

**CISG ARTICLE 79: EXEMPTION OF  
PERFORMANCE, AND ADAPTATION OF  
CONTRACT THROUGH  
INTERPRETATION OF  
REASONABLENESS—FULL OF SOUND  
AND FURY, BUT SIGNIFYING  
SOMETHING**

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ABSTRACT

Article 79 of the CISG provides that “[a] party is not liable for a failure to perform any of his obligations” if the party has encountered a certain impediment defined therein. It was once depicted as “the Convention’s least successful part of the half-century of work.” It has been thirty years since the CISG took effect. However, the interpretation of Article 79 is as old and unsuccessful as ever. For one thing, it has long been interpreted against our intuition, not to exempt a party from specific performance claims. For another, the controversy has long continued unsettled over whether a party could be exempted in the so-called “hardship” cases. Lastly, where an event fundamentally alters the equilibrium of the contract because of the increased cost of performance, judges’ power to adapt the contract is urgently

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desired, but no reasonable basis in provisions of the CISG has been suggested.

This article demonstrates that (1) Article 79 as a rule exempts a party from specific performance claims, (2) the so-called “hardship” cases are within the ambit of Article 79, and that (3) judges can adapt contracts through what this author terms a “reasonable expectation test.”

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## INTRODUCTION

United Nations Convention on Contracts for the International Sale of Goods (“CISG”)<sup>1</sup> provides for exemption from contractual liabilities in cases of an unexpected impediment beyond control in Article 79. Article 79 (1) prescribes:

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.<sup>2</sup>

Article 79(1) is said to be “one of the most complex and difficult in the CISG,”<sup>3</sup> and, therefore, one of the most controversial. For one, although at first blush Article 79 gives the impression that it exempts a failing party<sup>4</sup> from his obligation to perform, it in fact has been interpreted to allow for specific performance claims by the other party.<sup>5</sup> This puzzling interpretation has produced more perplexing theories of exception to relieve the failing party from

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<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988) [hereinafter CISG].

<sup>2</sup> *Id.* art. 79(1).

<sup>3</sup> Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on “Hardship” Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court*, 59 BELGRADE L. REV. 84, 84 (2011).

<sup>4</sup> In this article, a “failing party” is a party who fails to perform due to an impediment, and who may be exempted by Article 79.

<sup>5</sup> In this article, “the other party” is the alternative party from the failing party.

his obligation to perform in certain situations.<sup>6</sup> Second, in an effort to justify judicial relief in these so called “hardship” cases, various arguments have been made that tend to digress from the letters of Article 79, which sometimes invoke provisions of law other than the CISG.<sup>7</sup> These theories and arguments appear to have aggravated rather than settled the problems.

In order to enjoy the exemption by this provision, there must be an impediment obstructing performance and a causal relationship between the non-performance and the impediment. The promisor must also meet the elements of what this author terms the “four-prong test:” 1) the impediment that caused the failure was beyond his control; 2) he could not reasonably be expected to have taken it into account at the time of the conclusion of the contract; 3) he could not reasonably be expected to have avoided it or its consequences; 4) he could not reasonably be expected to have overcome it or its consequences.<sup>8</sup>

Article 79 is an exception to the ancient principle *pacta sunt servanda*, which means that a promise binds a promisor because it is nothing less than what he himself has said of his own

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<sup>6</sup> See, e.g., INGEBORG SCHWENZER, SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) ¶¶ 54-55, at 1150-51 (Ingeborg Schwenger ed., 4th ed. 2016) [hereinafter SCHWENZER].

<sup>7</sup> See *id.*

<sup>8</sup> Article 79(1) provides that “he could not reasonably be expected . . . to have avoided or overcome it or its consequences.” CISG, *supra* note 1, art. 79(1). It cannot be conclusively determined whether “expected to have overcome” or “expected to overcome” is correct since the verb “overcome” has the same form for the present tense and the past participle. The former is probably grammatically correct. In this article, unless there is a need to clarify the difference, the phrases are used interchangeably. Where the opportunity of a failing party to overcome an impediment has continued to be given to him up to the time of litigation, he could be “expected to overcome” it.

free will.<sup>9</sup> Thus, the ancient principle is based on the notion of the freedom of contract or private autonomy.<sup>10</sup> All of the above four conditions of Article 79(1) operate to confirm that the promisor's free will has not played any role in the exonerating situation.<sup>11</sup>

In Chapter I, this article will argue that if the conventional interpretation that Article 79 exempts a party only from damage claims were to be correct, the provision would not be indispensable and Article 74 could operate in its place. In Chapter II, the article will demonstrate that there was a flaw in the discussions during the drafting of Article 79, and that leading commentaries are in fact compatible with this article's interpretation that Article 79

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<sup>9</sup> See Ewoud Hondius & Hans Christoph Grigoleit, *Introduction: An approach to the issues and doctrines relating to unexpected circumstances*, in UNEXPECTED CIRCUMSTANCES IN EUROPEAN CONTRACT LAW 3, 4 (Ewoud Hondius & Hans Christoph Grigoleit eds., 2011) ("From a more general point of view, *pacta sunt servanda* is one aspect of the notion of individual autonomy. Under this idea individuals determine the rules governing their transactions by consent. It is a prerequisite of the freedom of contract that the rules that are consented to are binding on the relevant party as otherwise the agreement would be of little more than moral value and the functioning of contractual exchange would be endangered. Thus, freedom of contract corresponds with responsibility.").

<sup>10</sup> U.N. COMM'N ON INT'L TRADE LAW, DIGEST OF CASE LAW ON THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, ¶ 12, at 43, U.N. Sales No. V.11-86558 (2012), <https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf> ("According to several courts, one of the general principles upon which the Convention is based is party autonomy. According to one court, 'the fundamental principle of private autonomy is confirmed [in article 6;] it allows the parties to agree upon provisions which derogate from the provisions of the Convention or even to completely exclude its application with express and/or tacit agreement.'").

<sup>11</sup> See Hondius & Grigoleit, *supra* note 9, at 4 ("[I]t is not convincing to attribute the responsibility for the consequences of unexpected circumstances unilaterally to the burdened party based on the concept of *pacta sunt servanda* because a strict allocation of all exceptional events cannot be based on an autonomous act of contractual risk allocation."); see also Brandon Nagy, *Unreliable Excuses: How do Differing Persuasive Interpretations of CISG Article 79 Affect its Goal of Harmony?*, 26 N.Y. INT'L L. REV. 61, 71 (2013) ("Article 79's exemption establishes a limit to the no-fault regime inherent in the CISG.").

excludes specific performance claims. Four reasons will justify this interpretation. In Chapter III, the article will argue that the theory which exceptionally exonerates a party from performance when it is definitively impossible is wrongfully based on CISG provisions. The Chapter will also define the word “impediment” and the causal nexus between an impediment and a failure. Chapter IV will explain that Article 79 is based on tacit assumptions shared by parties that an impediment will not happen. The article will also advance a “reasonable expectation test,” which determines whether to exempt a party by asking whether a “reasonable person” could expect the party to take an impediment into account, avoid it, or overcome it. In Chapter V, this article will apply the new theory to three types of “hardship” cases frequently discussed in past discourses, and will show that the “reasonable expectation test” can be utilized to adapt contracts. Chapter V will also propound what this author has named the “Eisenberg Formula” to be used when a dramatic and unexpected rise in the costs of performance radically changes the equilibrium of the contract. In Chapter VI, this article will elucidate that judges presiding over CISG cases have been commonly adapting contracts, and that the adaptation by the “reasonable expectation test” is no aberration.

#### I. DAMAGE EXEMPTION

At the beginning, Article 79 provides in paragraph (1) that “[a] party is not liable for a failure to perform any of his obligations if he proves [certain conditions].”<sup>12</sup> At the end, it provides in paragraph (5) that “[n]othing in this article prevents either party from exercising any right other than to claim damages under this Convention.”<sup>13</sup> In essence, paragraphs (1) and (5) in combination stipulate that a party is not liable for damages when the failure is due to an impediment that satisfies the conditions listed in paragraph (1), and that the other party can nevertheless exercise other rights, including the right to require the failing party

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<sup>12</sup> CISG, *supra* note 1, art. 79(1).

<sup>13</sup> *Id.* art. 79(5).

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to perform his contractual obligations. As Professor Schwenger explains:

In contrast to Article 74 of the Convention relating to a Uniform Law on the International Sale of Goods, which not only excluded the right to claim damages but also the right to require specific performance if the conditions were satisfied, the CISG generally leaves the promisee's right to require specific performance unaffected according to Article 79(5).<sup>14</sup>

This view is widely shared.<sup>15</sup> However, reading Article 79 through to the end, we may feel somewhat betrayed since reading paragraph (1) makes us assume that a party is exempt from all of the liabilities that may arise from his failure and that he is no

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<sup>14</sup> SCHWENZER, *supra* note 6, ¶ 53, at 1150 (citing Convention Relating to a Uniform Law on the International Sale of Goods art. 74, July 1, 1964, 834 U.N.T.S. 107 [hereinafter ULIS]).

<sup>15</sup> YESIM M. ATAMER ET AL., UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) ¶ 16, at 1061 (Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas eds., 2001) [hereinafter ATAMER] (“Art. 79(5) clearly states that an impediment beyond control merely exempts the obligor from paying damages. The contract itself is not dissolved by the fact that an obligation cannot be performed in a way conforming to the contract due to an impediment, even if the impediment is of a lasting nature. Therefore, the possibility to resort to any other remedy given under the Convention and especially to make use of a claim for performance is not precluded by Art. 79. This rule has been much debated and criticized, since, unlike comparable national provisions, it is only concerned with the exclusion of the claim for damages but does not take account of the fact that an impediment beyond control may cause impossibility and therefore render a claim for specific performance futile.”); *see also* BGH Nov. 27, 2007, X ZR 111/04, *translated in* Albert H. Kritzer CISG Database, *CISG Case Presentation*, PACE L. SCH. INST. INT’L COM. L., <http://cisgw3.law.pace.edu/cases/071127g1.html> (last updated June 6, 2013) (“Article 79 CISG releases the debtor only from damages claims by the creditor. The creditor’s obligations to perform remain unaffected.”).

longer obliged to perform. However, we end up with paragraph (5) that brushes off our expectation for complete exemption.<sup>16</sup> Professor Honnold feels the same way:

The statement in paragraph (5) that nothing in Article 79 affects “any right other than to claim damages” could be read to say that a party who is entitled to exemption from damages could nevertheless be “required to perform” . . . . This conclusion would be inconsistent with the basic provision that a party “is not liable” when performance is barred by an impediment. In many cases an action to “require” performance would call for an impossibility and in other cases the sanctions to compel performance . . . could be at least as onerous as damages. There is no indication that the legislators intended such an absurd result.<sup>17</sup>

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<sup>16</sup> Denis Tallon, *Article 79*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION § 2.9, at 587-88 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987) [hereinafter Tallon], <https://cisgw3.law.pace.edu/cisg/biblio/tallon-bb79.html> (“The effects of the exemption are described in Article 79 in a most obscure and even contradictory way. The title of section IV is of no avail: exemption from what? The principle set forth in paragraph (1), which is copied from Article 74(1) of ULIS, is worded in very general terms: the party ‘is not liable for a failure to perform.’ Paragraph (5), however, is an innovation and appears to restrain the effects of the exemption to one remedy alone: damages.”).

<sup>17</sup> JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 435.5, at 641 (Harry M. Flechtner ed., 4th ed. 2009) [hereinafter HONNOLD].



We would not be as disappointed at the very end and realize that the exemption is limited to damages at the very beginning if these two paragraphs were to be united: “A party is not liable [in *damages*] for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control . . . .”<sup>18</sup>

The gist of Article 79 is that a party is not liable for damages if he proves that the conditions described in paragraph (1) are met.<sup>19</sup> On the other hand, it is Article 74 of the CISG that generally lays down the rules on damages:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.<sup>20</sup>

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<sup>18</sup> In fact, the 1977 Sales Draft had provided: “If a party has not performed one of his obligations, he is not liable in damages for such non-performance if he proves that . . . .” However, during the review of the draft, the committee “after deliberation, retained the proposal to delete the words ‘in damages.’” JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS ¶¶ 432-37, at 349 (1989) [hereinafter DOCUMENTARY HISTORY].

<sup>19</sup> Tallon, *supra* note 16, § 2.10, at 588 (“Paragraph (5), however, provides that ‘nothing . . . prevents either party from exercising any right other than to claim damages . . . .’ [W]hy then is Article 79 not included under the section entitled ‘Damages?’”).

<sup>20</sup> CISG, *supra* note 1, art. 74.

As far as damages are concerned, Article 79 might be useless because Article 74 could play the role of Article 79. When “an impediment beyond his control . . . that he could not reasonably be expected to have taken . . . into account” under Article 79(1)<sup>21</sup> arises, the impediment and the loss ensuing from it should be something other than what “the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known.”<sup>22</sup> Thus, the conclusion that he is not liable for damages can be deduced from Article 74 without any Article 79 intervention.

Against this argument, the following objection can be made, although perhaps it may be an orthodox interpretation. As Article 74 provides “as a possible consequence of the breach of contract,” it deals with a breach that has already happened and it does not care whether the breach was foreseeable or not. It is not on the occurrence of a breach, but on the “amount and kind of loss”<sup>23</sup> caused by a breach that Article 74 imposes the requirement of foreseeability. Foreseeability is not required for what kind of “event” has caused such a breach and loss. For example, *a crank shaft of a mill broke, and the broken shaft was entrusted to a common carrier to be sent to an engine manufacturer as a model for making a new one, but due to the carrier’s neglect, the transport of the model and the return of the new shaft took longer than promised by the carrier, causing the mill to be shut down longer than anticipated.*<sup>24</sup>

In this case, foreseeability is not required concerning the occurrence of the carrier’s neglect but concerning what kind of “loss” would ensue from the breach by the common carrier. The shutdown of the mill and the resulting loss of profit was not

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<sup>21</sup> *Id.* art. 79(1).

<sup>22</sup> *Id.* art. 74.

<sup>23</sup> *Id.*

<sup>24</sup> *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145, 145.

necessarily foreseeable because there was a good possibility that the mill had a spare shaft. Hence, the carrier would not be held liable for damages in this case. Article 74 does not require foreseeability as to the kind of “event” that has caused the breach and loss—it does not care whether it be a traffic accident, an employees’ strike, or an earthquake.

However, contrary to what may be the orthodox view of Article 74 above, we could interpret it as requiring that the event causing the breach must also be foreseeable. As Professor Schlechtriem pointed out, the underlying idea of Article 74 is that “the parties, at the conclusion of the contract, should be able to calculate the risks and potential liability they assume by their agreement.”<sup>25</sup> It would be anomalous for the purpose of Article 74 to say that “in the light of the facts and matters of which he then knew or ought to have known,” a loss arising from a breach has to be foreseeable, but the events causing the loss need not be foreseeable. The parties should be able to calculate the risks of such events at the time of their agreement. Otherwise, a breaching party should not be held liable for damages. In sum, Article 74 could in effect exempt a failing party from damage claims caused by an unforeseeable impediment, in place of Article 79.<sup>26</sup>

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<sup>25</sup> PETER SCHLECHTRIEM, *EXTENT AND MEASURE OF DAMAGES (ARTICLES 74-76)*, reprinted in *UNIFORM SALES LAW - THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 96* (1986); see also ATAMER, *supra* note 15, ¶ 2, at 1056 (“In fact, both provisions [Article 74 & 79] are based on the same value judgment: contract parties should only be liable for damages caused by risks they reasonably could take into account when concluding the contract and therefore also when fixing the price.”).

<sup>26</sup> Yet perfect substitution cannot be made, because Article 79 imposes additional conditions concerning the reasonable expectation to avoid or overcome an impediment. CISG, *supra* note 1, art. 79.

## II. EXEMPTION OF SPECIFIC PERFORMANCE

## A. Discussion During the Drafting and Views of Major Commentaries

It is clear that Article 79 is not indispensable to deny damage claims in case of an unforeseeable impediment beyond control. It may only perform a subsidiary function to clarify what can be reasoned out by the interpretation of Article 74, thereby foreclosing potential controversies. What can we do to save a provision of the CISG, a product of marvelous efforts by respectable scholars and experts?

According to one of the basic principles of legal interpretation, an interpretation which gives intrinsic meanings to a provision is preferable to one which undermines its *raison d'être*.<sup>27</sup> We must come up with those interpretations of Article 79 that will rescue it from sterility. What degrades Article 79 to a fruitless provision is the wrong interpretation of paragraph (5): “Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.”<sup>28</sup> As pointed out above, this paragraph is widely interpreted to retain the right to demand specific performance.

Contrary to the conventional view, this author believes paragraph (5) does not allow a party to exercise his right to specific performance. Further, the root of “the likelihood that Article 79 may be the Convention’s least successful part of the half-century of work towards international uniformity”<sup>29</sup> partly lies in the insufficient discussions over this provision during the drafting. During the review of the Working Group “Sales” draft in 1977 by the United Nations Commission on International Trade Law

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<sup>27</sup> See, e.g., *University of Cambridge v. Bryer* (1812) 16 East’s 317, 319 (“[T]he sound rule of construing any statute as indeed it is of construing any instrument, whether it be statute, will, or deed, is to look into the body of the thing to be construed, and to collect, as far as may be done, what is the intrinsic meaning of the thing . . .”).

<sup>28</sup> CISG, *supra* note 1, art. 79(5).

<sup>29</sup> HONNOLD, *supra* note 17, ¶ 432.1, at 627.

(“UNCITRAL”), “the Committee was more evenly divided as to whether [a party] should be able to exercise the remedy of specific performance of the contract.”<sup>30</sup> It decided that the remedy should be maintained on the ground that “*a temporary impediment would cease* and at such time a right to specific performance should not be precluded.”<sup>31</sup>

At the Diplomatic Conference in 1980, a German representative made a proposal that, in case of a permanent impediment, specific performance should not be insisted.<sup>32</sup> Unfortunately, this proposal was rejected.<sup>33</sup> One might think that this rejection offers a solid ground that a right to specific performance is retained under Article 79. However, it is not so solid when we scrutinize the opinions against the proposal. A Russian representative objected to the proposal, insisting that:

[I]f a seller who had delivered a part of the goods was unable, owing to force majeure, to deliver the rest, [and] if the buyer refused to pay for the goods already delivered, without, however, avoiding the contract, the seller would be deprived, under the

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<sup>30</sup> *Yearbook of the United Nations Commission on International Trade Law*, [1977] 8 Y.B. Int'l L. Comm'n 56-57, U.N. Doc. A/CN.4/SER.A/1977; DOCUMENTARY HISTORY, *supra* note 18, ¶ 455a, at 350; HONNOLD, *supra* note 17, ¶ 435.5, at 642, n.63.

<sup>31</sup> DOCUMENTARY HISTORY, *supra* note 18, ¶ 455a, at 350 (emphasis added).

<sup>32</sup> See SCHWENZER, *supra* note 6, ¶ 53, at 1150.

<sup>33</sup> *Id.* (“The German proposal that the wording should make clear that, if the impediment were of a permanent nature, specific performance could not be insisted on was rejected at the Vienna Conference because it was felt that, in the case of actual impossibility, no problems would arise in practice, whereas the categorical removal of the right to specific performance could impair the promisee’s accessory rights.”); see also DOCUMENTARY HISTORY, *supra* note 18, ¶¶ 17-44, at 604-06.

proposals . . . of the right to require payment, which was unacceptable.<sup>34</sup>

There is some difficulty in making heads or tails of this opinion. First, an impediment, or “force majeure,” prevented the seller’s performance “to deliver the rest.” Therefore, it should be the buyer’s right to require the seller to perform which matters in this context. However, the problem is switched to the seller’s “right to require payment” by the buyer. This example does not refer to any impediment to block the payment by the buyer. In addition, it seems to be based on the premise that the goods already delivered (e.g., 30 units delivered out of 100 units contracted for) can be utilized independently, and that they can be charged and paid for separately from those undelivered. This author could find no reason why the seller would be deprived of the right to require payment.

A Swedish representative objected that:

[A]lthough a party which was unable to perform owing to an impediment was not required to pay damages, it should not for that reason be content to wait until the impediment had disappeared. It had a duty to make all possible efforts to overcome the impediment and its consequences and to perform the contract.<sup>35</sup>

This opinion also contradicts the language of Article 79, as finally adopted. That the party is in the position “to make all possible efforts to overcome the impediment and its consequences and to perform the contract” implies that the party is reasonably expected to overcome the impediment. Therefore, we cannot possibly say that “he could not reasonably be expected to . . . overcome it, or its

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<sup>34</sup> DOCUMENTARY HISTORY, *supra* note 18, ¶ 23, at 605.

<sup>35</sup> *Id.* ¶ 25, at 605.

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consequences.”<sup>36</sup> Thus, his hypothetical fails to satisfy one of the conditions of Article 79. The Swedish representative did not have to worry about his hypothetical situation, because the party in it could not be exempted from his obligation to perform or from his liability to damages.

It should be noted that the opinion of the Committee quoted above—“*a temporary impediment would cease and at such time a right to specific performance should not be precluded*”<sup>37</sup>—in fact suggests that Article 79 does bar the remedy to require performance *during* a temporary impediment. After “*a temporary impediment would cease,*” no impediment exists which satisfies the conditions of Article 79(1) and the failing party is no longer exempt from his obligation to perform. The opinion conversely implies that so long as an impediment persists, the other party cannot demand a specific performance.

The leading commentary by Professor Honnold explains that:

[T]he broad language of paragraph (5) was retained because of the possibility that remedies other than damages might be needed in special circumstances, such as *the ending of a temporary impediment* or failure to pay the price for goods received when the agreed mode of payment was blocked *temporarily* (e.g.) by exchange controls.<sup>38</sup>

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<sup>36</sup> CISG, *supra* note 1, art. 79(1).

<sup>37</sup> DOCUMENTARY HISTORY, *supra* note 18, ¶ 455a, at 350 (emphasis added).

<sup>38</sup> HONNOLD, *supra* note 17, § 435.5, at 642 (emphasis added). Professor Honnold himself agreed with the German proposal. See DOCUMENTARY HISTORY, *supra* note 18, ¶ 38, at 606. (“The very slight change proposed by the Federal Republic of Germany would make the text consistent and prevent abuse.”).

While the payment is being blocked *temporarily* by exchange controls, the buyer is not required to perform. After the block is lifted, there exists no impediment defined in Article 79(1). Therefore, the buyer is no longer exempt, the payment is required by Article 53,<sup>39</sup> and the seller can require the buyer to pay the price according to Article 62.<sup>40</sup>

Another leading commentary edited by Professor Schwenger also maintains: “Upholding the right to claim specific performance where a promisor has gained exemption under Article 79 is entirely sensible if performance remains possible at a *later point in time*, by repair or delivery of substitute goods, etc.”<sup>41</sup> That “performance remains possible at a *later point in time*, by repair or delivery of substitute goods” means that after that later point the impediment for which the seller has once gained exemption is no longer beyond his control and that he can overcome its consequences. In other words, after the point there exists no impediment satisfying the conditions of Article 79(1), because the seller can “reasonably be expected to . . . overcome it or its consequences.”<sup>42</sup> Accordingly, the seller is no longer exempt, and is required to make repairs or to deliver substitute goods under

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<sup>39</sup> See CISG, *supra* note 1, art. 53 (“The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.”).

<sup>40</sup> *Id.* art. 62 (“The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.”).

<sup>41</sup> SCHWENZER, *supra* note 6, ¶ 53, at 1150 (emphasis added).

<sup>42</sup> CISG, *supra* note 1, art. 79(1).



Article 46.<sup>43</sup> Hence, this ratiocination also conversely suggests that so long as a qualified impediment continues, the promisor is not required to perform.

*B. Paragraphs (3) & (5) and Four Reasons for Exemption of Performance*

Paragraph (3) of Article 79 explicitly provides: “The exemption provided by this article has effect for the period during which the impediment exists.”<sup>44</sup> It unequivocally enunciates that the exemption loses effect when the impediment ceases to exist. Apparently, the prevailing interpretation of paragraph (5) has bothered to expatiate on it only to conclude what paragraph (3) manifestly announces. Paragraph (3) seems to set out a matter of course, because after “the period during which the impediment exists” is over, no impediment exists satisfying the conditions of paragraph (1). It is natural that the exemption should lose effect. Again, we must come up with an interpretation which gives this provision an inherent *raison d’etre*. For this purpose, “the exemption” provided at the beginning of paragraph (3) must be interpreted as “the exemption from the obligation to perform.” The nub of the paragraph is that the obligation to perform will “revive” after the impediment. Even if a performance is once interrupted and exempted by an impediment, such rights as guaranteed by Articles 46 (requiring the seller to perform)<sup>45</sup> and 62 (requiring the buyer to pay)<sup>46</sup> will survive it. In other words, the

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<sup>43</sup> *Id.* art. 46. “(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement. (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter. (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.” *Id.*

<sup>44</sup> *Id.* art. 79(3).

<sup>45</sup> *Id.* art. 46.

<sup>46</sup> *Id.* art. 62.

failing party cannot refuse to perform after the impediment, by asserting that once exempted, he will be exempted for good.<sup>47</sup>

On the other hand, this interpretation does not apply to the damage exemption. Damage claims should not “revive” after the impediment. The exemption from claims for damages caused by the delay during the impediment will last forever. Otherwise, the exemption would be meaningless, or it would only grant a grace period.<sup>48</sup> The failing party may be requested to perform after the impediment and may perform belatedly, but the other party is still prevented from making a damage claim for the delay *during* the impediment.<sup>49</sup> This interpretation is congruent with the fact that exercising the right to claim damages is an exception under Article 79(5).<sup>50</sup>

The pivotal question is whether the other party can demand specific performance *during* the period when the impediment

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<sup>47</sup> See Albert H. Kritzer CISG Database, *Guide to CISG Article 79: Secretariat Commentary (closest counterpart to an Official Commentary)* ¶ 14, PACE L. SCH. INST. INT'L COM. L., <https://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html> (last updated Aug. 30, 2006) [hereinafter *Guide to CISG Article 79*] (“However, if the contract was not avoided by the other party, the contract continues in existence and the removal of the impediment reinstates the obligations of both parties under the contract.”); see also ATAMER, *supra* note 15, ¶ 27, at 1065 (“According to Art. 79(3) the obligor is only exempt from paying damages for the duration of the impediment. If in that time-span specific performance is also barred since, for example, export from the country where the specific goods are coming from is stopped due to a plague, the buyer can only claim performance again once the ban is lifted. The performance claim is suspended.”).

<sup>48</sup> This is also true of the damages claims to non-conformities caused by an impediment. See ATAMER, *supra* note 15, ¶ 12, at 1059-60 (referencing applicability of Article 79 to defective delivery).

<sup>49</sup> Needless to say, a failing party is not exempt from the damages which he causes *after* the impediment (e.g., he is procrastinating his performance even after the impediment has been eliminated). It is a matter of course that such damages should not be exempted, and they are out of the sphere of Article 79 in the first place.

<sup>50</sup> CISG, *supra* note 1, art. 79(5).

persists. As is often pointed out,<sup>51</sup> Article 79(5) saves the other party's right to avoid the contract (Articles 49 and 64) and to reduce the price (Article 50) by announcing that it does not "prevent either party from exercising any right other than to claim damages."<sup>52</sup> As stated above, it is also interpreted to allow for specific performance claims, and contrary to this conventional view, it does not for the following four reasons.

First is the fundamental linguistic reason derived from the letters of Article 79(1) itself, which says, "a party is not liable for a failure to perform any of his obligations."<sup>53</sup> The CISG itself does not have a clause that glosses the terms used in its provisions. In addition, when we are engaged 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,"<sup>54</sup> and we must not resort to the usages of local judiciary. A commonly-used dictionary, such as the Oxford English Dictionary ("OED"), could be consulted. It defines the word "liable" as "bound or obliged by

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<sup>51</sup> See, e.g., HONNOLD, *supra* note 17, § 435.5, at 642, n.64 ("The language that became CISG 79(5) was prepared during UNCITRAL's 1977 review (in a Committee of the Whole) of the Working Group Draft. There was 'general agreement that' [under this provision the party expecting performance] 'should have the right to avoid the contract if the failure to perform amounted to a fundamental breach' and that 'he should have the right to reduce the price in appropriate circumstances.' (This right would be appropriate if the seller, after an excused delay, delivered defective goods.)"); see also DOCUMENTARY HISTORY, *supra* note 18, ¶ 455a, at 350; SCHWENZER, *supra* note 6, ¶¶ 56-57, at 1151-52.

<sup>52</sup> CISG, *supra* note 1, art. 79(5); see also *id.* arts. 49, 64; see also *id.* art. 50 ("If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.").

<sup>53</sup> CISG, *supra* note 1, art. 79(1).

<sup>54</sup> *Id.* art. 7(1).

law or equity, or in accordance with a rule or convention.”<sup>55</sup> A “failure to perform” means that the party has not performed. Hence, Article 79(1) says a party is not “bound or obliged” to perform any of his obligations under the contract even if he has not performed when he has encountered an impediment defined. It would not make any sense at all if a provision were to read: “A party is not liable for a failure to perform any of his obligations and yet is bound to perform it.”

There is more to buttress this conclusion. That is, paragraph (1) of Article 79 governs all four paragraphs following it. Paragraph (2) relies on paragraph (1) for its definition (“he is exempt under the preceding paragraph”); the word “exemption provided by this article” in paragraph (3) is the exemption in paragraph (1); and the “impediment” in paragraph (4) is the impediment defined in paragraph (1).<sup>56</sup> Therefore, the clear command of paragraph (1) that a “party is not liable for a failure to perform” infiltrates down to paragraph (5).<sup>57</sup> Paragraph (5) retains only those remedies which are consistent with forbearance of claiming specific performances (*i.e.*, avoidance of contract and reduction of price). It is antiparallel to Article 46(1), which provides: “The buyer may require performance by the seller of his obligations unless the buyer has resorted to a *remedy* which is

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<sup>55</sup> *Liable*, Oxford English Dictionary (2d ed. 1989).

<sup>56</sup> *Id.* art. 79(1)-(4).

<sup>57</sup> Article 38 can be spotlighted as another example that illustrates that paragraph (1) functions as a general provision for the following paragraphs. Article 38(1) provides: “The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.” The effect of paragraph (1) is acting on paragraph (2), which provides: “If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.” The deferred examination after arriving at the new destination does not have to be made as soon as possible, but can be made “within as short a period as is practicable in the circumstances.” The same is true of paragraph (3). See Yasutoshi Ishida, *CISG Art. 38 & 39 and Japanese Commercial Code Article 526—Examination of Goods and Notice of Non-conformity: “One Month No Prejudice” Test*, 56 HIMEJI L. REV. 1, 6-7 (2015) (citing CISG, *supra* note 1, art. 38).

inconsistent with this requirement.”<sup>58</sup> The “remedy” mentioned in this provision is the same as “any right” mentioned in Article 79(5), *i.e.*, avoidance and reduction of the price.<sup>59</sup> Thus, Article 46(1) clearly reveals that the right to avoid contract and to reduce price are “inconsistent with” the requirement of performance.

Third, even if a failing party were to be required to perform while the impediment continued, there would be virtually no remedy for the other party to resort to if the failing party refused. In all probability, he will refuse, but so long as the conditions of Article 79(1) are satisfied, no damages can be claimed for his refusal to perform. Domestic laws may have various provisions to enforce performance. However, they are subject to Article 28 of the CISG,<sup>60</sup> and they might be inconsistent with the damage exemption. In addition, it is doubtful whether their efficacy is worthy of the litigation costs involved in the international context. Therefore, the retention of the right to claim performance is illusory, without any enforceable endorsement.

Lastly, it is simply “unreasonable” to force a failing party to perform while a qualified impediment continues. When a failing party is exempt under Article 79(1), there is an impediment which “he could not reasonably be expected to have . . . overcome.”<sup>61</sup> Forcing him to overcome what he could not

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<sup>58</sup> CISG, *supra* note 1, art. 46(1) (emphasis added).

<sup>59</sup> See Guide to CISG Article 79, *supra* note 47.

<sup>60</sup> CISG, *supra* note 1, art. 28 (“If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.”).

<sup>61</sup> *Id.* art. 79(1).

reasonably be expected to overcome is clearly unreasonable, and even folderol.<sup>62</sup>

### III. DEFINITIVE IMPOSSIBILITY AND A CAUSAL NEXUS WITH IMPEDIMENT

#### A. *Definitive Impossibility*

Even those who maintain that Article 79(5) allows for specific performance claims concede that, as an exception, they are precluded in case of definitive impossibility, such as a permanent ban on the import of the contracted goods. That is, although Article 79(5) admits specific performance claims as a rule, it does not when the performance is rendered totally, physically, and definitively impossible, because a claim for specific performance in such a case would be meaningless. Professor Tallon explains:

The restrictive interpretation of paragraph (5) according to which the defaulting party is exempted only from liability for damages -- is least acceptable when the non-performance is total and definitive. . . . The right of the injured party to claim specific performance or avoidance does not make sense any more. Specific performance is, by definition, impossible.<sup>63</sup>

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<sup>62</sup> See Harry Flechtner, *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*, 19 PACE INT'L L. REV. 29, 43 (2007) ("But how can a party be forced to perform when it has shown, as required for exemption under Article 79, that an impediment has rendered its performance impossible (or, at the very least, so extraordinarily difficult as to satisfy the very strict standard for exemption)?").

<sup>63</sup> Tallon, *supra* note 16, § 2.10.2, at 589-90.

Professor Atamer points out this conclusion is drawn from provisions other than that of Article 79(5). She argues that, regardless of an impediment, the question of whether a specific performance claim is granted or not should be governed by the provisions specifically addressing performance:

Even if the obligor is responsible for *e.g.* the loss of any specific goods as there was a foreseeable and controllable impediment, or even if he has intentionally destroyed these goods, a claim for specific performance cannot be granted. The existence of a performance claim is independent from the fact of whether non-performance can be imputed to the obligor or not. Therefore, it is not correct to search under Art. 79 for an answer to the question of whether specific performance can still be claimed. This question has to be answered by looking at Arts 46 and 62, which are the main provisions regarding the remedy of specific performance.<sup>64</sup>

Perhaps Professor Atamer is right when she says that “it is not correct to search under Art. 79.”<sup>65</sup> However, following her instruction and searching Article 46(1), all we find is: “The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.”<sup>66</sup> As explained in Section B of Chapter II above, the “unless” clause is designed for such a case as where the buyer has

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<sup>64</sup> ATAMER, *supra* note 15, ¶ 18, at 1062.

<sup>65</sup> *Id.*

<sup>66</sup> CISG, *supra* note 1, art. 46(1).

declared the contract avoided or has reduced the price.<sup>67</sup> The clause does not seem to connote the idea that specific performance is unavailable where it is impossible. One interpretation, however, explains: “[T]he limit to the specific performance claim can be deduced from Art. 46(1) itself since it blocks such a claim whenever it is ‘inconsistent’ with another remedy the obligee has resorted to. To claim the impossible is inconsistent with the specific performance claim itself.”<sup>68</sup>

This interpretation is wrong. The “unless” clause of Article 46(1) says, “the buyer has resorted to a remedy [X] which is inconsistent with this requirement [Y].” When we say “X is inconsistent with Y,” X and Y are different things independent of each other. So, “a remedy [X]” in the “unless” clause must be a remedy other than “this requirement,” *i.e.*, the requirement of specific performance [Y]. In this respect, the first sentence quoted above appears to maintain consistency in saying, “whenever it [Y = such a claim = specific performance claim] is ‘inconsistent’ with *another* remedy [X] . . . .” In the second sentence, however, this “another remedy [X]” is transformed into “the specific performance claim [Y],” the very same remedy. This self-contradiction is a product of the result-orientated efforts to forcibly inject the impossibility theory into Article 46(1). Admittedly, this provision is meant for an inconsistent situation where, for example, “the buyer declares the contract avoided (*e.g.*, ‘I avoid: Don’t ship the goods’) and later demands performance: ‘Ship the goods.’”<sup>69</sup> It is equally wrong to search within Article 46.

We need not invoke a provision of the CISG to say “it is impossible to perform what is impossible to perform.” It is not so much a matter of legal interpretation as a matter of course that what cannot be done cannot be done. A contrary assertion would be irrational. For instance, it would ruin the integrity of the CISG

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<sup>67</sup> See Guide to CISG Article 79, *supra* note 47.

<sup>68</sup> ATAMER, *supra* note 15, ¶ 34, at 1067 (citing the works by Dr. Ivo Bach & Düchs).

<sup>69</sup> HONNOLD, *supra* note 17, § 282.1, at 411.



if one of its provisions were to provide that “the buyer may require the seller to perform even if it is impossible.” Every law is based on some axioms even though it does not expressly provide for them. That we cannot perform the impossible is such an axiom.<sup>70</sup>

The arguments on impossibility, although dwelt upon above, are in fact unnecessary for the new theory that Article 79 does bar specific performance claims. Impossible or not, performance is excused if the conditions of Article 79 are met. In other words, Article 79 is not a provision for a case where performance has become impossible. Performance need not become definitively impossible for a party to enjoy exemption.<sup>71</sup> All it requires is that “the failure was due to an impediment.”<sup>72</sup> Even when the performance is still possible, a party might fail to perform simply because the performance becomes very difficult or onerous due to an impediment.

It is now time to discuss the rudimentary question of when a party is exempted from performance and damage claims.

*B. Impediment and a Causal Nexus*

Article 79(1) requires the failure to be “*due to an impediment*.”<sup>73</sup> As such, it is necessary to clarify what “an

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<sup>70</sup> Article 82(1) provides that the “buyer loses the right to declare the contract avoided . . . if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.” CISG, *supra* note 1, art. 82(1). Professor Atamer refers to Article 82 as one of the two provisions of CISG using the term ‘impossibility’ and explains that its “underlying ratio is that the impossible cannot be delivered.” See ATAMER, *supra* note 15, ¶ 34, at 1067-68.

<sup>71</sup> Albert H. Kritzer CISG Database, *CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG*, op. 3.1, PACE L. SCH. INST. INT’L COM. L., <https://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> (last updated Apr. 7, 2008) [hereinafter AC Opinion] (“The language of Article 79 does not expressly equate the term ‘impediment’ with an event that makes performance absolutely impossible.”).

<sup>72</sup> CISG, *supra* note 1, art. 79(1).

<sup>73</sup> *Id.* (emphasis added).

impediment” actually means in this provision. The phrase was deliberately chosen to avoid “the use of various familiar domestic legal terms—such as *force majeure*, *wegfall der geschäftsgrundlage*, *eccessiva onerosità sopravvenuta*, impossibility, and impracticability—in favor of ‘terminology neutrality.’”<sup>74</sup> Therefore, again, it would be best to consult the OED to search for a definition not tainted by local legal usages. The OED defines an “impediment” as “something that impedes, hinders, or obstructs.”<sup>75</sup> A so-called “hardship” situation, which will be discussed later in Section A of Chapter V, is qualified as an impediment according to this definition.<sup>76</sup> One might suspect that a simple definition of a dictionary such as this will not work as an interpretive criterion for a provision of the Convention. It will, however, suffice because exhaustive modifiers following the word, such as “beyond his control” and “not reasonably be expected . . . to have avoided,” function as an elaborate annotation of “an impediment” and tailor the ambit of the word more narrowly than any other possible definition.<sup>77</sup>

The same is true of the phrase “due to” in Article 79(1).<sup>78</sup> According to the OED, “due to” has the same meaning as “owing to,” which is defined as “caused by.”<sup>79</sup> If paraphrased, “the failure was due to an impediment” becomes “the failure was caused by an impediment.” Therefore, Article 79(1) requires a causal relationship between the failure and the impediment. If the “due to” connotes a “but for” nexus, almost everything can be “due to

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<sup>74</sup> Nagy, *supra* note 11, at 64.

<sup>75</sup> *Impediment*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

<sup>76</sup> ROLF KOFOD, *HARDSHIP IN INTERNATIONAL SALES CISG AND THE UNIDROIT PRINCIPLES 3.1.2* (Univ. of Copenhagen-Faculty of Law ed. 2011), <https://www.cisg.law.pace.edu/cisg/biblio/kofod.html> (“By avoiding reference to hardship or any other similar concept such as *force majeure*, *frustration* or *wegfall der Geschäftsgrundlage*, the term ‘impediment’ manages to summarise these principles under one provision by a rather elastic wording.”).

<sup>77</sup> CISG, *supra* note 1, art. 79(1).

<sup>78</sup> *Id.*

<sup>79</sup> *Due to*, OXFORD ENGLISH DICTIONARY (2d ed. 1989); *owing to*, *supra*.

an impediment.” For instance, a seller was absorbed in checking the latest news of a big earthquake, which took place in a neighboring province, and forgot to reserve a ship for the transportation of the contracted goods, causing the delivery to be delayed. “But for” the earthquake, the delivery would not have been delayed. If “due to” connotes a nexus similar to the “proximate cause” used in tort law, it may confine the range of relevant impediments within some intelligible instances. However, a quest for an appropriate level of nexus is unnecessary, because whatever the level may be, the exhaustive modifiers of “an impediment” enumerated in Article 79(1) will adequately tailor qualified impediments in terms of causal relationship, as well. For example, in our forgetful seller hypothetical above, we cannot possibly say that “he could not reasonably be expected . . . to have avoided . . . its consequences”<sup>80</sup> (*i.e.*, his absorption into the news of the earthquake and the delayed delivery), and hence he is not exempted.

#### IV. TACIT ASSUMPTIONS AND THE REASONABLE EXPECTATION TEST

##### A. Shared Tacit Assumptions

When parties negotiate for and conclude a contract, both share many tacit assumptions. They may vary from “the sun will rise tomorrow again” to “the crude oil price will be steady during the one-month life of the contract.” They are a part of a contract in that the parties would not have made the contract or would have agreed otherwise if they had been fully aware that the assumed situations would not come about (“the sun will not rise tomorrow” or “the crude oil price will sky-rocket in a month”). They are basic conditions of a contract, but are simply too basic to merit attention or mention. Professor Eisenberg reminds us of what we may have somewhere in the back of our mind:

Shared tacit assumptions . . . are just  
as much a part of a contract as

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<sup>80</sup> CISG, *supra* note 1, art. 79(1).

explicit terms, so that where the risk of an unexpected circumstance would have been shifted away from the promisor if the assumption had been made explicit, an otherwise identical shared tacit assumption should operate in the same way.

This approach to shared tacit assumptions is an application of the usual hypothetical-contract methodology, under which unspecified terms are usually determined on the basis of what the contracting parties probably would have agreed to if they had addressed the relevant issue.<sup>81</sup>

The notion of shared tacit assumptions has much to do with Article 79. The Article comes into play when parties had commonly assumed the non-occurrence of an impediment at the time of the conclusion of the contract but it did, in fact, happen. The very reason why a failing party is exempt is that he and the other party would not have made a contract or would have agreed otherwise if they had actually foreseen an impediment and explicitly addressed the issue.

However, Article 79(1) focuses on the tacit assumption only of the failing party (not of the other party), and it demands reasonableness for not having assumed or foreseen the impediment, and for not taking measures to avoid or overcome the impediment. The tacit assumption of the other party is inferred by the “reasonable expectation test,” which will be considered next.

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<sup>81</sup> Melvin Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207, 214 (2009).

*B. The Reasonable Expectation Test*

In defining a qualified impediment, Article 79(1) uses a unique phrase: “could not *reasonably* be expected to have . . . .”<sup>82</sup> In all of the provisions of the CISG, the word “reasonable” is used 34 times, while “reasonably” is used twice.<sup>83</sup> It can safely be said that reasonableness has a status as one of “the general principles” on which the Convention is based.<sup>84</sup> It may be a universal legal criterion. However, it is a highly context-dependent concept, and we must consider its meaning in the context of the CISG and Article 79. Article 8, a general provision governing the interpretation of statements and conduct of parties, sheds light on the connotation. Article 8(2) provides that “statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.”<sup>85</sup> This provision formulates a so-called “reasonable person” standard. The standard is applicable to Article 79 situations because whether a party could reasonably be expected to do X depends on the interpretation of his conduct.<sup>86</sup> Paragraph (3) facilitates the determination of the “reasonable person’s” understanding by providing, “[i]n determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties

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<sup>82</sup> CISG, *supra* note 1, art. 79(1) (emphasis added).

<sup>83</sup> The word “unreasonable” is used 13 times. *See generally id.*

<sup>84</sup> *See id.* art. 7(2); *see also* Albert H. Kritzer CISG Database, *Reasonableness: Overview comments*, PACE L. SCH. INST. INT’L COM. L., <http://cisgw3.law.pace.edu/cases/071127g1.html> (last updated Jan. 23, 2001).

<sup>85</sup> CISG, *supra* note 1, art. 8(2).

<sup>86</sup> In fact, ULIS in Article 74 entitled “Exemption” explicitly adopted a “reasonable person” standard. It provides that a party can prove the intention of the parties not to be bound in case of an impediment, and that “in the absence of any expression of the intention of the parties, regard shall be had to what *reasonable persons* in the same situation would have intended.” ULIS, *supra* note 14, art. 74 (emphasis added).

have established between themselves, usages and any subsequent conduct of the parties.”<sup>87</sup>

If we incorporate the “reasonable person” standard of Article 8 into Article 79, we end up with the following test: “whether a reasonable person in the shoes of the [failing party], under the actual circumstances at the time of the conclusion of the contract and taking into account trade practices”<sup>88</sup> could expect the failing party to have taken the impediment into account or to have avoided or overcome it or its consequences. This article calls this the “reasonable expectation test,” and refers to a reasonable person described therein simply as a “reasonable person.”

V. THE SO-CALLED “HARDSHIP” CASES AND ADAPTATION BY THE REASONABLE EXPECTATION TEST

A. *The So-called “Hardship” Cases*

Past discussions on Article 79 are based on the proposition that in principle it allows for specific performance claims.<sup>89</sup> It would be better here to test our new theory, which denies specific performance claims, by applying it to hypotheticals utilized in the past discourses. The most formidable controversy has been focused on the so-called “hardship” cases. According to Professor Lindstrom, “[t]he question whether situations of hardship

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<sup>87</sup> CISG, *supra* note 1, art. 8(3).

<sup>88</sup> SCHWENZER, *supra* note 6, ¶ 14, at 1134.

<sup>89</sup> *But see* Ingeborg Schwenger, *Wider Perspective: Force Majeure and Hardship in International Sales Contracts*, 39 VICTORIA U. WELLINGTON L. REV. 709, 720 (2009) (“[N]owadays it seems to be undisputed that, wherever the right to claim performance would undermine the obligor’s exemption, performance cannot be demanded as long as the impediment exists. This rule not only applies, for example, to cases of actual impossibility of performance, but also to cases of hardship.”).

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are governed by Article 79 is one of the most difficult and most discussed questions concerning the Article.”<sup>90</sup>

The CISG itself does not have any provision concerning “hardship” situations. The UNIDROIT Principles of International Commercial Contracts (“UNIDROIT Principles”)<sup>91</sup> in Article 6.2.2 defines hardship in the following way:

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.<sup>92</sup>

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<sup>90</sup> Niklas Lindström, *Changed Circumstances and Hardship in the International Sale of Goods*, NORDIC J. COM. L. 1, 12 (2006), <http://njcl.dk/articles/2006-1/commentary1.pdf>.

<sup>91</sup> See generally Amin Dawwas, *Alteration of the Contractual Equilibrium Under the UNIDROIT Principles*, PACE INT’L L. REV. ONLINE COMPANION, Dec. 2010, at 1.

<sup>92</sup> Int’l Inst. for the Unification of Priv. L. [UNIDROIT], *UNIDROIT Principles of International Commercial Contracts* 2010, art. 6.2(2) (Dec. 2, 2013), <https://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

Article 6.2.3 provides for the effects of hardship. It authorizes the disadvantaged party to request renegotiation of the other party, and for the court to terminate the contract or adapt it with a view to restoring its equilibrium.<sup>93</sup>

During the review of the Working Group “Sales” draft in 1977 by United Nations Commission on International Trade Law (“UNCITRAL”), an article governing hardship situations was proposed. It stated:

If, as a result of special events which occurred after the conclusion of the contract and which could not have been foreseen by the parties, the performance of its stipulations results in excessive difficulties or threatens either party with considerable damage, any party so affected has a right to claim an adequate amendment of the contract or its termination.<sup>94</sup>

This would have enabled a party facing hardship to modify or terminate the contract in a manner similar to that prescribed by

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<sup>93</sup> *Id.* art. 6.2.3. Art. 6.2.3 provides:

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
  - (a) terminate the contract at a date and on terms to be fixed; or
  - (b) adapt the contract with a view to restoring its equilibrium. *Id.*

<sup>94</sup> DOCUMENTARY HISTORY, *supra* note 18, ¶ 458, at 350.



the UNIDROIT Principles. However, the “Committee did not retain this proposal.”<sup>95</sup>

It is suggested that this rejection of the proposal attests that CISG has no room for “hardship” cases.<sup>96</sup> However, “such history evidences that the discussions were not conclusive on this question,”<sup>97</sup> and the rejection is susceptible to various interpretations.

To logically interpret Article 79, it should be discouraged to discuss whether the Article is applicable to a “hardship” cases. Unlike the UNIDROIT Principles, the CISG does not have a provision defining “hardship” situations.<sup>98</sup> If we attempt to delineate a hardship for the purpose of applying Article 79, it is likely to become over-inclusive and under-inclusive, as compared to the ambit of Article 79. In other words, “[w]herever one cuts the seamless web there will be loose ends,”<sup>99</sup> and short ends. Even if a case governed by the CISG happens to fit the definition of Article 6.2.2 of the UNIDROIT Principles, such remedies as provided in Article 6.2.3 are not readily available under the CISG. Therefore, we should directly discuss whether an obstacle involved in a specific case, which might or might not fall in a so-called “hardship” situation, as defined in Article 6.2.2, should be characterized as “an impediment” governed by Article 79, satisfying its enumerated conditions. In case of an economic hardship, such as where a dramatic and unexpected rise in the costs of performance radically changes the equilibrium of the contract, it is often advocated that the performance needs to be “excessively

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<sup>95</sup> *Id.* ¶ 460, at 350.

<sup>96</sup> See, e.g., Scott D. Slater, *Overcome by Hardship: The Inapplicability of The Unidroit Principles’ Hardship Provisions to CISG*, 12 FLA. J. INT’L L. 231, 259-60 (1998).

<sup>97</sup> AC Opinion, *supra* note 71, cmt. 30.

<sup>98</sup> See generally CISG, *supra* note 1.

<sup>99</sup> Barry Nicholas, *Force Majeure and Frustration*, 27 AM. J. COMP. L. 231, 232 (1979), <https://www.cisg.law.pace.edu/cisg/biblio/nicholas.html>.

(extremely) onerous” to justify judicial relief.<sup>100</sup> However, for the same reasons as not to define the “hardship” situations, it would be better not to introduce another criterion apart from the letters of Article 79. This author believes that the “reasonable expectation test” concerning overcoming an impediment can play the same role as the standard of extreme onerousness (*i.e.*, whether a failing party could reasonably be expected to have overcome the impediment).

Generally speaking, the performance in the so-called “hardship” situations is physically possible (or not totally and definitively impossible), albeit it is very difficult, and, therefore, according to the conventional view of Article 79, the promisor cannot be exempted from his obligation to perform. This is why a proposal, which would have allowed for the adaptation or termination of contract, was made during the review of the draft, and why the Advisory Council Opinion No.7 insinuates the possibility of the adaptation of contract under Article 79.<sup>101</sup> However, under our new theory, specific performance claims are precluded if a “hardship” case meets the conditions of Article 79.

*B. The Sunken Ship Case*

The first case that epitomizes a hardship situation is a salvage case.

*Seller agreed to sell and Buyer agreed to buy a picture painted by an artist, who had died 5 years before. The ship transporting it has sunk together with the picture, but fortunately the picture itself remains intact in the hold of the ship. The price*

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<sup>100</sup> See, e.g., AC Opinion, *supra* note 71, op. 3.1; ATAMER, *supra* note 15, ¶ 81, at 1090.

<sup>101</sup> AC Opinion, *supra* note 71, cmt. 40 (“CISG Article 79(5) may be relied upon to open up the possibility for a court or arbitral tribunal to determine what is owed to each other, thus ‘adapting’ the terms of the contract to the changed circumstances.”).

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*of the picture is 55 thousand dollars, but the costs of salvage are enormous. Buyer sues Seller for specific performance.*

Because under our new theory Article 79 exempts a failing party from his obligation to perform if he encounters a qualified impediment, the conclusion that Seller is not required to salvage the ship can be reached by the simple application of the letters of Article 79(1). It can be easily acknowledged that the sinking of the ship carrying the goods is “an impediment beyond [Seller’s] control.”<sup>102</sup> It can also be admitted that “he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract.”<sup>103</sup> The OED defines the phrase to “take into account” as “to take into consideration as an existing element, to notice.”<sup>104</sup> Ordinarily, parties to a sales contract do not take into consideration the possibility that the ship carrying the goods will sink as a factor which must be embodied in their contract. In the words of our analysis, they do not “assume” that the ship will sink, or they share a tacit assumption that the ship will not sink. Therefore, they do not bother to arrange for the catastrophe, because it will cost them time and trouble, which are most likely doomed to be wasted. If they really believe the ship is likely to sink, they will never make a contract involving the ship.

Of course, everything could be foreseeable and expected, including a prophecy that “a meteorite might strike our ship,” in the sense that we could not conclusively assert that it will never happen in the future. It is a matter of a degree of probability. In the business world, there are many sophisticated contracts containing elaborate clauses for mishaps. However, as far as such a clause is concerned, such risks are beyond the scope of the CISG,

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<sup>102</sup> CISG, *supra* note 1, art. 79(1). Professor Atamer states that “to exempt the obligor, the impediment has to be an objective one, having its roots outside the sphere of influence of the obligor.” ATAMER, *supra* note 15, ¶ 47, at 1072.

<sup>103</sup> CISG, *supra* note 1, art. 79(1).

<sup>104</sup> *Take into account*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

which begins to function where the parties fail to agree.<sup>105</sup> Therefore, what is relevant here is the reasonable expectation of those who have not specifically agreed on the matter. In this hypothetical, a “reasonable person” could not expect Seller to have taken the impediment into account. So long as Seller could not have taken the sinking ship into account, a “reasonable person” could not have expected Seller to have avoided it or its consequences.<sup>106</sup> No one could be expected to avoid what is unforeseeable and unlikely.

The remaining part of Article 79(1)—“could not *reasonably be expected* to . . . overcome it or its consequences”<sup>107</sup>—is vital for the solution to this case. One of the consequences is the extreme difficulty of salvaging the ship and rescuing the painting from it. On the issue of whether Seller is required to carry out such an enterprise, this author agrees with Professor Lindström when he writes:

Routamo and Ramberg point out that absolute impossibility cannot be a requirement for exemption but that the question is what a party reasonably can overcome. As an example, the scholars state that it cannot be regarded as reasonable to require a party to save a plane that lays 100 meters below sea level. Such an impediment would be possible to overcome but the

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<sup>105</sup> CISG, *supra* note 1, art. 6. (“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.”).

<sup>106</sup> There may be some cases where a failing party could not reasonably be expected to have taken an impediment into account, but could reasonably be expected to have avoided its consequence. For example, a seller can avoid a consequence of the sky-rocketed price of an input for his products by obtaining substitute materials or by ensuring price stability using futures or options.

<sup>107</sup> CISG, *supra* note 1, art. 79(1).

scholars regard such an operation as unreasonably expensive. . . . The wording of Article 79 does not suggest that a party would be obliged to take on extraordinary responsibilities in order to perform. On the contrary, if the word “reasonably” in Article 79 also regards the obligation to overcome the impediment, *Article 79 only obligates a party to make a reasonable effort to perform.*<sup>108</sup>

Rescuing the painting may be technically possible, but Seller must bear huge costs totally disproportionate to the price of the painting, and will suffer a financial loss that is significantly greater than the risk of loss that a “reasonable person” could expect Seller to have undertaken.<sup>109</sup> It can also be regarded as an “economically irrational behavior”<sup>110</sup> to force Seller to salvage the ship. Therefore, a “reasonable person” could not expect him to overcome such a difficulty. Thus, all of the conditions of Article

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<sup>108</sup> Lindström, *supra* note 90, at 13 (emphasis added).

<sup>109</sup> Professor Eisenberg has advanced a test called the “bounded-risk test,” under which “a promisor should be entitled to judicial relief if as a result of a dramatic and unexpected rise in costs, performance would result in a financial loss significantly greater than the risk of loss that the parties would reasonably have expected the promisor to have undertaken.” See Eisenberg, *supra* note 81, at 234.

<sup>110</sup> Professor Atamer is also standing on the premise that Article 79 admits a specific performance claim but considers a claim for an “economically irrational behavior” as an exception, insisting that “[w]hen there is a blatant disproportion between the changed costs of performance and the interest of the buyer in receiving performance in kind, the seller ought to have the right to refuse a performance claim. What has to be done is a cost-benefit analysis. Each time one comes to the result that a claim for specific performance would be vexatious, the seller should have a defense.” ATAMER, *supra* note 15, ¶ 36, at 1068.

79(1) are met. Accordingly, Seller is exempted from his obligation to perform and from Buyer's claim for damages.<sup>111</sup>

C. *The Devalued Currency Case and Adaptation by the Reasonable Expectation Test*

The second so-called "hardship" case is a devalued currency case.

*Buyer, domiciled in State X, concluded a contract of sale with Seller, domiciled in State Y. Payment was agreed to be made in State Z within three months, upon delivery of the goods, in the currency of State Z (Z currency). The price was 50,000 in Z currency. Its value was equivalent to approximately 30 kilograms of gold. Suppose further that within a month of the conclusion of the contract an unpredictable political and economic crisis, which the parties could not have reasonably taken into account, led to a massive devaluation of 50% of Z currency. This has caused the value of the contract price to plunge by half. Now the value of 50,000 in Z currency has become equivalent to no more than approximately 15 kilograms of gold. As a result of this totally unanticipated and massive devaluation of the Z currency, the sale has turned out to be a huge windfall for Buyer and a gross loss for Seller.*<sup>112</sup>

The performance by Seller, *i.e.*, to procure the goods and deliver them to Buyer, is as possible as ever without any physical obstacle. Because of the massive devaluation of Z currency,

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<sup>111</sup> Of course, as Professor Tallon points out, "the final solution will not be the same if the said object is a highly valuable sculpture or merely a machine tool. Thus, everything is a question of measure." A sculpture made by Auguste Rodin would be worth salvage. In case of a machine tool, even if specially made according to the specifications by Buyer, the cost of making another may not be so high as to warrant salvage, and may be something Seller is "reasonably expected to overcome." See Tallon, *supra* note 16, ¶ 2.6.4, at 582.

<sup>112</sup> This hypothetical case is based on the example in AC Opinion, *supra* note 71, cmt. 33. In the Comment, "buyer A" is probably misprinted for "seller B" and vice versa.

however, the transaction has become impracticable for Seller as it would cause him a substantial financial loss if he were forced to carry it out. When we apply Article 79 to this case, the economy of State Z was “beyond control” for Seller as much as it was for anybody else. The economic crisis that triggered the devaluation was unpredictable by definition. Hence, the parties shared a tacit assumption that Z currency would be stable at least during the life of their contract. Accordingly, Seller “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 [it].”<sup>113</sup>

So far, there is an inclination to exempt Seller. However, it would not be reasonable for both parties to put an end to their deal. Seller, as well as Buyer, may not be happy with this ending. Let’s consider what the best solution that a “reasonable person” can come up with is. A “reasonable person” in Buyer’s shoes might simply forgo the windfall, thinking that he has not borne comparable *quid pro quo*.<sup>114</sup> If so, it is likely that he would like the transaction to stay on if he can obtain the profit that he had originally contemplated. On the other hand, Seller would also most likely want the deal to continue if he can glean the proceeds of the sale which he had originally attempted to earn. Z currency in their original undertaking was worth double of that after the devaluation. It would be reasonable for them to agree to modify their contract by increasing the price to 100,000 in new Z currency—the equivalent of 50,000 in old Z currency. If Seller simply eludes the contract, he must search for a bargain with another buyer from scratch, on terms which may or may not be more favorable than the eluded contract. Buyer, on the other hand, must procure the goods from another seller on terms which may or

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<sup>113</sup> CISG, *supra* note 1, art. 79(1); see AC Opinion, *supra* note 71, cmt. 39 (“Indeed, the theoretical possibility of such radical and unexpected changes admits the application of Article 79 in those rare instances as the one exemplified above.”).

<sup>114</sup> Of course, an actual breathing party will insist on the performance of the contract to the letter, trying to obtain the windfall, but as explained later in this section, this should be blocked.

may not be more favorable. In addition, negotiating for and concluding a new contract with other dealers would most likely take more time and trouble than the rearrangement of the contract already consolidated.

This is probably the most practical and reasonable solution, which will give both parties what they have wanted from the beginning, no more and no less. A judge deciding such a case could reach this solution partly through Article 8(1), which provides: “[f]or the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.”<sup>115</sup> A superb illustration by Professor Farnworth is pertinent to our current discussion:

One consequence of paragraph (1) [of Article 8] is that if the parties shared a common understanding of the meaning of language or other conduct, that understanding will prevail. . . . If, for example, a seller agrees with a buyer to show a price of 50,000 in the contract, rather than the true price of 100,000, in order to reduce the broker’s fees, their contract will be interpreted according to their common understanding,

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<sup>115</sup> CISG, *supra* note 1, art. 8(1).



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100,000 not 50,000.<sup>116</sup>

In our hypothetical, both parties agreed that Seller's performance was worth 50,000 in old Z currency or approximately 30 kilograms of gold, and intended to sell and buy it at that fixed valuation. Each "knew or could not have been unaware" of the other's intent. After the devaluation, the rate of 50,000 Z currency has plummeted down to the equivalent of approximately 15 kilograms of gold. Therefore, in order to maintain the originally intended value of the performance, the contract price must be increased to 100,000 in new Z currency. If they had foreseen the devaluation and addressed the issue at the time of the conclusion of the contract, they would probably have agreed on this sum.<sup>117</sup>

The interpretation of the parties' intent must be linked to the "reasonable expectation test" of Article 79(1), because, as Professor Farnsworth's exemplar shows, an Article 8(1) case does not usually involve an unexpected impediment. Allowing Buyer to pay only 50,000 in new Z currency is unreasonable and unfair because it is not what the parties really intended, and because it is a sheer windfall to Buyer and a substantial financial loss to Seller.

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<sup>116</sup> E. Allen Farnsworth, *Interpretation of Contract: Article 8*, in C.M. BIANCA ET AL., COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 95, 98 (1987); see also *United Nations Commission on International Trade Law*, [1978] IX Y.B. Comm'n on Int'l Trade 97, U.N. Doc. A/CN.9/SER.A/1978; see also BGH Nov. 27, 2007, X ZR 111/04, translated in Albert H. Kritzer CISG Database, *CISG Case Presentation*, PACE L. SCH. INST. INT'L COM. L., <http://cisgw3.law.pace.edu/cases/071127g1.html> (last updated June 6, 2013) (The case concerns a buyer who proposed to the seller price increases to prevent buyer's customers from finding out actual cost price. The price increment was to be skimmed off and transferred to a company affiliated with the buyer as "consulting and marketing fees." The German Court held pursuant to Article 8(1) of the CISG that the real intent of the price amendment proposed by the buyer was known to the seller, or the latter could not have been unaware of it.).

<sup>117</sup> Professor Eisenberg rightly pointed out that "unspecified terms are usually determined on the basis of what the contracting parties probably would have agreed to if they had addressed the relevant issue." See Eisenberg, *supra* note 81, at 214.

Therefore, Seller “could not reasonably be expected to overcome the impediment”<sup>118</sup> by performing the contract to the letter. However, he should not be exempted, because he could reasonably overcome the impediment by the solution mentioned above by applying Article 8(1). Buyer, who may persist in obtaining the goods at half the price, may reject this solution. However, if he does reject, the court will hold that Seller is exempted from performance, because a “reasonable person” could not expect Seller to overcome the impediment by accepting the payment which has only half the value of the original contract. If Seller is exempted, Buyer must obtain the goods from the market probably at roughly the same price fixed in the court order.

To order Buyer to pay 100,000 instead of 50,000 in Z currency is the same solution as adaptation of the contract, at least as far as its face value is concerned. Unlike the UNIDROIT Principles, the CISG has no provision that authorizes a judge to adapt the contract. However, such adaptation should be possible through the interpretation of the “reasonable expectation test” of Article 79, as demonstrated above. Whether a party could reasonably be expected to overcome an impediment, in other words, whether a “reasonable person” could expect a party to overcome an impediment, is ultimately determined by a judge presiding over the case. By this capacity of an umpire of reasonableness, a judge can adapt a contract by ordering a solution reasonably expected to be taken.

It is impracticable and even a waste of time to order the parties to renegotiate, because it is likely that they had already negotiated extensively before going to court.

*D. The Drastic Price Increase Case and the “Eisenberg Formula”*

*On September 1, Buyer and Seller had entered into a sales contract of certain type of steel tubes, which were to be used by*

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<sup>118</sup> CISG, *supra* note 1, art. 79(1).

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*Buyer to make scaffolding, at the price of 100,000 Euro. On September 30, the price of steel materials used for manufacturing the tubes increased by 70%. Seller suspended performance and did not deliver the tubes, but instead asked Buyer for an adjustment to the price. When negotiations failed, Seller declared that he would not make deliveries unless Buyer agreed to price increase. Buyer did not agree and sought a court order requiring Seller to make deliveries at the price specified in the contract of 100,000 Euro.*<sup>119</sup>

It is clear that the rise of steel price is “beyond control” of Seller, as well as anybody else. However, it is not so clear whether Seller “could not reasonably be expected to have taken [it] into account at the time of the conclusion of the contract.”<sup>120</sup> Our “reasonable expectation test” inquires whether a “reasonable person” in Seller’s shoes could expect Seller to have taken the price hike into account. If the answer is affirmative—in other words, if the price increase stays within the reasonably expected level—he is liable for specific performance or expectation damages. However, the scale of a reasonably expected price increase will sway widely depending on many, or probably infinite, variables, such as whether the transaction is of speculative nature, whether the goods are steel or farm products, whether the life of contract is long, or whether a proper market forecast is available. In some speculative trades, parties might foresee a 70% price increase or even more. Pinpointing the percentage that is uniformly applicable to all sorts of transactions in a reasonable manner is impossible. If the matter is “left to the discretion of the

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<sup>119</sup> This hypothetical is based on Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009, C.07.0289.N, <http://www.unilex.info/case.cfm?id=1457> (Belg.), translated in Albert H. Kritzer CISG Database, *CISG Case Presentation*, PACE L. SCH. INST. INT’L COM. L., <http://cisgw3.law.pace.edu/cases/090619b1.html> (last updated June 25, 2012). Professor Flechtner rightly criticized this opinion as wrongfully incorporating the UNIDROIT Principles into the general principles of the CISG. See Flechtner, *supra* note 3, at 91-99.

<sup>120</sup> CISG, *supra* note 1, art. 79(1).

courts,”<sup>121</sup> judges will be at a loss. Professor Eisenberg, however, has found a solution:

What constitutes a reasonably foreseeable increase in the seller's cost of performance should be historically based; more specifically, it should be the maximum percentage increase in the cost of the relevant inputs over a comparable stretch of time during a reasonable past period. In most cases, consideration of price movements during the prior ten to twenty years probably would suffice.<sup>122</sup>

This author calls this test the “Eisenberg Formula.” It is far more rational and versatile than any fixed static percentage, often discussed under the name of “limit of sacrifice.”<sup>123</sup> It is rational because it sophisticates crude statements concerning risk-bearing, for example, an argument that sellers in speculative businesses are regarded as bearing the risk of fluctuations. The “Eisenberg Formula” refines those statements and provides a rational answer to the question of when and how much a party should bear the risk. It is versatile because it can be applied to all kinds of transactions

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<sup>121</sup> ATAMER, *supra* note 15, ¶ 82, at 1090.

<sup>122</sup> Eisenberg, *supra* note 81, at 245.

<sup>123</sup> See, e.g., ATAMER, *supra* note 15, ¶ 82, at 1090; see also CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION OF NON-PERFORMANCE IN INTERNATIONAL 428-38 (Kluwer L. Int'l. 2009) (suggesting that, as a general point of reference, 100% increase is favored); see also Schwenger, *supra* note 89, at 715-17 (arguing that a 150-200 % margin is advisable, taking account of the international character of the transaction). Note that the concept of limit of sacrifice is related not only to the phase of “taking account of the impediment,” but also to the phase of “overcoming it,” which will be discussed in the rest of this article.

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with equal validity, regardless of their kinds, natures, lengths, or the types of goods.

In applying the “Eisenberg Formula” to the present hypothetical, we must research the fluctuation of the market prices of steel materials used for producing the tubes during the ten to twenty years before the conclusion of the contract, and identify the maximum percentage of price increase “over a comparable stretch of time,” that is, one month—from September 1 to September 30. Let’s assume that the maximum percentage of steel price increase in a month during the past ten years is 90%. Thus, the 70% increase that took place in the hypothetical is below that percentage and, therefore, a “reasonable person” could expect Seller to have taken the price spike into account. One critical condition of Article 79(1) is not met.<sup>124</sup> Accordingly, Seller is not exempted and is obliged to perform the contract to the letter, or pay expectation damages to Buyer.<sup>125</sup> It is notable that the 70% increase of the cost that Seller is ordered to bear is still below the reasonably expected level, *i.e.*, 90%.

On the other hand, if 70% is beyond the maximum percentage of the “Eisenberg Formula,” for example 50%, a “reasonable person” could not expect Seller to have taken a 70% increase into account. However, this does not exempt Seller yet, because we must further ask whether he “could reasonably be expected to . . . overcome an impediment,”<sup>126</sup> even where he could not reasonably be expected to have taken it into account at the time of the conclusion of the contract. This is the logical reading of Article 79(1), because even if an impediment beyond control was not taken into account, Seller still could do something to overcome its consequences after it happened to him. The consequence to

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<sup>124</sup> All of the conditions enumerated in Article 79(1) must be fulfilled for the exemption to apply.

<sup>125</sup> This would not be a windfall for Buyer, because in this hypothetical Buyer himself uses the tubes delivered by Seller or must obtain them from the market at the higher price.

<sup>126</sup> CISG, *supra* note 1, art. 79(1).

overcome is a 70% increase in the cost of the steel materials. It is true that if Seller decides to bear all the increase, he could certainly overcome it. However, needless to say, the question is whether he could reasonably be expected to.

Let's assume that *the market price of the tubes* of the same type has increased<sup>127</sup> by about 45%.<sup>128</sup> One simple solution would be complete exemption of Seller, because *the steel price* increase (70%) is above the reasonably expected level (50%). In this case, he would sell the tubes in the market at the price approximately 45% higher than the contract price, and probably make some profit. On the other hand, Buyer would have to buy the tubes from the market at the price approximately 45% higher than the contract price. This solution imposes all the increased cost on Buyer and none on Seller. At the other end of the scale is the solution that Seller bears all the increases. Unlike the hypothetical of the

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<sup>127</sup> Professor Eisenberg explains: "Cases in which the seller's cost of performance unexpectedly rises above the contract price *often, perhaps usually*, involve a cost increase that is market-wide. In such cases, the increase normally will raise not only the seller's costs but also the buyer's value for, and the market value of, the contracted-for commodity." See Eisenberg, *supra* note 81, at 238 (emphasis added). Criticizing his bounded-risk test, Professor Goldberg writes about cases where the rise of the input cost was not correlated with the price increase of the product. This may be so, especially where the input and/or product have substitute goods, and there may a time-lag between the price increase of inputs and final products. Professor Eisenberg, however, states "often, perhaps usually." In order to legitimately refute his rationale, Professor Goldberg must prove that it is *unusual* that an unexpected rise of the seller's cost of performance should involve a market-wide price increase. It does not seem that he has proved it. See Victor Goldberg, *Excuse Doctrine: The Eisenberg Uncertainty Principle*, 1 J. LEGAL ANALYSIS 359, 369-78 (2010).

<sup>128</sup> The original market price of the tubes includes other costs than steel materials and the profit. A 70% rise of the price of steel materials does not usually lead to a 70% rise of the tube price. In addition, the sellers may reduce their profit to make the changed price more acceptable to the buyers at the time of abrupt price hike. In actual cases, the market price of the product will usually increase at lower rate than 70%. As such, the hypothetical's rate is set to 45%.

sunken ship above, this is not an “event-oriented”<sup>129</sup> case, and there is no need for “all or nothing” approach. What is required here is a numerical determination in the gradation of successive figures. The word “reasonable” has affinity with a question of degree: where to draw the dividing line in the gamut of the continuum of increase. Seller should bear the extra cost to the extent of the maximum price increase percentage identified by the “Eisenberg Formula,” namely to 50%, which is what he could reasonably be expected to have taken into account. Seller should give up any profit included in the original contract price. Because even if Seller bears 50%, Buyer must also bear some portion of the increase, and a “reasonable person” could not expect Seller to make profit in sacrifice of Buyer. A hypothetical rough calculation of the sums that each party must bear can be made in the following manner. The original contract price of 100,000 Euro includes 70,000 for steel materials, 20,000 for other costs, and 10,000 for profit. A 70% increase of steel price makes the contract price go up to 149,000 ( $[70,000 \times 1.7] + 20,000 + 10,000$ ). Seller bears the cost of 50% increase of steel price, which is 35,000 ( $70,000 \times 0.5$ ), and other costs. Seller also must give up his profit. So Seller’s total cost is 125,000 Euro ( $70,000 + 35,000 + 20,000$ ). On the other hand, Buyer must bear the cost of 20% ( $70\% - 50\%$ ) increase of steel price and other costs. So Buyer must pay 104,000 Euro ( $[70,000 \times 1.2] + 20,000$ ), which is 4,000 Euro more than the original price. Seller suffers a loss of 21,000 Euro.

If Buyer persists in paying no more than the contract price of 100,000 Euro, Seller would be obliged to incur more loss than he could reasonably be expected to bear, and, therefore, would be

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<sup>129</sup> See Eisenberg, *supra* note 81, at 241. (“Typical shared-assumption cases are *event-oriented*, in the sense that the issue is whether the occurrence of a discrete event entitles the adversely affected party to judicial relief. If it does, then usually the relief should consist of an excuse of that party’s obligation to perform, although in some cases the relief may consist only of excusing liability for expectation damages. In contrast, the typical bounded-risk case is *magnitude-oriented*, in the sense that the issue is whether the adversely affected party’s dramatically increased cost of performance entitles it to judicial relief.”)

exempted, which means Buyer would have to obtain the goods in the market, probably at a price 45% higher than the original price, or 41,000 Euro ( $[100,000 \times 1.45] - 104,000$ ) more than the modified price.

On the other hand, Seller may not be allowed to leave the courtroom free from the contract with some prospect to make profit by selling to another, simply because the price spike is above his reasonable expectation. This is what the word “overcome” implies.

#### VI. JUDGES' CAPACITY TO ADAPT THE CONTRACT UNDER THE CISG

Professor Schlechtriem once dared to state:

But if you ask me whether there is somewhere in the Convention the principle of adjustment or adaptation of contracts, I would put forward a very provoking argument. I think the remedy of price reduction in Article 50 of the Convention is a kind of adjustment of the contract to reflect a disturbed balance between performance on one side and obligation on the other side. The defects in goods, or nonconformities on the goods, constitute a disturbance of the equilibrium or balance of the exchanged performances. That is why we defended price reduction -- as a just instrument for adjusting the disturbed balance of performances. . . . [Y]ou could use this principle as a springboard to



develop a general rule of adjustment  
in hardship cases.<sup>130</sup>

There has always been antagonism to “a judge rewriting our contract,” and probably there will be similar hostility to adaptation through the “reasonable expectation test.” However, it is the very function of the CISG to interpret and supplement what parties have expressly agreed to. In this sense, a judge applying the CISG always rewrites or supplements a contract. This is all the more true of the provisions with the word “reasonable” in their texts. For example, Article 39(1) provides: “The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.”<sup>131</sup> If in a case involving a 40-day delay of notice of a non-conformity, a judge holds that a “reasonable time” of Article 39(1) is within one month and denies the buyer’s claim for damages, he is practically adding in the contract a clause providing: “The buyer shall lose his right to claim concerning any non-conformity if he fails to notify the seller of it within one month.”<sup>132</sup>

Another example is Article 60, which uses a phrase similar to Article 79(1): “The buyer’s obligation to take delivery consists: (a) in doing all the acts which could reasonably be expected of him

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<sup>130</sup> Harry M. Flechtner, *Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More*, 18 J. L. & Com. 191, 238 (1999).

<sup>131</sup> CISG, *supra* note 1, art. 39(1).

<sup>132</sup> See Ingeborg Schwenzer, *The Noble Month (Articles 38, 39 CISG)--The Story Behind the Scenery*, 7 EUR. J. L. REFORM, 353-66 (2006); see also Ishida, *supra* note 57, at 8-15 (arguing that if the buyer’s notice of non-compliance is made to the seller within a month, it is presumed to be made within a reasonable time under Article 39(1), and that the presumption can be rebutted by the seller proving a prejudice caused by the delay).

in order to enable the seller to make delivery.”<sup>133</sup> In a China International Economic and Trade Arbitration Commission (“CIETAC”) case which applied Article 60(a), it was held that the buyer was reasonably expected to dispense with an inspection not specified in the contract and to send a ship to the loading place.<sup>134</sup> What this award did is no less than modifying the contract.

A court sometimes even vindicates the existence of a contract by utilizing the “reasonable person” standard of Article 8(2). When a party negates the existence of a binding contract, the court, by pointing at certain conducts of his, concludes that “a reasonable person of the same kind as the other party would have . . . in the same circumstances”<sup>135</sup> understood the conducts as making a binding contract. In one case, a Switzerland district court found that the conclusion of the contract, the buyer’s intention to be bound, and the definite quantity of goods to be sold could be deduced from the buyer’s request to the seller to issue an invoice for goods already delivered.<sup>136</sup> This case suggests that a court sometimes “writes” a contract.

Taking account of these extensive powers granted to judges by the CISG, it would not be a deviation from the language of the Convention for them to adapt the contract based on the “reasonable expectation test” of Article 79(1), particularly when they deal with an unexpected skyrocketing price beyond once-in-decade increase. It far better serves the integrity of the CISG than resorting to other laws, such as the UNIDROIT Principles. It might be their duty to make adaptation within the realm of interpretation of the CISG under the command of Article 7(1) “to promote uniformity in its

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<sup>133</sup> CISG, *supra* note 1, art. 60.

<sup>134</sup> *Mung Bean Case*, CISG/2001/02, China International Economic & Trade Arbitration Commission [CIETAC] (PRC) (Mar. 22, 2001), *translated in* Albert H. Kritzer CISG Database, *CISG Case Presentation*, PACE L. SCH. INST. INT’L COM. L., <http://cisgw3.law.pace.edu/cases/010322c1.html> (last updated Oct. 22, 2010).

<sup>135</sup> CISG, *supra* note 1, art. 8(2).

<sup>136</sup> Bundesgericht [BGer] [Federal Supreme Court] July 3, 1997, 125 Entscheidungen des schweizerischen Bundesgerichts [BGE] I 96 (Switz.).

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application and the observance of good faith in international trade.”<sup>137</sup>

## VII. CONCLUSION

This article has demonstrated following three theses.

First, Article 79 exempts a failing party from his obligation to perform. This is the most natural interpretation of Article 79, and the contrary conventional views have impliedly acknowledged it. This author earnestly hopes that a judge applying Article 79 will not have a hard time reaching the conclusion that it exempts performance. This author also wishes that in the future, a judge could simply and straightforwardly hold: “It is one of the basic principles of Article 79 that specific performance claims are barred if the conditions enumerated in paragraph (1) are satisfied.”

Second, in a case where a dramatic and unexpected rise in the costs of performance radically changes the equilibrium of the contract, the extent of reasonably expected increase should be determined by the “Eisenberg Formula,” which identifies the maximum percentage increase in the cost of the relevant inputs over a comparable stretch of time during the prior ten to twenty years.<sup>138</sup> If the actual increase is below the maximum level, the seller is not exempted, and is obliged to perform or to pay expectation damages to the buyer. If it is beyond the maximum level, the seller is expected and hence obliged to overcome the increase by bearing the cost up to the level.

Third, it is business as usual for judges to rewrite, adapt, or supplement a contract. Although the CISG has no provision explicitly authorizing a judge to do so, Article 79 itself presupposes such capacities of a judge. A judge can adapt a contract through the interpretation of the reasonable expectation expressly incorporated in Article 79(1). In the future, in solving a

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<sup>137</sup> CISG, *supra* note 1, art. 7(1).

<sup>138</sup> Eisenberg, *supra* note 81, at 245.

so-called “hardship” case, he should never invoke the domestic law of his state, nor resort to such other soft laws as the UNIDROIT Principles. He is recommended to straightforwardly hold: “The contracts governed by Article 79 of the CISG can be adapted or modified through the interpretation of the reasonable expectation provided therein.”

The author wishes this article would save time for judges presiding over Article 79 cases, who might not be very familiar with the Convention, and who could not spare sufficient time for a case, overwhelmed by caseloads. This author also sincerely hopes that legal scholars of the CISG all over the world will acknowledge that Article 79 allows for adaptation or modification of contracts. It has been thirty years since the CISG took effect, and it is high time the controversies—“sound and fury”—over the “hardship” situations and adaptation of contracts were settled.