right to avoid the contract, the right to price reduction, the right to refuse to take delivery, the right to make specifications, the right to suspend performance, the right to damages and the right to interest.[781] All of these remedies may be excluded, either in total or in part, if a party is excused from his non-performance according to article 80.[782]

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[779] Butler in Felemegas, *An Int'l Approach*, 2007, p. 506, Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 8, p. 1092-1093, Schwenzer and Fountoulakis, *International Sales Law*, 2007, p. 577, Schäfer in Felemegas, *An Int'l Approach*, 2007, pp. 251-252.

[780] See *supra* section 6.2.1.2 to 6.2.1.3, p. 150 *et seq.*

[781] Tallon in Bianca/Bonell, *Commentary*, 1987, p. 598. See articles 45-52, 61-65 and 71-73.

[782] Regarding the right to avoid the contract see Landgericht Düsseldorf, Germany, 9 July 1992, Unilex. Affirmed in relevant part by the Oberlandgericht Düsseldorf, Germany, 18 November 1993, Unilex. Affirmed in relevant part without invoking article 80 in CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995]. All cases named *Key Press Machine.* Regarding the right to specific performance see Oberlandesgericht München [Provincial Court of Appeal], *Leather Goods Case*, 9 July 1997 and Landgericht Hamburg [District Court], *Stones Case*, 21 December 2001. Regarding damages see Oberlandesgericht München [Provincial Court of Appeal], *Leather Goods Case*, 9 July 1997; Oberlandesgericht München [Appellate Court], *Automobiles Case*, 8 February 1995 and Oberlandesgericht Koblenz [Appellate Court], *Acrylic Blankets Case*, Germany, 31 January 1997. Regarding price reduction see Oberlandesgericht Koblenz [Appellate Court], *Acrylic Blankets Case*, Germany, 31 January 1997.

### 7.1.2 Remedies Following from the Contract

The effect of exemption according to article 80 goes beyond the legal remedies which follow from the CISG and it may also exclude contractually agreed remedies, for example penalty clauses or other individually agreed remedies.

A principle similar to the one expressed in article 80 was applied in *Food Products Case*[783] where the adjudicator stated in regard to also contractual sanction that *'its application may not be requested by those who are even partially responsible'*.[784]

The case concerned a sale from a Danish seller to a Spanish buyer under the agreement that the contract could be terminated without notice if there was a substantial change in the management of one of the companies. When the general manager of the buyer got dismissed, this would have permitted immediate termination. The reason why the general manager got dismissed was that he against local law had opened competing business. A conduct that the seller had facilitated by delivering goods to the general manager. Under those circumstances, the Danish seller could not rely on the contractual right to terminate the contract without notice. The case is described further *supra* section 6.3.2, p. 164 *et seq.*

Though the adjudicator did not refer to the CISG article 80, despite applying the Convention to the case, the principle referred to is one expressed in that provision. Similar to other cases, the quality of the case could, from a uniformity driven focus, improve by referring more clearly to the legal basis for the decision.

It is interesting to see that the Danish party lost the right to terminate without notice despite having secured this right in the contract. The general manager's conduct was illegal, but the behaviour of the Danish company was in comparison merely disloyal.

Another example is seen in *Equipment Case*.[785] Here a party also lost a right established in the contract due to that party's own causation of the other

[783] International Court of Arbitration, International Chamber of Commerce, *Food Products Case,* December 1996, no. 8817.

[784] International Court of Arbitration, International Chamber of Commerce, *Food Products Case,* December 1996, no. 8817.

[785] Tribunal of International Commercial Arbitration, Ukrainian Chamber of Commerce & Trade, Ukraine, *Equipment Case*, 21 June 2002.

party's failure to perform. Specifically, the buyer had not paid the outstanding remaining part of the agreed purchase price. The seller claimed the price and a penalty calculated according to the penalty clause contained in the contract applicable in the event that a party breached its obligations. The adjudicator found that the seller was entitled to the rest of the price, but since the delayed payment was caused by the seller's delivery of non-conforming goods, the seller lost the right to rely on a contractual penalty clause.

### 7.1.3 Remedies Following from Domestic Contract Law

It should be expected that a successful application of article 80 or its underlying principles can have a spill-over effect on domestic law issues. Often the attention has been on the effect domestic law may have on the interpretation of the Convention, but here the effect is reversed.[786] The effect that the CISG may have on domestic law can take various forms.[787] Presently, the effect addressed is the one where a matter is assessed by the rules of the CISG – an assessment that is then carried into domestic law issues in order to determine the applicability of remedies found here.

The method of letting the rules of the Convention decide the specific application of domestic law is correct. In fact, it would be contrary to article 7 to refer a matter to domestic law if it is governed by the CISG. Due to the specific and very different characteristics of domestic laws it is not possible to account completely for all possible effects that may appear from an application of article 80 and its principle. At present it is merely illustrated and pointed out that the effect of article 80 may reach into domestic law issues.

An example of a spill-over effect is seen in cases involving the Chinese 'double deposit back' rule. The Chinese Contract Law (CCL)[788] reads in article 115 regarding deposits;

> 'The parties may prescribe that a party will give a deposit to the other party as assurance for the obligee's right to performance in accordance with the Security Law of the People's Republic of China. Upon performance by the obligor, the deposit shall be set off against the price or refunded to the obligor. If the party giving the deposit failed to perform

[786] Reading the Convention in light of a domestic system is not permitted. See *supra* section 2.2, p. 17 *et seq.*

[787] See for more Ferrari, *Impact on National Systems*, 2008.

[788] Contract Law of the People's Republic of China, March 15, 1999.

> its obligations under the contract, it is not entitled to claim refund of the deposit; where the party receiving the deposit failed to perform its obligations under the contract, it shall return to the other party twice the amount of the deposit.'

The domestic Chinese system is that the deposit paid by the buyer is supposed to secure the performance of the contract.[789] If the contract is not performed due to the buyer's failure, the buyer loses the deposit paid. If the failure to perform is due to the seller, the deposit has to be repaid twice, leaving the buyer with a 'profit' equal to the deposit he paid.

The deposit system is to be distinguished from partial advance payment to which the 'double deposit back' rule does not apply.[790] No matter the deposit rule, the parties may still claim for example damages as a consequence of the breach of contract.[791]

The forfeiture of the deposit may be claimed if there is a fundamental breach of contract.[792] Should both the CISG and the domestic deposit rule apply[793] it seems correct to determine questions of breach of contract under the CISG and let the result spill over to the domestic deposit rule.

An example of spill-over, in what would be characterised as sole causation under article 80, is seen in *Medicine Manufacturing Equipment Case*.[794] In the case the buyer was found to have unrightfully terminated the contract since it caused the seller's failure to perform by having supplied disqualified test-bottles and later by acquiring machinery from the seller's competitor without an assurance of confidentiality. The Convention applied and because the buyer, from a CISG viewpoint, was responsible for the default of the contract it was not entitled under domestic law to get a refund of the deposit paid.

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789 Ling, *Contract Law in China,* 2002, p. 457.

790 Ling, *Contract Law in China,* 2002, pp. 455-456.

791 Ling, *Contract Law in China,* 2002, p. 457.

792 Ling, *Contract Law in China,* 2002, p. 457.

793 The domestic deposit rule of China require that the parties intended to use deposit as a security for performance and that the agreement is in writing. See for more Ling, *Contract Law in China,* 2002, p. 456.

794 China International Economic & Trade Arbitration Commission [CIETAC], China, *Medicine Manufacturing Equipment Case*, 27 December 2002.

There is also a spill-over effect in regard to shared responsibility. An example of this is seen in *Singapore Da Guang Group v. Jiangsu Machines Import & Export Ltd*.[795] In this case, to which the CISG applied, it was decided that since both parties had responsibility for the non-performance of the contract the 'double deposit back' rule did not apply and the buyer got the deposit back though without an additional benefit in form of double deposit back. Thus, neither party derived a benefit under the domestic deposit-rule. This result would not be possible from a literal interpretation of the CCL article 115, but follows by carrying over the shared responsibility view from CISG into the domestic law.

The spill-over effect from the concept of shared responsibility under article 80 CISG does not seem to have changed the outcome of the domestic rule since it is already applied to such situations with the result that only a single deposit is paid back.[796]

It is possible however that determination of issues according to the Convention is different to that of domestic law, thus changing the outcome from an application of domestic law. In that light, it is important to firstly apply the rules of the Convention before resorting to domestic remedies.

### 7.1.4 Remedies Following from Domestic Tort Law

It has on several occasions, both in the present work and elsewhere, been pointed out that article 80 contains a concept resembling what is known from tort law, for example contributory negligence, fault of the victim etc.[797] While it is not the intention with the current section to account for domestic tort law, it is relevant to clarify how one is to deal with claims based on the same facts, but with roots in contract and tort respectively. The following therefore assumes that a factual situations qualifies under both article 80 CISG according to the requirements dealt with throughout this dissertation and at the same time qualifies under a domestic tort rule, for example a general liability rule for negligently having caused harm.

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[795] Zuìgāo Rénmín Fǎyuàn [Supreme Court of People's Republic of China], China, *Singapore Da Guang Group v. Jiangsu Machines Import & Export Ltd*, 11 January 2001.

[796] Ling, *Contract Law in China,* 2002, p. 458 where it is indicated that if the failure to perform is caused by the other party's act or omission no forfeiture of deposit may follow and the deposit is to be refunded to the payer.

[797] Tallon in Bianca/Bonell, *Commentary*, 1987, p. 599.

The issue of concurrence is also interesting from the fact that what appear to be tortious conduct may be permitted as a relevant factor when establishing causation, both in the archetype and shared responsibility type, as no particularly strict requirement for the causal link is required.

The phenomenon of concurrence, also known in domestic law, may not *per se* be problematic.[798] However, the classification under either tort or contract may lead to different outcomes[799] and if the rules of the Convention are different to, or can be circumvented by, a concurrent domestic tort claim, it becomes problematic.[800] This can happen when specific liability rules of the CISG can be pushed aside by more broad notions of tort law,[801] for example when tort rules grant punitive damages, unforeseeable damages or are not dependent on a party giving notice.[802] It may also be that the classification of an issue under either the Convention or tort law makes a difference in limitation period, court jurisdiction or acceptance of liability disclaimers.[803]

Insofar as the outcome of the rules is different it is problematic for two reasons. First, it has been said that the law should give only one answer to a legal problem.[804] Second, the Convention is meant to create uniform law which may be circumvented by asserting a domestic tort rule.

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798 Schlechtriem, Peter, *The Borderland of Tort and Contract – Opening A New Frontier?*, Cornell International Law Journal, 1988, 467-476, [Schlechtriem, *Borderland of Tort and Contract*, 1988], p. 468, who welcomes the development in German domestic law, Decker, Micheline, *Contract or Tort: A Conflict of Characterisation*, The International and Comparative Law Quarterly, Volume 42, 1993, 366-369, p. 366. See also Ulfbeck, Vibe, *Kontrakters Relativitet: Det Direkte Ansvar i Formueretten*, Thomson, Copenhagen, 2000, [Ulfbeck, *Kontrakters Relativitet*, 2000], pp. 97-98.

799 Ulfbeck, *Kontrakters Relativitet*, 2000, p. 94.

800 Kruisinga, *Conformity in CISG*, 2004, p. 187.

801 Schlechtriem, *Borderland of Tort and Contract*, 1988, p. 468.

802 Ferrari, Franco, *The Interaction Between The United Nations Conventions on Contracts for The International Sale of Goods and Domestic Remedies*, Rabels Zeitschrift für Ausländisches und Internationales Privatrecht, 2007, 52-80, [Ferrari, *Interaction with Domestic Remedies*, 2007], pp. 70-71, Schlechtriem, *Borderland of Tort and Contract*, 1988, p. 468.

803 Decker, Micheline, *Contract or Tort: A Conflict of Characterisation*, The International and Comparative Law Quarterly, Volume 42, 1993, 366-369, p. 366 and Edlund, Hans Henrik, *Direkte Krav i de Seneste Års Retspraksis*. Ugeskrift for Retsvæsen, 2006, 173-180, p. 173.

804 Gomard, Bernhard, *Forholdet mellem Erstatningsregler i og uden for Kontraktsforhold*, GEC Gads Forlag, Copenhagen, 1958, p. 468.

If the outcome of two different sets of rules is the same, a problem of concurrence does not exist, rather, the rules may express a common principle.[805] However, for the sake of uniform development of the Convention it could be argued that more careful consideration of which set of rules to apply is due. Several approaches to such concurrent remedies exist and these are outline below. The approach accounted for *infra* section 7.1.4.3, p. 192 *et seq* is the one supported at present.

#### *7.1.4.1 The Non-cumul and the Pre-emption Approach*

In order to avoid that the party's reverting to tort law circumvents special liability rules, French courts are applying a *non-cumul* rule, under which nearly all tort rules are excluded if there is a contractual relationship between the parties.[806] Effectively, the contract law system supersedes the tort law one.

In Russian law, preference is as a starting point given to the contract law since the party has to sue in contract if such opportunity exists, though with exceptions. The plaintiff can choose between tort or contract if bodily harm has been caused to an individual or harm has been caused by a defective product.[807]

The *non-cumul* rule is, as reasoned in France, not only a way of respecting the contract and the legislator's separation of contract and tort, but springs from the fear that the general delict rule together with a party's free choice of liability rule will result in almost complete circumvention of contracts.[808]

In *Live Fish*[809] a buyer refused to pay the purchase price since the delivered fish transmitted a virus to the buyer's existing stock, thus causing damage. The adjudicator found that the buyer should have examined the fish and given notice. By not doing so within a reasonable time, the buyer's claim could not be followed and the seller was entitled to the purchase price. The adjudicator also stated that the lack of notice under the CISG extended to

805 Ulfbeck, *Kontrakters Relativitet*, 2000, pp. 98-99.

806 Schlechtriem, *Borderland of Tort and Contract*, 1988, p. 468.

807 Osakwe, *Russian Civil Code*, 2008, pp. 155-156.

808 Ulfbeck, *Kontrakters Relativitet*, 2000, pp. 101-102.

809 Oberlandesgericht Thüringen [Provincial Court of Appeal], Germany, *Live Fish*, 26 May 1998.

exclude claims based on domestic tort law according to which the buyer could otherwise claim damages due to the seller's negligent destruction of the buyer's production.

The benefit of applying a *non-cumul* rule is that circumvention is excluded and *one* set of liability rules are exclusive.[810] However, in the context of the CISG the *non-cumul* rule would, in its extreme form, have the effect that it excludes tort claims when the CISG itself is silent on a matter.[811] Application of a *non-cumul* approach would thus neglect that the Convention does not regulate all contractual matters.

#### *7.1.4.2 The Cumulative and the Merging Approach*

At the other end of the scale, in comparison to the *non-cumul* rule, is the approach according to which claims are allowed to compete side-by-side, so that it is left to the claimant to choose between them. Some courts follow an approach according to which remedies may concur and compete[812] if the domestic system allows competing rules already.

In other jurisdictions, for example Denmark and China, it is for the aggrieved party to choose freely among several applicable sets of rules and for him to prioritize them, just like he would do when choosing between types of remedies etc.[813]

Allowing a claimant to choose between competing rules makes sense from the view that the party in breach voluntarily has chosen to assume an additional contractual liability as a supplement to the already existent delictual one.[814] The approach was followed, and welcomed, in German law, but here there exist no general delictual liability rule, meaning that potential overlap

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[810] Schlechtriem, *Borderland of Tort and Contract*, 1988, pp. 470-471.

[811] Schlechtriem, *Borderland of Tort and Contract*, 1988, p. 470.

[812] Schlechtriem, *Borderland of Tort and Contract*, 1988, p. 470. The author indicates that this approach has been followed by American and German courts in domestic cases, but that it has probably been left.

[813] Edlund, Hans Henrik, *Direkte Krav i de Seneste Års Retspraksis*. Ugeskrift for Retsvæsen, 2006, 173-180, p. 180 and CCL article 122; *'Where a party's breach harmed the personal or property interests of the other party, the aggrieved party is entitled to elect to hold the party liable for breach of contract in accordance herewith, or hold the party liable for tort in accordance with any other relevant law.'*

[814] Ulfbeck, *Kontrakters Relativitet*, 2000, p. 100.

to tort is smaller, and there is a tradition to supplement contractual remedies with delictual ones.[815]

If all concurrent domestic claims are allowed, it opens up to circumvention and neglects the fact that the Convention system may lay down a *'fairly balanced system of contractual remedies'*.[816] Allowing any domestic claim to be advanced irrespective of the Convention would be a circumvention of the Convention rules and the goal of uniformity, since parties may be encouraged to shop for the forum with the most favourable domestic rules. It has been argued that the CISG is independent from domestic law[817] and is meant to displace similar rules in the countries where it is adopted.[818]

When a state enters into a treaty it is for that state to ensure that all state organs, including the judiciary, as well as private persons are bound in a way so that the treaty is performed.[819] Not doing so, will be a breach of the treaty and the VCLT articles 26 and *pacta sunt servanda*. Thus, if the Convention is in force and is applicable (articles 1 to 6) it could be a breach by the state if domestic rules were applied instead of those in the Convention. However, it can sometimes be difficult to determine precisely what the Convention regulates.

An alternative approach would be to merge contract and tort into 'contort'[820] instead of giving preference to one of the concurrent systems. It has been suggested that the law of contracts are being reabsorbed into the more expansive theory and mainstream system of tort law.[821] It is argued that the growing ideas of for example unjust enrichment and promissory estoppel are tearing down the *'dykes which were set up to protect the enclave'* of contract.[822]

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815 Ulfbeck, *Kontrakters Relativitet*, 2000, pp. 102-103.

816 Schlechtriem, *Borderland of Tort and Contract*, 1988, p. 470.

817 Felemegas in Felemegas, *An Int'l Approach*, 2007, p. 11.

818 See Enderlein/Maskow, *International Sales Law*, 1992, p. 11 who also mentions the two exemptions to the precedence of CISG; Article 90 concerning other international conventions and article 94 concerning state reservations.

819 Aust, *Modern Treaty Law*, 2007, p. 179.

820 Schlechtriem, *Borderland of Tort and Contract*, 1988, p. 469. The notion 'contort' suggested by Gilmore, Grant, *The Death of Contract*, Ohio State University Press, Columbus, 1974, [Gilmore, *Death of Contract*, 1974], p. 90.

821 Gilmore, *Death of Contract*, 1974, p. 87.

822 Gilmore, *Death of Contract*, 1974, pp. 87-88.

The benefit of merging tort and contract would be to achieve *one* liability system instead of the two concurrent ones. It was pointed out in *Eximin S.A. v. Textile and Footwear Italstyle Ferarri Inc*[823] that the shared responsibility case fell in the borderland between contract and tort and that a division of responsibility would unite the two fields. A single system could promote predictability and prevent speculation via forum shopping.

It has been said that common law lawyers are not ready to merge into contort since they follow a distinction between no-fault contractual liability and negligence-based tort liability,[824] however the idea can also be critisised in a CISG context in two ways.

First, deviating from the liability system in the Convention, for example by discarding or changing parts of it, would be to deviate from the binding agreement that the states ratifying the Convention have made with each other. Such deviation would necessarily require a reservation to the Convention.[825]

Second, merging the contract liability system in the CISG with a myriad of different domestic tort systems would undermine the purpose of the Convention – to create a uniform system.[826]

In general perspective, the merging approach has been criticised for neglecting that contracts and tort address voluntary duties and duties from society respectively and for not providing the adjudicator with any guidelines of what to do when presented with a case.[827]

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[823] Beit ha.M.ishpat ha'Elyon [Supreme Court], Israel, *Eximin S.A. v. Textile and Footwear Italstyle Ferarri Inc.,* 22 August 1993.

[824] As opposed to the civil lawyers' starting point in fault in both systems, see Lookofsky, *Loose Ends and Contorts*, 1991, pp. 405-406.

[825] Schlechtriem, *Borderland of Tort and Contract*, 1988, p. 469.

[826] Schlechtriem, *Borderland of Tort and Contract*, 1988, pp. 469-470. See also Enderlein/Maskow, *International Sales Law*, 1992, p. 11 who also mentions the two exemptions to the precedence of CISG; Article 90 concerning other international conventions and article 94 concerning state reservations.

[827] Ulfbeck, *Kontrakters Relativitet*, 2000, p. 113.

#### *7.1.4.3 The Functional Equivalent and the Protected Interests Approaches*

None of the approaches above are satisfactory as there is a need to consider that the Convention on one hand is meant to displace a range of different domestic rules, thus creating a uniform law and on the other hand that it is incomplete and that gaps are to be filled by domestic law according to article 7(2). The Convention is not meant to displace all domestic rules, neither is it meant to displace none of them.

In order to achieve the goal of uniformity, it has been suggested that if a matter is dealt with by the Convention, it pre-empts concurrent domestic rules no matter their contractual or tortious character.[828]

The matter becomes an issue of interpreting the scope of the Convention. The line between matters inside and outside the Convention is not easy to draw. Regarding concurrence and pre-emption there is no guidance to be found in the Convention itself.[829]

It has been stated that the CISG does not govern tort law,[830] but since the distinction between tort and contract may depend on a domestic approach, the question should rather be whether the Convention governs and pre-empts a particular issue, which in turn may then fall under either domestic contract or tort law.

Two ways of sorting out Convention matters and domestic matters have been suggested, one focused on the function of the Convention rule and one focused on the interests being protected.

If the CISG provides a solution to a specific set of facts and the solution is functionally equivalent to a domestic remedy, the CISG pre-empts the latter.[831] This way an autonomous interpretation of the CISG is followed,

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828 Schwenzer, Ingeborg and Hachem, Pascal, *The CISG – Successes and Pitfalls*, The Amercian Journal of Comparative Law, Volume 57, 2009, 457-478, p. 471.

829 Ferrari, *Interaction with Domestic Remedies*, 2007, p. 58 and p. 60.

830 Federal District Court of the Eastern District of Pennsylvania, USA, *Viva Vino Import v. Farnese Vini*, 29 August 2000.

831 Ferrari, *Interaction with Domestic Remedies*, 2007, p. 66, pp. 74-76 and p. 78.

considering the goal of unification and the approach is confirmed by the UNCITRAL Secretariat Commentary.[832]

Following the functional equivalent test, the CISG cannot pre-empt all domestic tort law, as the latter serves to protect a wider range of interests and is based on different policy considerations.[833] In this way the approach is similar to the one focused on the interests protected.

It has been suggested that a distinction between contractual and extra-contractual duties could work within the CISG regime, insofar as interests protected by the CISG (contractual) supersede tort claims. Other claims regarding extra-contractual duties outside the CISG can still be permitted.[834]

If the starting point is that the CISG prevails over domestic law and that concurrent tort claims are accepted when they seek to protect different interests than under the CISG, both circumvention of the Convention is prevented and its limited scope acknowledged.[835] At the same time tort law can still protect the more broad interests since a strict *non-cumul* rule is not applied.

In *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*[836] the adjudicator looked into whether a tort claim in fact was a contractual claim, in which case the CISG would pre-empt domestic tort law. In the case the claimant from USA acquired a sample of clathrate from the Canadian defendant together with a letter of support regarding manufacture and distribution of clathrate. The purpose was to get the clathrate approved by local American authorities for the production of medicine. After approval the claimant ordered 750kg of clathrate from the defendant so production could start, but the defendant rejected the order. The claimant sued, claiming that the

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832 Ferrari, *Interaction with Domestic Remedies*, 2007, pp. 66-67 and A/CONF.97/5, Commentary on The Draft Convention on Contracts for The International Sale of Goods, Prepared By The Secretariat, para. 2, p. 17 in A/CONF.97/19.

833 Ferrari, *Interaction with Domestic Remedies*, 2007, pp. 74-76.

834 Schlechtriem, *Borderland of Tort and Contract*, 1988, pp. 473-475.

835 Suggested by Kruisinga, *Conformity in CISG*, 2004, pp. 212-213.

836 Federal District Court of the Southern District of New York, USA, *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, 10 May 2002. See also Federal District Court of the Northern District of Illinois, USA, *Stawski Distributing v. Zywiec Breweries*, 6 October 2003 confirming that a *non-cumul* approach is not followed.

defendant was in breach of contract, was estopped from rejecting the order and had made negligent misrepresentations.

Though the adjudicator did not decide on the matter, two important details were stated regarding pre-emption. First, the concept of promissory estoppel adopted in article 16(2)(b) CISG is the same as the one in American domestic law so the latter would be pre-empted in order not to contradict the goal of uniform application of the CISG.

Second, since the claimant based its claim on a *different* domestic rule of estoppel and since the CISG has not adopted a similar reliance principle, or at least not according to any of the parties, the CISG did not pre-empt the domestic claim in this regard.

The adjudicator also found that a tort claim based on negligence is a matter outside the scope of the Convention and is thus left for domestic law. In this regard the CISG again does not pre-empt the domestic claim.

Also, in *Pamesa Ceramica v. Yisrael Mendelson Ltd.*[837] the Supreme Court of Israel had to decide whether a buyer of tiles from a manufacturer should be allowed to put forward a negligence-based tort claim when the claim according to the Convention was time-barred. In the case the buyer had purchased ceramic tiles in which a latent defect was discovered after the tiles had been put into a building and the tenants had moved in. The buyer sued for the purchase price and expenses for replacing the tiles.

The interesting conflict here is whether the buyer should be able to circumvent the fact that the notice of non-conformity was late according to the two-year prescription period in the CISG by forwarding a tort claim instead.

The adjudicator considered the approaches of pre-emption and interest protection and decided that since *domestic* tort law imposes a general duty of care on manufacturers so that they can be sued without the existence of a contract and since this rule protects interests different to the Convention, a concurrent tort claim should be permitted even though the promisee's rights according to the Convention were time-barred.[838]

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[837] Beit ha.M.ishpat ha'Elyon [Supreme Court], Israel, *Pamesa Ceramica v. Yisrael Mendelson Ltd.*, 17 March 2009.

[838] See also Lookofsky, Joseph, *CISG Case Commentary on Concurrent Remedies in Parmesa V. Mendelson*, Pace Law School, New York, USA, 2010.

The benefit of the approach is that the Convention pre-empts domestic law in the areas to which it was meant to apply and to interests that it seeks to protect. Such approach is more balanced than any of the other suggested approaches, which fail insofar as priority is given to merely *one* of several considerations.

### 7.1.5 The Temporal Effect of Article 80 – Excused in Total or in Part

Some provisions expressly indicates for how long they take effect, for example article 79(3) or the GIW § 294(1).[839] In regard to article 80, the contract is upheld by permitting the promisor to postpone his delivery for as long as the promisee's hindrance is impeding delivery.

Despite that the provision is silent on the matter, it follows from the process of sorting out cause and effect.[840] If delivery is prolonged first due to the promisor and later prolonged due to interference by the promisee, the promisee's remedies apply to the former period but not to the latter.[841]

The exemption is permanent if the promisor's performance has been made impossible or unreasonable by the promisee. The assessment whether it would be unreasonable to let the promisor demand performance is an assessment whether the promisor has incurred unreasonable extra costs or risk of such. This is elaborated *supra* section 6.3.3, p. 166 *et seq*.

#### *7.1.5.1 Total Exemption*

In an archetypical case, where the promisor was the sole case, *Propane Case,*[842] the seller did not name the place of loading, as he was obliged to do. In turn, the buyer could not open a L/C in which the information had to be stated. It would in fact have been possible for the buyer to open a blank letter of credit, thus fulfilling his duty to pay under the contract and article 53 CISG. However, the adjudicator stated that the details of the L/C are of utmost importance to the buyer and the '*… fact that a letter of credit can be opened without naming the exact place of loading, is not a decisive factor here …*'. Thus, it was unreasonable to demand a blank L/C when this had

839 See in general Rudolph in Wagner/Maskow, *Kommentary zum GIW*, 1983, § 294.

840 See *supra* section 6.2.1, p. 147 *et seq.*

841 Enderlein/Maskow, *International Sales Law*, 1992, p. 338.

842 Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996.

not been agreed and since the details in the L/C are to secure the order of the buyer.

A blank L/C would contain an additional risk for the buyer who would then risk of peayment being made since the delivery no longer had to match the terms and conditions specified in the L/C. Therefore, it is appropriate when the adjudicator excuses the buyer from not having paid, thus effectively excluding any remedy the seller is claiming.

However, article 80 streches beyond excluding the most obvious cases of interference with performance that may call for a partial exemption or an apportionment. Both approached effectively reaching the same result.

#### *7.1.5.2 Partial Exemption and Pro Rata Apportionment*

In regard to consequential damages it has been said that it sometimes would be unwise to lay down a categorical either-or rule and that it would be appropriate to apportion the damages.[843] Similarly under article 80 would an 'either-or' approach to shared responsibility either over- or under-compensate one of the parties, neglecting that they both caused one party's failure to perform.

It is appropriate to reduce the legal consequences for each party, thus, a *pro rata* apportionment according to each party's share of causation is called for. The view is supported, not only by the wording *'to the extent'*, but also because applying article 80 only to sole causation cases would be an inappropriately narrow interpretation of the provision.[844]

The interpretation is confirmed by the drafting history where it was clarified that in case of causation from both parties the provision would be sufficiently flexible to determine each party's share of the responsibility.[845] Further, a similar approach is followed in other international soft laws, for example UPICC 2004 article 7.1.2 that applies to such situations by virtue of article 7.4.7.[846]

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[843] Lookofsky, *Consequential Damages*, 1989, pp. 233-234 and p. 248.

[844] Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 250.

[845] A/CONF.97/C.1/SR.30, GDR, para. 7, p. 393 in A/CONF.97/19.

[846] Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 251. The wording of article 7.1.2 is the same in UPICC 1994, 2004 and 2010.

It is sustained that case law may be affected by ethnocentrism. However, even if the road to the result can be criticised, the outcome of the cases appear in line with the above interpretation of 80, which can be used as the sole basis for solving cases of shared responsibility in the future.

It is thus supported that article 80 applies to situations of shared responsibility,[847] but some argue that the provision follows an 'all-or-nothing' approach inappropriate for cases of shared responsibility.[848] Under such view it is suggested that article 77 or underlying principles of article 80 are the appropriate tools for adjudicating cases of shared responsibility[849] and that article 80 is only fit for cases where the failure to perform is caused *solely* by the other party.[850]

This view is rejected for three reasons. First, referring shared responsibility cases to article 77 is to ignore the mitigation/causation distinction accounted for *supra* chapter 4, p. 77 *et seq*. Second, it is to leave the words *'to the extent'* without meaning, contrary to common interpretation principles accounted for previously. Third, referring shared responsibility cases to the underlying principles of article 80 is possible, but unnecessary. Doing so contains a higher risk of non-uniform application since there is more room for interpreters to find, or not find, principles to be used before turning to

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847 Also, Herber and Czerwenka, *Internationales Kaufrecht*, 1991, article 80, para.s 7 and 8, pp. 360-362, Schwenzer, *Commentary on CISG*, 2010, article 80, para 7, pp. 1091-1092, Stoll and Gruber in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, article 80, para. 7, p. 841-842, Schäfer in Felemegas, *An Int'l Approach*, 2007, p. 250, Enderlein/Maskow, *International Sales Law*, 1992, p. 339, Tallon in Bianca/Bonell, *Commentary*, 1987, p. 598, Audit, *La Vente*, 1990, p. 180, Saenger in Bamberger, Heinz Georg and Roth, Herbert, *Kommentar zum Bürgerlichen Gesetzbuch*, C.H. Beck, München, 2nd edition, 2008, §§ 1-610 CISG, Article 80, para. 3, pp. 2233-2234.

848 Huber in Huber and Mullis, *The CISG*, 2007, pp. 267-268 and Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 14, pp. 794-795. See also Stoll and Gruber in Schlechtriem/Schwenzer, *Commentary on CISG*, 2005, Article 80, para. 7, n. 24, p. 841 where the authors in support of this view are listed as: Piltz, Schmid, Koziol, Soergel/Lüderitz/Dettmeier.

849 Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 15, p. 795 and Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 7, p. 1091-1092.

850 Piltz, Burghard, *Internationales Kaufrecht: das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung*, Beck, München, 1993, § 4, para. 214.

domestic law compared to relying on the wording of the provision as accounted for *supra* section 5.3.1, p. 134 *et seq.*

The concept of article 80 is that each party must bear the consequences of their conduct. A promisee who has entirely caused the promisor's failure to perform cannot win any remedies from such non-performance. In case the *'failures of the two parties are so closely interwoven that their effects cannot be delimited and attributed to the breach of contract which is the result'* it is appropriate to reduce the legal consequences[851] on a *pro rata* basis according to each party's causation.

A comparison of the parties in case of shared responsibility is called for in order to find a proportion according to which the consequences can be apportioned. When this is done, the remedies can be divided accordingly. Doing so is not problematic when the promisee has claimed a monetary remedy, but is more challenging regarding non-monetary remedies.

Monetary remedies consist of claims in money, such as damages, price reduction and interest. It is uncontroversial that the promisee's monetary claims can and should be reduced.[852] The *Yellow Phosphorus Case*[853] is recalled. Here the buyer's claim for damages occurring from having had to procure substitute goods were lowered to 70 % of its original claim because the buyer had caused inconvenience in the seller's performance.

In contrast, non-monetary claims of avoidance of contract and specific performance are characteristically difficult to apportion. It can seem illogical to allow 70 % avoidance of contract or 70 % specific performance.

Several approaches have been suggested for situations where a non-monetary remedy is claimed. First, that non-monetary remedies should not be apportioned, but that the promisee can only avoid the contract or demand performance if the promisor's contribution outweighs the promisee's and that the relative contribution can be taken into account in winding up the contract.[854] This position can be criticised for leading to random results

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851 Enderlein/Maskow, *International Sales Law*, 1992, p. 339.

852 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para 9, pp. 1093-1094.

853 China International Economic & Trade Arbitration Commission [CIETAC], China, *Yellow Phosphorus Case*, 9 August 2002.

854 Schäfer in Felemegas, *An Int'l Approach*, 2007, pp. 250-251.

since it relies on the adjudicator's discretion in determining the weight to be given to each party's causal contribution.[855]

Second, it has been suggested to be reasonable and consistent with the principle of article 77 and the duty to mitigate loss to let the promisee decide the remedy as long as he is willing to pay a financial contribution equal to his responsibility.[856] This will require that it to some extent is possible to put a price on for example 30 % of the right to avoid the contract or have specific performance. The focus in this view is the party's will to pay a financial contribution. This is in contrast to the following view.

Third, that it should be possible for the adjudicator to award damages instead of the non-monetary remedy claimed by the party.[857] This could support a view that the adjudicator has the right to reject a non-monetary claim and award partial damages instead. Whether such view is appropriate may depend on how far the party autonomy is respected at the dispute resolution forum.

Fourth, it has been provided that where apportionment is not practicable, the promisee cannot rely at all on the non-performance of the promisor.[858] This view is the one supported at present insofar as it resembles the already existing system of remedies in the Convention. The different remedies found in the Convention have different requirements and it is not unfamiliar that one remedy may apply when another will not. If a party puts forward a claim for which the prerequisites is not entirely met, that party bears the risk of taking a stand like in any other case.

A partial interference may provide, say 70 % damage recovery, but this does not mean that there should be access avoidance. The remedy of avoidance is qualified by requiring the promisor's breach to be fundamental.[859] In this way, a concept similar to that of article 80 may be considered to be embedded in the requirement of fundamental breach. In effect, the promisee may lose his right to avoidance due to partial interference, but he may retain access to for example damages.

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855 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para 9, pp. 1093-1094.

856 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para 9, pp. 1093-1094, Schwenzer and Manner, *The Pot Calling the Kettle Black*, 2008, p. 479.

857 Tallon in Bianca/Bonell, *Commentary*, 1987, p. 598.

858 Schäfer in Felemegas, *An Int'l Approach*, 2007, pp. 250-251.

859 See aticles 49 and 25 of the Convention.

The remedy of specific performance is also qualified. To receive substitute goods a fundamental breach is required and repair is qualified by the standard of reasonableness. It is thus conceivable that a promisee who has partially caused the promisor's non-performance cannot claim substitute goods, but maybe repair of the goods, as the latter remedy is under a less strict requirement.

It is thus proposed that the apportionment of non-monetary remedies is carried out by considering the particular requirements for the claimed remedy in light of the interference by the promisee and the underlying principles of article 80. In effect, non-monetary remedies end up being applied with an 'either-or' approach, though with the difference that the reprehensible behaviour in sense of article 80 is to be considered.

## 7.2 The Promisor's Position

### 7.2.1 The Right to Counter-Performance

On one hand, application of article 80 means that the promisor is excused from his non-performance and consequently, the promisee must accept the otherwise non-conforming goods or delay in delivery.[860]

On the other hand, the promisee's duty to perform remains unaffected,[861] though this does not appear expressly from the text of article 80 CISG.[862] The promisor's right to counter-performance from the promisee remains unaffected, precisely because the reason for the promisor's non-perfomance is the responsibility of the promisee.[863]

Though the promisor has the right to receive performance from the promisee, the questions remains; Whether further claims can be advanced in supplement to the exemption found in article 80 and whether the right to

860 Enderlein/Maskow, *International Sales Law*, 1992, p. 336.

861 Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 18, p. 796.

862 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 8, p. 1092-1093. GIW § 294(2) expressly regulated this issue.

863 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 8, p. 1092-1093.

counter-performance is affected by costs or benefits caused by the interference? These two issues are dealt with in turn below.

### 7.2.2 Supplementary Claims

If the promisor whish to supplement the defence of article 80 with further claims, these cannot be based on the application of article 80, but must appear from the application of other provisions[864] as a consequence of a breach. *'Article 80 gives [promisor] only a shield when [he] needs a sword.'*[865]

The counter-claim could be based on for example a provision like article 60(a),[866] which requires the buyer to take delivery and take performance-enabling steps.[867] Claims can be based on the breach of this duty, but not on interfering conduct in the sense of article 80, though there may be an overlap in this regard.[868]

This is due to the fact that the promisee's interfering conduct in the sense of article 80 not necessarily qualifies as a breach of contract.[869] However, if the promisee's causation of the promisor's failure to perform constitutes a breach of contract in itself, the promisor is not only exempt from his own non-performance, but can derive further claims from that separate breach according to the rules of the Convention.[870]

Since the supplementary claims have to be based on a breach of contract, the usual limits for its applicability can be used. Thus, the claim may for example be limited to other remedies than damages if the promisee's inter-

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[864] Flechtner/Honnold, *Uniform Law,* 2009, p. 647.

[865] Flechtner/Honnold, *Uniform Law,* 2009, p. 647.

[866] Flechtner/Honnold, *Uniform Law,* 2009, p. 647.

[867] Mohs in Schwenzer, *Commentary on CISG*, 2010, article 60, para. 9, p. 864. See for example China International Economic & Trade Arbitration Commission [CIETAC], *Molybdenum Alloy Case,* 30 April 1997, in which the buyer was liable to pay damages since it did not apply for inspection and L/C as required by the contract and CISG article 60.

[868] Similarly under GIW § 294 according to Rudolph in Wagner/Maskow, *Kommentary zum GIW*, 1983, § 294, para. 10, p. 426.

[869] See supra section 6.3, p. 162 *et seq.*

[870] Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 10, p. 1094, Enderlein/Maskow, *International Sales Law*, 1992, p. 336, Magnus in Honsell/Karollus, *UN-Kaufrecht*, 1997, article 80, para. 6, p. 995

ference that constitute's a breach is due to an impediment beyond control in the sense of article 79.[871]

### 7.2.3 Consequential Costs and Benefits

Should the promisor file a counter-claim, it must accept a reduction for anything that is saved or could have been saved from being exempt from liability since the promisor ought not to be put in a better position when being excused than if he had performed correctly.[872] The promisor may experience saved costs as a result of the performance being excused, for example saved costs for transportation, packaging or production.[873]

One thing is saved costs, another is benefit or 'fruits' derived from the performance in question. As an example, a seller may fail to perform the duty to deliver the goods if the buyer does not take the delivery. This is clearly a breach by the buyer and any claim based on the seller's non-performance would be lost according to article 80 CISG. If the seller in such situation does not demand avoidance of the contract, he may eventually have to sell the goods if the buyer insists on not taking delivery.

Under the Convention, the proceeds of such a self-help sale belong to the owner of the goods – in the example here the buyer. However, the party who conducts the self-help sale can deduct from the proceeds reasonable expenses for storage and sale.[874] Thus the seller may not acquire the benefit of the goods.

Costs for storage can be covered since they stem from a breach in itself[875] – the duty to take delivery. Similarly, and following a principle in articles 44, 77 and 80, a seller may deduct damages caused by the buyer's late, though excusable, notice of non-conformity.[876]

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871 Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 7, p. 793, Enderlein/Maskow, *International Sales Law*, 1992, p. 336. Similarly under PECL according to Butler in Felemegas, *An Int'l Approach*, 2007, pp. 506-507.

872 Magnus, *Wiener UN-Kaufrecht*, 2005, article 80, para. 18, p. 796 and Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 8, p. 1092-1093.

873 Similar in GIW according to Rudolph in Wagner/Maskow, *Kommentary zum GIW*, 1983, § 294, para. 7, p. 426.

874 Bacher in Schwenzer, *Commentary on CISG*, 2010, article 88, para. 18, p. 1168.

875 Bacher in Schwenzer, *Commentary on CISG*, 2010, article 85, para. 17, p. 1152.

876 Enderlein/Maskow, *International Sales Law*, 1992, p. 173.

If the situation is reversed, so that the buyer fails to pay because the seller will not accept payment, the question is whether the interest accrued are to be handed to the seller who would otherwise have had the chance to earn interest if payment had been timely. The position is that since article 80 bars the party from relying on the money being in arrears, which is a precondition for obtaining the right to interest under article 78 CISG.[877]

Thus, the position of the buyer and the seller is in this regard asynchronous. It should be noted that these issues are not solved in practice. The difference may be explained by the fact that storage of goods on behalf of the buyer will typically incur costs in the form of storage costs or the goods may deteriorate. Money, however, will usually earn an interest and not necessarily deteriorate or incur storage costs to the same extent as physical goods.

## 7.3 Concluding Argument

The consequence of application of article 80 is that promisor is exempt from responsibility and the promisee therefore has to accept the otherwise non-conforming or delayed performance. Any claim raised by the promisee relying on an excusable conduct in the sense of article 80 is precluded by the provision.

Similar to what is accepted in international soft law, all remedies are affected by the provision, including those appearing from the Convention, the contract, domestic sales and tort law.

Exemption from responsibility may be both total and partial. The latter is relevant when the interference by the promisee is not the only cause or only a weak causal link is possible to establish.

Regarding apportionments of remedies it is necessary to distinguish between monetary and non-monetary remedies. Monetary remedies can be apportioned whereas non-monetary remedies call for an either-or approach. The interference by the promisee should be considered under the unique requirement under each non-monetary remedy.

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[877] Bacher in Schwenzer, *Commentary on CISG*, 2010, article 78, para. 17, pp. 1052-1053 and Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 8, pp. 1092-1093.

The promisor retains his right to performance after being excused from his own non-performance according to article 80. However, additional claims cannot be based on article 80, but must follow from a separate breach of contract. Any costs experienced as a result of the promisee's interference can be sought recovered. At the same time, saved costs or benefits following from the exemption from responsibility must be deducted or handed back to the promisee.

# 8. Domestic Law and Homeward Trends

It has been argued that most domestic systems have rules similar to article 80.[878] From the investigation carried out below this appears to be true. However, this does not make article 80 a restatement of globally recognized principle since the Nordic region does recognize such principle. Thus, the need to unify sales laws existed also in regard to article 80.

This leads to the next issue. As indicated previously, one of the adversaries of uniformity in the application of the Convention is the ethnocentric application of the uniform text – or the homeward trend. The cursory comparison in section 8.2, p. 210 *et seq* aside, two issues are dealth with in turn in the following.

First, that the incorporation of CISG into domestic law in Norway has been carried out in a way that brings the Convention text itself in line with the traditional Nordic legal rule of *mora creditoris*. This ethnocentric transformation is accounted for in section 8.3, p. 211 *et seq* where it at the same time is demonstrated that the Nordic region does not recognize a rule similar to article 80, thus rejecting its status as a global restatement of sales law.

Second, that case law from China and Russia appear to apply a *pro rata* approach more frequently. The possibility that this is being done in order to bring the application of the Convention in line with domestic Chinese and Russian law is investigated *infra* in section 8.4, p. 223 *et seq*. Looking into the domestic law of these two regions will reveal whether the application trends are due to a sophisticated approach to article 8o CISG or whether it is more likely that they are affected by domestic rules. If the former is the case, these cases could serve as ideal cases to be followed by other jurisdictions in the future.

Knowing whether certain jurisdictions are affected by ethnocentrism makes it possible to evaluate the interpretive value of case law from such jurisdictions. For more in this regard, see *supra* section 2.2, p. 17 *et seq*. Before addressing each issue, it is appropriate to reveal the comparative method applied.

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[878] Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 1, p. 1088.

## 8.1 Comparing Legal Systems

In order to reveal whether the Convention is being applied in a manner that brings it in line with the adjuducators domestic legal home law it is necessary to compare the CISG rule with that particular domestic legal system. Thus, a comparative method is called for.

Comparative law is a method of comparing[879] and it comprises two main types that to some extent overlap each other; descriptive and applied comparative law.

Descriptive comparative law is an analysis of variations between jurisdictions without being directed towards a particular problem or issue, but rather the aim is to furnish information.[880] Applied comparative law is an analysis of variations with the purpose of, among others, to develop abstract theories of law, and trace the origins and evolution of concepts, thus clarifying problems of either abstract or specific nature.[881]

The applied comparative analysis often aims towards reforming or unifying divergent laws, especially in the law of obligations[882] and is thus rather suitable for the purpose of explaining article 80's role in the CISG.

Although the comparative methodology has been said to still be in an experimental stage, it has been recommended that a comparison should be carried out by first accounting for, and juxtaposing, the laws of each of the countries selected for comparison and then subsequently a critique and conclusion can be based on the material.[883] In this regard there is an overlap to the descriptive comparative law and the comparison carried out below follows this approach.

It is pointed out that a comparison does not imply that a particular solution is the best.[884] In the present chapter, the comparison has the purpose of finding domestic equivalents to article 80 CISG. The task of comparing

879 Gutteridge, *Comparative Law*, 1946, pp. 1-2, Zweigert/Kötz, *Comparative Law*, 1998, p. 2.

880 Gutteridge, *Comparative Law*, 1946, p. 8.

881 Gutteridge, *Comparative Law*, 1946, p. 9.

882 Gutteridge, *Comparative Law*, 1946, p. 9, p. 33.

883 Zweigert/Kötz, *Comparative Law*, 1998, p. 6, p. 33, p. 43.

884 Gutteridge, *Comparative Law*, 1946, p. 33.

raises two questions. First, which features or functions are to be compared (8.1.1) and which domestic systems will be investigated (8.1.2). The latter has already been dealt with above, but a few additional comments on the present context of methodology are provided below.

### 8.1.1 Criteria Selected

If a rule similar to article 80 is recognized in domestic law the application of the relevant domestic rule would lead to a similar outcome as article 80. This is tested and accounted for in the present chapter.

The main concept of article 80 is to bar the promisee's claim based on the promisor's non-performance if the non-performance has been caused by the promisee. The exclusion can be either total or partial. As also indicated elsewhere, article 80 allows in theory for an apportionment of remedies in situations of shared responsibility.[885]

If it is true that some domestic laws already contain a concept similar to article 80 CISG, thus making the provision a restatement, these features must be possible to identify in domestic systems. Therefore the selected domestic systems are matched against an archetypical case (*Propane Case*) and a shared responsibility case (*Sensitive Russian Components*) discussed previously.[886]

Considering the discussion of drafting style it should also be investigated whether domestic laws in general adopt rules with a drafting style similar to article 80, thus explaining why the adoption of the rule in the CISG was uncontroversial. Relating to the issue of drafting style is the systematic placement of the rule similar to article 80. It will be recalled that several views on the correct systematic home of article 80 was expressed during the drafting and that this questions whether the provision is in fact an exemption or more a general rule.[887] This too is a feature that should be investigated in domestic law contexts.

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[885] See Neumann, *Shared Responsibility,* 2009.

[886] See *supra* p. 195 *et seq* and p. 153 *et seq*. See also Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996 and International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003.

[887] See *supra* section 3.2.1, p. 63 *et seq*.

It is article 80's functional equivalent that is sought for in domestic law and the questions guiding the comparison is as follows;

- First, does the domestic system contain a concept similar to article 80's archetype?
- Second, does the domestic system contain a *pro rata* concept similar to article 80 regarding shared responsibility type?
- Third, where is the domestic rule placed systematically?
- Fourth, how is the drafting style of the domestic rule?

Comparing the answers to the questions outlined here will give an indicator whether article 80 can be said to be a restatement of an already globally recognized domestic law principle. Further, it will reveal possible different domestic solutions, thus possibly explaining tendencies of ethnocentrism in the incorporation and application of the Convention text.

### 8.1.2 Selection of Countries

For the sake of the methodological discussion, the considerations of selecting items to compare are addressed at present. Ideally, all CISG states should be compared. However, currently 76 states have ratified the CISG and it would be impossible within the limits of the current work to account for the domestic law of all countries with legal sources being in languages from Albanian to Uzbek.[888]

The draft of the CISG by the working group was finalized during a diplomatic conference under which 68 countries were represented in two committees dealing with each their part of the draft.[889] It was during the negotiations by the First Committee that article 80 was suggested and thus the provision was introduced rather late in the process as well. It is beyond the limits of this work to consider 68 domestic systems.

Grouping countries into similar legal systems and subsequently comparing representative systems from each group could be a way of limiting the number of countries that have to be investigated for a comparison. However, it

[888] United Nations Commission on International Trade Law (UNCITRAL), Status regarding the 1980 United Nations Convention on Contracts for the International Sale of Goods.

[889] Flechtner/Honnold, *Uniform Law,* 2009, pp. 10-12.

is not self-evident how one is to group legal systems in families and how many there should be.[890]

The Nordic system consisting of Denmark, Finland, Iceland, Norway and Sweden is interesting, not only due to its '*… refreshing lack of dogma*',[891] but also because these states have chosen different ways to modernize their domestic contract laws. Regarding the latter, it is interesting to see how article 80 CISG has been dealt with as it may reveal to the extent it applied in the region already, both before and after the conclusion of the CISG. Considering this, an analysis of the Nordic system is conducted in section 8.3, p. 211 *et seq.*

It has been argued that in the field of private law comparisons can be limited to the parent systems of the Romanistic family with focus on France and Italy, the Anglo-Saxon family with focus on America and England and the Germanic family with focus on Germany and Switzerland.[892] Traditionally, these three groups could be selected for comparison. However, considering the frames of the present work the analysis will be more cursory in this regard.

More interesting, is to observe that cases concerning what appear to be *pro rata* solutions possible to subsume under article 80 CISG are being produced by Russia and China. The domestic systems of these two jurisdictions are selected to reveal whether the cases being produced are due to a developed approach to article 80 or perhaps an expression of ethnocentrism due to familiarity with an article 80-like concept from domestic law.

The criteria and countries selected will give an indication as to whether or not a concept similar to article 80 is already recognized in domestic law, thus applying anyway, and possibly explain why the adoption of article 80 was uncontroversial and why the drafters chose the drafting style they did.[893] In addition, it will be revealed whether case law that can seemingly be categorized under article 80, is in fact an expression of ethnocentrism.

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890 For a discussion see Zweigert/Kötz, *Comparative Law*, 1998, pp. 63-73.

891 Zweigert/Kötz, *Comparative Law*, 1998, p. 41.

892 Zweigert/Kötz, *Comparative Law*, 1998, p. 41.

893 See *supra* section 3.2, p. 62 *et seq.*

## 8.2 The Three Legal Families

It has been asserted that the Anglo-American legal family does not have an express contract law principle similar to article 80.[894] However, at least in the archetype situation,[895] a similarity to UCC § 2-609(1) is noticed.[896]

Looking at the Germanic legal family, it has been provided that rules comparable to article 80 are contained in the German Bürgerliches Gesetzbuch (BGB) § 254(1), the Swiss Obligationsrecht (OR) articles 44(1) and 99(3) as well as the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB) § 1304.[897] The German BGB § 254(1) reads;

> 'Contributory culpability
> (1) Where culpability on the part of the aggrieved party contributed to the liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage was caused mainly by the one party or the other one.'[898]

ABGB § 1304 reads;

> 'If a party is at fault and has suffered harm, he shall bear the proportionate part of the damage and if a ratio cannot be established the parties share equally.'

Interestingly, the Germanic rules appear to allow for *pro rata* apportionments in the case of shared responsibility.

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894 Schwenzer and Manner, *The Pot Calling the Kettle Black*, 2008, p. 473.

895 See for more on the archetype situation, *supra* section 6.2.1, p. 147 *et seq.*

896 Noticed by Kritzer, Albert H. and Pace Institute of International Commercial Law, *International Contract Manual*, Thomson/West, St. Paul, 2008 edition, p. 657. UCC § 2-609(1), (Right to Adequate Assurance of Performance) 1st sentence reads; *'A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.'*

897 Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 1, fn. 3, p. 1088.

898 Translation by Dr. Ulrike Aschermann-Henger, Maria Bühler, Dr. Paul Conlon, Alison Mally, Dr. Margaret Marks, Katharina Schmalenbach, Gabriele Schuster, André Wahab at Juris GmbH.

The Romanistic legal family is also said to contain rules comparable to article 80, for example in the Italian Il Codice Civile Italiano (CCI) article 1227(1) and the Portuguese Código Civil Português (CCP) article 570.[899]

The Italian CC article 1227(1) reads under *'Negligence of the Creditor'*;

> 'If the fact of the creditor's negligence contributed to causing the damage, the compensation shall be reduced depending on the seriousness of sin and the magnitude of the consequences that have followed.'

The Portugese CC article 570 has a similar heading and reads;

> 'When a fault of the victim has contributed to the production or aggravation of damages, the Court shall determine, based on the degree of fault of both parties and the consequences resulting there from, whether compensation should be fully paid, reduced or exempted.'

Like the Germanic rules it appears that *pro rata* apportionments are appropriate in shared responsibility cases.

Interestingly, all of the rules expressly provide a sanction for the promisee's contributory fault, negligence or culpa. Naturally, one may say, but it has been argued in the context of the Convention's article 80 that such subjective elements as fault should not be decisive when conducting a *pro rata* apportionment in shared responsibility cases.

In spite of the resemblance to many domestic rules, the Nordic countries do not recognize a rule similar to that of article 80. This is demonstrated immediately below. As a consequence, article 80 is not a restatement of a common characteristic of domestic law in all CISG states.

## 8.3 Ignorance in Transformation

The five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) used to have rather similar domestic sales laws.[900] For this reason

[899] Schwenzer in Schwenzer, *Commentary on CISG*, 2010, article 80, para. 1, fn. 3, p. 1088.

[900] This is true also for Finland and Iceland, though they did not participate in the law cooperation between Denmark, Norway and Sweden, see Konow, Berte Elen;

these countries made a reservation so that the Convention is excluded in the so-called inter-Nordic sales where the trading parties have their place of business in a Nordic country.[901]

However, this position has changed since the countries have subsequently developed new and different domestic laws. It has been argued that the inter-Nordic reservation no longer is rational[902] and the process of revoking the reservation seems to have been initiated.[903]

Denmark chose to adhere to the CISG by making a reference to it and at the same time the domestic Sale of Goods Act from 1906 was left for domestic sales. Sweden and Finland chose to modernise their domestic sale of goods acts with inspiration from the CISG, but at the same time leaving the CISG for international sales. Norway and Iceland chose to completely translate and transform the CISG into a new hybrid law meant for both domestic and international sales.

Because the states started on a common ground and then moved in each their direction there is a good basis for comparing various legislation styles.

### 8.3.1 Norway and Iceland

The Norwegian and Icelandic systems are interesting insofar as the countries chose to translate and transform the CISG into a hybrid law meant for both domestic and international cases. Due to language difficulties regarding the Icelandic sources, the focus in the following is on the Norwegian law. The solution of transformation has been described as *'a major mistake*', among other reasons, because it creates discrepancies between language

Bergem, John Egil and Rognlien, Stein, *Kjøpsloven 1988 og FN-Konvensjonen 1980 om Internasjonale Løsørekjøp: Med Kommentarer*, Gyldendal Akademisk, Oslo, 3rd edition, 2008, [Konow, Bergem, Rognlien, *Kjøpsloven*, 2008], p. 23.

901 Denmark, Finland, Iceland, Norway and Sweden have all made a reservation according to CISG art. 94. See UNCTRAL, Status of 1980 United Nations Convention on Contracts for the International Sale of Goods.

902 Ramberg and Herre, *Köplagen*, 1995, p. 47, Lookofsky, *Understanding CISG,* 2008, p. 173.

903 In Denmark, see Statsministerens Redegørelse i Folketinget [*The Prime Minister's Report in the Parliament*], Skriftlig Del, Tirsdag d. 6. Oktober 2009, p. 11.

versions, which in turn questions whether the legislature intended to depart from the CISG rule or merely made a mistake.[904]

In this regard it is interesting to see that Norway did not just literally translate and adopt article 80 CISG directly. A Norwegian equivalent cannot be found just by reading the Norwegian Sale of Goods Act (NSGA). This could be because Norway ignored the provision, thought it would apply anyway without a need for an express provision or incorporated it elsewhere in the new law.

#### *8.3.1.1 Article 80 in NSGA*

An investigation of the NSGA and its preparatory works reveals that the drafters were of the opinion that they had included article 80 CISG in NSGA § 22(1) and § 30.[905] These two provisions, as well as § 51 catalogue the seller's and buyer's remedies in case of a breach and are equivalent to the CISG articles 45 and 61.[906] This is also reflected in the Icelandic Merchant and Trade Act (IMTA) § 22, § 30 and § 51.

The CISG articles 45 and 61 deal with the seller's breach and buyer's breach respectively. In NSGA the same issue is covered in three articles since the seller's delay and non-conformities are dealt with in § 22 and § 30 respectively.

In contrast to the CISG the catalogue rules in NSGA contain an additional requirement compared to the equivalent CISG rules. A comparison reveals this. The CISG article 45(1) states that *'[i]f the seller fails to perform any of his obligations under the contract or this Convention, the buyer may'* exercise the catalogued remedies.

NSGA § 22(1) reads[907] *'[i]f the goods are not delivered or are delivered too late and this is not due to the buyer or his circumstances, the buyer may'* exercise

[904] Krüger, *Norsk Kjøpsrett*, 1999, pp. 671-672. Issues of language characterises international sales law, see *supra* section 2.3, p. 30 *et seq.*

[905] Norwegian Preparatory works, Ot. prp. nr. 80 (1986-1987), Om A Kjøpslov B Lov om samtykke til ratifikasjon av FN-konvensjonen om kontrakter for internasjonale løsørekjøp, vedtatt 11 april 1980, [Norway, Ot. prp. nr. 80, 1986-1987], p. 184.

[906] Konow, Bergem, Rognlien, *Kjøpsloven*, 2008, pp. 116, 165 and 267. Confirmed by the Norwegian Preparatory works, Norway, Ot. prp. nr. 80, 1986-1987, pp. 65, 78 and 104.

[907] Present author's translation from the Norwegian law text.

catalogued remedies. Similarly, an additional sentence has been added to the catalogue rules in NSGA § 30 and § 51.

#### *8.3.1.2 Systematic Placement*

The effect of adding the sentence in NSGA's catalogue rules is that the provisions presuppose that the other party did not induce the non-performance.[908] Only a non-performance that is not caused by circumstances imputable to the aggrieved party's sphere of risk is relevant under SGA §§ 22, 30 and 51.[909] Consequently, the equivalent of article 80 acts as a definition barrier of which non-performances will be considered to be a breach, and not as a possibility of exemption from an already established breach as the systematic placement of article 80 in the CISG indicates.

It is irrelevant whether the buyer was at fault or not,[910] thus it would be the buyer's responsibility if he cannot acquire the necessary import document or accidentally does not take delivery.[911] This is similar to the archetype for article 80 CISG.

The assessment whether a circumstance falls under either the buyer or seller's sphere of risk depends on a broad and rather open interpretation.[912] This is also similar to the archetype for article 80 CISG.[913]

#### *8.3.1.3 Already in Existence*

The transformation of the CISG into Norwegian law has not changed the concept that the promisee's self-induced non-performance cannot be the basis for remedies[914] (*kreditor mora*). This supports that a rule similar to article 80 was already in existence in Norway before the incorporation of

[908] Krüger, *Norsk Kjøpsrett*, 1999, p. 521 and confirmed by the Norwegian Preparatory works, Norway, Ot. prp. nr. 80, 1986-1987, pp. 65 and 104.

[909] Hagstrøm, *Kjøpsrett*, 2005, pp. 135, 175 and 247, Konow, Bergem, Rognlien, *Kjøpsloven*, 2008, pp. 117, 165 and 269.

[910] Krüger, *Norsk Kjøpsrett*, 1999, p. 284, Konow, Bergem, Rognlien, *Kjøpsloven*, 2008, pp. 117, 165 and 269.

[911] Norwegian Preparatory works, Norway, Ot. prp. nr. 80, 1986-1987, p. 65.

[912] Krüger, *Norsk Kjøpsrett*, 1999, p. 368.

[913] See for example also *supra* section 6.2.1.1, p. 148 *et seq.*

[914] Krüger, *Norsk Kjøpsrett*, 1999, p. 308.

the CISG into NSGA. The original Nordic system of *mora creditoris* remains unaltered in Danish law and the character of it is investigated *infra* 8.3.2.

With the current wording of the Norwegian catalogue rules, the *'may not rely on'* of article 80 CISG has been successfully incorporated. However, the small, but important addition, *'to the extent'* is nowhere to be found. One may ask if the Norwegian legislature has excluded the possibility to conduct apportionments in cases of shared liability, which in theory is possible under article 80 CISG.[915]

The Norwegian legislature has chosen to incorporate article 80 as part of the rules defining which non-performances can constitute a breach of contract. Whether the solution of translation and transformation is an appropriate incorporation of the CISG is interesting, especially if outcomes of similar cases will be different depending on the application of either a UN authentic CISG version or the transformed Norwegian version. The Norwegian transformation may be a breach of the international agreement among states.[916]

### 8.3.2 Denmark

In contrast to Norway and Iceland, Denmark did not choose to modernize its domestic sales act at all and incorporated the Convention by reference.[917] Therefore, the older domestic sale of goods act applies alongside the CISG, for domestic and international sales respectively.

#### *8.3.2.1 Article 80 Equivalent in DSGA*

The Danish Sale of Goods Act (DSGA) does not contain a directly and literally equivalent to article 80 CISG in its text. However, like the system in Norway both before and after incorporation of the CISG, claims based

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915 Neumann, *Shared Responsibility,* 2009.

916 Also pointed out in regard to NSGA § 27 by Hagstrøm, *Kjøpsrett*, 2005, p. 38-39. See also Hagstrøm, Viggo, *CISG – Implementation In Norway, An Approach Not Advisable*, Internationales Handelsrecht: International Commercial Law, Volume 6, 2006, 246-248, pp. 246-248.

917 LOV nr 733 af 07/12/1988, *International Købelov*. The law is merely 5 articles and incorporates by way of reference. The appendix to the law was a Danish translation, not transformation, of CISG.

on non-performance are excluded if they are due to the promisor's circumstances (*fordringshavermora*).

DSGA § 21(1) reads *'If the goods are not delivered by the agreed time and this is not due to circumstances attributable to the buyer or an accidental event for which the buyer bears the risk, the buyer may demand performance or declare the contract avoided.'* [918] Similar to the NSGA, the provision presupposes that the non-performance is not due to the other party's circumstances. Insofar as the Danish system expresses the former Norwegian system, the new NSGA made no change to the old position.[919]

The Danish concept of *mora creditoris* is not entirely regulated by law, but follows from underlying principles.[920] Consequently, and despite the fact that that the text of DSGA is silent on the issue, the *mora creditoris* concept applies to § 28 regarding the buyer's delay and §§ 42-46 regarding non-conformities in the goods.[921]

#### *8.3.2.2 Systematic Placement*

Similar to the current Norwegian system, the Danish concept of *mora creditoris* is placed as part of the determination whether a non-performance is a breach or not. The effect is that in the case of *mora creditoris*, the promisee has no remedies since the failing party is not in breach at all.[922] Therefore, a claim made by a promisee that has caused the promisor's non-performance would be groundless and should be rejected.

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[918] Translation by Associate Professor, PhD, Sandro Nielsen, Department of Language and Business Communication, Aarhus School of Business.

[919] See *supra* section 8.3.1.3. p. 214 *et seq.*

[920] The concept is e.g. also expressed in DSGA § 74(1) and *Gældsbrevsloven* § 7(3), LBK nr 669 af 23/09/1986.

[921] Børge Dahl, Supreme Court Judge, in Eyben, Bo Von; Pedersen, Jan and Rørdam, Thomas (eds.), *Karnov*, Thomson Reuters Professional, Copenhagen, 25th edition, 2009, [Eyben, et. al., *Karnov*, 2009], volume 4, p. 6073, fn. 163, Ussing, Henry, *Obligationsretten. almindelig del. [1937]*, Juristforbundet, Copenhagen, 4th edition, 1967, p. 58, Nørager-Nielsen, Jacob, et. al., *Købeloven med Kommentarer*, Thomson, Copenhagen, 3rd edition, 2008, p. 800.

[922] Lookofsky and Ulfbeck, *Køb*, 2008, p. 221, Edlund, Hans Henrik; Ørgaard, Anders; Clausen, Nis Jul and Kruse, Anders Vinding, *Købsretten*, Thomson Reuters, Copenhagen, 4th edition, 2009, p. 17 and p. 203.

This explains the statement made by a Danish commentator to the CISG article 80: *'When the buyer does not take delivery the non-performance is obviously not a delay by the seller.'* [923] Though a non-delivery by the seller under the Convention is a breach of contract, he can be exempt from liability according to article 80. An example is seen in an archetype situation, *Automobiles Case,*[924] where the buyer according to article 80 lost the right to claim damages from the seller's non-delivery of some ordered cars since it was the buyer who did not take delivery of the cars because of a disadvantageous currency exchange rate.

Also similar to the NSGA, the *mora creditoris* concept applies irrespective of the promisee's fault.[925] The promisee's hindrance of performance can be either factual, for example where the goods are not picked up, or legal, for example where the promisee will not pay, but is willing to receive the goods.[926] An example of the latter was seen in *Leather Goods Case*[927] where the seller raised a claim for payment that had not been received, probably because the payment was lost in transit as it was sent in cash with a carrier. Though it would be a breach by the seller to withhold delivery, the buyer lost its right to claim damages by virtue of article 80 since it had not paid for delivered goods yet.

### 8.3.3 Finland and Sweden

Finland and Sweden chose to modernise their domestic sales acts with inspiration from the CISG[928] and let the latter apply concurrently to international sales.

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923 Børge Dahl, Supreme Court Judge in Eyben, et. al., *Karnov*, 2009, volume 4, p. 6112, fn. 236. Present author's translation. Original commentary reads; *'Der foreligger selvsagt ikke forsinkelse fra sælgers side, når ikke-levering alene skyldes købers manglende afhentning.'*

924 Oberlandesgericht München [Appellate Court], Germany, *Automobiles Case*, 8 February 1995.

925 Gomard, Bernhard, *Obligationsret: 2. Del*, Jurist- og Økonomforbundets Forlag, Copenhagen, 3rd edition, 2003, [Gomard, *Obligationsret,* 2003], p. 12, Børge Dahl, Supreme Court Judge in Eyben, et. al., *Karnov*, 2009, volume 4, p. 6068, fn. 111.

926 Gomard, *Obligationsret,* 2003, p. 248.

927 Oberlandesgericht München [Provincial Court of Appeal], Germany, *Leather Goods Case*, 9 July 1997.

928 Ramberg and Herre, *Köplagen*, 1995, p. 37.

#### *8.3.3.1 Article 80 Equivalent*

Similar to the other Nordic sales acts, the Swedish Sale of Goods Act[929] (SSGA) and the Finnish Sale of Goods Act (FSGA) contain the presumption that only non-performance that is not due to circumstances imputable to the other party is a breach.[930] This appears from SSGA § 22 and § 30 regarding the seller's non-performance and from § 51 regarding the buyer's non-performance. Similarly, this is found in FSGA §§ 22, 30 and 51.[931]

The rules in the CISG articles 45 and 61 are similar to SSGA § 22, § 30 and § 51[932] and FSGA § 22, § 30 and § 51 insofar as they are all catalogue rules. Both laws contains the same additional words in the catalogue rules as the NSGA, for example the SSGA § 22 states that if the seller does not deliver or deliver too late and this *'is not due to the buyer or his circumstances'* the buyer may use the listed remedies.

#### *8.3.3.2 Systematic Placement*

Again, and similar to the other Nordic sales acts the equivalent of article 80 is placed as a definition barrier regarding which non-performances can be considered a breach. As examples, a delay is not a breach if it is due to the buyer's omission to send a ship as required[933] and a seller is not responsible for non-conformities that are due to the buyer's defective instructions regarding production or payment or the buyer's provision of defective material.[934]

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929 Swedish Sale of Goods Act, Köplagen, (1990:931), 06-09-1990.

930 Ramberg and Herre, *Köplagen*, 1995, p. 311. pp. 375-376 and p. 513.

931 The similar numbering is due to the fact that the new FSGA and SSGA is a product of the same Nordic law cooperation concerning modernization of the Nordic sales acts, see Konow, Bergem, Rognlien, *Kjøpsloven*, 2008, pp. 32-33, Krüger, *Norsk Kjøpsrett*, 1999, p. 28.

932 Jori Munukka, Commentary to the Swedish Sale of Goods Act, fn.s 84, 122, 195 and 196, see also the comparisons in Ramberg and Herre, *Köplagen*, 1995, p. 310, p. 375, p. 512.

933 Example from Jori Munukka, Commentary to the Swedish Sale of Goods Act, fn. 86.

934 Ramberg and Herre, *Köplagen*, 1995, p. 376 and p. 513. The example regarding production would in CISG arguably be placed under article 35(2)(b), see *supra* section 4.2.1, p. 95 *et seq.*

### 8.3.4 Comparison and Effect

Though the Nordic sales acts developed differently from a common outset there is a great similarity regarding the concept *mora creditoris*.[935]

All Nordic sales acts will exclude a promisee's claim in the case of the cause of the promisor's non-performance being the promisee himself. This is done from the fact that in case of *mora creditoris* the promisor's non-performance is not considered a breach at all. Consequently, all remedies are excluded for the reason that the promisee has never been entitled to them. The effect of all remedies is similar to the solution called for under article 80 CISG[936] though remedies are not automatically and completely excluded under the Convention.

The placement of the articles in the Nordic acts is different to the CISG since article 80 is placed as an exemption from liability, presupposing that a non-performance is considered a breach.

If we consider the facts of the archetype case example under the Nordic rules we see that the outcome is likely to be the same under the CISG as under the Nordic sale of goods acts. In the archetype case, *Propane Case*[937] the buyer could not perform a letter of credit since the seller did not provide the necessary information regarding the place of loading. The court stated in the case that according to the CISG article 80, the seller was not entitled to avoid the contract since he caused the non-performance of the buyer.

Under the Nordic sales acts, the seller's claim would be barred under the view that the buyer's non-performance does not amount to a breach, with the consequence that the seller has no remedies.

The similar outcome of the two set of rules can indicate that claims made by a promisee in *mora creditoris* is, and was, dealt with in the same way. This could explain why the Nordic delegates did not find it problematic adopting article 80 into the CISG and since the Nordic rules are, and was, already

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935 The common core in the Nordic region makes it sensible to make the Nordic legal system accessible through a restatement as suggested by Lando, Ole, *En Nordisk Restatement*, Tidsskrift for Rettsvitenskap, Volume 122, 2009, 495-506.

936 See supra section 7.1, p. 181 *et seq*.

937 Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996. See also *supra* p. 195.

rather vaguely phrased, it would seem natural to adopt a similarly short and vague provision in the CISG.

Regarding the archetype case it can be confirmed that the Nordic region already recognized a concept similar to the one found in article 80 and still does.

Considering that the Nordic region places the matter as a part of the determination of breach it can hardly be surprising that it was a Nordic country that during the drafting suggested placing article 80 CISG in the sections dealing with breach of contract.[938] The placement of the Nordic equivalent of article 80 makes it imaginable that article 80 CISG, despite its current placement, in fact belongs together with rules concerning determination of breach of contract.

A similarity between the Nordic sales acts and the CISG is the drafting style. Both the Nordic acts and the CISG address the issue of the promisee's interference in rather short and vague terms. In the Nordic acts the issue is dealt with by inserting one additional sentence in the catalogue rules, thus leaving it to the adjudicator to interpret whether an act or omission has caused the promisor's non-performance.

Another similarity is the fact that the promisee's fault in causing the promisor's non-performance is irrelevant. As such, a no-fault system is followed according to which it has to be determined whether a circumstance belongs to the promisor or promisee's sphere of risk.[939]

A party's negligence may play a role in the determination of the seller's obligations, however an either-or approach is still followed. In an example from Denmark, *Oehlenschläger's Writing Desk,*[940] the adjudicator found that the buyer should have been aware that the previous ownership of a desk was insecure despite other indications in an advertisement. The seller had advertised in the paper that she was selling a writing desk that previously had belonged to the famous Danish poet, Oehlenschläger.[941] The buyer came

[938] A/CONF.97/C.1/SR.28, Sweden, para. 53, p. 386 in A/CONF.97/19.

[939] See also *infra* 6.3.5 Conduct by Employees, Third Parties and Agents, p. 169 *et seq.*

[940] Østre Landsret [Eastern High Court], Denmark, *Oehlenschläger's Writing Desk*, 28 November 1998.

[941] Adam Oehlenschläger wrote, among other things, what became Denmark's current national anthem.

to look at the desk and was informed by the seller that the ownership was not confirmed and that she would trace this if the buyer wanted her to. The buyer decided to buy the desk despite the uncertainty of its previous ownership and when it came to his knowledge that it had not belonged to the poet, he claimed avoidance of the contract.

As a starting point, such information about the goods becomes part of the contract in Danish law,[942] but when the buyer knew otherwise or should have known otherwise the information may become less significant.[943] It is a requirement under Danish law that such information has also been of significance to the specific buyer.[944]

The adjudicator found that the buyer knew, or should have known, that the previous ownership was insecure, but chose to buy the desk anyway instead of awaiting clarification. The price paid reflected that of an ordinary desk that was not previously owned by a famous poet and thus the court found that the buyer was not entitled to avoid the contract since he had assumed the risk. Similarly, the awareness discussion in regard to characteristics of the goods seems to be an either-or approach under the Convention. This is dealt with *supra* section 4.2.1, p. 95 *et seq.*

A discrepancy between the Nordic system and article 80 CISG is seen since the latter states that the promisee cannot rely on a breach *'to the extent'* he caused it himself. An equivalent of the words are not to be found in the Nordic sales acts. This indicates that a partial loss of remedies or an apportionment in cases of shared responsibility is not the solution called for under the Nordic sales acts.

If one considers the facts of the shared responsibility case under the Nordic rules the outcome seems to differ from the one permitted, at least in theory, by article 80 CISG.

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942 Bryde, Andersen Mads and Lookofsky, Joseph, *Lærebog i Obligationsret I*, Thomson Reuters, Copenhagen, 2010, p. 58.

943 Edlund, Hans Henrik; Ørgaard, Anders; Clausen, Nis Jul and Kruse, Anders Vinding, *Købsretten*, Thomson Reuters, Copenhagen, 4th edition, 2009, pp. 152-153 and Lynge Andersen, Lennart and Madsen, Palle Bo, *Aftaler og Mellemmænd*, Thomson, Copenhagen, 5th edition, 2006, p. 162, fn. 91, who speaks of negligence in this regard.

944 Lookofsky and Ulfbeck, *Køb*, 2008, p. 79.

In the shared responsibility case, *Sensitive Russian Components,*[945] both parties could potentially and logically have caused the defects of the goods. The non-performance of the seller was considered a breach, however, the claim was lowered by one third because the buyer as an expert did not enquire or settle the issue of the inspection method. As has been argued elsewhere the case could in theory be decided by exclusive reference to article 80 CISG.[946]

Had the case been decided under the Nordic rules it seems likely that the case would have been dealt with as an issue of assessing whether the non-performance of the seller was a breach of contract or not. The rule under the Nordic rules is that non-performance caused by the promisee does not constitute a breach at all. In contrast to what is possible under article 80 CISG, the application of the Nordic rules becomes an 'either-or' approach and not a question of apportionment. This is natural, as the question of the promisee's interference is moved forward as part of establishing whether the promisor is in breach. It has for example been decided that not paying a monthly instalment on a loan was not a breach of contract since the creditor who informed the debitor that he could pay to a particular account number, which turned out to be wrong, caused it.[947]

In this regard, the CISG is different to the Nordic rules and confirms that there was, and is, a need for uniform rules. It is puzzling why the Norwegian delegate was told during the drafting that article 80 CISG was flexible enough to determine each party's share of responsibility when Norway at the same time followed, and currently seems to follow an 'either-or' system.[948]

As accounted for elsewhere[949] the Norwegian drafters were of the opinion that they had incorporated article 80 CISG into the NSGA's catalogue rules.

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[945] International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003. See also International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Bilateral Commission Case*, 29 December 2004. See also *supra* p. 153.

[946] See section 8.4, p. 223.

[947] Vestre Landsret [Western High Court], Denmark, 15 April 2005.

[948] The question by Norway, see Norway, A/CONF.97/C.1/SR.30, p. 393, para. 6 in A/CONF.97/19. The answer by GDR, see A/CONF.97/C.1/SR.30, p. 393, para. 7 in A/CONF.97/19.

[949] See *supra* 8.3.1, p. 212 *et seq.*

However, the flexibility and words *'to the extent'* of article 80 CISG cannot be identified neither in the Norwegian nor the other Nordic rules. This again confirms the need for uniformity also in regard to the text in use.

It is seen that the Nordic region may produce results similar to article 80 insofar as under both systems a promisee in the archetype situation will not be able to rely on the promisor's non-performance.

However, differences appear since the *mora creditoris* rule is placed differently and does not seem to allow a *pro rata* apportionment of remedies in the case of shared responsibility. Consequently, there is a need for a uniform rule and the argument that article 80 is a restatement of a common domestic law concept is refuted.

## 8.4 Possible Ethnocentric Application by China and Russia

The common factors in most cases[950] identified as dealing with shared responsibility in international sales are that: firstly, an apportionment is carried out; secondly, the CISG is applicable, but the legal basis is not found in Article 80, and thirdly, the focus in the evaluative comparison of the parties is subjective.

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[950] International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003; International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Bilateral Commission Case*, 29 December 2004; International Court of Arbitration, International Chamber of Commerce, *Food Products Case,* December 1996, no. 8817; China International Economic & Trade Arbitration Commission [CIETAC], China, *Velvet Clothes Case*, 13 September 2002; China International Economic & Trade Arbitration Commission [CIETAC], China, *Yellow Phosphorus Case,* 9 August 2002; Zuìgāo Rénmín Fǎyuàn [Supreme Court of People's Republic of China], China, *Singapore Da Guang Group v. Jiangsu Machines Import & Export Ltd*, 11 January 2001; China International Economic & Trade Arbitration Commission [CIETAC], China, *Raincoat Case*, 10 August 1999; China International Economic & Trade Arbitration Commission [CIETAC], China, *Hot-dipped Galvanized Steel Coils Case,* 16 December 1997; China International Economic & Trade Arbitration Commission [CIETAC], China, *Steel Channels Case*, 18 November 1996 and China International Economic & Trade Arbitration Commission [CIETAC], *Diaper Machine Case,* 8 August 1996.

What makes the cases of the shared responsibility type is that the promisor fails to perform and it appears not to be possible to delimit the consequences of each party's interference with the failure to perform, though some causation is seen to come from both parties. Consequently, the adjudicator to some extent finds both parties' behaviour reprehensible and therefore conducts some kind of apportionment of the remedy claimed.

### 8.4.1 Article 80 Equivalent in CCRF and CCL

Before turning to case law, the texts of the domestic Chinese and Russian rules are investigated. If one is to assess whether these two jurisdictions produce *pro rata* apportioned international case law due to ethnocentrism, it could be significant to identify a domestic rule similar to that of article 80.

Furthermore, it is interesting to see whether a rule like article 80 CISG has found its way into the new domestic codes of the two countries since both have recently modernized their sales rules with international inspiration.[951] It is beyond the limits of this dissertation to account for the earlier regulation of sales in China and Russia, though the latter had an equivalent of article 80 since 1964.[952]

The shared responsibility cases from the two jurisdictions can be grouped in two; those indicating some legal basis for the decision and those that indicate nothing. Interestingly enough this groups the cases into Russian and the Chinese ones respectively, thus indicating a difference in legal tradition, and perhaps regulation in this regard.

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[951] Bonell, *An Int'l Restatement*, 2005, p. 268, who also mentions Estonia, Lithuania, Hungaria, Iran, Pakistan, Turkey and Mongolia as having been inspired by international rules and Snijders, W., *The Civil Codes of the Russian Federation and The Netherlands: Similaritites and Contrasts*, in Simons, William B. and Feldbrugge, F.J.M., *Private and Civil Law in The Russian Federation: Essays in Honor of F.J.M. Feldbrugge*, Martinus Nijhoff Publishers, Leiden, 2009, [Simons, *Private and Civil Law in Russia*, 2009], p. 20.

[952] Забарчук Е.Л. [Zabarchuk Eds.], Комментарий к Гражданскому кодексу Российской Федерации с постатейными материалами [Commentary to the Civil Code of the Russian Federation with itemized materials], 2009, Экзамен [Publisher], p. 656.

#### *8.4.1.1 Russia*

The search for the domestic equivalent of article 80 can start with the Russian cases as they indicate the legal basis for the *pro rata* apportionment. The first case is the *Russian Goods*[953] concerning a contract regarding delivery of goods from Russia at the Russian-Estonian border (DAF Incoterm) to a buyer from Cyprus. The buyer did not pay on the time agreed in the contract and the buyer argued that the B/L was not mailed as required by the contract. Not paying is in itself a breach under the Convention, but the adjudicator found that the delayed payment was due to the seller's negligence since he had not mailed the B/L, but handed it over to the buyer's agent. However, the delayed payment was also due to the buyer's decision not to pay, even after having received the B/L. The adjudicator found that the buyer was still obliged to pay.

It was stated *obiter dictum* that if the seller had claimed interest on the money in arrears, this right would have been lost according to article 80 CISG. Furthermore, the adjudicator decided that since both parties caused the delayed payment, the standard rule that the losing party should bear the arbitration costs was to be deviated from so the parties were to share equally.

No ethnocentrism is seen in this case. However, considering that the Convention was applicable in the following two cases, it appears to be contrary to article 7(2) to apply domestic rules in order to bar a party from deriving a benefit from his own interference with the performance if the CISG contains a similar rule.[954]

In the *Bilateral Commission Case*[955] a Russian party sold a machine to a buyer from Ukraine. During the guarantee period the machine broke down thus causing damage as it was rendered inoperable. The parties had in their contract agreed that in such event the cause of the breakdown was to be determined by a bilateral commission. The commission could establish that there were some defects in the machinery and that the service conditions had not been observed. However, the commission could

[953] International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Russian Goods*, 10 June 1999.

[954] For more on article 7(2) and the priority of CISG over domestic law, see *supra* section 2.2, p. 17 *et seq.*

[955] International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Bilateral Commission Case*, 29 December 2004.

not determine whether the breakdown was caused by the seller's delivery of defect machinery or if it was caused by the buyer's breach of the service conditions.

The buyer's claim for damages due to seller's delivery of non-conforming goods was granted, however it was, lowered with 25 % since the buyer also failed to determine the cause of the breakdown. The seller was to bear the main responsibility since the seller was the expert on that equipment. This is in line with the presumption of fault in CCRF article 401(2). The arbitration costs were divided similarly.

In its decision, the adjudicator referred to principles of fairness and justice, Articles 35, 36, 45 and 74 of the CISG, and Articles 475 and 476 of the Russian Federation Civil Code.

In the present chapter it is the domestic rules that are of interest and it is noted that the adjudicator refers to CCRF articles 475 and 476. These two provisions address, respectively, the consequences of delivering non-conforming goods and a presumption that the seller is liable since a guarantee has been issued.[956] Under the CISG cases sometimes seem to fall under both rules regarding conformity of the goods and article 80.[957]

In the present context, the two domestic rules of CCRF may be relevant and possible to apply, but they are not equivalents of article 80 insofar as they address conformity, not interference by the promisee. Application of one or the other rule may not affect the outcome, but it does not answer the present question; whether Russia has adopted an equivalent to article 80.

In the shared responsibility type case followed throughout this dissertation, *Sensitive Russian Components,*[958] other domestic articles are referred to for

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[956] Maggs, Peter B, and Zhiltsov, A.N., *The Civil Code of The Russian Federation: Parts 1 and 2*, M. E. Sharpe, Armonk, New York, 1997, [Maggs/Zhiltsov, *Civil Code of Russia*, 1997], pp. 167-168.

[957] See *supra* section 4.2.1, p. 95 *et seq.*

[958] International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003. Article 475 grants the buyer the right to reduction of price, the defects cured, compensation for cure and upon fundamental breach the right to avoid the contract or replacement goods. Article 476 establish that when a guarantee of a quality has been made it

the apportionment conducted. It will be recalled that the case between a Russian seller and a South Korean buyer concerned the sale of highly sensitive components needed in the production of another good. The parties agreed that the goods were defect, but disagreed what had caused the defects. It could either be that the seller had shipped non-conforming goods or it could be that the buyer had applied an inspection method that was harmful to the components delivered.

The adjudicator pointed out that both parties failed to perform their obligations under the contract since they failed to set an inspection procedure. The buyer, being an expert regarding that type of component, did not show due care in the making and performance of the contract. The buyer did not insist on specifying the proper inspection method in the contract.

The adjudicator evaluated the buyer's conduct on the basis of articles 74 and 77 CISG, took into consideration UPICC article 7.4.7 from the view that UPICC express general rules of international contracts and decided to apply a principle of joint liability according to article 404(1) of the Russian Civil Code. Consequently, the buyer's claim for damages was granted, but lowered with one third.

Of interest here is the reference to the CCRF article 404(1), which under the heading *'The Creditor's Guilt'* reads;

> 'If non-performance or improper performance of an obligation occurred due to the fault of both parties, the court shall accordingly reduce the amount of liability of the debtor. The court also shall have the right to reduce the amount of liability of the debtor if the creditor intentionally or by negligence facilitated an increase in the amount of damages caused by the non-performance or improper performance, or did not take reasonable measures to reduce it.' [959]

Part (2) of the provision, which is not cited above, states that part (1) also applies when the debtor bears the responsibility regardless of fault, according to law or contract. The starting point in the CCRF is that liability

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is presumed to be the responsibility of the seller unless he can show that a defect arose after transfer to the buyer and as a result of his fault.

[959] Maggs/Zhiltsov, *Civil Code of Russia*, 1997, p. 143.

for non-performance requires fault, in the form of intent or negligence[960] though it is for the party in breach to prove absence of fault.[961]

Especially the first sentence of article 404(1) resembles article 80. According to this sentence a party who is liable for a non-performance or wrongly performed obligation can have his responsibility reduced if the promisee is also at fault.

The second sentence resembles a duty to mitigate loss by requiring that the aggrieved party refrain from committing acts, which will increase loss, or that he takes reasonable measures to reduce such loss.

Having identified what appear to be an equivalent to article 80 could be an indication that the case has been decided from domestic law instead of the Convention. It has been provided that quite often, also before the International Commercial Court of Arbitration under the Chamber of Trade and Industry of the Russian Federation, domestic law will be applied if the Convention does not regulate a matter clearly, even though general principles underlying the Convention should be applied instead.[962] One may rightfully ask why all questions in the case were not decided by the rules of the Convention since an apportionment like the one conducted could have been reached by reference to article 80, instead of domestic law. Of course arbitrators are more free in their decisions and the outcome of the case may not necessarily have been different, had article 80 been applied. This is dealt with in 8.4.3 Effect, p. 235 *et seq*.

For now, it seems as if the two latter cases from Russia mentioned here shows a misapplication of the CISG, though not necessarily with a different outcome. It at least indicates an unawareness of article 80, since the

960 CCRF article 401(1), Osakwe, Christopher, *Russian Civil Code: Parts 1-3: Text and Analysis*, Wolters Kluwer, Moscow, 2008, [Osakwe, *Russian Civil Code*, 2008], pp. 150-151 and Maggs/Zhiltsov, *Civil Code of Russia*, 1997, p. xciii.

961 See CCRF article 401(2) and The Institute of State and Law (ISL) of the Russian Academy of Science, *Комментарий к Гражданскому кодексу Российской Федерации [Commentary to the Civil Code of the Russian Federation]*, Volume 1, 2004, Юрайт-Издат [Yurayt-Izdat], [ISL Academy of Science, *Комментарий*, 2004], Статья 401 [Article 401].

962 Komarov, Alexander, *The Role and Significance of International Arbitration in the Formation of a Modern Legal System in Russia,* in Simons, *Private and Civil Law in Russia*, 2009, p. 122.

apportionments conducted could be reached from this provision as well as the domestic one used.

#### *8.4.1.2 China*

Turning now to the cases decided in China. These cases are characterised, not only by the commons outline above,[963] but also by the fact that most of these cases do not provide any basis for their result, neither domestic nor international rules. This makes it harder to reveal whether a misapplication of the Convention has taken place and which rules the adjudicator has derived his solution from. What we do know is that they have been categorised as being relevant for article 80 in the eyes of the editorial board at the CISGW3 database.

Starting with a case in which the legal basis is indicated; In *Hot-rolled Coils Case*[964] a seller from Korea and a buyer from China had agreed shipment of some particular goods on a specific date and that payment was to be made by L/C. After the buyer had issued the L/C with the specific delivery date, the seller requested the delivery time to be postponed 13 days. The buyer accepted postponement, but only for 10 days. However, the buyer did not revise the delivery date in the L/C as he should have.

The seller loaded the goods into the ship 'Jeon Jin' on the agreed 10 days after original agreed time, but believed that the ship was called 'Jeon Fin'. The seller sent, 5 days after loading, the incorrect name to the buyer in a shipment notice.

When the ship arrived with the goods, the goods were not released since the seller had not corrected the typo of the ships name in shipment notice and B/L. At the same time, the buyer did not request the seller to instruct the shipping agent to release the goods against the B/L with a typo. Also, the buyer did not revise the L/C, fearing a potential fraud, but requested a re-negotiation of the contract with a lower price for the goods for which the buyer already had a re-sale contract.

The adjudicator found that the buyer should have paid and the seller should have cooperated in removing the effects of the wrong ship name. By not

963 See *supra* p. 223.

964 China International Economic & Trade Arbitration Commission [CIETAC], China, *Hot-rolled Coils Case*, 15 December 1997.

doing so, the claim for lost profit of the buyer and the seller's claim for lost profit and shipping costs were dismissed by reference to both parties' breach and article 80 CISG. Fees divided accordingly, 50/50.

It is interesting that article 80 is identified when no other adjudicator has used it to apportion consequences in a shared responsibility case. This could be due to the fact that the Chinese adjudicator is familiar with a similar domestic rule. It could also be that the adjudicator is more familiar with the CISG and has developed a more sophisticated approach to it.

Before returning to these questions it is pointed out that the rest of the cases from the Chinese jurisdiction do not indicate article 80, nor any other provision or law, as the legal basis for the decision to apportion.[965]

To illustrate, in *Velvet Clothes Case*[966] both parties where found to be responsible for the seller's late delivery. The buyer received the delayed goods and resold them, but refused to pay due to alleged defects and delay in delivery. The non-conformities could not be proved, but the seller was found to be responsible for the delay. The adjudicator established that not paying

[965] International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Sensitive Russian Components*, 6 June 2003; International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, *Bilateral Commission Case*, 29 December 2004; International Court of Arbitration, International Chamber of Commerce, *Food Products Case,* December 1996, no. 8817; China International Economic & Trade Arbitration Commission [CIETAC], China, *Velvet Clothes Case*, 13 September 2002; China International Economic & Trade Arbitration Commission [CIETAC], China, *Yellow Phosphorus Case,* 9 August 2002; Zuìgāo Rénmín Fǎyuàn [Supreme Court of People's Republic of China], China, *Singapore Da Guang Group v. Jiangsu Machines Import & Export Ltd*, 11 January 2001; China International Economic & Trade Arbitration Commission [CIETAC], China, *Aureomycin Case*, 11 January 2000; China International Economic & Trade Arbitration Commission [CIETAC], China, *Raincoat Case*, 10 August 1999; China International Economic & Trade Arbitration Commission [CIETAC], China, *Hot-dipped Galvanized Steel Coils Case,* 16 December 1997; China International Economic & Trade Arbitration Commission [CIETAC], China, *Steel Channels Case*, 18 November 1996 and China International Economic & Trade Arbitration Commission [CIETAC], *Diaper Machine Case,* 8 August 1996.

[966] China International Economic & Trade Arbitration Commission [CIETAC], China, *Velvet Clothes Case*, 13 September 2002.

for the received goods was a breach and so was the delay in delivery of the goods. The seller was awarded the contract price.

However, the buyer's claim for damages due to the late delivery was lowered since the buyer had requested modifications of the goods and had not provided a bank guarantee before the start of the production, leading the seller to postpone the production. The buyer was granted US$15,000 in damages for the late delivery, which is 20 % of the total damage claim of US$75,000. The arbitration fee was divided accordingly so 20 % were to be borne by the seller and the rest by the buyer.

No legal basis for the apportionment was indicated, but since the CISG was applicable in the case, it could, or perhaps should, have been article 80.

This can also be found in other cases.[967] In *Yellow Phosphorus Case*[968] the parties had agreed on a number of deliveries of phosphorus against payment by L/C. The seller failed to deliver an instalment and as a consequence, the buyer had to procure substitute goods at a higher price. The seller claimed to be exempt from liability as the incomplete deliveries were caused partly by natural disaster in the seller's region and partly by the buyer's issuance of a non-contractual letter of credit.

The adjudicator found the force majeure argument immaterial since the seller should have, and could have, acquired substitute goods. Thus, the seller was liable for the incomplete deliveries. Regarding the buyer's issuance of a L/C which was not strictly in compliance with the contract, the adjudicator stated that a L/C is a '*… precondition for the seller to deliver the goods, but not the necessary condition for the seller to prepare the goods*' thus not deviating from the starting point, that the seller was responsible. However, since the buyer did cause inconvenience by issuing the L/C later than stated in the contract and by changing details regarding times and delivery amounts, the buyer's claim for costs for replacement goods and freight was lowered by 30 %. The arbitration fees were required to be paid 30 % by the buyer and 70 % by the seller.

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967 See China International Economic & Trade Arbitration Commission [CIETAC], China, *Raincoat Case*, 10 August 1999, were the seller was awarded 50 % of claimed lost profit since a prober inspection certificate could not be provided due to acts of both parties

968 China International Economic & Trade Arbitration Commission [CIETAC], China, *Yellow Phosphorus Case,* 9 August 2002.

Not only cases by the CIETAC lack an indication of the legal basis for the decision. There is a similar lack of explanation in a Supreme Court decision, *Singapore Da Guang Group v. Jiangsu Machines Import & Export Ltd,*[969] in which termination of a range of contracts was found to be partly justified, insofar as the buyer had indicated that it would not perform a particular contract. The buyer had requested the seller to stop production or enter into an alternative project elsewhere. This in itself is a fundamental breach allowing the seller to avoid the contract. However, the seller avoided all contracts with that buyer, also those not affected. This was unjustified. Since the buyer was responsible for the seller's avoidance of a related contract the buyer was awarded his deposit back, but lost the domestic right to double deposit back from the view that both parties were at fault in the matter.[970]

Similarly in the archetype cases, which essentially is concerning sole causation by the promisee is there a lack of legal basis. In *Aureomycin Case*[971] a buyer of antibiotics received a letter from the seller that it had taken over another company, which owed US$6,000 to the buyer from another matter. As a result of the letter the buyer deducted the money in the contract sum to the seller. The seller claimed the full price and a late fee because the payment was not as agreed.

The adjudicator found that the seller had not legally taken over the third party company and stated that as a starting point the buyer is obliged to pay the full contract sum, but as the seller '*… had a share of fault in the dispute w…*' the claim for a late fee was rejected. The seller was awarded the deducted 6.000 and the arbitration fee was shared with 40 % payable by the seller and 60 % payable by the buyer.

It is not surprising that no legal basis is indicated since, firstly, a Chinese court judge is not bound to do so by domestic law,[972] and secondly, a Chi-

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969 Zuìgāo Rénmín Fǎyuàn [Supreme Court of People's Republic of China], China, *Singapore Da Guang Group v. Jiangsu Machines Import & Export Ltd*, 11 January 2001.

970 The double deposit back rule of CCL article 115 is explained *infra* p. 184 *et seq*.

971 China International Economic & Trade Arbitration Commission [CIETAC], China, *Aureomycin Case*, 11 January 2000.

972 An effect of 'fixed style judgements' according to Han, Shiyan in Ferrari, Franco, *The CISG and Its Impact on National Legal Systems*, Sellier, Munich, 2008, [Ferrari, *Impact on National Systems*, 2008], pp. 76-77.

nese arbitrator enjoys the power of *amiable compositeurs* unless the parties request a strict decision on law.[973]

Furthermore, the Chinese judicial system has been criticised for both lack of education among adjudicators, for local favouritism and for corruption.[974] Combined with the flexible terms of the Convention, political interpretation of the CISG can happen.[975] This is not investigated further as the focus at present is whether these cases demonstrate a domestic rule equivalent to article 80 or a sophisticated approach to the CISG.

Looking at the domestic Contract Law of the People's Republic of China (CCL) it could be asked whether the decisions are inspired or perhaps directly decided according to article 120 CCL? The provision reads under the heading *'Bilateral Breach'*:

> 'In case of bilateral breach, the parties shall assume their respective liabilities accordingly.' [976]

Theoretically, the provision is meant for situations where both parties unjustifiably have not performed their part of the contract and in such situations the parties' claims may be set off against each other and the rule of forfeiture of deposit will not apply.[977]

However, it has been stated that despite article 120 not applying to cases where a party has a valid excuse for not performing, such as the contributory conduct of the promisee, the courts have applied the provision anyway.[978] It could be that the cases from the Chinese jurisdiction are an expression of

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973 Bonell, *An Int'l Restatement*, 2005, p. 195.

974 See for example Lubman, Stanley, *Looking for Law in China*, Columbia Journal of Asian Law, Volume 20, Issue 1, 2006,1-92, Ye, Ariel, *Enforcement of Foreign Arbitral Awards and Foreign Judgements in China*, Defence Councel Journal, Volume 74, Issue 1, 2007, 248-252 and Long X., Cheryl, *Does The Rights Hypothesis Apply to China?*, Journal of Law and Economics, Volume 53, Issue 4, 2010.

975 Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in Meyer/ Janssen, 2009, pp. 35-37.

976 Translation of the Contract Law of the People's Republic of China, March 15, 1999 by Jiang, John and Liu, Henry.

977 Ling, Bing, *Contract Law in China*, Sweet and Maxwell, Hong Kong, 2002, [Ling, *Contract Law in China,* 2002], p. 398-399.

978 Ling, *Contract Law in China,* 2002, p. 397.

a misapplication of article 120, but it could also be an application of article 80 CISG.

Speaking in favour of the latter is that Chinese adjudicators and practitioners have been said to be more familiar with the CISG than with their new domestic sales law, meaning that the Convention is rarely excluded by lawyers and sometimes applied by courts to contracts where the domestic law should have applied.[979]

This is supported by the fact that *Raincoat Case*[980] was between two parties within the Chinese sovereignty,[981] though the CISG was still applied by agreement. *Possehl Limited v China Metlas & Minerals Import & Export Corporation*[982] was also between parties within the sovereignty of China and despite application of the domestic contract law the parties asserted, among others, article 80 as being an international principle. Further, some of the cases cited above pre-dates the domestic Chinese sales law that is from 1999, thus rendering the CISG a modern alternative.

### 8.4.2 Systematic Placement and Style

The short drafting style of article 404(1) CCRF and article 120 CCL is rather similar to that of article 80. It could be that this is because the two instruments have been made with inspiration from international instruments. It may also be the general style of the instrument as well as the nature of the rule expressed in these provisions.

Interestingly, the provisions in CCRF and CCL are placed differently than article 80 in the CISG. Article 404(1) CCRF is placed in the chapter 25 *'Liability for Violation of Obligations'* which is to be found in subdivision 1, *'General Provisions on Obligations'* under division III, *'General Part of the*

979 Han, Shiyan in Ferrari, *Impact on National Systems*, 2008, pp. 72-74 and pp. 81-82.

980 China International Economic & Trade Arbitration Commission [CIETAC], China, *Raincoat Case*, 10 August 1999.

981 One party from mainland China and one from Hong Kong, which since 1997 has belonged under Chinese sovereignty.

982 China International Economic & Trade Arbitration Commission [CIETAC], China, *Possehl Limited v China Metlas & Minerals Import & Export Coroporation*, 2005.

*Law of Obligations*'.[983] Article 120 CCL is placed in chapter 7 *'Liabilities for Breach of Contracts'* under part I *'General Principles'*.

It will be recalled that it was suggested to place article 80 CISG with other general provisions instead of as an exemption. The difference in placement could mean a difference between a narrow or broad interpretation and the application of the provision without necessarily having established a breach.

Interestingly, both the CCRF article 404(1) and CCL article 120 are distinguished from rules of mitigation and force majeure. The CCL has a provision on force majeure in article 117 and a mitigation rule in 119.[984]

The CCRF article 404 also contains a duty to mitigate damages by requiring the aggrieved party to take measures that in the circumstances are reasonable to avoid or reduce damages[985] and a force majeure rule is contained in article 401(3).[986] Also article 80 appears to be distinct from force majeure and mitigation rules, see *supra* section 4.1, p. 77 *et seq.*

### 8.4.3 Effect

If the words *'to the extent'* in article 80 are interpreted as calling for a *pro rata* apportionment in case of shared responsibility, it is likely that both the domestic laws of Russia and China will provide similar outcomes to cases decided under article 80 CISG.

Despite that Russia using a slightly different liability rule than the no-fault basis adopted in China and the CISG, both jurisdictions provide for an apportionment of the consequences in cases of the promisee's causation in part resulting in the promisor's non-performance.[987]

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983 Maggs/Zhiltsov, *Civil Code of Russia*, 1997, p. xviii-xxi.

984 Han, Shiyan in Ferrari, *Impact on National Systems*, 2008, p. 89.

985 ISL Academy of Science, *Комментарий*, 2004, Статья 404 [Article 404], para. 2.

986 Osakwe, *Russian Civil Code*, 2008, p. 151.

987 Fault-based in Russia and no-fault in China according to CCRF article 401(2), Osakwe, *Russian Civil Code*, 2008, pp. 150-151 and Maggs/Zhiltsov, *Civil Code of Russia*, 1997, p. xciii, ISL Academy of Science, *Комментарий*, 2004, Статья 401 [Article 401], CCL article 107 and Ling, *Contract Law in China,* 2002, p. 382 and pp. 399-400.

In Russia this follows from article 404. The provision is addressing cases of 'mixed fault' where a party's failure is due to the fault of both parties and the provision provides that the liability should be proportionately reduced.[988] In China, a similar approach follows from the courts' interpretation and application of article 120, though this may not strictly be how that rule was intended to be used.[989]

If the outcome of the cases appears to follow also from article 80, one may say that no problem exists in this regard. However, one major issue affects the cases; it is not possible to clearly identify the legal basis for the decisions, thus leaving future intepreters of article 80, who are obliged to consider foreign case law according to article 7 and VCLT, in the dark. It cannot clearly be identified, especially in regard to the Chinese cases, whether the domestic Chinese laws have affected them or if they are expressions of an advanced approach to article 80 CISG.

It has previously in this work been stated that article 7 of the Convention instructs the interpreter of the CISG to consider uniformity in its application. If this is considered to be an instruction to consider foreign case law as well as an instruction for the adjudicator to be aware that he is paving the road for the future, he should under a purely uniform-focused view, reveal the legal basis and reasoning for his decision. It could be a breach by the state not to make sure that the judiciary acts according to the conventions entered into by the state.[990] If nothing else, it is hereby pointed out that future decisions could greatly aid uniform application by stating the legal basis of the decision, thus improving the quality of the award.[991]

## 8.5 Concluding Argument

It is correct that many countries have in their domestic rules provisions that resemble that of article 80 CISG. However, the Nordic region is an exemption to this, thus rejecting the view that article 80 in fact is a codification of a principle recognized across the domestic systems of the globe.

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[988] ISL Academy of Science, *Комментарий*, 2004, Статья 404 [Article 404], para. 1.

[989] Ling, *Contract Law in China,* 2002, p. 397.

[990] Aust, *Modern Treaty Law*, 2007, p. 179.

[991] Quality in the sense of correct application of provisions to the facts at hand. Similarly, Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations* in Meyer/Janssen, 2009, p. 37.

This in turn demonstrates the need for lawmakers and adjudicators to maintain focus on the need for uniformity in the incorporation and application of the Convention. In this regard, two issues are raised.

First, in the incorporation of the text of the Convention, Norway has applied an ethnocentric transformation method during which article 80 has disappeared from the Norwegian legislation. This brings the text of the Convention as it applies in Norway closer to the former Norwegian domestic sales law, but may be an incorrect incorporation of the CISG as such.

Second, many cases applying a *pro rata* approach has been decided in Russia and China. The *pro rata* approach is perfectly admissible under article 80 CISG, however, the reasoning for applying it can be criticised. First of all, the *pro rata* solution exists also in Russian domestic law and in Chinese case law. It can thus be feared that the decided international cases are not the result of consideration of the CISG, but more domestic law.

This leads to the second point, that adjudicators in Russia and China could greatly improve the significance of their decisions by clearly indicating the legal basis for the otherwise article 80-compatible result.

# 9. Conclusions

## 9.1 Conclusion

Based on the analyses of the drafting history, the text of the Convention, the underlying principles of the Convention, domestic law, case law and international soft law it is possible to derive a more clear picture of the otherwise overlooked provision of article 80.

A delegate from GDR suggested article 80 very late in the creation process of the Convention. Having identified a domestic rule rather similar to article 80 from the GDR, it is more likely that the delegate's background law inspired the provision more than it was the product of influence from an interest group. In spite of the resemblence, the autonomous interpretation rule laid down in article 7 prohibits reading the rule from GDR into the Convention.

Considering that there was a general whish to maximize the adoption by states of the CISG and the late time at which the article was proposed, article 80 could be a midnight clause in the sense that it received very little attention by the drafters who could have been keen to finalise the Convention.

Several underlying principles of the Convention are expressed in article 80 and though similar principles are expressed in other more specific provisions, these do not completely deprive article 80 of having an independent role.

There is no sign that the drafters were aware that many questions under article 80 would be left to be answered by the adjudicator who would later have to apply it in practice. Neither is there any sign that the drafters were considering that the provision should address many cases of very different facts. With its current wording it will be possible to address many different facts without having to resort to analogical application or reference to underlying principles.

Though application of the provision to a large extent is left in the hands of the adjudicator, his discretion is to be exercised within certain frames. It is in this regard appropriate to apply a more broad interpretation of article 80 rather than taking a narrow approach to it.

Some domestic systems contain rules similar to that of article 80, but it would be inappropriate to identify a similar domestic rule and apply this instead of article 80. However, there are other domestic systems that do not contain an express rule like article 80 and the provision can therefore not be seen as a restatement of an already recognised global concept known in all domestic legal systems.

Article 80 is conceptually different to rules of mitigation in article 77 and impediments beyond control in article 79. Primarily when it comes to the causal features are the three provisions distinguished.

When article 80 is to be applied in practice a distinction between sole causation (archetype) and causation by both parties where it is not possible to delimit the consequences of each party's conduct (shared responsibility type) is useful.

Regarding the archetype it is seen that the promisee's lack of fault in causing the promisor's failure to perform cannot be used as a defence against application of article 80. In this regard the discussion of fault is irrelevant and article 80 is thus following the general liability rule of the Convention. Any cause may be enough to invoke article 80, be it breach of contract in itself or lack of cooperation. The exemption of the promisor may be total or partial.

Regarding the shared responsibility type cases it is seen that cases resembling shared responsibility are solved by *pro rata* apportionments according to each party's degree of causation. There is a consideration of the reprehensibility of the promisee's acts or omissions and less on the probability, though it may be difficult to separate the two. It is not necessary to refer to general principles, international soft law or even domestic law as is done in some of these case law since the results achieved will fit under the words *'to the extent'* in article 80.

Considering both probability of causation and the reprehensibility of each party's conduct when apportioning the responsibility is in line with the spirit of the Convention qua the fact that subjective consideration are already contained in the Convention. It must however be considered that the burden to prove exemption is at the outset of a discussion of article 80 resting upon the failing promisor.

## 9.2 The Goal of Uniformity

The overarching goal of the Convention is to achieve uniformity in rules of sales law. Whether article 80 assists in the removal of barriers to trade facilitated or it is an impediment in itself can be answered in at least in two different ways. First, uniformity starts with unifying the words of the law across jurisdictions. Second, the unification has to be carried out in practice when adjudicators apply the law.

Regarding the former, unification has been achieved insofar as it is now the authentic language versions of the CISG and article 80 that is to apply in the ratifying states. Since not all domestic laws already contain a rule like article 80, a common text is a removal of barriers to trade.

However, several things impair the textual uniformity. First, that Norway transformed the text into the local language and in the process changed the position and wording of article 80. Second, that the authentic Arabic and Chinese language versions of article 80 are badly worded, thus leaving an advanced linguistic interpretation for the adjudicator when he has to extract the common meaning of the provision. This could be a barrier if the text is different, as it will impede a proper subsequent application.

Regarding the latter, whereby uniformity in law depends in part on its application by adjudicators in practice, a uniform application is difficult to extract since the cases applied are factually very different. It is however possible to locate a tendency towards a broad interpretation of article 80 where causation does not have to be conduct that in a strict way has made performance impossible. Interference may also lead to total or partial excuse from liability.

However, the application of article 80 is impaired by the fact that case law does not contain references to previous cases on article 80 and sometimes no references for what looks like application of a concept like article 80. The need for *pro rata* apportionments is recognized in case law. However, with many different or no references to the legal basis for making such apportionments a uniform development of the law is impeded, thus presenting a barrier for trade.

Some cases address situations where a party has suspended performance without considering whether such suspension was rightful or not. Allowing acces to exemption from liability under article 80 in cases of suspension may lead to circumvention of other provisions of the Convention. Not

considering this presents a barrier to trade if established rules cannot be relied upon.

In this way, some aspects of article 80 help to remove barriers to trade while others add to them. The question is whether it is overambitious to demand total unification of the text and application of the Convention in a judicially pluralistic environment where no supreme CISG court exists.

## 9.3 Perspective and Future

It appears that there has been a lack of attention paid to article 80, both among adjudicators, trading parties and scholars. With this work it is possible to point out that article 80 has an independent scope and role in the Convention and that similar rules are found in international soft law. Thus there does not seem to be reason to exclude a rule similar to article 80 from future international restatements or soft laws.

This work may serve as inspiration when considerations of adopting a rule similar to article 80 in international instruments are made. Especially the fact that article 80 expresses underlying principles that are found also in international soft law makes this work valuable as inspiration for similar tools in the future. Considerations are currently being made regarding the creation of The Global Principles of International Consumer Contracts and the ongoing process of developing the TLP.[992]

Considering the factually very diverse cases that article 80 applies to it seems counterproductive to suggest that future rules expressing the principles found in article 80 be elaborated by more detailed text. Elaboration of a standard like article 80 may restrict its scope. Flexibility in the law is often achieved at the cost of specific wording. Looking at for example the Danish Traffic Law, which requires the speed of the vehicle to be adjusted to the

[992] See more, for example in Del Duca, Louis F.; Kritzer, Albert H. and Nagel, Daniel, *Achieving Optimal Use of Harmonization Techniques in an Increasingly Interrelated Twenty-First Century World Consumer Sales: Moving The EU Harmonization Process to a Global Plane*, Uniform Commercial Code Law Journal, 2008, 51-65, CISGW3.law.pace.edu, Berger, Klaus Peter, *The Creeping Codification of The New Lex Mercatoria*, Wolters Kluwer, Austin, 2010, [Berger, *Creeping Codification*, 2010] and trans-lex.org.

circumstances[993] it would appear counterproductive and perhaps impossible to specify which behaviour in the traffic is considered appropriate in each particular situation.

The motorist who reads such a rule will not find self-evident answers to an otherwise self-evident rule that has the effect that when it snows you have to drive slower. As a consequence, the motorist will not see that a specific speed limit applies when it is snowing and similar in article 80 where the trading parties will not become informed which specific behaviour will lead to a loss of rights.

In this regard, the flexibility of article 80 is contained in its wording. However, it is also demonstrates its weakness and the need for having more specific rules applying alongside the provision, despite the fact that they may have an overlap to article 80.

The strength of article 80 is its mere existence in the Convention. By including a rule in text and considering article 7, it is unnecessary to refer cases to be solved by underlying principles, good faith or perhaps domestic law. As such, article 80 is a useful example of good faith and principles that would otherwise have to be identified on an ad hoc basis. Instead, the words can be relied upon for uniform development.

In some case law there is an unused potential for facilitating uniform development. This dissertation assists in the future uniform development of article 80 in two ways.

First, it is pointed out that adjudicators can greatly improve the future development of article 80 by considering article 7 more carefully and by indicating the legal basis for their decisions more clearly. This will give the opportunity of assessing the cases' value as interpretation aids and remove doubt as to whether the adjudicator is applying a domestic rule.

Second, this dissertation is an extensive exploration of the provision. It does not pretend to solve all relevant questions that may arise in relation to article 80. However, it does assist future uniform development and awareness of the rule by exploring the provision's characteristics within frames that are wider than a scholarly article, a commentary or a specific case can allow.

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[993] For example § 41(1) of Færdselsloven, LBK nr 1320 af 28/11/2010, [Traffic Law of Denmark].

Thereby the basis for future scholarly attention is formed and such work could address a number of issues that exceeded the frames of the current dissertation.

One such issue is that since article 80 has a nexus to good faith, it is relevant to ask whether parties may completely exclude the application of the provision if the Convention would otherwise apply. The parties can already affect the application of article 80 through their contract, but is it possible for a party to exclude liability for interfering with the other party's performance?

This may depend on an analysis of party autonomy vis-à-vis good faith and its mandatory or overriding character. Would a liability disclaimer for interference with performance be upheld in all cases or perhaps only insofar as the interference is less than gross negligence?

Additionally, the view proposed at present, is that clearer reference to the legal basis for the adjudicator's decision would improve the quality of case law as interpretation aid in the future. However, it may be of interest to clarify to what extent there is a direct *duty* for adjudicators to do so. Does article 80 apply *ex officio* or does it depend entirely on the parties claiming it? The answer may be different for a judge who is bound by the laws of the state and an arbitrator who is not necessarily bound by any particular domestic law.

The present dissertation has touched upon some fundamental principles of law by indentifiying some of the principles underlying article 80 and the Convention. An interesting aspect is seen in the similarity between these principles within the law of sales and other areas of law. However, a constant tracing of principles of law across areas of law becomes an investigation of the role of law in society and among individuals. This was not the focus of the current dissertation where focus has been on a clarification of article 80 with the purpose os assisting in the development of the Convention as a viable tool.

Further more, this dissertation may also serve as inspiration for the development of domestic law. In the Nordic region a development is traced regarding the traditional *mora creditoris* – delay by the creditor. The position is that a promisee's interference with the promisor's performance is not considered a breach of contract, hence the promisor cannot resort to any remedies. Current writings however suggest that this is changing so that the promisee's interference is considered a breach, similar to the position under

the Convention.[994] In this regard inspiration for a development regarding loss of rights due to interference with the other party's performance may be derived from article 80 and this work.

It has been seen that article 80 and the principles expressed in it plays an independent though perhaps as yet underused role in the Convention. Though the provision is not independent in the sense that it is without overlap to other provisions, it applies to cases that would otherwise need considerations of other provisions, underlying principles, the controversial good faith or domestic law. The text of article 80 is a useful tool to avoid the dangers to uniformity contained in considerations of principles, good faith and domestic law. The present dissertation has sought to clarify the role of article 80 and in so doing further the goals of the CISG.

[994] Bryde, Andersen Mads and Lookofsky, Joseph, *Lærebog i Obligationsret I*, Thomson Reuters, Copenhagen, 3rd edition, 2010, pp. 186-188.

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