

UNIVERSITY OF CAPE TOWN
SCHOOL FOR ADVANCED LEGAL STUDIES
Faculty of Law
Department of Commercial Law

**THE IMPEDIMENT OF NON-CONFORMITY OF
GOODS, AS AN EXCUSE UNDER ARTICLE 79
OF THE UNITED NATIONS CONVENTION ON
CONTRACTS FOR THE INTERNATIONAL SALE
OF GOODS (CISG)**

Name: Jesse-Scott Ranier Ruiters

Student Number: RTRJES001

Qualification: Masters of Laws specializing in International Trade Law

Supervisor: Dr. Andrew Hutchison

Word-count: 23788 words

Submission Date: 15 September 2015

Research dissertation/ research paper presented for the approval of Senate in fulfillment of part of the requirements for the Masters of Laws in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Masters of laws dissertations/ research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

Table of Content	
Table of Content	I
CHAPTER 1: PRELIMINARY ISSUES	1
1.1 Introduction	1
1.2 Drafting History of the CISG and Article 79	3
1.2.1 Drafting History Which Lead to the Creation of the CISG.....	3
1.2.1.1 UNIDROIT and The Hague Conference’s Attempts at a Uniform International Sales Law	3
1.2.1.2 UNCITRAL and the Creation of the CISG	4
1.2.2 Drafting History of Article 79	5
CHAPTER 2: UNDERSTANDING ARTICLE 79: A LOOK INTO ITS COMPONENTS, REQUIREMENTS AND AVAILABLE ALTERNATIVES	9
2.1 Components of Article 79	10
2.2 Requirements Necessary to Satisfy an Exemption under Article 79.....	14
2.3 The Relationship between Article 6 and Article 79	22
CHAPTER 3: THE DEBATE OF NON- CONFORMITY AS A VIABLE EXCUSE UNDER ARTICLE 79	24
3.1 The Advisory Council	24
3.2 Argument against non-conformity existing as an excuse: John O. Honnold’s take on the issue	25
3.3 Argument for non-conformity as an excuse: Peter Schlechtriem’s take on the issue 28	
3.4 Current state of affairs: an analysis of the available case law.....	31
CHAPTER 4: AN ANSWER DETERMINED THROUGH THE LEGAL INTERPRETATION OF TREATIES	46
4.1 Interpretation under the CISG	47
4.1.1 Article 7: Interpretative Rules under the CISG	47
4.1.2 Tools for the Interpretation of CISG Provision.....	51
4.2 Interpretation of Treaties: A Solution through the United Nations Convention on the Law of Treaties 1980.....	54
4.2.1 Schools Of Thought Regarding Treaty Interpretation.....	54
4.2.2 The United Nations Convention on the Law of Treaties 1969 (VCLT)	57
4.2.3 Application Of Article 31 And 32 To The VCLT To The Issue Of The Delivery Of Non-Conforming Goods Being Excused Under Article 79 Of The CISG...	62
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS	65
5.1 Conclusion.....	65
5.2 Recommendations	67
Bibliography.....	70

CHAPTER 1: PRELIMINARY ISSUES

1.1 Introduction

The *United Nations Convention on Contracts for the International Sale of Goods 1980* (hereafter “CISG”), has been considered the most successful attempt at a uniform substantive contractual law.¹ Its success can be attributed to several reasons. One such reason is based on the fact that more and more international sale contracts embody the CISG as either a choice of law, or by virtue of the conventions applications parties to the contracts have their place of business in contracting states to the Convention² or the private international law rules lead to the law of a contracting state to the CISG.³ Another reason can be attributed to the fact that as of 26 September 2014 it has exactly 83 contracting states⁴ as opposed to its predecessor⁵ which only had nine.⁶ A final reason would be the ever increasing utilization and interpretation of the Convention by domestic courts.⁷ However despite its successes, the CISG remains vague in various aspects. This is due to compromise between Common law and Civil law countries, during its negotiating phase.⁸ For the purpose of this dissertation, the vagueness revolves around the question, if whether Article 79 permits an exemption based on the delivery of non-conforming goods?

Article 79 operates as a *force majeure* clause, effectively affording a party who has not performed any of his respective obligations, due to an impediment beyond his control, of which he could not have reasonably taken into account at time of the conclusion of the contract, the opportunity to escape liability for contractual damages. Note that the innocent party may still invoke, all other available remedies due to the fact that the defaulting party is still in breach of contract.⁹ Nevertheless, if the requirements are satisfied under Article 79, then the innocent party may not claim damages.

¹ Loukas Mistelis ‘CISG-Advisory Council: CISG-AC Publishes First Opinions’ (1997) 1.

² United Nations Convention on Contracts for the International Sale of Goods 1980, Art. 1(1)(a) (hereafter “CISG”)

³ CISG, Art. 1(1)(b).

⁴ CISG: Table of Contracting States available at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> accessed on 18 June 2015.

⁵ The Uniform Law on the formation of Contracts for the International Sale of Goods 1964 (hereafter “ULFIS”) and the Uniform Law on the International Sale of Goods 1973 (hereafter “ULIS”).

⁶ Ingeborg Schwenzer and Pascal Hachem ‘The CISG – Successes and Pitfalls’ (2009) 459.

⁷ Peter Huber & Alastair Mullis *The CISG: a new textbook for students and practitioners* (2007) 1.

⁸ CISG-AC Opinion No. 7 ‘Exemption of Liability for Damages under Article 79 of the CISG’ Available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>. Accessed on 20 July 2015.

According to recent jurisprudence, courts decisions have allowed for various Article 79 excuses typically under: ‘A seller’s late delivery of goods, a buyer’s late payment of the price, a buyer’s failure to take delivery after paying the price.’¹⁰ On one occasion, a French court has even granted the exemption based on a sellers inability to produce conforming goods.¹¹ However despite this fact scholars continually debate if whether the CISG allows for such an exemption. Accordingly, Alejandro Garro once stated that,

‘There are issues under Article 79 that, either as a result of flexibility in the language of the provision and an unusual level of ambivalence in its drafting history, leave courts and arbitrators with significant leeway when applying Article 79 to the facts before them.’¹²

He further cautions the use of any survey of reported decisions, due to that fact that the number of cases decided under Article 79 provides few interpretive conclusion to be drawn.¹³ This is due to the fact that, despite the few cases of success under Article 79, there exists even more claims that have been denied.¹⁴

In my analysis of the research on this particular topic, I had discovered, that one prominent scholar had argued from the point of view of the intention of the Drafters, essentially the legislative intent. The other CISG Advisory Council Member had argued from a purely textual approach based on the wording of the provision of Article 79.¹⁵ Therefore I am of the view that if we funnel these arguments through an interpretive guide, we will be left with a determination as to which should be preferred. This will indicate if whether we should include or exclude the delivery of non-conforming goods as an excuse for the purposes of Article 79.

With due regard given to the above paragraph, this dissertation contains five chapters. The first chapter contains a brief drafting history of the CISG and Article 79, in which I seek to illustrate that the challenges of compromise have resulted in the creation of a vague and plastic norms.¹⁶

⁹ CISG, Art. 79(5) and Joseph Lookofsky *Convention on Contracts for the International Sale of Goods* (2012) 186.

¹⁰ *Uncitral Uncitral Digest of Case Law on the United Nations Convention on the International Sale of Goods* (2008) 253.

¹¹ (*Flippe Christian v. Douet Sport Collections*) - Tribunal de Commerce de Besançon, France, 19 January 1998, unlex. Available at <http://cisgw3.law.pace.edu/cases/980119f1.html> accessed on 20 July 2015.

¹² CISG-AC Opinion No. 7 ‘Exemption of Liability for Damages under Article 79 of the CISG’ Available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>. Accessed on 20 July 2015.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See Chapter 3 at 3.2 and 3.3.

¹⁶ Harry Flechtner ‘Gedenkschrift In Honor Of E. Allan Farnsworth (1928-2005): Article: Article 79 Of The United Nations Convention On Contracts For The International Sale Of Goods (CISG) As Rorschach test: The Homeward Trend And Exemption For Delivering Non-Conforming Goods’ (2009) 2.

The second chapter will illustrate the components of Article 79, which essentially embodies the requirements necessary for the utilization thereof and the issues presented under each requirement. The Third chapter will bring to light the debate as to whether non-conformity exists as an excuse. Within chapter three, I will illustrate the importance of the Advisory Council, the arguments presented by the relevant scholars and Advisory Council members as to the current debate, and finally the current state of affairs with regard to non-conformity of goods and Article 79. Chapter four is the crux of this dissertation, within this chapter I will use the relevant arguments, funneled through the applicable interpretive guides in order to ascertain if whether from a legal interpretative vantage point, an answer may be derived. Furthermore I will explain the internal interpretive rules embodied under Article 7 of the CISG. The fifth and final chapter will be a summing up of all the relevant points as well as recommendations.

1.2 Drafting History of the CISG and Article 79

1.2.1 Drafting History Which Lead to the Creation of the CISG

Initially, one has to understand that the CISG was not the first attempt at a uniform international sale law. These first attempts were established by the International institute for the Unification of Private law (hereafter “UNIDROIT”) and the Hague Conference for Private International Law (Hereafter The Hague Conference).¹⁷ Later an attempt by the United Nations Commission on the International Trade law (hereafter “UNCITRAL”) saw the creation of a uniform international sales law, as we know it today, the CISG.

1.2.1.1 UNIDROIT and The Hague Conference’s Attempts at a Uniform International Sales Law

In 1928, the Austrian scholar, Ernst Rabel¹⁸ led the world on the path to a uniform international sales law, it was he who had motioned to the newly created UNIDOIT institute that such a creation would be a beneficial first project.¹⁹ Note that UNIDROIT had been established in 1926 and was founded in Rome.²⁰

¹⁷ Huber & Mullis op cit (n7) 2.

¹⁸ Schwenger and Hachem op cit (n6) 459. ‘Ernst Rabel was the first scholar to report on the possibility of sales law unification, based on his work a committee consisting of representatives from various legal systems had been founded. Of which we saw the creation of the first draft of uniform sales law in 1935. Later in 1936 Rabel published the first volume of his works on uniform sales law, titled ‘*das Recht des verkaufs*’ which provided a broad comparative analysis of the status quo of sales law.’

¹⁹ Huber & Mullis op cit (n7) 2.

²⁰ Schwenger and Hachem op cit (n6) 459.

However it was not until after the Second World War that we see the creation of a Special Sales Commission which had been appointed by the conference in The Hague.²¹ The responsibility of this Special Sales Commission was to further the unification of international sales law, a process initially started by Ernst Rabel.²² It was this Commission that inevitably created the first two drafts of uniform international sales law, these drafts, subsequently adopted were known as the: The Uniform Law on the formation of Contracts for the International Sale of Goods (hereafter “ULFIS”) and the Uniform Law on the International Sale of Goods (hereafter “ULIS”).²³ These predecessors of the CISG had entered into force in 1972, however both Hague Conventions existed as a failed attempt at uniform international sales law, for the reason that both had failed to muster the requisite attention by the international community to be ratified and applied.²⁴ As a result the Hague Conventions had not met the high hopes and expectations, shared by all the interested parties.²⁵ It was during the time that ULFIS and the ULIS had been struggling to receive the appropriate number of member state ratifications, that UNCITRAL had been established in 1966.²⁶

1.2.1.2 UNCITRAL and the Creation of the CISG

It was due to the failures of the Hague Conventions and after consultations with the member states of the United Nations, that UNCITRAL had decided to establish a working group to try modify the Hague Conventions or create a new convention that would have a much better chance at receiving international acceptance.²⁷

The choice is however obvious, the Working Group had decided to create the New York Draft Convention, which had later been modified several times before it had been adopted in 1980.²⁸ The New York Draft Convention ‘covered specific rules on sales as well as the formation of the sales contract’²⁹. This inevitably means that the New York Draft Convention is the Draft Convention that became the CISG. Article 99 of the CISG mandated that the Convention would only come into force upon the ‘deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contained a declaration made

²¹ Huber & Mullis op cit (n7) 3.

²² Schwenzer and Hachem op cit (n6) 459.

²³ Huber & Mullis op cit (n7) 3.

²⁴ Ibid.

²⁵ Schwenzer and Hachem op cit (n6) 459.

²⁶ Huber & Mullis op cit (n7) 3. And ‘Origin, Mandate and Composition of UNCITRAL’ available at <http://www.uncitral.org/uncitral/en/about/origin.html> accessed on 24 August 2015.

²⁷ Huber & Mullis op cit (n7) 3.

²⁸ Ibid.

under Article 92'.³⁰ On 11 December 1986, the mandated threshold, as established under Article 99, had been met and subsequently the CISG came into force on the 1 January 1988.³¹

It is no secret that the creation of this new convention has gained sufficient international attention and as a result it can be stated that the Working Group had successfully accomplished their goal, which is evident based on the success as illustrated in the introductory paragraph.³²

1.2.2 Drafting History of Article 79

When one speaks of the drafting history of Article 79 of the CISG, essentially one is in fact referring to the *travaux Préparatoires*. It has been stated that the overabundance and disorganised nature of *travaux préparatoires* primarily made the legislative history of the CISG particularly difficult to navigate.³³ Nonetheless, this is not the position today.³⁴

However for the purposes of a discussion on the drafting history of Article 79, I turn to the works of the Late Advisory Council Member and scholar, Peter Schlechtriem, in his commentary on Article 79.³⁵ Of all the available commentary on the drafting history of article 79, his seems to be the most thorough.

First of all it has to be highlighted that Article 79, for all intents and purposes, exists as a revised version of Article 74 of the ULIS.³⁶ Peter Schlechtriem notes that the reason for the revision was due to the fact that Article 74 of the ULIS had been criticised during the Working Group discussions, for making it 'too easy for the promisor to excuse his non-performance of the contract'³⁷. Therefore various members of the Working Group were all for making the

²⁹ Huber & Mullis op cit (n7) 3.

³⁰ CISG, Art. 99(1).

³¹ Schwenger and Hachem op cit (n6) 459 and 460.

³² See Chapter 1 at 1.1.

³³ 'Roadmap to the legislative history of CISG Article 79' available at <http://cisgw3.law.pace.edu/cisg/text/roadmap/intro-79.html> accessed on 25 May 2015

³⁴ 'Roadmap to the legislative history of CISG Article 79' available at <http://cisgw3.law.pace.edu/cisg/text/roadmap/intro-79.html> accessed on 25 May 2015. 'Our response is navigation aids (pilots) to identify paths and shoals (caveats) -- *roadmaps* for each Article of the CISG'.

³⁵ Peter Schlechtriem *Commentary on the UN convention on the international sale of goods* 2ed (1998).

³⁶ Joern Rimke 'Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts' (2000) available at <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> accessed on 29 August 2015.

³⁷ Schlechtriem op cit (n35) 601.

provision more objective.³⁸ It also has to be noted that the scope of Article 74 was quite broad, it not only covered situations of ‘physical or legal impossibility or circumstances which fundamentally altered the character of the performance owed’³⁹ but also covered situations where performance had suddenly become more difficult.⁴⁰

Peter Schlechtriem then continues to explain that, despite the fact that the Working Group had decided to alter the wording of the provision, they could not however decide on what wording should have been adopted.⁴¹ As a result they created two alternatively worded drafts as options. The first alternative (Alternative A) was the Provisional Alternative.⁴² Which stated that, there would be no liability to pay damages, only in a situation that had occurred, but was not due to the fault of the promisor and where performance had become impossible or the situation changed the nature of the performance.⁴³ Inevitably this meant that the expected performance under the contract would not be rendered, but in its stead, a new and different performance would be due.⁴⁴ In this situation fault was presumed and the onus rested on the promisor to prove one of three things: first, that he could not have taken the situation into account, or secondly that he could not avoid the situation or finally that there was no way to overcome this situation. It also contained a provision similar to that of the current Article 79, that the promisor is under an obligation to notify the promisee of the impediment.⁴⁵

The second alternative (Alternative B), was significantly different from the Provisional Alternative, it provided that any impediment, that could not have been taken into consideration by the parties at the time of conclusion of the contract or in the case of which it had already occurred and could not have been avoided or overcome thereafter, would exist as an exemption.⁴⁶ Like the Provisional Alternative, it also catered for the notification to the promisee, however the way in which they differed was that Alternative B afforded the injured

³⁸ Schlechtriem op cit (n35) 601. And Joern Rimke ‘Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts’ (2000) available at <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> accessed on 29 August 2015.

³⁹ Schlechtriem op cit (n35) 601.

⁴⁰ Ibid.

⁴¹ Schlechtriem op cit (n35) 601. And Joern Rimke ‘Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts’ (2000) available at <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> accessed on 29 August 2015.

⁴² Ibid.

⁴³ Schlechtriem op cit (n35) 601.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Schlechtriem op cit (n35) 601.

party the remedies of avoiding the contract or a reduction of the purchase price, provided that the impediment was not due to their act.⁴⁷

Ultimately, the Working Group adopted a version primarily premised on the Provisional Alternative but included the use of the term “impediment” in Alternative B.⁴⁸ This meant that if a party to the contract had not performed any of their obligations under the contract, that party would not be liable to pay damages provided that, the defaulting party met certain requirements.⁴⁹ These requirements are expressed as follows: that the above situation was due to an impediment and furthermore that the impediment was not due to the fault of the defaulting party.⁵⁰ Schlechtriem therefore, draws the reader’s attention to the fact that fault was presumed, unless the defaulting party could prove that situation met the further criteria of impossible performance and the like expressed within the Provisional Alternative as explained above.⁵¹ This version was adopted as Article 50 of the Geneva Draft of 1976.⁵²

Later upon reformulating the ground for the exception under Article 51 of the Vienna Draft, it was decided that the no fault requirement should be abandoned and in its stead we see the importation of the phrase ‘impediment beyond his control’.⁵³ This shift would essentially see the inclusion of an objective test.⁵⁴

Additionally we also see a second alteration, which was an insertion of the sentence that we effectively know as Article 79(5), this meant that, the innocent party could now claim any other remedy available under the convention except damages.⁵⁵ This was however qualified by the fact that there had been no consensus for the remedy of claiming specific performance where the due performance had become impossible.⁵⁶ Moreover, the concept ‘sub-contractor’ under paragraph (2) was replaced by the phrase ‘a person whom has engaged to perform the whole or a part of the contract’. Lastly under paragraph (4) the drafting parties decided to make it clear

⁴⁷ Schlechtriem op cit (n35) 602.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Joern Rimke ‘Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts’ (2000) available at <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> accessed on 29 August 2015.

⁵³ Schlechtriem op cit (n35) 602.

⁵⁴ Schlechtriem op cit (n35) 601. And Joern Rimke ‘Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts’ (2000) available at <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> accessed on 29 August 2015.

⁵⁵ Schlechtriem op cit (n35) 602.

⁵⁶ Ibid.

that the promisor completed his obligation to inform the promisee, only when the notice arrives within a reasonable time, non-receipt was therefore placed squarely on the promisor's shoulders.

Finally Peter Schlechtriem, reflected the difficulties that the delegates of the Working Group had as to the interpretation of the provisions after the completion of the final draft.⁵⁷ An example of which would be with respect to paragraph (5), which the Federal Republic of Germany proposed that its wording should be made clear to the fact that the right to claim specific performance could not be insisted upon, if the impediment was a continuing one.⁵⁸ However certain parties objected to this, due to the fact that, the question was more than just a clarification of law.⁵⁹ It embodied a technical question as well.⁶⁰ It was understood that the removal of right to performance would prejudice the other accessory rights of the promisee and basically, despite the fact that the impediment had occurred, it was the obligation of the promisor, nevertheless, to try and overcome such impediment and perform.⁶¹

Furthermore The Norwegian proposed that under paragraph (3), the promisor should be released of his duty to perform, even though the impediment was temporary, if the impediment radically changed the nature of the promisor's due performance.⁶² It was rejected for the reason that essentially this introduced a *Théorie de l'imprévision*⁶³ into the convention. Consequently both The German proposal and Norwegian proposal were rejected.⁶⁴

Ultimately the reflection of compromise during the drafting stages, for the purpose of non-conformity of goods existing as an excusable exemption, is evident within Peter Schlechtriem's arguments on the issue at hand.⁶⁵ Note that this will be discussed in much greater depth.⁶⁶

⁵⁷ Schlechtriem op cit (n35) 602 and 603.

⁵⁸ Schlechtriem op cit (n35) 603.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Dionysios Flambouras 'Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108' (2002) available at <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html> accessed on 29 August 2015, Joern Rimke 'Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts' (2000) available at <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> accessed on 29 August 2015. And Schlechtriem op cit (n35) 602 and 603. 'Effectively, the promisor would be released from his obligations the minute the impediment made the obligation more difficult.'

⁶⁴ Joern Rimke 'Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts' (2000) available at <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> accessed on 29 August 2015.

⁶⁵ Schlechtriem op cit (n35) 606.

⁶⁶ See Chapter 3.

However, briefly, Peter Schlechtriem argues that the term “impediment” as evident under Article 79 is a fundamental shift from the use of the term “circumstance” under Article 74 of the ULIS.⁶⁷ Impediment encompasses a situation that essentially restricts the promisor’s scope of activities. Additionally, the term “circumstances” under The Hague Convention, replaced the term “obstacle”.⁶⁸ It was understood that the term “obstacle” would encompass the fact that only external events would be capable of being excused.⁶⁹

With regard to the above, it has to be noted that effectively ‘The compromise nature of Article 79 has led commentators to question whether the rules it establishes provide real clarity for parties to a commercial transaction.’⁷⁰ As the drafting history of the CISG particularly Article 79 suggests that, it had taken a considerable amount of thought and logic to arrive at a mutual solution as to the terms applicable. However, with regard to the drafting history, the mutual solution derived at, although it embodies consensus, this consensus embodies compromise which had led, nevertheless, to the creation of vague provisions.⁷¹ One such provision being if whether the promisor is capable of claiming non-conformity of goods delivered as an exemption under Article 79, due to the fact that the supplying of conforming goods essentially exists as one of the promisor’s fundamental obligations.

CHAPTER 2: UNDERSTANDING ARTICLE 79: A LOOK INTO ITS COMPONENTS, REQUIREMENTS AND AVAILABLE ALTERNATIVES

Initially it has to be understood that Articles 45(1) and 61(1) collectively sets out the no fault liability principle contained in the CISG. Together they state that if either the seller or the buyer fails to perform any obligations due under the contract or those set forth under the convention, that either party may then exercise any rights⁷² provided under the convention or

⁶⁷ Schlechtriem op cit (n35) 606.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Franco Ferrari, Harry Fletcher & Ronald A. Brand (eds) *The Draft Uncitral Digest & Beyond: Cases, Analysis & Unsolved issues in the UN Sales Convention* (2004) 394.

⁷¹ Flechtner op cit (n16) 2.

⁷² CISG, Art. 45(1) ‘remedies available to the [buyer] are contained in Articles 46 to 52’ and under CISG, Art. 61(1) ‘remedies available to the [seller] are contained in Articles 62 to 65’.

claim damages⁷³. Consequently, Article 79 effectively operates as a limited exception to the no-fault liability principle as set forth.⁷⁴

It has also been mentioned that Article 79 must be read together with Article 80, as Article 80 also forms part of Chapter V, Section IV of Part III of the CISG, titled “Exemptions”.⁷⁵ Article 80 states that,

‘A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.’

In essence Article 80 can also operate so as to alleviate a party of the consequences incurred, due to the fact that, they had failed to perform, by virtue of the fact that the other party had caused the failed performance.⁷⁶

2.1 Components of Article 79

Article 79 has been divided into five paragraphs and reads as follows:

(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.

⁷³ ‘Under Article 45(1) and Article 61(1) the claims for damages are collectively contained in Articles 74 to 77’.

⁷⁴ Lookofsky op cit (n9) 186.

⁷⁵ ‘ANNOTATED TEXT OF CISG Article 80’ Available at <http://www.cisg.law.pace.edu/cisg/text/e-text-80.html> accessed on 29 June 2015.

⁷⁶ ‘Section IV of Part III, Chapter V Exemption (Articles 79-80)’ available at http://www.uncitral.org/pdf/english/clout/digest2008/p3_ch5_s4_overview.pdf accessed on 29 June 2015, see overview.

John Honnold, under an analysis of Article 79, states that it is preferable to start with paragraphs (1) and (5), because paragraphs (2) – (4) deals specifically with special situations.⁷⁷ Accordingly, I will follow this approach.

Paragraph (1) illustrates the necessary requirements that need to be met by the party seeking the exemption.⁷⁸ The requirements will be discussed later within this chapter.⁷⁹ Jacob Ziegel makes two very important observations with regard to paragraph (1): first that ‘the existence of a qualifying impediment to non-performance does not "frustrate" or automatically terminate the contract’⁸⁰ and his second observation lends itself to the manner in which the defaulting party addresses the impediment. This means that the subsequent ‘impediment’ must not only be beyond his control but furthermore he must show that he could not have taken the impediment into consideration at the time of the conclusion of the contract or have avoided it or overcome the impediment or its consequences.⁸¹ Additionally, it is my view that, paragraph (1) effectively exists as a chapeau⁸², illustrating that all the other paragraphs are subject to the requirements contained within.

Paragraph (5) on the other hand concerns the consequence of non-performance and expresses the remedies available to the innocent party.⁸³ Upon a closer reading it affords either party the right to use any other remedy available⁸⁴ except, claiming damages. One can therefore draw a relationship between paragraphs (1) and (5), which is that, when a party fails to perform any obligations as considered under paragraph (1) but satisfies the requirements contained within,

⁷⁷ John Honnold ‘Article 79 impediments excusing parties from damage ("Force Majeure")’ available at <http://www.cisg.law.pace.edu/cisg/biblio/ho79.html> accessed on 12 March 2015 see §423.4 (2) *The Convention*.

⁷⁸ Joseph Lookofsky ‘The 1980 United Nations Convention on Contracts for the International Sale of Goods’ available at <http://cisgw3.law.pace.edu/cisg/biblio/loo79.html> accessed on 24 June 2015. And Secretariat Commentary ‘GUIDE TO CISG ARTICLE 79’ available at

<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html> accessed on 24 June 2015.

⁷⁹ See Chapter 2 at 2.2.

⁸⁰ Jacob S. Ziegel ‘Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods’ (1981) available at <http://cisgw3.law.pace.edu/cisg/text/ziegel79.html> accessed on 1 July 2015.

⁸¹ Ibid.

⁸² <http://unterm.un.org/dgaacs/unterm.nsf/8fa942046ff7601c85256983007ca4d8/99954c21bccf56e185257156006f0e6b?OpenDocument> accessed on 1 July 2015 ‘French word used in English-language documents at the UN to refer to an introductory paragraph to a convention or other legal text or to a heading... Note, however, that "un chapeau" is a separate entity from the story itself and is intended above all to summarize or announce the story; ... [note that within a legal context it would be the most important part of the provision upon which all other provisions depend, in the case of Article 79 it is paragraph (1) which embodies the requirements necessary to fulfil an exemption under any of the other paragraphs]’.

⁸³ Jacob S. Ziegel ‘Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods’ (1981) available at <http://cisgw3.law.pace.edu/cisg/text/ziegel79.html> accessed on 1 July 2015.

⁸⁴ See n72 and n73 ‘these remedies are: Specific performance, Avoidance of the contract, Suspension of performance and with regard to its non-applicability under Article 79, Damages’.

the other party may not claim damages as a result, however the use of their other remedies remain available.⁸⁵ Furthermore, the contract is not automatically terminated, in order for the contract to be terminated, the innocent party must rely on the remedy of avoidance.⁸⁶

Additionally it is my view that paragraph (5) is a single phrase that houses two consequences, the first is that, if the seller satisfies the requirements of Article 79 then he can be excused from paying contractual damages. However, based on the way in which paragraph (5) is phrased, even if the seller satisfies the requirements, the buyer is not barred from relying on any of the other remedies available to him, this is the second consequence. The remedies of the buyer are: 'specific performance (Art. 46 CISG), Avoidance of the contract (Art. 49 CISG), Reduction of the purchase price (Art. 50 CISG) [and taking into consideration of Article 79, with the exclusion of] Damages (Art. 45(1)(b), Art. 74 et seq. CISG)'⁸⁷.

Paragraph (2) indicates the special situation in which performance under the contract comes from a third person. It further illustrates a relationship between itself and paragraph (1) stating that with regard to such a special circumstance, the exemption is only applicable if the defaulting party⁸⁸ or the Third person⁸⁹ would satisfy the requirements under paragraph (1). Barry Nicholas states that paragraph (2) is essentially a new innovation that cannot be found under any other authority.⁹⁰ He further notes that the purpose for which paragraph (2) was created was to limit the reliance on Article 79 due to the failure of a third party to provide the due performance.⁹¹

Paragraph (3) is fairly straight forward, it simply illustrates that the exemption only available as long as the impediment exists. This in my view limits the availability of Article 79, to the life-

⁸⁵ John Honnold 'Article 79 impediments excusing parties from damage ("Force Majeure")' available at <http://www.cisg.law.pace.edu/cisg/biblio/ho79.html> accessed on 12 March 2015 see §423.4 (2) *The Convention*.

⁸⁶ Jacob S. Ziegel 'Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' (1981) available at <http://cisgw3.law.pace.edu/cisg/text/ziegel79.html> accessed on 1 July 2015.

⁸⁷ Huber & Mullis op cit (n7) 179.

⁸⁸ CISG, Art. 79(2)(a).

⁸⁹ CISG, Art. 79(2)(b).

⁹⁰ Barry Nicholas 'Impracticability and impossibility in the U.N. Convention on contracts for the International Sale of Goods' 21. Available at <http://www.cisg.law.pace.edu/cisg/biblio/nicholas1.html#504> accessed on 1 July 2015 'to the notion of authority he refers to the ULIS and he also asserts that he assumes within various domestic legislation however he had not done a detailed enquiry'.

⁹¹ Barry Nicholas 'Impracticability and impossibility in the U.N. Convention on contracts for the International Sale of Goods' available at <http://www.cisg.law.pace.edu/cisg/biblio/nicholas1.html#504> accessed on 1 July 2015.

span of the impediment.⁹² Therefore logically speaking, once the impediment ceases to exist, the obligations of the party claiming an exemption should concurrently be reinstated.⁹³

Finally paragraph (4), places an obligation on the defaulting party to notify the innocent party. This is due to the fact that, the innocent party should be afforded the opportunity to take the necessary steps to overcome the consequences of said non-performance.⁹⁴ Note that the notification is effective upon receipt by the innocent party.⁹⁵ Furthermore the obligation of notifying, is only appropriate when the existence of the impediment is certain, therefore it has to be understood that if the impediment is impending, then as per paragraph (1), the responsibility to take the necessary steps to avoid the impediment is squarely placed on the shoulder of the soon to be defaulting party.⁹⁶

This provision also encompasses the concept of reasonableness, due to the fact that notice must be given within a reasonable time period.⁹⁷ The concept of reasonableness is a general principle routed in the CISG as a whole.⁹⁸ The concept of reasonableness used during the CISG's drafting is essentially equivalent to that contained in Article 1:302⁹⁹ of the Principles of European Contract Law 2002 (hereafter "PECL").¹⁰⁰ The PECL has received its concept of reasonableness, with regard to the domestic provisions contained within both Civil law and Common law jurisdictions.¹⁰¹ It states that, when assessing reasonableness, one has to take into account, if whether a person in the same position, acting in good faith would consider the action reasonable?¹⁰² Accompanying this definition, it goes further to state that one should look at what is reasonable with regard to the nature and purpose of the contract, the circumstances of

⁹² Peter Schlechtriem 'Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods' available at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-79.html> accessed on 2 July 2015 'a temporary impediment may be excused but only for the length of its duration'.

⁹³ Secretariat Commentary 'GUIDE TO CISG ARTICLE 79' available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html> accessed on 24 June 2015.

⁹⁴ Denis Tallon, in Bianca-Bonell 'Commentary on the International Sales Law' (1987) available at <http://cisgw3.law.pace.edu/cisg/biblio/tallon-bb79.html> accessed on 2 July 2015.

⁹⁵ Peter Schlechtriem 'Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods' available at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-79.html> accessed on 2 July 2015.

⁹⁶ Denis Tallon 'Bianca-Bonell Commentary on the International Sales Law' (1987) available at <http://cisgw3.law.pace.edu/cisg/biblio/tallon-bb79.html> accessed on 2 July 2015.

⁹⁷ Ibid.

⁹⁸ <http://cisgw3.law.pace.edu/cisg/text/e-text-79.html> accessed on 2 July 2015 at 'definition of reasonableness'.

⁹⁹ The Principles of European Contract Law 2002 (hereafter "PECL"), Art. 1:302 (ex art. 1.108) – 'Reasonableness Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account'.

¹⁰⁰ <http://cisgw3.law.pace.edu/cisg/text/e-text-79.html> accessed on 2 July 2015 at 'definition of reasonableness'.

¹⁰¹ 'Definition of reasonableness recited in the PECL' available at <http://cisgw3.law.pace.edu/cisg/text/reason.html#def> accessed on 2 July 2015.

the particular case and finally what would be considered reasonable within the specific usages and trade practices.¹⁰³

Finally, the wording of paragraph (4) seems to illustrate a kind of deviation from paragraph (5), for the fact that if the defaulting party fails to notify timeously, he will then be liable to pay damages with regard to the non-receipt of the notification.¹⁰⁴ Note that the deviation expressed is for the payment of damages for the failure to notify and not the payment of damages within the context of non-performance, so essentially the payment of damages does not operate the same as within the two.¹⁰⁵

2.2 Requirements Necessary to Satisfy an Exemption under Article 79

Based on the available literature, although it appears that the various scholars seem to lead in similar directions as to the interpretation of the requirements embodied in paragraph (1), a notable issue becomes prevalent. Which is that the scholars tend to phrase the requirements differently. This means that although their interpretation of the requirements are similar, the requirements themselves may not have been expressed identically. To illustrate this, I take the first part of paragraph (1); which states:

‘A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control...’

Accordingly Ronald Brand Believes that the first requirements is ‘...’due to an impediment beyond his control’.¹⁰⁶ However Barry Nicholas believes that this sentence encompasses two requirements, which are: ‘(i) the non-performance must be “due to an impediment”; (ii) the impediment must have been “beyond his control”’.¹⁰⁷ Nevertheless my approach to resolve this is to find a middle ground between the various illustrations of the requirements.

¹⁰² PECL, Art. 1:302.

¹⁰³ Ibid.

¹⁰⁴ Peter Schlechtriem ‘Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods’ available at <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem-79.html> accessed on 2 July 2015.

¹⁰⁵ Secretariat Commentary ‘GUIDE TO CISG ARTICLE 79’ available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html> accessed on 24 June 2015.

¹⁰⁶ Ferrari, Fletcher and Brand op cit (n70) 393.

¹⁰⁷ Barry Nicholas ‘Impracticability and impossibility in the U.N. Convention on contracts for the International Sale of Goods’ available at <http://www.cisg.law.pace.edu/cisg/biblio/nicholas1.html#504> accessed on 1 July 2015.

I therefore believe that the requirements can be illustrated as follows: a party may succeed with an exception as to his non-performance, if he can prove that the non-performance (i) ‘was due to an impediment’¹⁰⁸, said impediment was (ii) ‘beyond his control’¹⁰⁹, of which at the time of the conclusion of the contract he (iii) ‘could not reasonably be expected to have taken the impediment into account’¹¹⁰, or he could not have also been expected to have (iv) ‘avoided or overcome it or its consequences’¹¹¹ and finally, according to Peter Schlechtriem, there must be a causal nexus between the impediment and the failed performance as illustrated in the text by the phrase ‘due to’.¹¹²

(i) ‘was due to **an impediment**’

The first requirement indicates that there must be an “impediment”. It has to be however noted that CISG doesn’t contain a definitions clause; as a result it has been mentioned by Joseph Lookofsky, that according to the silence as to the definition within the CISG and for the fact that its ‘legislative history casts little clear light on its intended meaning’¹¹³, we are essentially left boggled as to what may constitute an impediment.

To the issue of the vagueness of the intended meaning of the CISG, I therefore refer back to the drafting history as illustrated in the first chapter¹¹⁴, in summary however, a notable progression from the words “obstacle” to “circumstance” and finally settling on “impediment” could be observed.

‘Professor Honnold stated that UNCITRAL’s use of the word “impediment” ...[under Article 79]...was intended to revert back to words [similar to “obstacle”] that implied an external, objective barrier to performance’.¹¹⁵

Furthermore the Working group imported the term “impediment” from Alternative B into Alternative A. Martin Davies states that, it would appear that the use of the word “impediment” must not have seemed controversial at the time, to this he theories that the inclusion of the term was in fact to agree on a word not commonly used in either respective Common or Civil law

¹⁰⁸ Barry Nicholas ‘Impracticability and impossibility in the U.N. Convention on contracts for the International Sale of Goods’ available at <http://www.cisg.law.pace.edu/cisg/biblio/nicholas1.html#504> accessed on 1 July 2015. And Schlechtriem op cit (n35) 608.

¹⁰⁹ Ibid.

¹¹⁰ Ferrari, Fletcher and Brand op cit (n70) 393.

¹¹¹ Ibid.

¹¹² Schlechtriem op cit (n35) 608.

¹¹³ Lookofsky op cit (n9) 188.

¹¹⁴ See Chapter 1 at 1.2.2

jurisdictions, in a hope to create a new binding jurisprudence that would grow to become a new excuse principle.¹¹⁶

Furthermore, the use of the words “due to” and “impediment” have been criticised for essentially existing as “elastic words”.¹¹⁷ The criticism exists based on consequences that it produces. It has been stated by Barry Nicholas that under an international enactment such words are undesirable, however in the context of a national enactment such words would most certainly be drafted against the backdrop of one legal system, essentially entailing that the drafters would be able to predict how such a word would play itself out with regard to its interpretation.¹¹⁸ The issue, in the context of an international instrument, is that there might not be a back drop or conversely that there might be a multiplicity of back drops, nevertheless the consequence of this would be that the interpretative body might import an interpretation common to their domestic legal system instead.¹¹⁹ This issue is commonly known as the homeward trend.¹²⁰

Despite the above, the issue still remains, as to what would constitutes an impediment? To this authors have taken various approaches from the ordinary meaning of the word to what impediments have courts and arbitral tribunals exempted.

Joseph Lookofsky states that the ordinary meaning of the word is likened to that of an “obstacle” which is something that ‘gets in the way’.¹²¹ According to Black’s law dictionary, an “impediment” is defined as ‘a hindrance or obstruction’.¹²² Furthermore the Concise Oxford English Dictionary defines an “obstacle” as ‘a thing that blocks one’s way or hinders

¹¹⁵ Larry A. DiMattio (ed) *International sales law: A Global Challenge* (2014) 297.

¹¹⁶ DiMattio op cit (n115) 298.

¹¹⁷ Barry Nicholas ‘Impracticability and impossibility in the U.N. Convention on contracts for the International Sale of Goods’ available at <http://www.cisg.law.pace.edu/cisg/biblio/nicholas1.html#504> accessed on 1 July 2015.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Franco Ferrari ‘Homeward Trend and Lex Forism Despite Uniform Sales Law’ available at <http://www.cisg.law.pace.edu/cisg/biblio/ferrari17.html> accessed on 3 July 2015

‘Threat to the CISG’s main purpose be defined? According to those CISG commentators who have not only referred to the homeward trend, but who have also attempted to define it, the homeward trend is akin to the ‘natural’ tendency of those interpreting the CISG to project the domestic law in which the interpreter was trained (and with which he or she is likely most familiar) onto the international provisions of the Convention’. It is, in other words, the ‘the tendency to think that the words we see [in the text of the CISG] are merely trying, in their awkward way, to state the domestic rule we know so well’.

¹²¹ Lookofsky op cit (n9) 188.

¹²² Bryan A. Garner (ed) *Black’s Law Dictionary* 9ed (2009) 711.

progress¹²³. As illustrated, both definitions allude themselves to the notion of hindrance. Therefore, logically speaking an impediment must be something that hinders progress.

Furthermore it has to be understood that, frequently courts and arbitral tribunal tend to hedge around the fact that there was an impediment.¹²⁴ This means that the existence of an impediment when analysing case law should inevitable be gleaned from the fact that the exemption had been granted¹²⁵ or alternatively that they have denied the exemption based the non-fulfilment of one of the other requirements necessary to satisfy Article 79.¹²⁶ Nevertheless the wide range of successful exemptions can in effect lead the reader to the notion that under those specific circumstances, an impediment of that kind would exist.¹²⁷ Brandon Nagy further notes that an analysis of the current jurisprudence show that courts and arbitral tribunals essentially use the interpretation ‘that an impediment [is] an unmanageable risk or a totally exceptional event, such as *force majeure*, economic impossibility, or excessive onerousness’.¹²⁸

It is my view, based on what has been discussed above; that the definition of impediment is quite broad. An analysis of any of the considerations presented would eventually lead the reader to the existence of an impediment. Additionally, however the impediment must be premised on an ‘Objective circumstance’¹²⁹ which has an effect on the defaulting party’s performance.¹³⁰

(ii) **beyond his control**

The existence of an impediment, however, is not enough to satisfy Article 79. Consequently the “impediment” must be ‘beyond [the defaulting parties] control’. To this requirement Peter Schlechtriem adds that the wording of Article 79 makes the assumption that the promisor has a notable “sphere of control”.¹³¹ It must be understood that when this requirement is discussed and debated, the scholars do nothing more that illustrate with regard to case law, that this requirement either had or had not been met.

¹²³ Judy Pearsall (ed) Concise Oxford English Dictionary 10ed (2002) 983.

¹²⁴ Brandon Nagy ‘Unreliable Excuses: How do Differing Persuasive Interpretations of CISG Article 79 Affect its Goal of Harmony?’ (2013) 21.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ See introduction in Chapter 1 at 1.1.

¹²⁸ Nagy op cit (n124) 22.

¹²⁹ Schlechtriem op cit (n35) 608. ‘These objective circumstances may be natural, social, or political events, or physical or legal difficulties, such as a ban on exports or imports.’

¹³⁰ Schlechtriem op cit (n35) 608.

¹³¹ Schlechtriem op cit (n35) 610.

An example of which can be illustrated by Joseph Lookofsky in his work titled *CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*, in which he states that,

‘The German Supreme court took pains to emphasize in its landmark 1999 decision, that a party can never be granted an Article 79 exemption unless he proves that the impediment in question lies “beyond is control”, and because the possibility of assuring that the goods in question do conform will nearly always lie within the seller’s sphere of control, the beyond-control requirement itself severely reduces the possibility of exempting a given seller from liability for non-conformity’.¹³²

In this case however the defaulting party did not succeed. This case will be discussed in greater detail further on.¹³³

Furthermore Peter Schlechtriem adds that the concept of “sphere of control” denotes a sphere within which it is objectively possible and can be expected of the promisor to adopt measures that are necessary for his due performance under the contract.¹³⁴ Therefore he consequently states that any matters which fall outside this sphere would impair the adoption of the necessary measures or performance, examples being: floods, earthquakes, prevented delivery due to war or riot, etc.¹³⁵

(iii) ‘could not **reasonably** be expected to have **taken the impediment into account**’

The third requirement is qualified by the phrase ‘at the time of the conclusion of the contract’, it is my interpretation that the parties should not have foreseen the likely occurrence of the impediment when the contract was being concluded.

Furthermore, the definition of reasonableness has been discussed.¹³⁶ To this I add that the definition of reasonableness within the CISG has universal application, therefore it holds the same meaning within paragraphs (1) and (4).¹³⁷

¹³² Lookofsky op cit (n9) 188.

¹³³ See Chapter 3 at 3.4.

¹³⁴ Schlechtriem op cit (n35) 610.

¹³⁵ Ibid.

¹³⁶ See Chapter 2 at 2.1.

¹³⁷ <http://cisgw3.law.pace.edu/cisg/text/e-text-79.html> accessed on 2 July 2015 at ‘definition of reasonableness’.

This requirements of “taken...into account”, has been termed the foreseeability requirement,¹³⁸ however the language of the provision does not expressly state or make reference to the use of the word foreseeability, instead taken into account is used. Nevertheless, according to the Pace law website it has been recognised that ‘An Article 79 issue present is whether it was reasonable for the non-performing party to foresee or take an impediment into account’.¹³⁹ The use of the word “or” in the sentence would lead one to believe that these two terms are interchangeable.

Additionally, Larry DiMatteo states that ‘the ultimate question under Article 79 should not be whether the impediment was foreseeable, but whether it was one that a reasonable person would have taken into account when making the contract’.¹⁴⁰ I have to agree with this interpretation, as it reads more in line with the phrasing and spirit of Article 79. Furthermore his reasoning, is due to the fact that there is a difference between foreseeing a possibility and taking it into account.¹⁴¹ Hence he argues that ‘taking into account involves considering what might be done to guard against the foreseen possibility and then deciding whether or not to take that action’.¹⁴² He further advocates that the inclusion of a *force majeure* clause would illustrate that an event has been taken into account.¹⁴³

‘...In essence, what the structure of Article 79 calls for, [is] a consideration of whether the party seeking relief might have “provided against” the relevant changed circumstances “by [its] contract”’.¹⁴⁴

Despite this there may however be situations so unusual, that it could not have been taken into account and consequently, not contemplated.¹⁴⁵ Note, however, that it is commonly understood that in today’s age, despite the occurrence of these events, there are hardly any circumstances that are unforeseeable to some degree; this makes this requirement particularly difficult to satisfy.¹⁴⁶ In such situations however, Peter Schlechtriem provides the solution, that we should take a purely subjective approach to this issue.¹⁴⁷ The subjective approach will be in light of the promisor and the contract, meaning that ‘whether the actual circumstances at the time of the conclusion of the contract the promisor ought to have reasonably foreseen the impediment to

¹³⁸ Lookofsky op cit (n9) 188.

¹³⁹ <http://cisgw3.law.pace.edu/cisg/text/e-text-79.html> accessed on 2 July 2015 at ‘definition of foreseeability’.

¹⁴⁰ DiMattio op cit (n115) 302.

¹⁴¹ DiMattio op cit (n115) 302.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ DiMattio op cit (n115) 303.

¹⁴⁵ DiMattio op cit (n115) 304.

¹⁴⁶ Lookofsky op cit (n9) 189. And Schlechtriem op cit (n35) 611.

¹⁴⁷ Schlechtriem op cit (n35) 611.

some degree likely to occur'.¹⁴⁸ This would indicate that total foreseeability is not important. what is important however based on the argument of Larry DiMatteo is whether there is evidence to suggest that the matter had been taken into account based on the contract and whether the promisor had decided to take action against the impediment or not. This “taking action” is expressed as the next requirement.

(iv) ‘**avoided or overcome it or its consequences**’

Often requirement (iii) and (iv) are coupled together. Accordingly, in the context of requirement (iii), the promisor should have taken the necessary steps to ‘avoided or overcome it or its consequences’¹⁴⁹ the impediment, which had been taken into account. It is not enough that he had taken the impediment into account, he should avoid the impediment in a reasonable manner.¹⁵⁰

However as illustrated by Joseph Lookofsky, with regard to the example of generically defined obligations such as the delivery of coal or wood, which is not restricted under the contract to a particular supplier.¹⁵¹ If the sellers own supply dried up this would not permit him to be exempted, meaning that this requirement is equally difficult to satisfy and could serve as a barrier against exemption in this context.¹⁵² Furthermore,

“‘Avoidability’, in the context of Article 79, means the faculty of avoiding an actual disturbance which is caused by a specific impediment’.¹⁵³

Based on the above statement by Peter Schlechtriem, I have been led to believe that the requirement of avoidability must be read with regard to the particular impediment that is present, making this requirement completely subjective, when under analysis.

(v) ‘**due to**’: Causal nexus between the impediment and the Non-performance

The causal nexus is not obviously expressed within the Article, it exists. With regard to Article 79, the causal nexus is implied by the use of the words “due to”¹⁵⁴. Therefore, read within the

¹⁴⁸ Schlechtriem op cit (n35) 611.

¹⁴⁹ CISG, Art. 79(1).

¹⁵⁰ Schlechtriem op cit (n35) 611.

¹⁵¹ Lookofsky op cit (n9) 191.

¹⁵² Ibid.

¹⁵³ Schlechtriem op cit (n35) 612.

¹⁵⁴ CISG, ART. 79(1).

context of Article 79(1) there has to be a causal nexus between the impediment and the non-performance, effectively meaning that the non-performance must be ‘due to’ an impediment. This requirement is not complex and as a result will be briefly discussed.

Denis Tallon notes that the inclusion of the causality requirement is a logical one.¹⁵⁵ This means that ‘the seller cannot avail himself of an event’.¹⁵⁶ He rationalises this by way of example, in which a seller refuses to perform a contract and subsequently his warehouse, in which the goods were housed, burns down.¹⁵⁷ In this case his non-performance was due to the fact that he refused to perform, not due to the fact that the goods had been lost.¹⁵⁸ However he adds that when there are several causes, the determination of this requirement becomes problematic.¹⁵⁹ His solution is that, this decision lies in the hands subjective appraisal of the judge in which he may follow two paths, the first is that Article 80¹⁶⁰ may influence the matter or secondly the judge may resolve the issue based on the approach within his domestic law.¹⁶¹ Nevertheless the causality requirement can only be satisfied with regard to the exclusive cause.¹⁶²

To conclude based on all the requirement, John Honnold once stated that ‘one [can easily] notice that the scope of Article 79 is broad’¹⁶³. What can be determined based on the above interpretation of the requirements, is that reducing them to their exact meaning, which can be followed by courts is extremely difficult. Upon the completion of identifying these requirements it is my opinion that the interpretation and application of Article 79 is entirely dependent on the facts of a particular case. However the use of elastic words like “impediment” essentially mean that for us to truly get a concrete interpretation of each requirement, we would have to move through every situation that essentially could exist as an impediment. Applying such a strategy to determine the exact meaning of the requirements contained within Article 79 is utterly unrealistic.

¹⁵⁵ Denis Tallon, in Bianca-Bonell ‘Commentary on the International Sales Law’ (1987) 582 available at <http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html> accessed on 3 August 2015’ at 2.6.6.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ CISG, Art. 80 reads as follows: ‘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’.

¹⁶¹ Denis Tallon, in Bianca-Bonell ‘Commentary on the International Sales Law’ (1987) 582 available at <http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html> accessed on 3 August 2015 at 2.6.6.

¹⁶² Ibid.

2.3 The Relationship between Article 6 and Article 79

The principle of party autonomy is of primary importance within international trade law, it premises itself on the concept that the parties to a contract are free to determine the rules with due regard given to the terms of their contract.¹⁶⁴ Article 6 of the CISG essentially exists to preserve this concept and as a result has been deemed the “opt-out” provision of the CISG.¹⁶⁵ Practically, Article 6 of the CISG, effectively grants upon the parties the right to deviate from any provision of the CISG, it reads as follows:

‘The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions’.¹⁶⁶

It is therefore, my view that Article 6 effectively expresses a respect for the autonomy of the parties with regard to their contract.

To place the relationship between Article 6 and Article 79 in context, I draw the reader’s attention to the *Corn case*¹⁶⁷. This case was heard before the International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade. It involves a Ukrainian seller and a Swiss buyer. The facts are as follows, on the 26 July 2011 the Swiss buyer commenced arbitration against the Ukrainian buyer based on breach of contract. The breach revolved around the fact that in terms of the contract the seller had the obligation to deliver corn in five shipments, of which he supplied the first shipment then subsequently failed to deliver the rest due a change in Ukrainian law. This change made it impossible for the seller to obtain the requisite license in order to export the corn.

Of importance is the way in which the arbitral tribunal discussed and considered Article 6 read together with Article 79. To this they stated that Article 79 resembles a *force majeure* clause and further noted that upon inspection of the contract, there were other provisions that seemed to be expressed as a *force majeure* clause however they seemed to cater for more, than Article 79 did.

¹⁶³ John O. Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* 3ed (1999) 473.

¹⁶⁴ Franco Ferrari (ed) ‘The 1980 Uniform Sales Law: Old issues revisited in the light of Recent Experienced’ (2003) 5.

¹⁶⁵ *Ibid.*

¹⁶⁶ CISG, Art. 6.

¹⁶⁷ (*Corn Case*)- International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry [218y/2011] 23 January 2012 available at <http://cisgw3.law.pace.edu/cases/120123u5.html> accessed on 20 July 2015.

‘Therefore, applying Article 6 CISG allowing derogation or variance from the CISG, the tribunal noted that the provisions of the contract should prevail over Article 79(1)’.¹⁶⁸

The tribunal found that after examining the contract, that the failure to supply the rest of the shipment was due to a *force majeure* that could be excused either under Article 79 or the *force majeure* clause.

This case illustrates that according to Article 6 of the CISG, if a contract provides a *force majeure* clause, which embodies more than that of Article 79, then the *force majeure* clause must be considered instead of Article 79 due to the application of Article 6. This demonstrates what I had said about the relationship between Article 6 and party autonomy.

Furthermore Ronald Brand reiterates the positions of John Honnold, who believes that the delivery of non-conforming goods cannot be exempt under Article 79 and Peter Schlechtriem who argues that it can.¹⁶⁹ Brand therefore begs the question, what would be the situation if the parties had included their own *force majeure* clause?

To this he states that if John Honnold was correct, then Article 79 would not excuse the delivery of defective goods, however the use of a *force majeure* clause contained within the contract, and which excuse the seller’s delivering of defective goods, according to Article 6 would not only allow it, but would be the only permissible way to cater for this issue.¹⁷⁰ Brand then notes that if Peter Schlechtriem’s argument was correct, then the inclusion of such a *force majeure* clause would not be necessary.¹⁷¹

To this however I have to draw the reader’s attention, once more to the *Corn case*, in which it was stated, that with regard to the application of Article 6, any deviation from the provisions of the CISG that caters for more than that which is catered for in Article 79 would mean that the *force majeure* clause would be preferred. Essentially this would mean that, it is in the interest of the parties to provide for a *force majeure* clause that excuses the delivery of non-conformity of goods. This is based on the fact that as illustrated above, the requirements of Article 79 are very vague and more often than not, as will be discussed through case law analysis, are very

¹⁶⁸ *Corn Case* supra (n167).

¹⁶⁹ Ferrari, Fletcher and Brand op cit (n70) 401. Also see Chapter 3 at 3.2 and 3.3 for a detailed discussion of their arguments.

¹⁷⁰ Ferrari, Fletcher and Brand op cit (n70) 401.

¹⁷¹ Ferrari, Fletcher and Brand op cit (n70) 402.

difficult to satisfy. Essentially what I would like to illustrate based on Article 6 is that parties to a contract can exempt the delivery of defective goods by including it into a contract under a *force majeure* clause, despite the fact that it is still left open to interpretation as to whether it can be excused under Article 79. Furthermore the ‘inclusion of a force majeure clause is a simple and cost-free precaution that is unlikely to affect the bargained-for price because it may operate for the benefit of either of the parties, depending on what happens’.¹⁷²

CHAPTER 3: THE DEBATE OF NON- CONFORMITY AS A VIABLE EXCUSE UNDER ARTICLE 79

3.1 The Advisory Council

In June 2001, at a meeting in Paris, the foremost experts on the CISG gathered to discuss the creation of a council tasked with the responsibility of interpreting the CISG.¹⁷³ This established council would come to be known as the Advisory Council of the United Nations Conventions on Contracts for the International Sale of Goods (hereafter “CISG-AC”). The existence and creation of this council was to address the ambiguity and vagueness that has always plagued the CISG and which merited an interpretive guidance.¹⁷⁴ Consequently their primary goal is to guide courts and tribunals to a uniform interpretation of the CISG.¹⁷⁵

In practice however the responsibility of the CISG is to draft opinion concerning the interpretation of the CISG, note that while drafting these opinions the council is guided by Article 7.¹⁷⁶ To date the CISG-AC consists of sixteen members¹⁷⁷ and has published sixteen opinions¹⁷⁸ and two declarations¹⁷⁹. The most important for our purposes is Opinion 7¹⁸⁰; however a detailed discussion of this opinion is not important as the dissertation reflects their discussion. Furthermore, what must be underscored is the fact that, despite the CISG-AC

¹⁷² DiMattio op cit (n115) 302.

¹⁷³ Mistelis op cit (n1) 1.

¹⁷⁴ Ibid.

¹⁷⁵ Joshua D. H. Karton ‘Can the CISG Advisory Council Affect the Homeward Trend?’ (2009) 457.

¹⁷⁶ See Chapter 4 at 4.1.1 for full text of Article 7 and Mistelis op cit (n1) 2.

¹⁷⁷ See the list of the current Advisory council member at ‘council members’ available at <http://www.cisgac.com/default.php?ipkCat=129&sid=129> accessed on 9 July 2015.

¹⁷⁸ See the full list of Advisory council opinions at ‘Opinions’ available at <http://www.cisgac.com/default.php?ipkCat=128&sid=128> accessed on 9 July 2015.

¹⁷⁹ See full list of declarations at ‘Declarations’ available at <http://www.cisgac.com/default.php?ipkCat=128&sid=128> accessed on 9 July 2015.

¹⁸⁰ ‘Opinion 7’ available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> accessed on 29 August 2015. ‘Opinion 7 is titled: Exemption of Liability for Damages under Article 79 of the CISG’.

members publishing opinions under the council, its members also publishes opinions independently, known as commentaries¹⁸¹ which will become important later.

Additionally, drawing from the way in which I have illustrated the advisory council, it may appear that the CISG-AC would be an official body tasked to interpret the Convention, this is however not the case. ‘Indeed, while it emphasizes that it is a private initiative, the Advisory Council has taken on something of an official appearance’.¹⁸² Joshua Karton, makes the statement that although they are not an official body they however do function much like one.¹⁸³ He bases this on two points: first, that they have drafted a charter¹⁸⁴ illustrating their ‘...mission, procedures, membership, sponsors, and the roles of the chair and secretary’¹⁸⁵ and second that their ‘opinions...read more like official commentaries than scholarly publications’¹⁸⁶.

Of interest, Loukas Mistelis believes that ‘they are scholars who look beyond the cooking pot for ideas and for a more profound understanding of issues relating to CISG’.¹⁸⁷

3.2 Argument against non-conformity existing as an excuse:

John O. Honnold’s take on the issue

The most prominent scholar, who has frequently been cited by numerous academics, scholars, courts and frequently by the CISG-AC in their opinions, is Professor John Honnold.¹⁸⁸ All scholars that believe that the delivery on non-conforming goods cannot be excused for the purposes of Article 79, subscribe to Honnold’s argument. Therefore an analysis of his argument is important. However to the critical conclusion of the findings of this dissertation, it

¹⁸¹ Examples of these would be the ‘commentary on the UN convention on the international sale of goods’, second edition by Peter schlechtriem (ED) and the ‘UN Convention on contracts for the international sale of goods (CISG)’ by Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas.

¹⁸² Karton op cit (n175) 454.

¹⁸³ Ibid.

¹⁸⁴ Ibid. ‘note that the charter remains a draft which had never adopted; it is considered to be more of a gentleman’s agreement, which is not formally binding’.

¹⁸⁵ Karton op cit (n175) 454.

¹⁸⁶ Ibid.

¹⁸⁷ Mistelis op cit (n1) 2.

¹⁸⁸ ‘Emeritus Professor John Honnold, Father of the Vienna Convention, Dies at 95’ available at https://www.law.upenn.edu/live/news/1901-emeritus-professor-john-honnold-father-of-the#.Vbi_z_mqqko accessed on 29 July 2015. ‘Honnold returned to Penn Law in 1974 but continued working on and advocating acceptance of the UNCITRAL draft. In 1980, the draft was adopted at the U.N. Convention on Contracts for the International Sale of Goods in Vienna, Austria. For his work leading up to the adoption, Honnold became known as the “father of the Vienna Convention.” furthermore he has been coined the father of the CISG for his notable contributions to the interpretation thereof’.

is not the argument itself that is important but the sources that he cites in order to establish his argument.

Honnold's basis for qualifying that Article 79 does not allow for non-conforming of goods to exist as an impediment, finds its roots in the *travaux préparatoires* which in English is known as the "preparatory works or drafting history" of the CISG.¹⁸⁹ The drafting history of the CISG had already been discussed¹⁹⁰, however for the purposes of completeness, it will briefly be revisited.

Honnold states that the issue at hand had been thoroughly discussed during the preparation of the ULIS¹⁹¹. Notably in the course of the Hague Conference in 1964, controversy had struck over the use of the word "obstacle" as opposed to "Circumstance".¹⁹² This was due to the fact that the word considered for adoption under the draft was "obstacle".¹⁹³ It was at this time that a Civil law group had argued that:

'This test [obstacle] might refer only to supervening and external events, as contrasted with the more personal issue as to the seller's due care or fault, and might bar excuse based on an extreme and onerous change in economic circumstances'.¹⁹⁴

Consequently, the word "obstacle" was later replaced by the word "circumstance", which is evident based on the wording of Article 74 of the ULIS. This change in wording meant that, with regard to the interpretation of the provision, a 'drastic change in costs or other economic conditions'¹⁹⁵ could now be considered. Note that according to André Tunc, in his commentary on the *International Sale of Goods and the Formation of the Contract of Sale*, he had made the statement that according to Article 74:

'Exemption from liability will be effective even in the case of the handing over of goods which do not conform to the contract, unless the parties have agreed otherwise, and this is why the text refers to

¹⁸⁹ John O Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* 3ed (1999) available at <http://www.cisg.law.pace.edu/cisg/biblio/honnold.html> accessed on 29 July 2015 and 'What are travaux préparatoires and how can I find them?' Available at <http://ask.un.org/faq/14541> accessed on the 29 July 2015.

¹⁹⁰ See Chapter 1 at 1.2.2.

¹⁹¹ John O Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* 3ed (1999) available at <http://www.cisg.law.pace.edu/cisg/biblio/honnold.html> accessed on 29 July 2015.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

"circumstances" which gave rise to non-performance, a term more vague and general than the term "obstacle" which was used in Article 85 of the Draft'.¹⁹⁶

However, after the creation of UNCITRAL, the term "circumstance" was replaced by the word "impediment", the word "impediment" is perceived to hold characteristics similar to that of "obstacle".¹⁹⁷ Hence, we see a shift from a word that once allowed for the inclusion of circumstances personal to the seller's performance, shift back to one that does not.¹⁹⁸

What's more, Honnold argues that the notion that the word impediment considers situations where performance is prevented is supported by Article 79(4)¹⁹⁹. To this he states that the inclusion of this paragraph would be absurd with regard to hidden defects, and furthermore this provision was not included within Article 74 of the ULIS.²⁰⁰

For the purposes of this discussion, the most important point that he makes with regard to the fact that non-conformity does not exist as an excuse, is based on discussions and a decision taken at the diplomatic conference.²⁰¹ What has to be underscored, based on the above argument is that, Honnold, has essentially derived his conclusion using the drafting history of the CISG, which means that his argument is premised on legislative intent of the drafters. To this the CISG-AC explains in Opinion 7 that,

'At that time, some delegates from common-law jurisdictions favoring a "warranty-based" liability in contract law raised concerns that the prevailing view in civil law jurisdictions, to the effect that contractual liability is based on proof of fault, might unduly influence civil-law judges or arbitrators too

¹⁹⁶ Mr. André Tunc 'Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale' available at <http://www.cisg.law.pace.edu/cisg/biblio/tunc.html> accessed on 29 July 2015.

¹⁹⁷ John O Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* 3ed (1999) available at <http://www.cisg.law.pace.edu/cisg/biblio/honnold.html> accessed on 29 July 2015 at §426(1)(a).

¹⁹⁸ Ibid.

¹⁹⁹ CISG, Art. 79(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'.

²⁰⁰ John O Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* 3ed (1999) available at <http://www.cisg.law.pace.edu/cisg/biblio/honnold.html> accessed on 29 July 2015 at §426(1)(a).

²⁰¹ Ibid. see footnote 10 in the book which states 'The basic change narrowing the area of exemption provided by ULIS 74 was taken in UNCITRAL: The Working Group: (1974) V YB 39–40, 58, *Docy. Hist.* 185–186 204; (1975) VI YB 60–61, *Docy. Hist.* 251–252; The Commission: VIII YB 56–57, *Docy. Hist.* 349–350; Diplomatic Conference: O.R. 80, 55–56, 378–386, 408–412, 430, 134–136, 227, *Docy. Hist.* 401, 445–446, 599–607, 629–633, 651, 705–708, 762 (adoption by Plenary 42–0). An authoritative analysis of the decision to deny exemption with respect to defects in goods by Professor Nicholas, chairman of the Drafting Party on exemption, appears in *Parker Colloq. Ch. 5 at §5.02[21, pp. 5–10—5–14. Accord: Tallon, B-B Commentary at 580*, Honnold's explanation at the Vienna Conference, O.R. 410–411, *Docy. Hist.* 631–632. *But cf. Schlechtriem 1986 Commentary 101 n. 416a*'.

ready to allow sellers to escape liability for defective performance, pleading events beyond their control that could not have been taken into account'.²⁰²

This provides a very solid argument as the source cited is premise on legislative intent.

However Honnold makes an additional statement of vital importance, which is that 'Under the Convention the answer [to the issue at hand] is not obvious, since exemption may apply to a party's failure to perform [any] of its [obligations]'.²⁰³

This notion as to the wording of the convention has been cited by Harry Flechtner as being one of the criticisms to Professor Honnold's Argument. To this he states that:

'Although Professor Honnold's position that Article 79 was not intended to apply to a seller's delivery of non-conforming goods has substantial support in the drafting history of the provision as well as the principles underlying the CISG, the language of Article 79 does not unambiguously state that its scope is so limited'.²⁰⁴

It is with this in mind that we move forward to discuss the argument that the delivery of non-conforming goods is excusable under Article 79.

3.3 Argument for non-conformity as an excuse: Peter Schlechtriem's take on the issue

Professor Peter Schlechtriem is one of the most prominent CISG-AC Members.²⁰⁵ When one argues that non-conformity exists as an exemption for the purposes of Article 79, Schlechtriem's argument is almost always stated as the authority.²⁰⁶ As a result, a discussion of his argument is important.

Peter Schlechtriem states that, with regard to non-conformity of goods existing as an impediment, it is possible based on the principle that the seller has the obligation to deliver

²⁰² CISG-AC Opinion No. 7 'Exemption of Liability for Damages under Article 79 of the CISG' Available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>. Accessed on 20 July 2015.

²⁰³ John O Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* 3ed (1999) available at <http://www.cisg.law.pace.edu/cisg/biblio/honnold.html> accessed on 29 July 2015 at §426(1)(a).

²⁰⁴ Flechtner op cit (n16) 5.

²⁰⁵ CISG-AC Opinion No. 7 'Exemption of Liability for Damages under Article 79 of the CISG' Available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>. Accessed on 26 May 2015. 'See footnote 1 of the opinion which states [... *Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term.*]'.

²⁰⁶ Ferrari, Fletcher and Brand op cit (n70) 401. And Flechtner op cit (n16) 5 and 6. 'Note that in both sources Professor Honnold is discussed as the argument against the delivery of non-conforming goods existing as an impediment'.

conforming goods under Article 35 of the CISG.²⁰⁷ Additionally, even if the seller sells specific goods in his possession, an exemption is not prohibited even if the defect already existed at the time of the conclusion of the contract.²⁰⁸

Furthermore he discusses the change of words as discussed by Honnold and reaches a conclusion that it would appear that the delivery of defective goods would not exist as exemption, to which he notes that this would be the view of English and American law and cannot be followed.²⁰⁹ Schlechtriem's reasons based on the fact that, unlike English and American law, the CISG does not place upon the seller a special warranty to supply conforming goods in addition to his general obligation to supply delivered goods.²¹⁰ Subsequently he reaches the notion that the CISG instead imposes an obligation that the goods be free from defect instead.²¹¹

I cannot however agree with this argument. In Chapter II of the CISG, clearly titled "Obligations of the Seller", we find all the obligations that the seller holds with regard to the CISG. Within his obligations we furthermore find Article 35(1) which reads:

'(1) the seller [must] deliver goods which are of the quantity, [quality] and [description] [required by the contract]...'

This Article is not negatively worded so as to establish that the seller is obliged to deliver goods, which are subsequently free of defect. Instead it clearly states that the obligation that the seller holds with regard to conformity of goods is to provide the exact good expressly agreed upon under the contract. Therefore the seller must deliver conforming goods. Nevertheless if his interpretation of this Article was correct, the obligation to provide goods free from defect would inevitably mean that he must provide conforming goods, due to the words 'deliver goods which are of the...[quality] and [description] [required by the contract]'²¹².

According to Black's Law dictionary, "conforming" is defined as follows: 'Being in accordance with contractual obligations (conforming goods)²¹³. Article 35(1) seems to align itself with this definition of conforming in the sense that it illustrates compliance the

²⁰⁷ Schlechtriem op cit (n35) 619.

²⁰⁸ Ibid.

²⁰⁹ Schlechtriem op cit (n35) 606.

²¹⁰ Ibid.

²¹¹ Schlechtriem op cit (n35) 606.

²¹² CISG, Art. 35(1).

²¹³ Garner op cit (n112) 341.

contractual obligations as expressed²¹⁴. Therefore, Article 35(1) must be referring to conforming goods.

Finally he reaches the conclusion that if there is a defect in the good then accordingly the seller's performance is incomplete and resultantly, it is logical to ask whether the impediment to performance is impossible to overcome.²¹⁵ Such an impediment therefore may lie at the time of the conclusion of the contract of which fact the seller is not aware.²¹⁶ To this he states that the wording of Article 79 does not suggest such a restriction to what may constitute an impediment.²¹⁷

The CISG-AC in Opinion 7 has also stated that,

‘A defect present in the goods at the time of the conclusion of the contract may conceivably constitute an impediment to the seller's obligation to deliver conforming goods under CISG Article 35. Indeed, to the extent that delivery of conforming goods is expressed as a contractual obligation under the CISG (rather than in terms of warranties or guarantees), it stands to reason that a breach of the obligation to deliver conforming goods amounts to a seller's failure to perform "any of his obligations"’.²¹⁸

For the purposes of this discussion, what is important as to Schlechtriem's and the CISG-AC arguments is that, based on the wording of Article 79, the delivery of defective goods could exist as an impediment and consequently be exempted under Article 79 due to the fact that it can be perceived as a failure to perform ‘any of his obligations’²¹⁹. At this point an interesting play between the, for and against arguments is observable. According to Honnold the answer to the issue is a definitive “no”, based on legislated intent as demonstrated within the drafting history, whereas according to Schlechtriem the answer is definitive “yes”, based on the wording of the provision. Logically this means that the wording of the Article 79 does not express the intention of the negotiating or drafting parties.

As a result I have been led to believe that a definitive answer can be attained by funneling this provision through an interpretive guide, which would beg the question should we follow the drafting history? Or a purely textual approach? Or should we read the established legislative

²¹⁴ CISG, Art. 35(1).

²¹⁵ Schlechtriem op cit (n35) 606.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ CISG-AC Opinion No. 7 ‘Exemption of Liability for Damages under Article 79 of the CISG’ Available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>. Accessed on 26 May 2015. ‘Note they base this not a fault based argument of the issue however it is still applicable to the concerning the wording of the provision’.

²¹⁹ CISG, Art. 79(1).

intent into the provision so as to restrict the obligations of the seller to any obligation except the impediment of delivering defective goods?

3.4 Current state of affairs: an analysis of the available case law

‘Most recently, UNCITRAL, the CISG formulating agency, has completed a digest which provides a comprehensive presentation of case law on the CISG and aims at assisting courts in the application of the Convention.’²²⁰ For this part of the dissertation the author will analyze the case law available, this analysis will be based on cases starting in 1998 till those most recent, with reference to the issue at hand. Note that because of the fact that the CISG is international legislation, most of the cases have been decided in the respective language of the court that has heard and decided upon the matter. In order to assist the international world, pace university makes the attempt to translate each case from its respective language to English²²¹, however many cases remain untranslated. For this I will have to rely on English abstracts made available instead.

The first time the issue of non-conformity of goods existing as an impediment for the purposes of Article 79 was encountered, was in 1998 in the Tribunal de commerce [District Court] de Besançon of France. This case is commonly known within the academic community as *Flippe Christian v. Douet Sport Collections*²²². The facts of this case are quite simple, a Swiss buyer had contracted with as French seller for the sale of Judo-suits. The seller however had received complaints from his respective clients concerning a defect. This defect was that after the judo-suits were washed, they would shrink. One of the complaining clients was the Swiss buyer, who had given notice of the defect, twice²²³ and had furthermore requested an amicable resolution of the dispute. Despite sending the notice twice, the buyer had not received any response from the seller, consequently the buyer had the goods examined by an expert who had identified the non-conformity. Thus, the buyer then relied on the remedy of avoidance of the contract, in which he had sought to claim the purchase price and damages. The court held that based on the expert evidence, a lack of conformity had been established, as a result the buyer was entitled to avoid the contract and be awarded damages although the amount of damages received would be subject to the fact that the buyer could not prove that all the goods received

²²⁰ Mistelis op cit (n1) 1.

²²¹ ‘Note that the cases that have been translated to English do not possess any page numbers which makes it difficult to reference exactly’.

²²² (*Flippe Christian v. Douet Sport Collections*) supra (n11).

²²³ Ibid.

were defective and had made a profit of the non-defective goods. However within the context of Article 79, the court held that the seller's failure to perform was subject to the actions of a third party who had manufactured the goods, this was the identifiable impediment that existed. Consequently the court ordered a 35 per cent reduction of the purchase price and the seller to reimburse the buyer accordingly. This case demonstrates that Article 79 had been successfully satisfied at least once.

Within the same year, we find, a decision handed down by a German court (Oberlandesgericht Zweibrücken) that concerned a similar type situation in which the court had found that Article 79 could not be relied upon. This case is known as the *Vine Wax case*²²⁴. A German seller had sold vine wax to an Austrian buyer. Vine wax is a product 'which protects the rootstocks and the cuttings [of grape vine] against dehydration and infections'²²⁵. The defect within this case was that after the buyer had used the vine wax to treat his plants, some of the plants had been damaged. The buyer therefore claimed non-conformity and sought damages. The seller on the other hand asserted the fact that he merely acted as an intermediary and had received the product from his supplier. Consequently the defectiveness of the goods was due to his supplier of which it can be considered to be an impediment beyond his control. The court however found that goods did not meet the demands of practice and as a result they were not in conformity for the purposes of Article 35(1) of the CISG.

However what is important for our purposes is the way in which the German court approached Article 79. To this the court stated that the delivery of non-conforming goods, can exist as an impediment for the purposes of Article 79, however the requirements of Article 79 still has to be satisfied²²⁶. With this consideration the court held that the 'beyond his control' requirement had not been satisfied by the seller, reasoning that, it was not reasonable for the seller to rely on the product of his supplier without undertaking large-scale field trials. This would have been considered necessary because vine wax was a newly developed product. Therefore the impediment was not beyond the seller's sphere of control. Furthermore despite the fact that the seller had acted as an intermediary he was nevertheless responsible for lack of conformity and

²²⁴ (*vine wax case I*)- Court of Appeals (*Oberlandesgericht*) Zweibrücken
31 March 1998 [8 O 1995/95] Available at <http://cisgw3.law.pace.edu/cases/980331g1.html>. Accessed on 20 July 2015.

²²⁵ *Ibid.*

²²⁶ (*Vine wax case I*) supra (n224). '(the court outlines the requirements as: 1) that non-performance was due to an impediment, 2) the impediment was beyond the control of the seller and 3) the impediment was not taken into account at the time of the conclusion of the contract or that the impediment or its consequences could neither have been avoided nor overcome by a reasonable seller.)'.

within such circumstances the supplier of an intermediary cannot be regarded as a third party for the purposes of Article 79(2).

This case demonstrates that interpretation of the CISG left up to the domestic courts could produce a growth within the interpretation of the CISG however it may also create the situation where two divergent opinions as to the wording of the CISG may arise. Also we can see that despite the fact that the seller had failed to be exempted under Article 79, that the courts seem to have agreed up to that point that non-conformity of goods exists as an excusable impediment.

The German seller was not happy with the decision of the Oberlandesgericht Zweibrücken and sought an appeal in the Bundesgerichtshof (Federal Supreme Court) in 1999.²²⁷ It was noted in the Bundesgerichtshof that the court a quo (Appeal Court) had established the liability of the seller without deciding if whether Article 79 was applicable. The reasoning of the court a quo was that even if applicable, the seller would not satisfy Article 79's 'beyond his control' requirement. The Oberlandesgericht Zweibrücken further held that, even though it was not the case, that under Article 79, the seller will only be excused from liability of the impediment is beyond the control of that seller and his respective suppliers. As a result the court hedged around the determination if Article 79 can be relied on with regard to all kinds of non-performance, which would include delivery of defective goods. Furthermore it stated that with regard to the liability of the seller due to his failure to provide conforming goods, it inevitably made no difference whether the seller or the supplier was at fault, as a result 'Article 79 does not alter the allocation of risk'²²⁸. The Oberlandesgericht Zweibrücken therefore decided that the judgement in favour of the buyer, should be set aside and remanded back to the appeal court. Its reasoning was based on the fact that, the seller had made no effort to mitigate his loss. The Oberlandesgericht Zweibrücken inevitably decided the matter on the basis of German law as opposed to Article 7 of the CISG for the fact that the matter before it was procedural rather than substantive.

In the Bundesgerichtshof of Germany in 2002, the issue appears again.²²⁹ This case is known as the *Powdered Milk case* and revolves around a German seller who had entered into several

²²⁷ (*vine wax case 2*)- Federal Supreme Court (*Bundesgerichtshof*) 24 March 1999 available at <http://www.cisg.law.pace.edu/cases/990324g1.html> accessed on 20 July 2015.

²²⁸ Ibid.

²²⁹ (*Powdered milk case*)- Federal Supreme Court (*Bundesgerichtshof*), Civil Panel VIII January 9, 2002 [VIII ZR 304/00] available at <http://cisgw3.law.pace.edu/cases/020109g1.html> accessed on 20 July 2015.

contracts of sale of powdered milk with a Dutch buyer. The Dutch buyer had then resold the powdered milk to an Algerian company and a Dutch company. Before selling it, an inspection was held that yielded no negative results, it was subsequently shipped off to the respective companies. However after processing in Algeria it became evident that the product had a rancid taste. Note that the Dutch company had also identified this problem. The buyer as a result commenced with an action against the seller claiming that, the goods did not conform at the time of the passing of the risk; however the defect only became apparent upon the processing of the product. The issue had then passed through the German court system starting with the court of first instance which dismissed the buyer's claim.²³⁰ The court of appeal (Oberlandesgericht Dresden) 'partially granted the claim, compelling the seller to pay damages according to Articles 74 and 75 CISG'.²³¹

However, of importance was the decision of the Bundesgerichtshof (Federal Supreme Court), in which it was stated that the seller did not satisfy the requirements of Article 79, because the seller could not show that the defect was beyond his sphere of control and that he had taken steps to avoid the defect.

Importantly, the court noted that,

'It may remain open whether this rule can generally be applied to goods that do not meet contractual requirements'.²³²

The court makes very important obiter dicta however: in the event of further proceedings, it states that in its opinion Article 79 does apply to goods that do not conform to the requirements of the contract. Considering this, the court notes that the seller could only succeed under Article 79 if he could prove the argument that it made. The argument was that,

'The powdered milk had been manufactured according to the current knowledge of science and technology and that any existing lipase stock [which was the organism that caused the defect] could have only been such stock that could have never been excluded based on standard procedure'.²³³

In 2003, the issue was considered once more, this time by the Tribunale d'appello in Lugano, Switzerland (Appellate Court). This case is known as the *Modular Wall Partitions case*.²³⁴ This

²³⁰ (*Powdered milk case*) supra (n229).

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ (*Modular wall partitions case*)- Court of Appeal (*Tribunale d'appello*) Lugano

case had a Swiss buyer and an Italian supplier (seller) and concerned the sale of modular wall partitions. Note that the case was on appeal because the seller had successfully sued the buyer for the outstanding balance on the sale price. However, what has to be underscored with regard to this case is that the defect did not concern the quality of the wall partitions but revolved around the way in which they were installed.

It is therefore important to understand that this case dealt with Article 79(2), which meant that the seller would have only been excused in a situation where the person responsible for installation was acting based upon his request. Furthermore the court held that employees and suppliers are not considered to be third parties for the purposes of the CISG, even though they are ‘subjects who, autonomously or as independent parties, fulfill a part or the whole of the contract’²³⁵. The court therefore established certain criteria to determine a third party, namely: 1) individuals, charged by the seller, 2) after the conclusion of the contract, 3) with the fulfillment of existing obligations to the buyer. Furthermore the court noted the examples of a carrier, tasked with delivery under the contract and subcontractors assigned by the seller to carry out the finished work, as examples of a third parties. As a result the court considered the issue to be whether they had received the task directly from the buyer or the seller.²³⁶ From the record of witnesses the court concluded that the persons responsible for installation were at the behest of the seller. The court held that with regard to this particular situation, the buyer would bear the burden of proof to establish this and because he didn’t satisfy this burden of proof the court ordered the buyer to pay the outstanding sales price, consequently it upheld the decision of the court a quo.

The next importance case was decided in 2004, in the Oberster Gerichtshof (Federal Supreme Court of Austria) and is titled the *Omnibus case*.²³⁷ In this case we have an Austrian seller and a Swiss buyer, though the plaintiff in this case is the insurer of the buyer. The seller is a distributor of omnibuses produced by a German supplier (intervening party 1). Note that there is a second supplier (intervening party 2). The second intervening party is the supplier of the air conditioning units installed in the Omnibuses. The facts of this case is simply that the buyer had ordered two omnibuses. Based on internal corporate guidelines the seller was only

29 October 2003 [12.2002.181] available at <http://cisgw3.law.pace.edu/cases/031029s1.html> accessed on 20 July 2015.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ (*Omnibus case*)- Federal Supreme Court of Austria (*Oberster Gerichtshof*)

21 April 2004 [7 Ob 32/04p] available at <http://cisgw3.law.pace.edu/cases/040421a3.html> accessed on 20 July 2015.

authorized to sell the omnibuses within Austria and not to foreign buyers at the time.

Consequently the buyer's name was crossed out of the order form and replaced with another (A____ GmbH), in order to sell the omnibuses in Switzerland. Note that the seller knew what was going on. The effects of this would lead to a situation where the buyer could purchase the omnibuses for a cheaper price in Austria than in Switzerland. However the omnibuses were never delivered to A____ GmbH. Furthermore because the omnibuses were to be delivered to Switzerland, the seller had to adapt them to comply with Swiss statutory vehicle regulations. This meant that they would be new buses as opposed to the standard ones stipulated under the contract by the parties. Upon receipt of the vehicles, the seller issued a guarantee, which existed for two years or 200 000 km on the engine, gear box and rear suspension and a second guarantee which for eighteen months or 50 000 km on the rest of the vehicle excluding parts subject to wear and tear. As the vehicle could not be registered in Switzerland, another party (S____ GmbH) made its Austrian license available, with himself as the named registered owner and consequently concluded an insurance contract with the plaintiff (insurance provider).

In order to complete the chain of sale to the buyer, a sales contract (*Pro forma*) was entered into between the buyer and A____ GmbH. The purchase price was financed by a Swiss corporation (U____ AG) under an installation contract, of which comprehensive insurance would be ceded to that corporation. As a result title to the goods was transferred to U____ AG at the time when delivery was affected to the buyer and in turn the buyer would bear the risk of non-insurable depreciations or destruction of the goods.

The non-conformity with regard to this case revolved around the fact that after using the vehicles it had become apparent that the air-conditioning systems were not functioning properly. This became apparent when smoke began to emanate from the air-conditioning unit, which led to the bus catching fire and burning out completely. Accordingly the non-conformity revolved around the improper installation of the air-conditioning unit. It could not however be determined which intervening party was responsible for this. The insurance was subsequently paid out to U____ AG; with this the buyer settled his installment contract and consequently initiated proceedings against the seller.

The court of first instance interpreted the factual basis and attributed fault to the seller as to the non-conformity of the goods, without considering Article 79. It furthermore stated that deal

with A____ GmbH was a “sham transaction” and the actual transaction was between the buyer and seller. Also the buyer had assigned comprehensive insurance to U____ AG and therefore the plaintiff (insurer) could reclaim the insurance sum.

The appeal court however totally dismissed the court a quo’s judgment, nevertheless it adopted its factual findings. It stated that the seller had acted as dealer, who had acquired goods from a producer to which it noted that any defect could not have been detected prior to the occurrence of the damage. Consequently the dealer could not hold the obligation to conduct a technical examination of harmless factory parts before they were resold. Furthermore the inspection of the air-conditioning system would be a complex procedure.

For the purposes of this discussion it is their analysis of Article 79 that is important. The court noted that the requirement of Article 79 seems to align itself with that of Austrian law (ABGB). In which it reasoned that, for the fact, that the seller had not installed the air-conditioning system, inevitably its installation was beyond his control.

‘Moreover, it could not be reasonably expected from [Seller] to have examined the installation, especially since considerable technical efforts would be necessary and [Seller] was not expected to reckon with any such defect’.²³⁸

According to the CISG the seller could not have been expected to take the impediment into consideration at the time of conclusion of the contract and as a result it is not reasonable for the seller to have taken steps to avoid the impediment.

The appeal court then went on to an analysis of Article 79(2) and concluded that according to literature and jurisprudence the term third party seems to refer to persons assisting in the performance. The court notes that according to literature, the persons who may be classified as “third parties” are divergent. However this case presented an issue not of persons who had to affect performance to the obligee, but of persons whose performance was auxiliary so that performance could be affected. To this the court stated that the obvious functioning of the CISG according to the opinions contained in literature was that, the seller could be excused if he met the requirements of Article 79(1). The appeal court held that,

‘Even applying the strictest of opinions would not help the Plaintiff [Insurer], because any potential buyer -- thus, A____ GmbH as well as [Buyer] -- must have been aware that [Seller] could only have acquired

²³⁸ (*Omnibus case*) supra (n237).

the bus from the German producer ([1st Intervening Party]). Therefore, [Seller] had no possibility to choose its supplier'.²³⁹

Ultimately it was held that the seller had met the requirements of Article 79 and consequently exempted. The matter was then referred to the federal court of which it found the appeal court's decision to be justified and admissible.

Following the interpretation of Article 79 to the issue of non-conformity of goods considered in 1999, the next case seems to be a retackling of the issue. This case was decided in the Hovioikeus / hovrätt (Appellate Court) of Finland in 2005 and is known as the *Radiated Spice case*.²⁴⁰ This case involves a Spanish seller and a Finnish buyer who had contracted for the sale of paprika powder to be used in various spice mixes for further sale. The non-conformity revolved around the way the spices had been treated in order to reduce the microbial levels contained within. The contract had specified that it be steam-treated however laboratory analysis had determined that the spice had actually been treated with radiations. The apparent issue was that according to a directive issued by the European Union all consumer products treated with radiation had to be clearly marked as such. The issue as illustrated by the buyer was that, Finnish customers were not fond of purchasing consumable products that were treated with radiation. Consequently the product was, useless with regard to its intended use. The issues before the court were numerous, these being: had the buyer given notice on time? Was the seller in breach of the contract based on the fact that he supplied radiated goods? If in breach, did such breach cause damage? What is the quantum of the damages? Was the seller liable for damages?

However with regard to the conformity of goods contained within Article 35(1) of the CISG the court stated that despite the fact that the contract did not exclude the use of radiation treatment, that based on the fact that the buyer and seller were experienced in their field, the seller should have taken cognizance of the directive and as a result. Radiation treatment should not have even been considered.

Furthermore, with regard to Article 79, the seller had argued that he could not be liable for factors beyond his control, in that the party who had delivered the goods could have been the

²³⁹ (*Omnibus case*) supra (n237).

²⁴⁰ (*Radiated spice case*)- TURKU COURT OF APPEAL, S 04/1600 (24 MAY 2005) available at <http://cisgw3.law.pace.edu/cases/050524f5.html> accessed on 20 July 2015.

one that had radiated the goods.²⁴¹ Concerning this argument the court discussed the provisions of Article 79(1) and 79(2). With regard to Article 79(2) it had concluded the position that various other courts had reached as to whom a third party may be. It established that ‘Article 79(2) does not include suppliers of the goods or of raw materials to the seller.’²⁴² Consequently it created a more detailed definition of who a third party is by stating further that, ‘If the party engaging in performance is not considered to be a third person within the meaning of Article 79(2), this party is part of the personal risk of the promisor.’²⁴³

The court went on to consider the opinion of Honnold, particularly that delivery of defective goods is not excusable under Article 79. It also took consideration of the cases within German and French law²⁴⁴ stating that this issue had to date been left open. The court finally concluded that the district court had established that the sales agreement had bound both the seller and the buyer, consequently the seller had been aware of the EU directive and furthermore that the seller had the responsibility to label any goods that had been radiated.

Additionally the seller held the obligation to provide goods in conformity with the contract and was liable for radiated goods, as a result the court stated that ‘It was not a question of an impediment beyond the Seller's control as required by Article 79(1).’²⁴⁵ Accordingly the court of appeal upheld the decision of the district court and stated that the seller had not satisfied the burden of proof that the failure to perform was based on an impediment “beyond his control”. The court reasoned that the seller normally bears the risk for his suppliers. However the court also noted that with due consideration given to the *Flippe Christian v. Douet Sport Collections case*, the seller could have been successful. Due to the fact that the buyer rarely has a contractual relationship with the seller’s supplier, the approach that the seller be exempt from liability based on the conduct of the supplier seems unfair to the buyer.

The court makes an important recommendation that,

‘The impediment in sense of Article 79 ought to be defined strictly to unpredictable events outside the sphere of influence of the party in breach’.²⁴⁶

²⁴¹ (*Radiated spice case*) supra (n240).

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ See (*Flippe Christian v. Douet Sport Collections*) supra (n11). , (*Vine wax case 1*) supra (n224) and (*Vine wax case 2*) supra (n227) ‘As expressed at the beginning of 3.4’.

²⁴⁵ (*Radiated spice case*) supra (n240).

²⁴⁶ Ibid.

This illustrates that the court is of the opinion that the scope of impediments permissible should be a limited one, so as to not allow for all impediments in the broadest interpretation of the word. The court also dismissed the sellers claim as it was of the opinion that Article 79 is not applicable in the case of hidden defects. Furthermore with regard to Article 79(2) the court stated that the supplier should have also conformed to the requirements as set out in Article 79(1) for Article 79(2) to be satisfied. It note that to this requirement, it would be difficult for a seller to establish this in order to be exempt under Article 79(2).

This case is very interesting as it is the first case in which it can be observed that all sources with regard to non-conformity of goods, existing as an impediment are thoroughly discussed. Note that the discussion of these sources has already been discussed and as a result there is no need to revisit them again in this part. Ultimately the court makes a statement that seems to be true upon the analysis of the available case law, which is that ‘the argumentations of the courts are surprisingly short and do not go deeply into the problems of Article 79.’²⁴⁷

The next case illustrates the approach to the issue under arbitration. The matter was heard before the China International Economic and Trade Arbitration Commission in china in 2007. This case is known as the *Hammer Mill case*.²⁴⁸ In this case we have a German seller and a Chinese buyer, who had executed two agreements, one was a sale and purchase agreement, the other was a technical support agreement for the supply of hammer mills (hereafter “equipment”).

The defect was that after the equipment had been used, their flaws had become apparent. In 2005 the equipment had broken down due to 3 flaws, which where: ‘(1) three impact boards were broken; (2) hammer heads and clamping rings on the heads fell apart; and (3) pins and hammer heads wore out.’²⁴⁹ To remedy the situation, the seller’s engineers had examined the parts that the seller replaced for free. However in 2006 the equipment broken down again, due to the fact that ‘(1) the hammer heads wore out and could not be used; and (2) the cable lines in the electrical heating system of the auxiliary equipment broke down.’²⁵⁰ On response to this the seller replaced the parts for free again. However it was at this time that the end-user had claimed that the replacements delivered were either non-conforming or that quantitatively there

²⁴⁷ (*Radiated spice case*) supra (n240).

²⁴⁸ (*Hammer mill case*)- China International Economic & Trade Arbitration Commission CIETAC (PRC) Arbitration Award Hammer mill case [May 2007] available at <http://cisgw3.law.pace.edu/cases/070500c1.html> accessed on 20 July 2015.

²⁴⁹ Ibid.

was a shortage. It was at this time that the buyer claimed that hammer heads didn't conform to the specifications as provided within the contract and alleged that it was for this fact that the equipment kept breaking down. Subsequently the buyer moved for arbitration.

The arbitrators held in favour of the buyer. What is important for our purposes is the way in which the arbitrators handled Article 79. The arbitrators considered the hammer heads supplied in 2004, to which they stated that the hammer heads were an integral part of the hammer mills and those supplied by the seller did not in fact conform to the specifications as set out under the contract. Consequently the arbitrators established that this was a fundamental breach for the purposes of the CISG.

Furthermore, because the buyer had contracted with the seller to provide hammer heads customized to its needs within the contract and the buyer had paid extra fees for this, the argument of the seller, that he could not have obtained the required hammer heads could not convince the Arbitration Tribunal that the seller would satisfy the requirements to be exempted under Article 79. It was the arbitration tribunal's reasoning that the seller 'should have the chance to change the contract terms to avoid this upon negotiating the contract.'²⁵¹

The next time that we find this issue discussed was in the Appellate Court Hamburg of Germany on 25 January 2008, this case is known as the *Café Inventory case*.²⁵² In this case we have a buyer from Spain and a seller from the Netherlands. The facts progress as follows, a Spanish company had concluded contracts for the purchase of fittings and equipment for ice cream production to be used in an ice café. According to the contract the seller had the obligation of making the items available in a ready to use condition at the ice café in Palma de Mallorca, subject to a deadline contained within the contract. However this deadline was postponed, by consensus of both parties. Note that the contract also contained a penalty clause.

Later the fittings and equipment had been delivered, however they had not been installed. In response to this the buyer had granted the seller additional time to have the equipment installed. The seller had failed to install the equipment in a ready to use condition and the buyer had the contract declared void. The fittings and equipment had been stored and under a court order, its value had later been realized. The realization thereof was in order to cover the storage costs.

²⁵⁰ (*Hammer mill case*) supra (n248).

²⁵¹ Ibid.

Note that according to an assignment document of the buyer's CEO, stated all claims that the buyer had against the seller would be assigned to the CEO and the buyer's respective assignees. It was these parties who brought a claim against the seller with regard to repayment of the purchase price and an enforcement of the contractual penalty. They had claimed that the seller had delivered defective and incomplete goods and had failed to install the items. The seller had died in the meantime and it was his successor who claimed that, buyer had failed to send notice of the lack of conformity within a reasonable time period and that they could not have installed the goods due to the fact that the buyer had not provided a space for them to do the installations.

When the matter came before the court of first instance (District Court), the claim had dismissed, reasoning that the buyer's assignee's action was not justified, on the grounds that they had not embraced all of the joint creditors and they were as a result not entitled to claim performance without the others.

On appeal, with regard to Article 79, the appeal court had stated that the buyer was entitled to claim the contractual penalty, as it was undisputed that the seller had failed to install the equipment in a ready to use condition. Furthermore they stated that seller had no right to rely on any excuse that would relieve him of his obligation to effect installation in the agreed upon condition. Moreover any possible excuse would have had to have been determined with regard to the applicable law of the contract, which is to say, the CISG or German law. To this the appeal court reiterated the statement that the seller could not be excused but went on to discuss Article 79 nevertheless.

According to the CISG, the seller would only be excused if 'due to an unforeseeable impediment beyond his control (Art. 79(1)) or due to conduct on the part of [Buyer] (Art. 80) the inventory for ice cream production could not be installed'²⁵³ or according to German law, if he was not legally responsible for the failure to install. Furthermore the court considered the undisputed fact that the seller's technician had returned from a trip without having installed the equipment in a ready to use condition. To the submission by the seller that the buyer had not provided a suitable space within which to install the goods, the court found that even if the submission was correct, the seller still held the obligation to assemble the goods on the

²⁵² (*Café inventory case*)- Appellate Court (*Oberlandesgericht*) Hamburg 25 January 2008 [12 U 39/00] available at <http://cisgw3.law.pace.edu/cases/080125g1.html> accessed on 20 July 2015.

²⁵³ Ibid.

premises, to the best of his ability. The issue with the premises was the sole concern of the buyer and the seller should have nevertheless prepared the goods so that it could be later be put into operation as a result, this didn't constitute an impediment. Consequently 'The failure to install by the personnel is to be attributed to [Seller], either by way of Art. 79(1) CISG'²⁵⁴ or under German law.

Ultimately the court ordered that the buyer's assignees were entitled to contractual damages as well as interest thereon pursuant to Article 74 and 78 of the CISG and determined according to the applicable national law under German conflict of law rules.

Within the same year, the issue of non-conformity under Article 79 had come before the District Court Maastricht in the Netherlands. This case is known as *Agristo N.V. v. Macces Agri B.V.*²⁵⁵. This case has a seller from Belgium and a buyer from the Netherlands. The facts are as follows: the buyer was a company whose primary business was the processing of potatoes, in which it sold them as a deep frozen product. The buyer concluded a forward contract with potato growers, this contract covered 60 per cent of the buyer's needed potatoes, and the rest was bought on the free market. The seller was a farming company, which specialized in grain, corn and potatoes. They concluded a contract in which the seller would supply 440 tons of a certain type of potatoes to the buyer.

Extreme weather conditions however resulted in a lower yield and inferior quality of the potatoes. To this the seller noted that he had 440 tons of potatoes, although based on their inferior quality, the ability to stock the potatoes had become problematic, as a result the seller sought to dispose of the stock on a very short date during inspection by the buyers representative. However the buyer did not want to accept the potatoes at this time as other growers had declared their yield as well and he could not stock all of the goods at the same time. Later when the buyer was ready to accept the goods, the quality of the potatoes had plummeted. The seller nevertheless delivered 257,100 kilos. The buyer had requested the goods be washed and after washing it was discovered that only 155,240 kilos were left. The buyer however refused delivery of only 36,340 kilos, however he later accepted after discount based on the unladen weight of the remaining potatoes and requested delivery of the remainder on a later date. The delivery did not take place and the buyer subsequently terminated the contract.

²⁵⁴ (*Café inventory case*) supra (n252).

²⁵⁵ (*Agristo N.V. v. Macces Agri B.V.*)- District Court (*Rechtbank*) Maastricht 9 July 2008 [120428 / HA ZA 07-550] available at <http://cisgw3.law.pace.edu/cases/080709n1.html> accessed on 20 July 2015.

The buyer therefore had to replace the potatoes that he should have received from the seller and sought the payment of the sum as damages plus interest on the main claim.

With regard to Article 79 the seller made the submission that it could not fulfill its obligation to deliver the required amount due to the extreme weather conditions. Consequently, that the weather conditions and its effects on the harvest of the buyer were beyond the control of the seller and since such weather conditions are rare to Maastricht, the seller could not have taken them into consideration at the time of the conclusion of the contract. The buyer rejected this argument, stating that the weather conditions and consequences are to be taken into account by the seller and therefore the seller bears the risk. The buyer also submitted that based on the performance under the other forward contracts, that the weather conditions were not that bad. Furthermore, that the buyer had enough potatoes to sell to third parties and as a result should not have sold their entire stock but reserved some of the stock in anticipation of the weather conditions. Finally the buyer argued that the potatoes were an indeterminate obligation, meaning that he could acquire potatoes elsewhere in order to fulfill his respective contractual obligations.

The court refused the buyers argument that the weather conditions were not beyond the seller's control and the seller could have obtained the remaining amount of potatoes elsewhere. The court reasoned that the seller was not a trader but a farmer, therefore the argument that he could have obtained the potatoes elsewhere was not sound and only guaranteed under the forward contract to deliver potatoes grown on his own land. However it has to be noted that the court subscribed to the buyers argument in general, it is expected of a diligent farmer to not sell his whole crop without giving due consideration to weather conditions affecting the harvest.

Consequently it noted that:

‘It can be expected from a diligent grower that he considers the weather circumstances when entering into a sales contract concerning future harvest insofar that he can fulfill his duty to deliver in 90[per cent] of the cases. This means, in the instant case, that [Seller] can only rely on an impediment beyond control, if the harvest stayed behind the minimum of crop achieved in 90[per cent] of the years’.²⁵⁶

The court ultimately held that the matter be referred for a later court session. This case doesn't critically discuss Article 79 however what it does provide is that weather conditions could exist as an impediment however it has to be read in conjunction with the due consideration given in a particular field. E.g. if it was a farmer it would be more difficult to dispute that you should

exempted under Article 79 because the requirement of taking the weather into account would hold a lot of weight in this regard.

The final case discussed was heard in 2012 in the Audiencia Provincial de Murcia of Spain. This case is known as the *Red Pepper Powder Case*²⁵⁷ in which we have a Spanish seller and a buyer from the Netherlands. The two contracting parties had concluded a series of sale and purchase contracts for red chilli powder. The dispute revolved around five batches of the chilli powder containing unauthorized colourants, these colours were Sudan Red and Para Red. According to the buyer, the unauthorized colourants made the goods effectively unfit for human consumption and as a result amounted to a fundamental defect which gave effect to a fundamental breach of contract. Furthermore the buyer believed that various European and Spanish food regulations had been breached. As a result, the buyer was claiming for the loss and damages caused by the fundamental breach.

Of importance is that this case came forward at the time at which, illegal food colourants in food and chilli products had caused the food crisis in Europe. This resulted in the European Union issuing an order to withdraw all food products that were deemed to have more than the permitted amount of contaminant. ‘The Court considered that it could not rule on the breach of the European regulations’.²⁵⁸

With regard to four of the five batches the court held that the existence of contaminants was not due to any intentional policy due to the seller, but instead occurred due to a chance contamination of the environment or the processing machinery. With regard to the processing machinery the court surmised that it could have been due to the ‘the use of lubricants in the machines, the packaging used or the printing ink on the bags’.²⁵⁹ Furthermore within these 4 batches the level of contaminants was quite low however in the fifth batch the level clearly exceeded the minimum standard. This batch was made with red pepper skins obtained from Uzbekistan. Based on this the seller claimed that in terms of Article 79, the effects could not have been foreseen.

²⁵⁶ (*Agristo N.V. v. Maccas Agri B.V.*) supra (n255).

²⁵⁷ (*Red Pepper Powder Case*)- Case law on UNCITRAL texts [A/CN.9/SER.C/ABSTRACTS/142], CLOUT abstract no. 1342 available at <http://cisgw3.law.pace.edu/cases/120525s4.html> accessed on 20 July 2015.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

Concerning the requirement of foreseeability the court reasoned that the seller operated in an industry in which safety concerns were of the highest importance. Nevertheless the presence of contaminants (colourants) was not however uncommon in this industry. Furthermore concerning the pepper skins acquired from Uzbekistan, ‘the first time that it had been bought from that country — and the pepper skins had been added in the interests of improving safety, which already indicated some lack of confidence in the product, particularly since other illegal colourants had been detected in another batch’²⁶⁰. Accordingly the court held that the requirement of unforeseeability had not been met.

The court concluded that the buyer had to buy replacement goods and was claiming the difference, to this the court stated that the claim for damages had to be dismissed as the case did not concern the remedy of avoidance of the contract, consequently the substitute transaction was not of importance in this case.

After a look into the applicable case law what has become apparent is that, it seems to be the position of various judicial bodies that the delivery of non-conformity goods does exist as an impediment for the purposes of Article 79. However there is a disheartening side to what has been observed, which is that most of the courts seem to identify that the issue as to its applicability remains unresolved without establishing if whether the delivery of non-conforming goods does exist as an impediment. This is particularly observable amongst German Courts. Nevertheless, despite highlighting this fact they go about establishing if whether the parties are exempt under Article 79. The disheartening irony is that upon researching the various sources what has become apparent is that, most bodies that discuss the matter remain merely persuasive, to this I add the CISG-AC, therefore it only stands to reason that it is these judicial bodies that will be the entities to provide the conclusive answer however they all seem to hedge around the issue.

CHAPTER 4: AN ANSWER DETERMINED THROUGH THE LEGAL INTERPRETATION OF TREATIES

Before analyzing which of the relevant approaches should be adopted with regard to the issue at hand, it is important to briefly revisit the arguments provided. It had previously been

²⁶⁰ (*Red Pepper Powder Case*) supra (n257).

discussed that there are two major contributors to the debate as to whether the delivery of non-conforming goods exists as an excuse for the purpose of Article 79.²⁶¹

The first contributor being John Honnold, who had asserted, that based on the discussions within the drafting history, it had been decided that the delivery of non-conforming goods is not excusable under Article 79. The second author is Peter Schlechtriem who asserts that the delivery of non-conforming goods does exist as an impediment for the purposes of Article 79, he rationalizes that the existence of a defect would result in incomplete performance and that the wording of Article 79 does not suggest a limitation on what may constitute an impediment. Furthermore I had argued that the wording of Article 79 namely the use of the words “any of his obligations” would denote that based on the seller's obligations to provide conforming goods, that he could be excused because the wording of Article 79 refers to ‘any obligations’ of which Article 35 states that there is a duty to deliver goods which conform to the standards as provided under the contract.

Based on these two arguments, two fundamental points may be gleaned. First, that one of the arguments is based on the legislative intent of the negotiating parties and the other is based on the wording of the provision, and based on this, secondly, the wording of the provision does not as a result reflect the intention of the negotiating parties. Starting from these points we move onto an interpretation of treaties to establish which source should be preferred. Should we accept the legislative intent? Or should we accept the black letter texts of Article 79 as it currently reads?

4.1 Interpretation under the CISG

4.1.1 Article 7: Interpretative Rules under the CISG

Before going through the different approaches to the interpretation of treaties, it has to be asserted that the CISG contains its very own guide as to interpretation of its provisions. Note however that this guide is not without its own issues.

The governing interpretative provisions as to the interpretation of CISG provisions can be found in Chapter II of Part 1 of the CISG titled “General Provisions”. Furthermore chapter II

²⁶¹ See Chapter 3 at 3.2 and 3.3.

contains two articles which relate to the interpretation of the convention, these being Article 7 and Article 8. For our purposes however, only Article 7 is applicable as Article 8 does not concern the interpretation of the Convention itself but refers to the interpretation of CISG contracts.²⁶² Pressing forward, Article 7 reads as follows:

- (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.

Accordingly Article 7 mandates that any court or arbitral tribunal interpreting the Convention should ‘pay due regard to the Convention’s international character and to the need to promote uniformity in its application and the observation of good faith in international trade’²⁶³.

Scholars often state that the drafting parties had included Article 7 in order to curtail the threat of divergent interpretations of the provisions by courts and arbitral tribunals of the different parties.²⁶⁴

Note that a divergent interpretation poses two threats to a uniform interpretation in the current context. First that it is considered ‘an obstacle to predictability of legal situations and [this threat would] prevent the parties from relying on a uniform application of the conventions’ provisions in the various contracting states²⁶⁵ and secondly that it may lead to forum shopping.²⁶⁶ Based on the above, interpreters of the CISG have been urged to follow an autonomous interpretation of the CISG, free from domestic legal concepts or interpretations that have common law or civil law origin.²⁶⁷

With regard to the issue of non-conformity of goods existing as an impediment for the purpose of Article 79 however it can be noted, based on the analysis of the case law²⁶⁸ that divergent interpretations does not seem to be an issue at all. It seems that most courts and arbitral tribunals seem to agree, although not expressed in words but by their actions, that Article 79 does exempt the delivery of non-conforming goods.

²⁶² Lookofsky op cit (n9) 25.

²⁶³ Lookofsky op cit (n9) 25.

²⁶⁴ Ferrari op cit (n164) 307. And Kröll, Mistelis and Viscasillas op cit (n275) 113.

²⁶⁵ Ferrari op cit (n164) 306.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ See Chapter 3 at 3.4.

Furthermore I draw the reader's attention to another issue with regard to Article 7, as posed by Anna Veneziano, which is that,

‘This provision... has been however aptly described as a policy rule which does not give a precise indication of the best way to attain the desired result’.²⁶⁹

Plainly put she is saying that this provision is nothing more than a guide, it does not help in the interpretation of any of the provisions and it is a provision that merely reminds interpreters that there are certain criteria that have to be established when one looks at the interpretation that had been provided. Peter Schlechtriem also notes that the CISG does not lay down methods of interpretation, instead it only offers principles that should be followed and furthermore states that Article 7(2) provides that interpretation must be done with regard to the Convention as a result one cannot rely on domestic interpretive methods.²⁷⁰

Therefore, to the current debate we note that Article 7 is only applicable with regard to the guidelines one should use when interpreting the provision. Consequently, it does not tell us exactly which interpretative approach should be followed. However for the sake of completeness I will explain the guidelines as contained in Article 7. According to Peter Huber and Alastair Mullis (hereafter “Huber and Mullis”), Article 7 contains three guidelines²⁷¹:

The first guideline, illustrated in Article 7(1), is the concept of “international character”.²⁷² This concept aligns itself with the fact that that interpreter should seek an autonomous interpretation of any CISG provision²⁷³. An autonomous interpretation would mean that ‘ [the] words or phrases in the CISG should not simply be regarded as having the same meaning as identical words or phrases that exist in the domestic legal system’.²⁷⁴

Furthermore it had been advocated that the first guideline and the second are ‘functionally interrelated and independent as well’²⁷⁵, these two concepts are “international character” and “uniformity”. This is due to the fact that in order to take into account the CISG’s “international

²⁶⁹ Ferrari op cit (n164) 326.

²⁷⁰ Schlechtriem op cit (n35) 63.

²⁷¹ Huber & Mullis op cit (n7) 7.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas UN Convention on Contracts for the International Sale of Goods (CISG) (2011) 116.

character” ‘consideration is to be given to the international framework of the application and permanent development of uniform law rules’²⁷⁶.

Additionally Huber and Mullis assert that instead the provision should be interpreted to have a “CISG- meaning” which would be based on the ‘structure and ... underlying policies [of the CISG] as well as... its drafting and negotiating history’.²⁷⁷ I do not agree with this view, the reason why we cannot use the drafting and negotiating history will be discussed later.

The second guideline is the concept of “uniformity”, which means that any court or tribunal should interpret the provision in the exact same way and reach the same conclusion.²⁷⁸ Huber and Mullis believe that this is impossible in the absence of a supranational court that has binding powers.²⁷⁹ Consequently, it is also important to distinguish between “uniform interpretation” and “uniform application”. Joseph Lookofsky defines these concepts as follows,

‘Uniform interpretation suggests that different courts (and arbitral tribunals) should attribute the same meaning to the convention text, whereas uniform application suggests that the different decision-makers who decide (similar) CISG cases should achieve similar results’.²⁸⁰

This is important as it shows that a uniform interpretation is not only necessary but would greatly assist and benefit a uniform application as mentioned under the first guideline.

The third and final guideline is the concept of “good faith”. It has been noted that the meaning of this concept is not entirely clear internationally.²⁸¹ This is particularly problematic when one imports the first guideline which calls for an autonomous interpretation of CISG provision, the question would then be what is the concept of “good faith” according to the CISG?²⁸² Note, however, that the answer to this question is not the focus of this dissertation, in fact it would require a dissertation itself, and as a result it will not be discussed but merely noted. I reason this based on the fact that the non-determination of this concept will not affect the result of this dissertation. However for the sake of interest, Joseph Lookofsky states that scholarly commentary suggests that “good Faith” is linked to the concept of “reasonableness” and

²⁷⁶ Kröll, Mistelis and Viscasillas op cit (n275) 116.

²⁷⁷ Huber & Mullis op cit (n7) 7.

²⁷⁸ Ibid.

²⁷⁹ Huber & Mullis op cit (n7) 8. And Lookofsky op cit (n9) 33.

²⁸⁰ Lookofsky op cit (n9) 33.

²⁸¹ Huber & Mullis op cit (n7) 8.

²⁸² Ibid.

consequently the concept of “reasonableness” is able to meet a multitude of “good Faith” needs within the CISG.²⁸³

It would appear that Article 7(1), for the purpose of this dissertation offers very little assistance. This is due to the fact that the arguments had already been supplied and as a result we are merely looking into which of the arguments should be adopted in light of the sources it stems from.

4.1.2 Tools for the Interpretation of CISG Provision

Huber and Mullis have stated that when interpreting the CISG, first, respect must be given to the guideline contained within Article 7(1) and, second, the interpreting body must use the available tools to determine the meaning of a provision.²⁸⁴ These tools according to them are: the wording of the provision²⁸⁵, the *travaux preparatoires* or drafting history, the purpose of the provision and the underlying policy, finally the position of the provision as read from the point of view of the CISG as a whole.²⁸⁶

However it has to be emphasized that the list of interpretive tools of the CISG is in no way limited to only those stated by Huber and Mullis. This is evident based on the work of Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (hereafter “Kröll, Mistelis and Viscasillas”) who adds to the list: the preamble of the CISG²⁸⁷, CISG case law²⁸⁸, doctrines²⁸⁹ and the works of the CISG-AC²⁹⁰. Furthermore they seem to convey an observable hierarchy, essentially giving rise to the perception that certain tools hold more value than others.

It is my view that there are two primary interpretative tools and the rest exist as secondary tools. This however may not be the opinion of other authors. The first of these primary interpretative tools is the literal wording of the provision, additionally it has been stated that the CISG has been drafted in various languages and this is a fundamental consideration to take into account when assessing a literal interpretation of its provisions.²⁹¹ However this may be a very unreasonable approach to take. For the fact that when a matter concerning the interpretation of

²⁸³ Lookofsky op cit (n9) 36.

²⁸⁴ Huber & Mullis op cit (n7) 9.

²⁸⁵ Ibid. ‘consequently the wording as determined in the language of all official version of the CISG, which are: Arabic, Chinese, English, French, Russian and Spanish’.

²⁸⁶ Huber & Mullis op cit (n7) 9.

²⁸⁷ Kröll, Mistelis and Viscasillas op cit (n275) 127.

²⁸⁸ Kröll, Mistelis and Viscasillas op cit (n275) 128.

²⁸⁹ Kröll, Mistelis and Viscasillas op cit (n275) 130.

²⁹⁰ Kröll, Mistelis and Viscasillas op cit (n275) 131.

CISG provisions comes before a court, that court may only have the resources to determine certain versions²⁹² of the CISG.

Additionally, the fact that all version of the CISG should be considered would mean that, interpreters versed in the necessary languages, would have to be employed so as to ascertain the true meaning of the provisions and consequently would have an impact on the cost of the case.

The courts may also run into issues where the CISG as expressed in another official language which is not English, give rise to an alternative interpretation of the CISG.²⁹³ Based on the previous statement, it is the view of Kröll, Mistelis and Viscasillas that ‘Different interpretative criteria should be used to avoid the prevalence of...one text over the other; *Prima Facie* preference for the English version should be rejected unless confirmed by other interpretation techniques’²⁹⁴.

The second primary interpretative tools is case law, for the fact that it can be used to render and promote consistency of interpretations.²⁹⁵ It has to be emphasized that ‘international case law is [merely] a persuasive authority’²⁹⁶. It can be argued by the author, that despite the fact that case law is not binding, a well-reasoned interpretation of the matter tackled by various courts could be very valuable from a developmental perspective.²⁹⁷ Logically, this would give rise to the fact that although interpretations may differ, a well-reasoned interpretation may give rise to a development of the provisions and ultimately an interpretation that would be considered to be correct.

Despite the fact that it is my view that the other tools are secondary, it does not mean that they do not offer valuable interpretative insight. The first of these interpretative tools is the preamble²⁹⁸. It has been stated that the preamble, ‘is not a mere philosophical- legal declaration

²⁹¹ Kröll, Mistelis and Viscasillas op cit (n275)125.

²⁹² ‘When reference to the words “versions of the CISG” is stated, the author is in no way suggesting that there are alternative versions of the CISG but instead is making reference to the versions of the CISG as expressed in its different official languages’.

²⁹³ Kröll, Mistelis and Viscasillas op cit (n275) 125.

²⁹⁴ Kröll, Mistelis and Viscasillas op cit (n275) 125 and 126.

²⁹⁵ Kröll, Mistelis and Viscasillas op cit (n275) 128.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Preamble of the CISG:

THE STATES PARTIES TO THIS CONVENTION,

of principles'²⁹⁹, it offers valuable insight into the interpretation of the provisions of the Convention, particularly when read together with Article 7(1)³⁰⁰.³⁰¹ In the view of Kröll, Mistelis and Viscasillas,

‘The preamble emphasizes the goals of the convention as also provided in Article 7 [and furthermore] the goals of removing legal barriers and promoting the development of international trade, [which helps to] understand the dynamic approach of the convention towards its interpretation’.³⁰²

The second of these secondary interpretative tools is the *travaux préparatoires*. Its importance stems from the fact that ‘[it is relevant] in order to understand the evolution of the rules of the Convention and thus to apprehend [the provisions] finality and correctness’³⁰³. Furthermore, its importance is evident within the context of Article 7(2), with regard to discerning internal and external gaps.³⁰⁴ However it has been cautioned that too much reliance on this should be avoided.³⁰⁵

The question therefore posed is, why has John Honnold, relied so heavily on the *travaux préparatoires*? The only reasonable conclusion is that, this is due to the fact that the *travaux préparatoires* provides a definitive answer. The fact that so many scholars have followed his line of reasoning and adopted his argument as fact would mean that a new development with regard to the authoritative nature of the drafting history can be perceived. Which is that, when it provides a conclusive determination, consequently its level of authority increases.

Finally the other secondary tools can be grouped together, as ‘scholarly works’. Two of these are: doctrines by scholars and the other being the works of the CISG-AC. These have already been expressed in case law and discussed in the in chapters two and three of this dissertation,

BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order, CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

²⁹⁹ Kröll, Mistelis and Viscasillas op cit (n275) 127.

³⁰⁰ ‘Of particular importance in this regard is the wording “*international character*” of which the preamble would provide valuable insight’.

³⁰¹ Kröll, Mistelis and Viscasillas op cit (n275) 127.

³⁰² Ibid.

³⁰³ Kröll, Mistelis and Viscasillas op cit (n275) 126.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

their importance as an interpretive tool can be gauged from their use and, therefore, do not have to be restated.

Despite the hierarchy, Peter Schlechtriem however is of the opinion that when interpreting CISG provisions it is the literal meaning, or the wording of the provision that is important.³⁰⁶ Only when this meaning cannot be ascertained from the wording should we turn to the *travaux préparatoires*.³⁰⁷ Which seems to be the process through which he had reached his determination that the delivery of non-conforming goods can be excused under Article 79.

Kröll, Mistelis and Viscasillas on the other hand tend to align themselves with the fact that an interpretation should first follow a dynamic and progressive approach.³⁰⁸ Which should take into consideration the : case law, new international uniform instruments, development of practices and usage , scholarly works, new interpretative methods and evolution in legal thinking.³⁰⁹ Second if after this analysis ambiguity and uncertainty still remains we should look into the *travaux préparatoires* and finally the unofficial commentary of the secretariat.³¹⁰ Although their approach is more detailed, they seem to neglect the literal interpretation of the wording and as a result I believe that Peter Schlechtriem's approach would be the more simplistic and cost effective approach to adopt. Note that although all of the tools have not been discussed, this serves to merely illustrate the vast amount of interpretative tools available in order to ascertain the meaning of a CISG provision.

4.2 Interpretation of Treaties: A Solution through the United Nations Convention on the Law of Treaties 1980

4.2.1 Schools Of Thought Regarding Treaty Interpretation

Before the creation of the *United Nations Convention on the Law of Treaties 1969* also known as the *Vienna Convention on the Law of Treaties 1969* ("hereafter "VCLT"), interpretation of treaties was based on the applicable schools of thought.³¹¹ These schools of thought are often

³⁰⁶ Schlechtriem op cit (n35) 64.

³⁰⁷ Ibid.

³⁰⁸ Kröll, Mistelis and Viscasillas op cit (n275) 126.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Richard Gardiner *Treaty Interpretation* (2008) 56.

referred to as the canons of treaty interpretation.³¹² There are in essence five schools of thought: the Intention school; the Textual school; the Teleological school; the New Haven school³¹³ and finally the Sociological school.³¹⁴

Briefly the Intention school finds its premise in the notion that when interpreting a treaty, the intention of the parties must be determined.³¹⁵ The determination can be ascertained by way of looking into:

‘The conduct of the parties, prior and subsequent to the treaty, the historical background, the aims and objectives of the parties sought to be effected in the treaty, the other provisions of the treaty which compare or contrast with the provision in dispute, the practice of the parties in making like provisions and their conduct thereunder, other extrinsic circumstances prevailing at the time of the conclusion of the treaty’.³¹⁶

Essentially this refers to the use of the *travaux préparatoires*. This school however is not widely recognized as applicable when one seeks the interpretation of a multilateral treaty, for the fact that it mainly relies on the drafting history.³¹⁷ The reason for this is due to the fact that,

‘The nature of a multilateral treaty and its negotiation does not admit of the free use of preparatory work, in that the negotiations are usually the work of a few important parties... a treaty open to accession since the acceding parties have had no participation in the preparatory work and are deemed to have accepted only the text of the treaty and the formal reservations thereto’.³¹⁸

Based on the above quote it would be unfair to bind a party to what had been decided during the drafting and negotiation of the treaty, due to the fact that they had not participated.

The Textual school believes that the text as it reads is an embodiment of the intention as expressed during the treaties negotiation and drafting.³¹⁹ ‘Furthermore, treaties must be interpreted as they stand, and subject to the limitations inherent in the fact that they only contain so many articles, phrases, and words’.³²⁰ Gerald Fitzmaurice stated that under this approach the court is not allowed to interpret a provision based on its intended meaning but

³¹² Martin Ris ‘Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties’ (1991) 120.

³¹³ Ris op cit (n312) 113.

³¹⁴ Oliver Morse ‘Schools of Approach to the Interpretation of Treaties’ (1960) 41.

³¹⁵ Morse op cit (n314) 39.

³¹⁶ Morse op cit (n314) 39 and 40.

³¹⁷ Morse op cit (n314) 40.

³¹⁸ Ibid.

³¹⁹ G. G. Fitzmaurice ‘The Law and Procedure of the International Court Of Justice:’ Treaty Interpretation And Certain Other Treaty Points’ (1957) 7.

³²⁰ Ibid.

must ascertain the meaning based on the actual wording of the provision or its actual meaning.³²¹

The Teleological school seeks an interpretation based on the “object “and “purpose” of the treaty itself.³²² This is determined in accordance with Article 19 (a) of the draft convention to the VCLT, which are ‘the historical background of the treaty, the subsequent conduct of the parties, the circumstances surrounding the adoption and interpretation of the treaty, and *travaux preparatoires*’.³²³ Note that the draft convention does not place a hierarchy on the sources as to which should be preferred; this is the principle difference between the Intention and Textual schools and the Teleological school.³²⁴

The New Haven School seeks an interpretation based on ‘the genuine shared expectations of the parties, subject to overriding community policies’.³²⁵ Furthermore Onyeka Nwaigbo notes that with regard to this school, a treaty and its drafting history are of equal value.³²⁶ However it has been cautioned that the use of this school of thought may give rise to a vague interpretation.³²⁷

The final school of thought is the Sociological school, which has not been applied judicially.³²⁸ Essentially this school is an extension of the Teleological school with the addition that intention must conform to the law of social interdependence, meaning that an interpretation will not be accepted if it is contrary to social justice.³²⁹

Despite the existence of these schools of thought, it has to be understood that now there is a convention which exists to govern the law of treaties and their interpretation, this convention is the VCLT.

³²¹ Fitzmaurice op cit (n319) 7.

³²² Ris op cit (n312) 115.

³²³ Ibid.

³²⁴ Ibid.

³²⁵ Onyeka Nwaigbo ‘Vienna convention on the law of treaties and interpretation of treaty in investment dispute arbitration.’ (2013) 6.

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Morse op cit (n314) 42.

³²⁹ Morse op cit (n314) 41.

The question therefore posed is, now that we have a convention that regulates the interpretation of treaties, what does this mean for the existence of these schools? Onyeka Nwaigbo states that although the VCLT limits the approach to the interpretation of treaties,

‘The convention does not therefore exclude other principles which are compatible with these general rules. In the application of Articles 31 and 32, tribunals have in various ways applied these varying methods of interpretation’.³³⁰

However not all scholars think this way, Richard Gardiner makes a statement based on an arbitral award handed down by the International Centre for settlement of investment disputes in which it was stated that,

‘... The Vienna [Convention on the Law of Treaties] represents a move away from the canons of interpretation previously common in treaty interpretation and which erroneously persist in various international decisions today’.³³¹

Furthermore, according to Urs Gruber, who comments on the schools of thought with regard to Article 7 of the CISG, to which he states that the appropriate way in which to interpret provisions under the Convention would be to subscribe to the Teleological school.³³²

Additionally he states that a purely textual approach to the Convention should not be considered, though he does not substantiate this claim.³³³ I cannot therefore agree with his line of reasoning as stated previously it would be unfair to bind parties who have acceded to the Convention to an interpretation asserted during the Negotiating and drafting stages of the CISG, which is a component of the Teleological school. Accordingly we must therefore determine what the VCLT says about the issue of interpretation of Article 79.

4.2.2 The United Nations Convention on the Law of Treaties 1969 (VCLT)

The first step when discussing the applicability and usefulness of the VCLT is to determine what it covers and what position a convention has in relation to it. For this we therefore note that according to the full name of the VCLT, that it governs the law of “treaties”. As a result the term, “treaty” will have to be defined.

³³⁰ Nwaigbo op cit (n325) 5.

³³¹ Gardiner op cit (n311) 56.

³³² André Janssen & Olaf Meyer (eds) *Cisg Methodology* (2009) 96. ‘Note that he actually refers to the Purposive approach to interpretation which would import the use of the travaux préparatoires, essentially this would be the teleological school of thought.’

³³³ Ibid.

The VCLT unlike the CISG contains a definitions clause, embodied in Article 2. Within this definitions clause we find the term “treaty” defined. Hence Article 2(1)(a) reads as follows:

“‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.’

This definition contains various requirements that have to be met before an international agreement can be considered a treaty. These are that the treaty must be an: “international agreement”, “concluded between states”, “in written form”, “governed by international law”, “whether embodied in a single or multiple related instruments”, “whatever its particular designation”.³³⁴ For the purposes of this discussion it isn’t important to discuss all these requirements in order to establish that a convention is a treaty, however what is important is to note that the VCLT uses “treaty” as a somewhat flexible generic term.³³⁵ Consequently a convention can be considered a bilateral or multilateral Treaty.³³⁶ ‘The term “bilateral” describes a treaty between two states, and “multilateral” [as] one between two or more states’.³³⁷ Considering the amount of countries³³⁸ that are party to the CISG it can only be concluded that the CISG represents a multilateral treaty.

The next step is, whether the interpretive guide contained within the VCLT can be applied under the CISG, and consequently whether the VCLT is applicable to the CISG? In order to determine this we consider Article 4 of the VCLT, which reads as follows:

‘... The Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.’

Article 4 is not a complex provision, it states very clearly that the Convention will apply to all treaties that have been concluded after the VCLT came into force. Furthermore it has to be noted that there is a distinction between the date upon which it was concluded and the date that it came into force. The document itself very clearly states that the date upon which it was concluded was the 23 May 1969 and the date upon which it had entered into force was the 27

³³⁴ Anthony Aust *Modern Treaty law and Practice* 2ed (2007) 17-24.

³³⁵ Aust op cit (n334) 17.

³³⁶ Ibid.

³³⁷ Aust op cit (n334) 10.

³³⁸ For the number of contracting parties to the CISG see Chapter 1 at 1.1.

January 1980.³³⁹ Subsequently the CISG was concluded on the 11 April 1980 and came into force on the 1 January 1988.³⁴⁰ This illustrates that the CISG was concluded after the VCLT came into force, therefore the VCLT is applicable to the CISG and accordingly its interpretive rules contained within are available by application of Article 4.

Now that it has been determined that the VCLT is applicable to the CISG, we can move forward to discuss the interpretive provisions within it. ‘The Convention sets out specific legal rules of treaty interpretation, in particular a general rule and supplementary means of interpretation’³⁴¹. These interpretive rules are contained in Section 3 titled “Interpretation of Treaties” of importance to this dissertation are Articles 31 and 32.

Article 31 sets out the “GENERAL RULE OF INTERPRETATION” and reads as follows:

- (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
- (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Paragraph (1) of Article 31 is considered to be the foundation of the interpretive rules.³⁴²

Richard Gardiner states that the general rule under Article 31 follows a ‘process of

³³⁹ Vienna Convention on the law of treaties (with annex). Available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> accessed on 20 august 2015. ‘See the date it was concluded on the first page of the document in the heading and see the date it was concluded on page 333 at n.1.’

³⁴⁰ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en accessed on 20 august 2015.

³⁴¹ Enzo Cannizzaro (ed) *The Law of Treaties: Beyond the Vienna Convention* (2011) 147.

³⁴² Olivier Corten & Pierre Klein (eds) *The Vienna Convention on the Law of Treaties* (2011) 817.

encirclement’.³⁴³ Based on its reading this process first starts with the ordinary meaning of the terms contained within the treaty, secondly, this ordinary meaning must be read in the context of the treaty’s object and purpose and finally it must be read in light of the treaties object an purpose.³⁴⁴ Moreover there does not appear to be a hierarchy as to which of these 3 processes are more important, therefore an interpreter must use all of them.³⁴⁵

In order to utilize the general rule of interpretation effectively, one has to take cognizance of the “means” contained within the provision. Mark Villiger makes reference to the fact that there are eight means and that all means should be considered when interpreting.³⁴⁶ Briefly, the first is ‘good faith’.³⁴⁷ Good faith essentially exists as a principle, which establishes the conduct of the parties when interpreting a treaty.³⁴⁸ This conduct is to ‘act honestly, fairly, reasonably, and to refrain from taking unfair advantage’³⁴⁹ when interpreting a treaty.

The second means is to consider the “ordinary meaning” of the terms. The ordinary meaning is the ‘current and normal, regular and usual meaning’.³⁵⁰ Note, however, that a term may have more than one meaning.³⁵¹ Despite this fact Anthony August notes that ‘the ordinary meaning is most likely to reflect what the parties intended’.³⁵² I do not however agree with this statement, for the fact that it totally disregards the argument based on parties who accede to the treaty should not be bound to decisions taken in their absence, consequently during the drafting history.

Furthermore Anthony August states that the ordinary meaning can only be ascertained in the context of the treaty in light of its object and purpose.³⁵³ He furthermore notes that regard to this consideration is mainly for the purpose of clarifying an interpretation.³⁵⁴ Of importance under the ordinary meaning is the use of generic terms. Richard Gardiner states that,

³⁴³ Gardiner op cit (n311) 141.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Cannizzaro op cit (n341) 108-114.

³⁴⁷ Mark E. Villiger *Commentary on the 1969 Vienna Convention on the law of Treaties* (2009) 425.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Cannizzaro op cit (n341) 109.

³⁵¹ Ibid.

³⁵² Aust op cit (n334) 235.

³⁵³ Ibid.

³⁵⁴ Ibid.

‘A “Generic term” includes a known legal term, whose content the parties expected would change over time’.³⁵⁵

The third, fourth and fifth means are the “context”, “purpose” and “object”, this had been discussed in the sentence above, meaning that the ordinary meaning should be read in light of the “context”, “purpose” and “object” of the treaty. Furthermore I add that when considering these three terms, one must consider the aim, nature and ends of the treaty as well, which could be contained in the treaties preamble of statement of objectives.³⁵⁶

The next two means are embodied in paragraphs (2), (3)(a) and (3)(b), which all refer to an “authentic interpretation”.³⁵⁷ To this Mark Villiger states that collectively paragraphs (2) and (3) affirm the concept of a uniform interpretation of the treaty by all parties subject to it.³⁵⁸ Furthermore Article 2 sets out what the context of the treaty will comprise of. Article 3 denotes further sources to be taken into consideration and read together with the context of the treaty as establish within paragraph (2). All of these extra sources have the common link to the interpretation.

The eighth means is embodied in paragraph (3)(c), which states that the interpretation of the treaty must be read against the back drop of, International law as a whole.³⁵⁹

Article 32 sets out the ‘SUPPLEMENTARY MEANS OF INTERPRETATION’ and reads as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 :

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

Article 32 is not as complex as Article 31 it provides only one means³⁶⁰ which is that, if after an interpretation of Article 31 you are left with an interpretation that is obviously incorrect, then you should look into the drafting history of the Convention to ascertain the true meaning of the provision.

³⁵⁵ Gardiner op cit (n311) 172.

³⁵⁶ Villiger op cit (n347) 427 and 428.

³⁵⁷ Cannizzaro op cit (n341) 110.

³⁵⁸ Villiger op cit (n347) 429.

³⁵⁹ Cannizzaro op cit (n341) 111.

For the purpose of this discussion it is not the way in which you interpret but the school of thought that these two provisions represent. It has been made clear by the International Law Commission, in their commentary on the draft to the VCLT, that when interpreting a treaty one must not give greater weight to the Textual school of thought over any other school of thought and vice versa³⁶¹. Which is observable in paragraph (1), since paragraph (1) embodies aspects of both the Textual school of thought as well as the Teleological school of thought.³⁶² This is based on the fact that the term “ordinary meaning” encompasses a textual approach and also the use of the terms “object and purpose” denotes a reference to the teleological approach of interpretation.³⁶³ However above all it has been expressed, within the context of Article 31, that the textual approach must be given precedence.³⁶⁴ This argument seems to correspond with a judgment handed down by the International Court of Justice in the *Territorial Dispute*, in which they held that,

‘[According to Article 31] a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to a term in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty’.³⁶⁵

The question that now remains is how does, Article 31 and 32 affect the Issue of whether the delivery of non-conforming goods should exist as an impediment for the purposes of Article 79?

4.2.3 Application Of Article 31 And 32 To The VCLT To The Issue Of The Delivery Of Non-Conforming Goods Being Excused Under Article 79 Of The CISG.

It is at this point where we derive a more conclusive answer to the issue at hand. The first port of call is to reiterate that Article 31 does not embody a purely textual approach, however it has clearly been established that a textual approach should take precedence over the other applicable approaches to interpretation contained within.

³⁶⁰ Cannizzaro op cit (n341) 112.

³⁶¹ Aust op cit (n334) 230.

³⁶² Aust op cit (n334) 235.

³⁶³ Cannizzaro op cit (n341) 117.

³⁶⁴ Aust op cit (n334) 235.

³⁶⁵ Cannizzaro op cit (n341) 115.

Secondly it has to be argued that the way in which these two articles are set out, seems to set a hierarchy, note that the hierarchy that I am referring to is not concerning the means embodied within but the use of the one article before the other. This is evident based on the wording of Article 32 which simply states that, recourse to it will only be possible if you have first used Article 31 and established an incorrect interpretation. There is therefore, a clear division between the two articles due to the fact that, Article 31 embodies a textual approach that should be read in conjunction with a teleological approach. Whereas reference to the preparatory works would indicate an attempt at determining the legislative intent and consequently would fall within the Intention school which is embodied in Article 32. This is fundamentally important as John Honnold has created his argument based solely on the *travaux préparatoires*. If we therefore, place his argument into the interpretive guide of Section 3 of the VCLT, it would fall perfectly into Article 32 which as stated before is only applicable after Article 31 has been used.

Therefore the question put forward is, does Peter Schlechtriem argument, which finds its premise on the wording of Article 79 of the CISG fit neatly into Article 31 of the VCLT?

In order to determine this we have to use the means as provided earlier. Two points have to be stated, first that, Article 31 has to be read as a whole.³⁶⁶ Which illustrates that, the means contained within should be read collectively. However this leads us to our second point which is that even though all means should be considered, it does not mean that all means are applicable.

‘Parties to a treaty are free to agree in the treaty or subsequently to select only some of the means of interpretation mentioned in Article 31... and/or to employ different means of interpretation’.³⁶⁷

With this in mind we move on to an analysis of the means in relation to the issue. The first means is good faith, which exists as a principle and is not directly applicable to the application at hand.

The second means is the ordinary meaning of the terms. Within the context of Article 79 of the CISG with due consideration given to the issue and the argument provided by Peter Schlechtriem, the relevant terms are: “impediment”, “any” and “obligation”. For the purposes of the argument provided by Peter Schlechtriem I would reduce the applicable words to only

³⁶⁶ Cannizzaro op cit (n341) 114.

“impediment” and “obligation”. Therefore first it has to be noted that these two terms are generic in nature. Consequently the ordinary meaning of these terms will be the ordinary meaning given to a generic term. As stated previously within the means analysis, a generic term will encompass all known legal meanings of that term. As a result an “impediment” would therefore encompass the delivery of non-conforming goods and an “obligation” would encompass the duty to deliver conforming goods.

The third, fourth and fifth means would illustrate that the ordinary meaning must align itself with the provision as well as the convention as a whole. First, in the context of the provision itself, Peter Schlechtriem had argued that the use of the word “impediment” does not appear to be limited in any way to only certain impediments, secondly the use of the word “any” in relation to “obligations” denotes that all obligations should be considered. Accordingly the inclusion of obligation of delivering conforming goods is supported by Article 35 of the CISG under the “obligations of the seller”. Additionally the preamble does not suggest that such an interpretation will be in contravention of the Convention.

It is at this point that I discuss paragraph (4) of Article 31 of the VLCT which governs special meaning of terms. Mark Villiger has stated that,

‘To interpret a rule is to assign a meaning to the words contained therein. The meaning of words are not ironclad: words can mean many things to many people. This is confirmed in Article 31, which deals on paragraph 4 with “special” meaning of terms’.³⁶⁸

However despite this paragraph (4) refers to special meaning of provisions based on the intention of the parties.³⁶⁹ For this I draw on John Honnold’s argument that it was the intention of the parties to not include the delivery of non-conforming goods as an “impediment”.³⁷⁰ However this argument cannot stand as there is nothing in the Convention itself to suggest that this is the intention of the parties. Furthermore to rely on this argument would essentially mean that we are relying on the *travaux préparatoires*, as it finds its basis within the *travaux préparatoires*. This would effectively give rise to a situation where we bind the newly acceded countries to a decision taken in their absence, in my view this would give rise to an unfair and unreasonable interpretation.

³⁶⁷ Cannizzaro op cit (n341) 114.

³⁶⁸ Cannizzaro op cit (n341) 106.

³⁶⁹ VCLT, Art. 31(4).

³⁷⁰ See Chapter 3 at 3.2.

The final three means give rise to an “authentic interpretation” which is a uniform interpretation, contained in agreements or documents that had been decided by all the parties. To which, for the purposes of the issue at hand, there are none. As a result we are led back to what had been stated before, that not all of the means are applicable.

Finally an answer has been derived. It appears that Peter Schlechtriem’s argument falls squarely within Article 31 and provides a clear cut answer. Based on the interpretive guide under Section 3 of the VCLT, we should first interpret under Article 31. Accordingly, if an incorrect interpretation had been derived, then we should move towards an analysis of the supplementary material under Article 32. In the context of the issue of the delivery of non-conforming goods existing as an impediment for the purposes of Article 79 of the CISG, the answer will therefore come from Peter Schlechtriem. Consequently the delivery of non-conforming goods *does* exist as an impediment, which can be excused under Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (1980).

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Before revisiting the conclusive analysis, what has to be noted is that this dissertation does not undermine the importance of the interpretative guide contained within Article 7 of the CISG.³⁷¹ Article 7 holds valuable principles that should always be taken into account and as a result, the author has tried to embody these principles in his interpretation of Article 79 of the CISG. Nevertheless, Article 7, unfortunately does not provide any actual rules that can be used in order to gauge the true meaning of the CISG’s provisions and it is for this fact, that we find the importance and applicability of Articles 31 and 32 of the VCLT. With this in mind we therefore move on to the conclusive remarks.

It has been argued in this dissertation, with due regard given to Articles 31 and 32 of the VCLT, that Peter Schlechtriem’s view that the delivery of non-conforming goods is excusable

³⁷¹ See Chapter 4 at 4.1.1.

under Article 79, is the correct interpretation which should be adopted.³⁷² He argues that the way in which Article 79 is worded does not suggest a limitation as to what would constitute an impediment.³⁷³ Furthermore I had added that the use of the term “any” in Article 79 broadens the concept of “obligations”, which lead to a determination that the delivery of conforming goods would form part of the sellers “obligations”. Therefore the delivery of defective goods is contrary to the duty to deliver conforming goods under Article 35 of the CISG. Consequently anything that hinders this duty would be an impediment. The crux of the argument however falls within the clear divide between Articles 31 and 32 of the VCLT.

With regard to Section 3 of the VCLT, there is notable divide between the textual and teleological approach to treaty interpretation, under Article 31 and the supplementary means of interpretation, which includes the *travaux préparatoires*, as contained in Article 32. Article 32 is only applicable if the interpreter has already used Article 31 and arrived at an incorrect interpretation. If we consider John Honnold’s very persuasive arguments that, the intention of the negotiating parties can be illustrated based on the preparatory works, in which it was decided that the delivery of non-conforming goods cannot be exempted under Article 79, we would find that it would fall squarely within Article 32.³⁷⁴ The way in which Section 3 of the VCLT operates would not permit such an interpretation.

Furthermore, although Honnold conclusively indicates that the answer to the issue is “no”³⁷⁵, the use of the preparatory works at this stage would lead to an unfair and unreasonable interpretation of the CISG provisions.³⁷⁶ This is due to the fact that the CISG is a convention open to accession and consequently it would not be in the interest of parties that have acceded to the Convention, to be made subject to an interpretation based on a decision taken, in which they did not participate. Therefore the only reasonable approach could have been to find an interpretation based on the wording of the provision or to accept an interpretation under an agreement that all parties have participated in.

To conclude this dissertation, the lengthy case law analysis suggests that parties will continually relying on Article 79 to excuse their delivery of defective goods as a defense. It is therefore important, that a definite answer should exist. The determination that it does, based

³⁷² See Chapter 4 at 4.2.3.

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ See Chapter 3 at 3.

³⁷⁶ See Chapter 4 at 4.2.1.

on the wording of the provision in relation to the Convention as a whole, can as a result place, at ease parties to a contract which finds the CISG to be the applicable law. From this point on it is therefore the defaulting party's fulfillment of the requirements as contained in Article 79(1) that will determine his success.

5.2 Recommendations

After a thorough analysis of the topic and the issue at hand, the author believes that, there are essentially four vital recommendations that can be made.

According to a determination made under the dissertation, the only thing that hold binding authority is the CISG itself. Which means that all other authorities hold nothing more than persuasive value. This holds true with regard to the courts and arbitral bodies, however despite this, I believe that these bodies hold a little more persuasive value, than for instance, the CISG-AC or the works of other scholarly authors. Hence the first, two recommendations have to be directed at these judicial bodies.

With regard to the first recommendation, I believe that these bodies should take a more proactive approach in respect of any interpretations made. I base this, on the case law analysis.³⁷⁷ The analysis shows that when the issue became apparent, the courts would acknowledge that the required interpretation had not been done and then consequently hedged around it in order to resolve the case.³⁷⁸ I believe that, despite the fact that they merely hold persuasive authority, the interpretative issue should be discussed every time and consequently the culmination of multiple persuasive interpretations will eventually lead to the correct interpretation that could be considered binding. Furthermore it is their responsibility to engage with an interpretation which will be considered by other judicial bodies, if not done, the interpretative issue will remain open.

The second recommendation concerns the length of a courts or tribunal's discussion on the issues. Courts and arbitral tribunals should not forget that they are interpreting international law and as a result interpretations should be thoroughly discussed. I acknowledge that the length of a judgment, differs according to the jurisdiction from which it comes, however when

³⁷⁷ See Chapter 3 at 3.4.

³⁷⁸ Ibid.

interpreting the CISG they should remember that they are writing interpretative judgments that will increase the world's understanding of the provisions.

The third recommendation is directed at the contracting parties to the CISG. As stated earlier in the dissertation, the Convention would greatly benefit from an interpretative body that holds binding authority.³⁷⁹ Furthermore, I add that commonly, most interpretative bodies are in the form of international courts however, an international court is not necessary because the CISG already has an advisory council.³⁸⁰ This council holds the responsibility of clarifying the relevant provisions.³⁸¹ Additionally, despite the fact that they operate as an official body, they are essentially an unofficial interpretative body.³⁸² Therefore my recommendation is to make the CISG-AC an official interpretative body, with the capacity to provide binding interpretations. In order to do this I believe that all the contracting parties to the CISG should provide one representative to form part of a new CISG-AC. The act of each member selecting a representative should ensure that an interpretation is made which is fair to and considers all contracting parties. Furthermore, with regard to the binding nature of their interpretation, I believe that in order to make their interpretations conform to the principle of 'good faith' as contained within Article 7(1) of the CISG, interpretations made by this new advisory council, should be made effective by way of consensus. This will ensure an interpretation which is fair to all contracting parties.

The final recommendation seeks to provide an alternative way of clarifying the meaning of the provision of the CISG. This recommendation will illustrate a tool that is at the disposal of the contracting parties to the CISG. This tool is embodied in Article 31 of the VCLT.³⁸³

The parties should create an agreement as to the interpretation of a provision. Consequently, Article 31 will allow for the importation of this agreement into the interpretation. This is an easy alternative way for the contracting parties to clarify a meaning of a provision that they have decided upon. According to Article 31(3)(a), the parties are allowed to create any subsequent agreements which relate to the interpretation of the Convention. This holds an overwhelming amount of value as essentially, such an agreement will be read together within context of the CISG. Basically, this would mean that, an interpretation under such an

³⁷⁹ See chapter 3 at 3.1.

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ See chapter 4 at 4.2.2.

agreement would be imported into the ordinary meaning of the terms and would then constitute the new meaning. As stated before this is a valuable alternative at the contracting party's disposal.

The importance of these recommendations cannot be underestimated. It is the belief of the author that if due consideration is given to these four recommendations, the interpretation of the CISG provisions may find greater clarity.

Bibliography

Primary sources:

Cases:

- (*Flippe Christian v. Douet Sport Collections*) - Tribunal de Commerce de Besançon, France, 19 January 1998, unlex. Available at <http://cisgw3.law.pace.edu/cases/980119f1.html> accessed on 20 July 2015.
- (*Corn Case*)- International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry [218y/2011] 23 January 2012 available at <http://cisgw3.law.pace.edu/cases/120123u5.html> accessed on 20 July 2015.
- (*vine wax case 1*)- Court of Appeals (Oberlandesgericht) Zweibrücken 31 March 1998 [8 O 1995/95] Available at <http://cisgw3.law.pace.edu/cases/980331g1.html>. accessed on 20 July 2015.
- (*vine wax case 2*)- Federal Supreme Court (Bundesgerichtshof) 24 March 1999 available at <http://www.cisg.law.pace.edu/cases/990324g1.html> accessed on 20 July 2015.
- (*Powdered milk case*)- Federal Supreme Court (Bundesgerichtshof), Civil Panel VIII January 9, 2002 [VIII ZR 304/00] available at <http://cisgw3.law.pace.edu/cases/020109g1.html> accessed on 20 July 2015.
- (*Modular wall partitions case*)- Court of Appeal (Tribunale d'appello) Lugano 29 October 2003 [12.2002.181] available at <http://cisgw3.law.pace.edu/cases/031029s1.html> accessed on 20 July 2015.
- (*Omnibus case*)- Federal Supreme Court of Austria (Oberster Gerichtshof) 21 April 2004 [7 Ob 32/04p] available at <http://cisgw3.law.pace.edu/cases/040421a3.html> accessed on 20 July 2015.
- (*Radiated spice case*)- TURKU COURT OF APPEAL, S 04/1600 (24 MAY 2005) available at <http://cisgw3.law.pace.edu/cases/050524f5.html> accessed on 20 July 2015.
- (*Hammer mill case*)- China International Economic & Trade Arbitration Commission CIETAC (PRC) Arbitration Award Hammer mill case [May 2007] available at <http://cisgw3.law.pace.edu/cases/070500c1.html> accessed on 20 July 2015.
- (*Café inventory case*)- Appellate Court (Oberlandesgericht) Hamburg 25 January 2008 [12 U 39/00] available at <http://cisgw3.law.pace.edu/cases/080125g1.html> accessed on 20 July 2015.

- (*Agristo N.V. v. Maccas Agri B.V.*)- District Court (Rechtbank) Maastricht 9 July 2008 [120428 / HA ZA 07-550] available at <http://cisgw3.law.pace.edu/cases/080709n1.html> accessed on 20 July 2015.
- (*Red Pepper Powder Case*)- Case law on UNCITRAL texts [A/CN.9/SER.C/ABSTRACTS/142], CLOUT abstract no. 1342 available at <http://cisgw3.law.pace.edu/cases/120525s4.html> accessed on 20 July 2015.

Model law:

- Principles of European Contract Law 2002.
- Uniform Law on the formation of Contracts for the International Sale of Goods 1964.
- Uniform Law on the International Sale of Goods 1973.
- United Nations Convention on Contracts for the International Sale of Goods 1980.
- United Nations Convention on the Law of Treaties 1969.

Secondary sources:

Books:

- André Janssen & Olaf Meyer (eds) *Cisg Methodology* (2009) Sellier. European law publishers, München.
- Anthony Aust *Modern Treaty law and Practice* 2ed (2007) Cambridge University Press, Cambridge.
- Bryan A. Garner (ed) *Black's Law Dictionary* 9ed (2009) West Publishing Company, St. Paul: Minn.
- Enzo Cannizzaro (ed) *The Law of Treaties: Beyond the Vienna Convention* (2011). Oxford University Press, Oxford.
- Franco Ferrari (ed) *The 1980 Uniform Sales Law: Old issues revisited in the light of Recent Experienced* (2003) Sellier. European law publishers, München and Giuffrè, Milan.
- Franco Ferrari, Harry Fletcher & Ronald A. Brand (eds) *The Draft Uncitral Digest & Beyond: Cases, Analysis & Unsolved issues in the UN Sales Convention* (2004) Sellier. European Law, München and Thomson/Sweet & Maxwell, London.
- John O. Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* 3ed (1999) [Kluwer Law International](http://www.kluwerlawinternational.com), The Hague.
- Joseph Lookofsky *Convention on Contracts for the International Sale of Goods* (2012) Wolters Kluwer Law & Business, Alphen aan den Rijn: The Netherlands.

- Judy Pearsall (ed) *Concise Oxford English Dictionary* 10ed (2002)
- Larry A. DiMattio (ed) *International sales law: A Global Challenge* (2014) Warrington College of Business Administration, University of Florida
- Mark E. Villiger *Commentary on the 1969 Vienna Convention on the law of Treaties* (2009) Martinus Nijhoff Publishers, Leiden.
- Olivier Corten & Pierre Klein (eds) *The Vienna Convention on the Law of Treaties* (2011) Oxford University Press, Oxford.
- Peter Huber & Alastair Mullis *the CISG: a new textbook for students and practitioners* (2007) sellier. European law publishers, München.
- Peter Schlechtriem *Commentary on the UN convention on the international sale of goods* 2 ed (1998) Oxford University Press, New York.
- Richard Gardiner *Treaty Interpretation* (2008) Oxford University Press, Oxford.
- Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas *UN Convention on Contracts for the International Sale of Goods (CISG)* (2011) Verlag C.H. Beck oHG, München.
- Uncitral *Uncitral Digest of Case Law on the United Nations Convention on the International Sale of Goods* (2008) United Nations, New York.

Internet references:

- ‘CISG: Table of Contracting States’ available at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> accessed on 18 June 2015
- CISG-AC Opinion No. 7 ‘Exemption of Liability for Damages under Article 79 of the CISG’ Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007. Available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>. Accessed on 20 July 2015.
- ‘Origin, Mandate and Composition of UNCITRAL’ available at <http://www.uncitral.org/uncitral/en/about/origin.html> accessed on 24 August 2015.
- ‘Roadmap to the legislative history of CISG Article 79’ available at <http://cisgw3.law.pace.edu/cisg/text/roadmap/intro-79.html> accessed on 25 May 2015.
- Joern Rimke ‘Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts’ (2000) *Pace Rev. of the CISG* available at <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> accessed on 29 August 2015.

- Dionysios Flambouras ‘Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108’ (2002) Pace Rev. of the CISG available at <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html> accessed on 29 August 2015.
- ‘ANNOTATED TEXT OF CISG Article 80’ Available at <http://www.cisg.law.pace.edu/cisg/text/e-text-80.html> accessed on 29 June 2015.
- ‘Section IV of Part III, Chapter V Exemption (Articles 79-80)’ available at http://www.uncitral.org/pdf/english/clout/digest2008/p3_ch5_s4_overview.pdf accessed on 29 June 2015.
- Joseph Lookofsky ‘The 1980 United Nations Convention on Contracts for the International Sale of Goods’ Pace Rev. of the CISG available at <http://cisgw3.law.pace.edu/cisg/biblio/loo79.html> accessed on 24 June 2015.
- John Honnold ‘Article 79 impediments excusing parties from damage ("Force Majeure")’ Pace Rev. of the CISG available at <http://www.cisg.law.pace.edu/cisg/biblio/ho79.html> accessed on 12 March 2015.
- Secretariat Commentary ‘GUIDE TO CISG ARTICLE 79’ available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html> accessed on 24 June 2015.
- Jacob S. Ziegel ‘Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods’ (1981) Pace Rev. of the CISG available at <http://cisgw3.law.pace.edu/cisg/text/ziegel79.html> accessed on 1 July 2015.
- <http://unterm.un.org/dgaacs/unterm.nsf/8fa942046ff7601c85256983007ca4d8/99954c21bccf56e185257156006f0e6b?OpenDocument> accessed on 1 July 2015.
- Barry Nicholas ‘Impracticability and impossibility in the U.N. Convention on contracts for the International Sale of Goods’ Pace Rev. of the CISG Available at <http://www.cisg.law.pace.edu/cisg/biblio/nicholas1.html#504> accessed on 1 July 2015.
- Peter Schlechtriem ‘Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods’ Pace Rev. of the CISG available at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-79.html> accessed on 2 July 2015.
- Denis Tallon ‘Bianca-Bonell Commentary on the International Sales Law’ (1987) Pace Rev. of the CISG available at <http://cisgw3.law.pace.edu/cisg/biblio/tallon-bb79.html> accessed on 2 July 2015.
- <http://cisgw3.law.pace.edu/cisg/text/e-text-79.html> accessed on 2 July 2015.
- ‘Definition of reasonableness recited in the PECL’ available at <http://cisgw3.law.pace.edu/cisg/text/reason.html#def> accessed on 2 July 2015.

- Franco Ferrari ‘Homeward Trend and Lex Forism Despite Uniform Sales Law’ Pace Rev. of the CISG available at <http://www.cisg.law.pace.edu/cisg/biblio/ferrari17.html> accessed on 3 July 2015.
- ‘Council members’ available at <http://www.cisgac.com/default.php?ipkCat=129&sid=129> accessed on 9 July 2015.
- ‘Declarations’ available at <http://www.cisgac.com/default.php?ipkCat=128&sid=128> accessed on 9 July 2015.
- ‘Opinions’ available at <http://www.cisgac.com/default.php?ipkCat=128&sid=128> accessed on 9 July 2015.
- ‘Emeritus Professor John Honnold, Father of the Vienna Convention, Dies at 95’ available at https://www.law.upenn.edu/live/news/1901-emeritus-professor-john-honnold-father-of-the#.Vbi_z_mqqko accessed on 29 July 2015.
- Mr. André Tunc ‘Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale’ Pace Rev. of the CISG available at <http://www.cisg.law.pace.edu/cisg/biblio/tunc.html> accessed on 29 July 2015.
- Vienna Convention on the law of treaties (with annex). Available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> accessed on 20 august 2015.
- https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en accessed on 20 august 2015.
- ‘What are travaux préparatoires and how can I find them?’ Available at <http://ask.un.org/faq/14541> accessed on the 29 July 2015.

Journals:

- Brandon Nagy ‘Unreliable Excuses: How do Differing Persuasive Interpretations of CISG Article 79 Affect its Goal of Harmony?’ (2013) 26 *New York Internarial Law Review* 61-92.
- G. G. Fitzmaurice ‘The Law and Procedure of the International Court Of Justice:’ Treaty Interpretation And Certain Other Treaty Points’ (1957) 33 *British Year Book of International Law* 203.
- Harry Flechtner ‘Gedenkschrift In Honor Of E. Allan Farnsworth (1928-2005): Article: Article 79 Of The United Nations Convention On Contracts For The International Sale

Of Goods (CISG) As Rorschach test: The Homeward Trend And Exemption For Delivering Non-Conforming Goods' (2009) *19 Pace International Law Review* 29.

- Ingeborg Schwenzer and Pascal Hachem 'The CISG – Successes and Pitfalls' (2009) *57 American Journal of Comparative Law* 457-478.
- Joshua D. H. Karton 'Can the CISG Advisory Council Affect the Homeward Trend?' (2009) *13 Vindobona Journal of International Commercial Law & Arbitration* 71-90.
- Loukas Mistelis 'CISG-Advisory Council: CISG-AC Publishes First Opinions' (1997) *Pace Law School Institute of International Commercial Law*.
- Martin Ris 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' (1991) *14 Boston College International and Comparative Law Review* 111.
- Oliver Morse 'Schools of Approach to the Interpretation of Treaties' (1960) *9 Catholic University Law Review* 36.
- Onyeka Nwaigbo 'Vienna convention on the law of treaties and interpretation of treaty in investment dispute arbitration.' (2013) *17 The Centre for Energy, Petroleum and Mineral Law and Policy Annual Review* 1.