Shared Responsibility under Article 80 CISG

by

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I. Introduction

A promisor's failure to perform will render it liable and a range of remedies will be available to the aggrieved party pursuant to Articles 45 and 61 of the UN Convention on Contracts for the International Sale of Goods (CISG).[2] If the failure to perform has been caused by the aggrieved party, Article 80 provides:

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

The provision applies to the situation where a promisee interferes with the promisor's performance in such a way that it fails. Honnold gives the example that a buyer might persuade officials in the country of import not to issue an import licence to the seller, thereby causing the seller to fail to deliver to the buyer in the country of import.[3]

The provision allows the defaulting promisor to be exempt from liability and it seems only fair that a promisee should not be able to obtain a benefit from interfering with the promisor's performance. In this way, the provision has *'... the seductive charm of a self-evident statement.'*[4]

The defaulting promisor is exempt from liability, if the sole cause of interference is the other party to the contract. The wording *'to the extent'* indicates that Article 80 also applies to the situation of the promisee's *partial* interference with the promisor's performance. However, the Article does not provide much guidance for the complex situations where both parties seem to have caused one party's failure to perform, but without it being possible to delimit the consequences of each party's contribution, e.g. where the parties have agreed that a method of inspection of the goods will be determined before delivery, but neither party takes steps to do so, thus making it impossible to determine whether the goods are defective due to the seller's faulty production or the buyer's defective inspection method.[5]

An apportionment of responsibility based on a comparison of the acts and omissions of the parties is needed, thus making it a situation of *shared responsibility* where the aggrieved party will have parts of a claim dismissed due to its own interference. In this article, the term 'shared responsibility' is used to describe situations where responsibility for a party's failure to perform can be ascribed both to the defaulting and the aggrieved party to the contract. As a result, the aggrieved party will lose its right to remedies in part and the defaulting party will be partly

[2] United Nations Convention on Contracts for the International Sale of Goods, (adopted 10 March to 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG).
[3] Honnold, John O, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International, Hague, 3rd ed. 1999), Article 80, § 436.2.
[4] Ibid, Article 80, § 436.
[5] See also *infra* section 3.2, and footnote 69.

liable. The literature is sporadic in this field and with a growing amount of case law addressing these situations, the aim of this article is to investigate the characteristics of shared responsibility situations.

Compared to other provisions in the CISG, Article 80 has lived a quiet life. It could be argued that this is because it does not have an independent scope of application, especially compared to Articles 77 and 79. In this article it is demonstrated how, despite its vague wording, Article 80 has an independent scope of application. The primary focus of this article is on the particular situation known as shared responsibility and the problems arising from the need for a causal link. The choice between an objective and a subjective approach is also investigated. It is shown that there is a growing amount of case law expressing a concept similar to the one found in Article 80.

The basis for the conclusions are, besides the text of the CISG itself, scholarly works, preparatory works, case law and other international rules concerning sales. For the sake of uniformity one must not either use domestic law or compare domestic law to identify concepts under the CISG.[6] In order to promote uniformity and the international application of the CISG, international principles like the UPICC and the PECL could and should be used as aids to interpretation.[7] The international rules looked into are the Acquis Principles (ACQP),[8] the Draft Common Frame of Reference (DCFR),[9] the Principles of European Contract Law (PECL),[10] Central's Transnational Law Digest and Bibliography (TLDB)[11] and the Unidroit Principles (UPICC).[12] These international rules are not tied to a particular domestic legal system and therefore they are valuable sources of inspiration when the international character of the CISG is being considered. The UPICC has particular added legitimacy as it is a clear expression of general principles.[13] Furthermore, soft law like the UPICC expresses truly internationally recognized rules, since the adoption of non-recognized rules would make contracting parties choose other rules to govern their contracts. The entire success of soft law depends on its ability to produce rules that are recognized by the contracting parties, as it would otherwise become obsolete or redundant. It is beyond the scope of this article to compare domestic rules.

6 Felemegas, John in Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge University Press, Cambridge 2007), pp. 27-29 and Enderlein, Fritz and Maskow, Dietrich, *International Sales Law* (Oceana Publications 1992), Article 7, para. 9.2.
7 Felemegas, p. 33.
8 Principles of Existing EC Private Law, Acquis Principles, 2007, by the Acquis Group (ACQP).
9 Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Interim Outline Edition (DCFR).
10 The Principles of European Contract Law, 1999, by the Commission of European Contract Law (PECL).
11 Transnational Law Digest and Bibliography, List of Principles, 2008, by Center for Transnational Law (TLDB).
12 UNIDROIT Principles of International Commercial Contracts, 2004, (UPICC).
13 Felemegas, p. 34.

Two areas are dealt with in this paper. First, the scope of Article 80 is defined and delimited. Second, the particular situation of shared responsibility is investigated.

During the drafting of the CISG the German Democratic Republic suggested supplementing Article 79 by including a new Article 80.[14] The latter is not a mere extension of Article 79 but it has its own independent sphere scope of application.[15] As is demonstrated in the section immediately below, Article 80 differs from the closely related rules in Article 77 (mitigation) and Article 79 (force majeure) in five major respects: firstly, their position in the structure of the CISG and the point in time at which they apply; secondly, the focus of the Articles; thirdly, the cause of the detriment or loss that occurs; fourthly, the remedies that they affect; and finally, the extent of the duty to overcome or avoid the detriment or loss that occurs.

II. An Independent Scope

Position and Point in Time

Looking at the structure of the CISG, one can see that Articles 77, 79 and 80 are positioned differently. The positioning of these Articles cannot be ignored since headings are considered a part of the Convention and since the positioning of the Article was given consideration during the drafting of the Convention.[16] Article 77, on the one hand, and Articles 79 and 80, on the other, are not only positioned differently in the Convention, but their applicability to pre- and post-breach situations is different.

Article 77 is placed under the heading 'damages' and concerns the calculation thereof. It primarily applies to post-breach situations, but it may already apply when a breach is threatened.[17] Articles 79 and 80 are both placed under 'exemptions', which presupposes that these two Articles apply only in post-breach situations. When a breach has been established and attributed to a party, Articles 79 and 80 provide for the possibility of being exempt from liability.

[14] 'Summary Records of the First Committee, 28th Meeting' United Nations Conference on Contracts for the International Sale of Goods (Vienna 10 March – 11 April 1980) (28 March 1980) UN Doc A/CONF.97/19, para.s 50-64.
[15] Schwenzer and Manner, 'The Pot Calling the Kettle Black: The Impact of the Non-Breaching Party's (Non-) Behavior on its CISG-remedies' in Andersen, Camilla B. and Schroeter, Ulrich G. (eds), *Sharing International Commercial Law across National Boundries - Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill Publishing, London 2008), p. 474.
[16] Honnold, Article 80, § 436.1.
[17] Lookofsky, Joseph, *Understanding the CISG* (Kluwer Law International, The Netherlands, 3rd Worldwide Edition, 2008), p. 136 and Schwenzer and Manner, p. 481.

Focus

The three Articles investigated have a different focus. Article 77 concerns the avoidance of loss and regulates situations where the aggrieved party has not *mitigated* the loss caused by the breaching party,[18] whereas Article 80 regulates a promisee's *own interference* with the promisor's performance. The difference between the two situations is that the former addresses the duty to mitigate potential or actual loss, whereas the latter is a question of contributory negligence, a distinction known to the CISG.[19]

The distinction broadly corresponds to the rules in the UPICC and the PECL.[20] As an example, Article 7.1.2 of the UPICC restricts the exercise of remedies and Article 7.4.7 thereof limits, on the basis of fairness, the right to damages to the extent that the aggrieved party has contributed to the harm.[21] According to the official UPICC commentary, these provisions must be distinguished from articles concerning mitigation of loss[22], which are dealt with in Article 7.4.8 of the UPICC.

In comparison, the focus of Article 79 of the CISG is on the existence of an impediment that can be said to be outside the defaulting party's sphere of control, unforeseeable and unavoidable. The exemption is very narrow and typically comprises catastrophes, war, government bans, boycotts, etc.[23]

Cause of Detriment or Loss

The three Articles apply to different areas when it comes to causation. The situation where a party fails to perform because of an *impediment* beyond its control is within the scope of Article 79.[24] Article 80 covers a failure caused by an act or omission by the *other party*, whereas Article 79 covers *impediments*. The two Articles appear to supplement each other and are in this way in harmony[25] and apply concurrently[26]. Article 77 is different again: it applies to situations where a

[18] Stoll and Gruber in Schlechtriem, Peter and Schwenzer, Ingeborg (eds), *Commentary on the UN Convention on the International Sale of Goods*, 2nd English (Oxford University Press, Oxford 2005), Article 80, para. 2.a.
[19] Ibid, Article 77, para. 6.
[20] Schwenzer and Manner, p. 472.
[21] International Institute for the Unification of Private Law, *UNIDROIT Principles 2004* (UNIDROIT, Rome 2004), p. 242, para. 1.
[22] Ibid, pp. 242-243, para.s 2 and 4.
[23] Stoll and Gruber in Schlechtriem and Schwenzer, article 79, paras. 1 and 10 and Enderlein and Maskow, article 79, para.s 3.1 and 3.6.
[24] Tallon, Dennis, 'Article 80' in Bianca and Bonell (eds) *Commentary on the International Sales Law* (Giuffrè, Milan 1987), Article 80, para. 2.2.
[25] Ibid.
[26] Stoll and Gruber in Schlechtriem and Schwenzer, Article 80, para. 2.

party has not mitigated loss that was *solely caused* by the defaulting party[27] and not by any impediments or by the aggrieved party itself.

Affected Remedies

The remedies affected are different in respect of the three Articles. Interference with a promisor's performance in a way that falls under Article 80 can affect all remedies,[28] as the interfering party '*... may not rely on a failure ...*' at all. In contrast, Article 79 affects only the liability to pay damages, according to paragraph 5 thereof.

The wording of Article 77 states that it applies to claims to damages. It is uncertain whether a broad interpretation can be used to justify applying Article 77 to all remedies. This was rejected during the drafting of the Convention and contradicts case law[29], the wording and the positioning of the article. However some scholars argue that it can be applied to all remedies as a part of the principle of good faith.[30] Article 80 is placed under the heading 'exemptions', thus dealing with exemption from responsibility in all respects, affecting all remedies available.

Duty to Avoid or Overcome Detriment or Loss

According to the wording of Article 79, a defaulting party must pass the foreseeability threshold if it is to be exempt from liability. Only impediments and consequences that the promisor could not reasonably avoid or overcome can excuse liability. The wording of Article 77 is slightly less strict: the aggrieved party claiming damages must take '*... such measures as are reasonable ...*' in order to mitigate loss occurring from the other party's breach.

By comparison, Article 80 does not comprise a duty to avoid or overcome a detriment or loss,[31] at least not from its wording. Article 7(1) applies to the interpretation of all Articles in the CISG, but besides the requirement of good faith following from that provision, there is no obvious obligation under Article 80 to avoid or overcome one's own failure to perform when it

[27] Stoll and Gruber in Schlechtriem and Schwenzer, Article 77, para. 6 and Article 80, para. 2 and Schäfer, Friederike, 'Editorial remarks on whether and the extent to which the UNIDROIT Principles may be used to help interpret Article 80 of the CISG' (Commentary, July 2004) <www.cisg.law.pace.edu/cisg/biblio/schafer.html> Accessed 27 August 2008, section 5.
[28] Stoll and Gruber in Schlechtriem and Schwenzer, Article 80, para. 2; Schwenzer and Manner, p. 475 and p. 478 and Enderlein and Maskow, Article 80, para. 3.1.
[29] Oberste Gerichtshof [Supreme Court], Austria, Roofing Material Case, 9 March 2000, <http://cisgw3.law.pace.edu/cases/000309a3.html> and UNCITRAL, *Digest of Case Law on the United Nations Convention on the International Sale of Goods* (2008), Article 77, para. 1.
[30] Enderlein and Maskow, Article 77, para. 4.
[31] Schwenzer and Manner, p. 475.

has been caused by the contractual partner.[32] It has been argued that in the situation where the promisee's interference is not the only possible logical cause of the failure of performance it has to be determined on a case-by-case basis whether the promisor could have been expected to overcome the promisee's conduct.[33]

Consequently, the threshold for being exempt from liability is lower in Article 80 than in Articles 79 and 77, with Article 79 the strictest of the three. This is illustrated in the *Yellow Phosphorus Case*[34], where a seller made incomplete deliveries. The seller claimed to be exempt from liability as the incomplete deliveries were caused partly by natural disaster in the seller's region and partly by the buyer's issuance of a non-contractual letter of credit. Regarding the first cause, the tribunal stated that the seller could have overcome the impediment by acquiring substitute goods. By choosing not to, the seller was fully liable. Regarding the second cause, it was stated that a contractual letter of credit is a '*... precondition for the seller to deliver the goods, but not the necessary condition for the seller to prepare the goods.*' However, since the buyer did cause inconvenience, the claims made against the seller were reduced.

Comparative Chart

Illustration 1

	Art. 77, mitigation	**Art. 79, force majeure**	**Art. 80, interference**
Focus	Mitigation	Impediment	Interference
Cause of detriment or loss	Solely by the failing party	An impediment outside sphere of control	The aggrieved party or both parties
Affected remedies	Damages	Damages	All
Point in time where applicable	From threat of breach	When breach is occurring	When breach is occurring
Duty to avoid or overcome consequence	Within reasonableness, according to wording	Within reasonableness, according to wording	Within good faith, under Article 7(1)

[32] Stoll and Gruber in Schlechtriem and Schwenzer, Article 80, para. 5; Enderlein and Maskow, Article 80 para. 3.3 and Schäfer, para. 3(a).
[33] Schäfer, para. 3(a).
[34] China International Economic & Trade Arbitration Commission [CIETAC], China, *Yellow Phosphorus Case*, 9 August 2002, <http://cisgw3.law.pace.edu/cases/020809c1.html>.

Though the three Articles may present similarities, the comparative chart above shows that the combination of the five investigated features are different, thus making the Articles applicable to different situations. The salient feature of Article 80 is that interference by the aggrieved party can result not only in total loss, but also partial loss of that party's remedies in cases of shared responsibility. This logic is to be found also in Article 50, where it is stated that a buyer's claim for a price reduction is lost if it denies performance. Even though we do not find the words '*... to the extent ...*', as in Article 80, Article 50 has been used to lower a price reduction proportionately.[35]

By comparison, Article 77 covers the duty to reduce damage occurring as a result of the other party's failure and Article 79 deals with impediments that it is not possible to ascribe to any one party.

III. Causation by Both Promisor and Promisee

Three Case Types

In this section the focus is on cases where '*... the failures of the two parties are so closely interwoven that their effects cannot be delimited and attributed to the breach of contract.*' [36] It would seem unfair to absolve one party of responsibility entirely or to give full compensation, despite a party's own contribution to the failure of performance. An either/or solution would not be just as it would either compensate the aggrieved party's own wrongdoing or it would hold the defaulting party liable for a failure from which it could normally be exempted; this has been described as'*The Pot Calling the Kettle Black ...*'.[37] These cases are described as cases of shared responsibility.[38]

In general, the cases that can justify exempting a promisor from liability under Article 80 can be grouped into three categories, as set out below.

[35] The link confirmed in Oberlandesgericht Koblenz [Provincial Court of Appeal], Germany, *Acrylic Blankets Case*, 31 January 1997, <http://cisgw3.law.pace.edu/cases/970131g1.html>, where the same interference by the buyer meant a loss of price reduction pursuant to Article 50 and loss of damages pursuant to Article 80. See also China International Economic & Trade Arbitration Commission [CIETAC], China, *Diaper Machines Case*, 8 August 1998, <http://cisgw3.law.pace.edu/cases/960808c1.html>, where the price reduction pursuant to Article 50 was lowered due to joint causation.

[36] Enderlein and Maskow, Article 80, para. 6.c.

[37] Schwenzer and Manner, p. 470. The phrase is used to describe '*… someone accusing another of faults similar to those committed by himself*' according to Room, Adrian and Brewer, Ebenezer Cobham, *Brewer's Dictionary of Phrase and Fable*, (Cassell, London, 15th edition, 1995).

[38] *Responsibility* refers to the fact that either the promisor or the promisee will be responsible for the promisor's failure to perform and thus having to bear the consequences thereof. The promisor is responsible for its failure to perform unless it can be exempted due to interference by the promisee. *Shared* refers to the outcome of the apportionment called for. Each party may bear the responsibility *in part*, thus leading to a partial dismissal of the aggrieved party's claim.

The first category covers cases where the promisor's failure to perform is caused solely by the promisee, e.g. when a buyer sues the seller for damages because of non-delivery caused by the buyer's persuasion of state officials to deny the seller a licence needed for it to deliver. [39]

In cases of a promisee's sole interference with the promisor's performance, adjudicators have, by reference to Article 80, exempted promisors from liability for: failure to pay the price[40]; failure to take delivery[41]; failure to designate port of shipment[42]; failure to deliver goods in conformity with the contract[43]; withholding of delivery[44]; unlawful avoidance of the contract[45]; and denial of the promisor's cure of a lack of conformity.[46]

The second category comprises cases where there is joint causation by the parties and the consequences of each contribution can be delimited, e.g. when the promisor's breach of contract in the form of late delivery is prolonged due to interference by the promisee. In such cases the promisee's remedies apply to the former period but not to the latter.[47]

An example is a case of non-conformity in relation to 100 units of goods. If the first 50 units are faulty because of the promisor's faulty packaging it would be responsible for this, whereas it will be exempt from liability under Article 80 if the remaining units are faulty because of faulty instructions provided by the promisee. If each consequence can be delimited, this must be done.

In these cases of joint causation '*... the consequences of the different causes can be delimited from one another, [and] every cause has to be attributed its legal remedy.*'[48] These are not cases of shared

[39] Honnold, Article 80, § 436.2.
[40] Oberlandesgericht München [Provincial Court of Appeal], Germany, *Leather Goods Case*, 9 July 1997, <http://cisgw3.law.pace.edu/cases/970709g1.html>; Belarusian Chamber of Commerce and Industry International Court of Arbitration, Belarus, *ATT v. Armco Case*, 5 October 1995, <http://cisgw3.law.pace.edu/cases/951005b5.html> and Oberlandesgericht München [Provincial Court of Appeal], Germany, *Shoes Case II*, 1 July 2002, <http://cisgw3.law.pace.edu/cases/020701g1.html>.
[41] Oberlandesgericht München [Provincial Court of Appeal], Germany, *Automobiles Case*, 8 February 1995, <http://cisgw3.law.pace.edu/cases/950208g1.html>.
[42] Oberster Gerichtshof [Supreme Court], Austria, *Propane Case*, 6 February 1996, <http://cisgw3.law.pace.edu/cases/960206a3.html>.
[43] Tribunal of International Commercial Arbitration, Ukrainian Chamber of Commerce & Trade, Ukraine, *Equipment Case*, 21 June 2002, <http://cisgw3.law.pace.edu/cases/020621u5.html>.
[44] Landgericht Kassel [District Court], Germany, *Wooden Poles Case*, 21 September 1995, <http://cisgw3.law.pace.edu/cases/950921g1.html>.
[45] Oberlandesgericht Düsseldorf [Appellate Court], Germany, *Shoes Case I*, 24 April 1997, <http://cisgw3.law.pace.edu/cases/970424g1.html>.
[46] Germany, *Acrylic Blankets Case*.
[47] Enderlein and Maskow, Article 80, para. 6.a.aa.
[48] Enderlein and Maskow, Article 80, para. 6.a.

responsibility in the context of this article as it is possible to attribute a specific consequence to each cause. Each party must bear the consequences of its respective interference.[49]

The third category is cases where there is joint causation by the parties, but it is not possible to delimit the consequences of each party's contribution since the acts and/or omissions of both parties could potentially have caused the promisor's failure to perform. These are cases of shared responsibility.

As will be explained immediately below, there is good support for the proposition that the appropriate solution in cases of shared responsibility is a *pro rata* apportionment of the responsibility in accordance with each party's contribution. However, fundamental uncertainties are exposed in the attempt to reach such a solution. These are due to unresolved questions as to the requirement of a causal link[50] and confusion as to the appropriate approach in comparing the parties.

Having concluded *supra* section 0 that Article 80 has an independent scope of application, this section deals in particular with the third category of shared responsibility and the issues arising therefrom.

Apportionment is Appropriate

Compared with an *all-or-nothing* approach, the possibility of apportioning detriments and losses in accordance with the relative contribution of the parties *'... represent[s] a conceptually refined solution*'.[51] It has support in preparatory works, literature, other international rules and case law.

Following a question from Norway during the preparation of the CISG, it was clarified that the wording *'... in so far as ...*'[52] in Article 80 allows the court to determine each party's share of the responsibility.[53]

A minority do not find in Article 80 the legal basis for a *pro rata* apportionment of the consequences in cases of shared responsibility[54]; however, they do support the solution per se.

[49] This is not saying that the attribution is without difficulty, but it is beyond the scope of this paper to investigate this matter further. See Enderlein and Maskow, para. 6.a.aa.-ab. for suggested solutions.
[50] The words *causal link* is here used to describe the fact that in order for Article 80 to apply there needs to be a connection between the promisee's conduct and the promisor's failure to perform. The nexus may vary in strength.
[51] Schwenzer and Manner, p. 487.
[52] This was the wording of the article being discussed. Article 80, as worded in the CISG, reads *'… to the extent that …',* which does not seem to change the applicability of the Article to cases of shared responsibility.
[53] 'Summary Records of the First Committee, 30th Meeting' United Nations Conference on Contracts for the International Sale of Goods (Vienna 10 March – 11 April 1980) (31 March 1980) UN Doc A/CONF.97/19, para.s 1-18.

Under this view, Article 80 is seen as an *all-or-nothing* solution. Only cases where the failure to perform is caused *solely* by the other party can be subsumed under Article 80.[55] Cases of shared responsibility are preferably solved by reference to Article 77 or to the underlying principle of Article 80. However, *pro rata* apportionment is nonetheless seen as the appropriate solution for shared responsibility, whatever the legal basis.

However, the majority view is that Article 80 applies to situations of shared responsibility[56] and that an apportionment is appropriate in such cases. The concept of shared responsibility is not unknown within the CISG. A similarity can be seen in the arrangement of Articles 39, 40 and 44. The starting point here is that a buyer will lose all available remedies if it does not give notice of a non-conformity within a reasonable period of time. However, the loss of remedies can be *partial*, depending on the circumstances. The concept of shared responsibility is also found in Article 50, which has been used as the legal basis for a *partial* loss of price reduction.[57]

The PECL, UPICC and ACQP also suggest an apportionment in situations of partial interference by the promisee. The close similarity between the relevant provisions in these instruments and Article 80 of the CISG on this issue not only indicates that a *pro rata* solution is the appropriate and widely agreed solution in international trade. It also acts as an interpretation aid for the CISG in a way that takes account of its international character, in accordance with the method set out in Article 7 of the CISG.

Concerning the UPICC, Bonell indicates that the situation where the conduct of the promisee makes performance by the promisor impossible[58] falls within the scope of Article 7.1.2 thereof (interference by the other party). That Article also comprises the situation where the conduct of the promisee acts as a *partial* impediment to the promisor's performance[59]; it is very similar in this respect to Article 80 of the CISG. Such similarity can also be seen in Article 7.4.7 (harm due in part to the aggrieved party), which gives the opportunity to assess the contribution of the harm and apportion correspondingly.[60]

[54] Huber, Peter and Mullis, Alastair, *The CISG*, (Sellier, European Law Publishers, 2007), pp. 267-268 and Stoll and Gruber in Schlechtriem and Schwenzer, Article 80, para. 7, n. 24 where the authors in support of this view are listed as: Piltz, Schmid, Koziol, Soergel/Lüderitz/Dettmeier and, with some restrictions, Achilles.

[55] Piltz, Burghard, *Internationales Kaufrecht [International Law of Sales]* (C. H. Beck München, 1993), § 4, para. 214.

[56] Schäfer, para. 4.a.; Enderlein and Maskow, Article 80, para. 6.; Tallon in Bianca and Bonell, Article 80, para. 2.4-2.5 and Stoll and Gruber in Schlechtriem and Schwenzer, Article 80, para. 7, n. 28 where the authors in support of this view are listed as: Audit, Bianca/Bonell/Tallon, Enderlein/Maskow/Strohbach, Herber/Czerwenka, Neumayer/Ming, Ziegler, Staudinger/Magnus, Bamberger/Roth/Saenger and Schlechtriem.

[57] See for example CIETAC, *Diaper Machines Case,* where the price reduction pursuant to Article 50 was lowered due to joint causation.

[58] UPICC Commentary, p. 194, para. 1.

[59] Ibid, p. 195, para. 1.

[60] Schäfer, para. 4.b.

An apportionment in cases of shared responsibility is also the suggested solution under Article 8:101(3) of the PECL.[61] In the commentary[62] to the PECL it is stated that when loss is caused by both the promisor and the promisee, the whole range of remedies should not be available. The wording '*... to the extent ...*' in Articles 8:101(3) and 9:504 of the PECL is the same as in Article 80 CISG and it too covers the situation of *partial* causation of the aggrieved party. The wording is also to be found in the ACQP[63], where the preliminary comments to Article 8:102 state that an apportionment should be allowed.[64]

The wording '*... to the extent ...*' is not to be found in either the DCFR or the TLDB. However, the former instrument does deny the aggrieved party access to remedies in situations where that party itself caused the promisor's failure to perform.[65] Whether an *either/or* solution or apportionment is appropriate is not clarified. Furthermore, it is uncertain whether either No. I.4 (no advantage in case of own unlawful acts) or No. X.1 (unjust enrichment) of the TDLB comprises shared responsibility and permits an apportionment. However, the solution of apportionment is not directly rejected in either of the two abovementioned sets of rules.

With such great support in both scholarly works and other rules relating to international sales it is striking to see that adjudicators have yet to make a *pro rata* apportionment with *express* reference to Article 80 of the CISG.[66] It is just as striking to see that there are several cases where an apportionment has been carried out[67]: without any reference to the legal basis for doing so, and in some cases with multiple references to provisions other than Article 80 of the CISG.[68]

The cases in which a *pro rata* apportionment has been carried out can be seen as confirmation that an apportionment is the appropriate solution and that the way to reach that result has been considered as being of secondary importance. The adjudicator may have been searching

[61] A similar principle is seen in PECL Article 9:504 (loss attributable to aggrieved party).
[62] Lando, Ole and Beale, Hugh, *Principles of European Contract Law* (Kluwer Law International, The Hague, 2000), Specific comments on 8:101(3), pp. 359-362.
[63] The ACQP is meant to contribute to the Common Frame of Reference by showing common principles of existing EC contract law. See Schulte-Nölke, Hans, 'The Commission's Action Plan on European Contract Law and the Research of the Acquis Group', (2003), 2 ERA Forum 142, p. 144.
[64] Schulze, Reiner (ed), *Common Frame of Reference and Existing EC Contract Law* (Sellier, Munich, 2008), p. 307, para. 4.
[65] DCFR III. – 3:101 (remedies available).
[66] A good number of cases concerning *sole* interference by the promisee have been decided with express reference to Article 80, see *supra* footnotes 40-46.
[67] For details see *infra* 3.3.3. The majority of cases conducting apportionments are from China. This may be due to the fact that Chinese contract law provides for the possibility of a *pro rata* apportionment.
[68] See for example ICC International Court of Arbitration, *Food Products Case*, December 1997, <http://cisgw3.law.pace.edu/cases/978817i1.html> and Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, *Sensitive Russian Components Case*, 6 June 2003, <http://cisgw3.law.pace.edu/cases/030606r1.html>. Described further *infra* section 3.3.3.

for the legal basis to support what the adjudicator and the parties would consider a fair result. Not referring to the legal basis for a result is harmful to the goal of uniform application laid down in Article 7(1). Having said that, the outcome of the cases seems to be correct and, especially in arbitration cases, the adjudicator may rightfully be more concerned with the outcome than a formalistic reference to a specific provision.

To illustrate: in the *Sensitive Russian Components Case*[69] between a Russian seller and a South Korean buyer, the arbitral tribunal reduced the damages by one-third by reference to the CISG, the UPICC and the Russian Federation Civil Code. The goods in question were highly sensitive components that the parties agreed were defective, as proved by the buyer's examination. However, the parties did not agree what caused the defect, thus making the case a dispute as to causation (liability) and not mitigation of the loss that resulted (amount of damages).[70]

It was suspected that the *inspection* had in itself damaged the goods. The arbitral tribunal found that, due to prior dealings, the buyer was entitled to inspect the goods in the way that it did, since the seller failed to instruct the buyer otherwise. The tribunal also found that both seller and buyer, being experts within the field, had contributed to the goods being defective by not setting procedures and methods for inspection. As the tribunal stated: *'Both parties failed to take steps necessary to duly perform their obligations under the contract.'*

The tribunal considered Articles 74 and 77 of the CISG and brought in Article 7.4.7 of the UPICC to determine that a party's act or omission may demonstrate participation in the creation of damages. The tribunal then found it appropriate to apply a principle of shared responsibility: it placed responsibility for two-thirds of the damage on the seller and dismissed the remaining one-third. This was also to be found to be in line with Article 404(1) of the Russian Federation Civil Code.

It appears to be unnecessary to refer to the domestic civil code. Furthermore, it is contrary to the method set out in Article 7, according to which a solution is only to be found *outside* the CISG if no solution can be reached *within* the CISG itself,[71] for example in Article 80. Besides this, the apportionment conducted in the case cited above is in itself in line with Article 80 CISG and scholarly works, and it appears to be the widely accepted solution in international trade.

The case illustrates that a *pro rata* apportionment was seen as the right solution and that pinpointing a legal basis is of secondary importance. The adjudicators did not find the legal basis in Article 80, despite the fact that the situation is within the scope thereof.

[69] Russia, *Sensitive Russian Components*.
[70] See the distinction *supra* section 0.
[71] Schlectriem in Schlechtriem and Schwenzer, Article 7, para. 35 and Zeller, Bruno, *CISG and the Unification of International Trade Law* (Routledge-Cavendish, New York, 2007), pp. 100-101.

The outcome of the case is correct, but the Articles cited by the arbitral tribunal either have a different scope from Article 80 or overlap with it, so that reference could have been made to Article 80 instead, thus observing the method established by Article 7. Articles 74 and 77 of the CISG do not directly provide an opportunity for an apportionment in cases of shared responsibility as they cover the calculation of damages, as explained *supra* at section 0. Article 404(1) of the Russian Federation Civil Code[72] and Article 7.4.7 of the UPICC do on the other hand provide an opportunity for an apportionment where both parties have caused the failure to perform, but they are outside the text of the CISG. The four provisions referred to by the adjudicators apply to two different situations: the duty to mitigate loss occurring in post-breach circumstances and a prohibition on interfering with the promisor's performance and at the same time deriving a benefit from it.

A similar situation was seen in the *Bilateral Commission Case*[73] where a seller was found 75% liable by reference to Articles 35, 36, 45 and 74 of the CISG and Articles 475 and 476 of the Russian Federation Civil Code.[74] Similarly to the *Sensitive Russian Components Case*, in a case of shared responsibility an apportionment was found to be appropriate and, overlooking Article 80, the legal basis was justified by means of multiple references.

Thus far it has been established that Article 80 has an independent scope of application and that a *pro rata* apportionment is the appropriate and widely accepted solution in cases of shared responsibility. It has also been pointed out that there is a lack of guidance as to how to conduct such an apportionment and a clear tendency not to refer to Article 80 as the legal basis.

An apportionment in a case of shared responsibility invites a comparison of the parties. The lack of guidance relates to the factors that are relevant when conducting this comparison. These are dealt with immediately below.

Two Issues in Cases of Shared Responsibility

It is widely agreed that an apportionment is appropriate in cases of shared responsibility,[75] but the concept is not as refined as one might have hoped. This is due to the fact that Article 80 is vague and an apportionment invites a comparative evaluation of the two parties in order to deduct a fraction according to which the responsibility, and consequently the remedies, can be

[72] Russian Federation Civil Code Article 404(1): *'If the non-discharge or an improper discharge of the obligation has occurred through the fault of both parties, the court shall correspondingly reduce the scope of the debtor's responsibility. The court shall also have the right to reduce the scope of the debtor's responsibility, if the creditor has intentionally or through carelessness contributed to the increase of the losses, caused by the non-discharge or by an improper discharge, or if he has not taken reasonable measures to reduce them.'* <http://www.russian-civil-code.com/PartI/SectionIII/Subsection1/Chapter25.html>.
[73] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, *Bilateral Commission*, 29 December 2004, <http://cisgw3.law.pace.edu/cases/041229r1.html>.
[74] Articles 475 and 476 of the Russian Federation Civil Code cover the conformity of goods.
[75] See *supra* section 3.2.

apportioned.[76] The problem with a comparative evaluation is twofold: firstly, it is uncertain how strong the requirement of a causal link between the promisee's conduct and the promisor's failure to perform is; and secondly, the approach and thus the relevant or mandatory factors when comparing the two parties are uncertain. These two issues are dealt with in turn below.

Causal Link

It should be pointed out that in this paper the term *causal link* refers to the fact that if a promisor is to be exempt from liability under Article 80 there must be at least some connection between the promisee's act or omission and the promisor's failure to perform. However, the threshold that must be satisfied to be exempt is uncertain. Put in an extreme way: one could either require that the interference must have been the direct and necessary cause of the failure, or an indirect and potential interference could be seen as enough to allow an exemption.[77] The issue was not raised during the preparation of the CISG.

One view is that the failure to perform must be the characteristic consequence of the other party's conduct that can be expected in international trade,[78] thus excluding situations with an unusual chain of cause and effect.

A second view is that the conduct must have caused the failure to perform in a logical sense and that it must objectively be of such a nature that it prevents performance.[79] Under this view the cause cannot be attributed to a party's conduct if it did not impair the ability to fulfil the contract.[80] Indirect causation is enough if the conduct created a risk within that party's sphere of influence and that risk has been realized.[81]

A final view[82] is that the requirement of a causal link changes focus depending on whether an objective or a subjective approach to the comparative evaluation is chosen. Under an objective approach, the decisive criterion is the degree of probability that the conduct would result in the failure to perform, whereas the focus of the subjective method is the behaviour of the parties. Since the latter would entail reverting to the notion of fault, the former is preferred. However,

[76] Though it may be difficult to apportion other remedies than damages it is not impossible, e.g. specific performance according to Article 28 can still be available if the party claiming it indemnifies the seller its proportionate share in accordance with the causation fraction. See, for example, Schwenzer and Manner, pp. 479-480.
[77] The question of causal link is equally relevant to all three case types described *supra* section 3.1.
[78] Enderlein and Maskow, Article 80, para. 5.1.
[79] Stoll and Gruber in Schlechtriem and Schwenzer, Article 80, para. 4.
[80] Ibid, Article 80, para. 6.
[81] Ibid, Article 80, para. 4. In support of the argument that indirect causation is enough to lose remedies under Article 80 see also Schäfer, Article 3.a.
[82] Tallon in Bianca and Bonell, Article 80, para. 2.5.

the two approaches are related *'...insofar as the more reprehensible the behavior of one party is, the more likely it is to have played an important causal role in the other party's failure to perform.'*[83]

Turning to case law,[84] it can be seen that a promisee lost its right to remedies under Article 80, even though the interference of the promisee did not make the promisor's performance *impossible,* thus supporting a less strict requirement of the causal link.

In the *Propane Case*[85] between a German seller and an Austrian buyer, the court found that the seller could not rely on the failure of the buyer to open a letter of credit. The seller did not name the place of loading, as it was agreed that it should and the buyer chose not to open the letter of credit. The cause of the buyer's failure to perform was found to be the seller's failure to name the place of loading, but opening the letter of credit would in fact still have been *possible* despite the seller's failure. However, the court did not hold that the omission was *necessary* for the failure to perform and it stated that the buyer could not be obliged to open a blank letter of credit.

A similar result was achieved in the *Soinco v. NKAP Case*[86], where the court stated that no reasonable business person would initiate payment when the seller had breached a primary obligation concerning delivery. In that particular case it was still possible to initiate payment despite the act of the seller.

The two cases could either support a view that indirect causation is enough to become partialy exempt from liability for a failure to perform. However, they could also support an exemption from a requirement of direct causation insofar as demanding a blank letter of credit or initiation of payment would have put the buyer in a high-risk situation. No conclusion can safely be drawn from the insufficient amount of case law.

There is no guidance to be found on the causal link issue in other international rules. This is due to the fact that those rules do not address the issue and they present the same uncertainty due to a close similarity to the CISG.[87] Relevant case law relating to other international rules has not been identified.[88]

[83] Ibid.
[84] For an example of direct causation see: Germany, *Automobiles Case*, where a buyer refused to take delivery.
[85] Austria, *Propane Case.*
[86] Zürich Chamber of Commerce, Switzerland, *Soinco v. NKAP Case*, 31 May 1996, <http://cisgw3.law.pace.edu/cases/960531s1.html>.
[87] For example Schäfer, para. 3.b. states that there is no interpretation aid to be found in UPICC.
[88] Identified case law based on the UPICC concerns *direct* causation. See: ICC International Court of Arbitration, 9 October 2006, <http://www.unilex.info/case.cfm?pid=2&do=case&id=1177>; International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russia, 2 September 1997, <http://www.unilex.info/case.cfm?pid=2&do=case&id=670>. A small indicator of allowing indirect causation was seen in ICC International Court of Arbitration, March 2000,

The issue of the causal link requirement remains mainly unresolved. There is support in favour of indirect causation being enough to bring Article 80 into play. It seems correct to draw the limit for being exempt at cases that would put a party at high risk of not receiving something in return for its primary performance. The primary obligations of the two parties must be determined in each specific case using Article 8 and, consequently, the issue of whether or not the causal link is strong enough to allow an exemption from liability is determined on a case-by-case basis.

Objective or Subjective Approach

The second issue that arises in cases of shared responsibility is the *pro rata* apportionment based on each party's contribution,[89] which requires a comparison of the parties. The comparative evaluation reveals a set of unresolved issues that stretches beyond the scope of Article 80 itself. Basically, the question is how the adjudicator should approach a case where *both* parties seem to have caused the promisor's failure to perform, i.e. shared responsibility.

It has been suggested that two approaches to the comparison are possible: an objective and a subjective approach.[90] An objective comparison involves assessing the *probability* that the conduct caused the failure to perform, whereas the subjective approach compares the *gravity* of the conduct of the parties, thus bringing it closer to the idea of fault.[91] It has also been suggested that the objective approach is to be preferred as it is in line with the no-fault liability rule in the CISG, the spirit of the Convention and the letter of the text. [92]

However, the favoured objective approach is not followed strictly since: *'... the more reprehensible the behaviour of one party is, the more likely it is to have played an important causal role in the other party's failure to perform.'* [93] The reservation allows relevant tortious behaviour to be included in the evaluation as part of the good faith requirement, as long as the tort has a connection with the failure to perform.[94]

It seems contradictory to favour an objective approach based on the no-fault concept yet at the same time bring in highly subjective standards of good faith and tort. The reservation to the objective approach brings it closer to the slightly different alternative view under which cases of

<http://www.unilex.info/case.cfm?pid=2&do=case&id=697>, where it was stated that it is contrary to the principle of good faith to *'... indirectly [do] what the contract prevents from doing directly'.*

[89] See *supra* section 3.2.

[90] Tallon in Bianca and Bonell, Article 80, para. 2.5.

[91] Ibid.

[92] In support of the objective approach: Tallon in Bianca and Bonell, Article 80, para. 3.1., Enderlein and Maskow, Article 80, para. 4. and Ramberg & Herre, *Internationella Köplagen (CISG) [The International Law of Sales (CISG)]* (Nordstedts Juridik AB, 2001), p. 554.

[93] Tallon in Bianca and Bonell, Article 80, para. 2.5.

[94] Ibid, Article 80, para. 2.3. Also in favour of including tortuous behaviour in the evaluation is Enderlein and Maskow, Article 80, para. 4.

shared responsibility are resolved by reference to the respective degree of each party's contribution to causation.[95]

Under this alternative view, the distinction between an objective and a subjective approach is not followed. The relevant factors here are the probability that the conduct would lead to loss, the degree of negligence and the gravity of the breach,[96] thus making the preferred approach a mix of an objective and a subjective approach.

The preparatory works do not support a strictly objective approach. During the drafting Norway asked to what extent Article 80 presupposed that the other party was at fault. The answer given was that Article 80 applies to situations of both fault and no fault.

In line with the instruction in Article 7(1) to have regard to the international character of the CISG, it is relevant to seek inspiration from other international sales laws.[97] However, other relevant international rules favouring an apportionment[98] do not indicate clearly whether an objective or subjective approach is to be preferred.

Case Law

Case law seems to supports a less strict requirement as to the causal link and supports a subjective approach. Cases that adopt a *pro rata* approach to shared responsibility with *express* reference to Article 80 have yet to be clearly identified.[99] The most clear reference is found in the *Russian Goods Case*,[100] where a seller was found to have showed '*... a certain degree of negligence ...*' that caused the buyer to delay its payment. In an *obiter dictum* the tribunal stated that had the seller claimed interest on money in arrears or damages caused by the late payment that claim would have been dismissed by virtue of Article 80 of the CISG. The court found that the buyer was obliged to pay for the received goods as the seller had claimed.

In several cases the principle in Article 80 has been applied to situations of shared responsibility. The cases can be grouped in two categories: those overlooking the legal basis for

[95] Stoll and Gruber in Schlechtriem and Schwenzer, Article 80, para. 7.
[96] Ibid, Article 80, para. 10.
[97] It is beyond this paper to explain the method, advantages and disadvantages of filling in the gaps in the CISG by reference to other international instruments.
[98] See *supra* section 3.2 where the rules calling for an apportionment are Articles 7.1.2 and 7.4.5 of the UPICC, 8:101(3) of the PECL and 8:102 of the ACQP.
[99] In China International Economic & Trade Arbitration Commission [CIETAC], China, *Hot-rolled Coils Case*, 15 December 1997, <http://cisgw3.law.pace.edu/cases/971215c1.html>, the English abstract indicates that the decision is based on Article 80, whereas this is not confirmed in the English translation of the case. The original Chinese case text could not be retrieved. For case law where the failure to perform is caused *solely* by the aggrieved party, see *supra* footnotes 40-46.
[100] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, *Russian Goods Case*, 10 June 1999, <http://cisgw3.law.pace.edu/cases990610r1.html>.

the result in Article 80 of the CISG, referring to several other international and domestic rules, and those that do not refer to any particular provision as the basis for the apportionment.

In the first category we find the previously described *Sensitive Russian Components Case*[101]. The tribunal found that the principle of joint liability set out in Article 404(1) of the Russian Federation Civil Code was appropriate, and it referred to Article 7.4.7 of the UPICC and Articles 74 and 77 of the CISG as the basis for reducing the damages claimed by the buyer by one-third.

A similar approach to the legal basis for apportionment is seen in the *Bilateral Commission Case*,[102] where the seller was found 75% liable by reference to principles of fairness and justice, Articles 35, 36, 45 and 74 of the CISG, and Articles 475 and 476 of the Russian Federation Civil Code.[103]

In the second category we find, among other cases, the *Food Products Case*[104]. Here the tribunal found that the seller was not entitled to invoke a clause in the contract allowing termination of the contract without notice. The reason for the termination was a substantial change in the management of the buyer's company. However, the tribunal did not find this reason valid since the seller *partially* caused the dismissal of the general manager in the buyer's company by having delivered goods in secrecy to the manager's other company. No legal basis for the conclusion was given.

A similar partial reduction of a claim without reference to a legal basis has been applied in shared responsibility cases where: delayed shipment was caused by the buyer's many requests for modification of the goods and the seller's non-request for postponed shipment date;[105] deliveries were incomplete because of the buyer's issuance of a non-contractual letter of credit and the seller's failure to prepare the goods for delivery;[106] production of goods were stopped at the buyer's request and the seller did not object thereto, but without any party subsequently taking steps either to cancel or start production again;[107] a payment was not made in full as the seller had given indications that could have led the buyer to believe that a set-off could be applied;[108] goods could not be given a quality certificate and be shipped since neither the buyer

[101] Russia, *Sensitive Russian Components Case*. See also summary of the case *supra* section 3.2, p. 13.
[102] Russia, *Bilateral Commission Case*.
[103] Articles 475 and 476 of the Russian Federation Civil Code cover the conformity of goods.
[104] ICC, *Food Products Case*.
[105] China International Economic and Trade Arbitration Commission [CIETAC], China, *Velvet Clothes Case*, 13 September 2002, <http://cisgw3.law.pace.edu/cases/020913c1.html>.
[106] CIETAC, *Yellow Phosphorus Case*.
[107] Supreme Court of People's Republic of China, China, *Singapore Da Guang Group v. Jiangsu Machines Import & Export Ltd. Case*, 11 January 2001, <http://cisgw3.law.pace.edu/cases/010111c1.html>.
[108] China International Economic & Trade Arbitration Commission [CIETAC], China, *Aureomycin Case*, 11 January 2000, <http://cisgw3.law.pace.edu/cases/000111c1.html>.

nor the seller reacted to the fact that parts of the goods suffered from a non-conformity;[109] a seller had to resell the goods at a lower price since the buyer did not revise a letter of credit and the buyer packed the goods in a non-contractual manner;[110] a buyer had to deal with customs authorities detaining the goods and the seller did not cooperate in having the goods released;[111] the rights and duties with regard to a failed trial run of a machine could not be resolved.[112]

The common factors in all cases[113] of shared responsibility are that: firstly, an apportionment is carried out; secondly, the CISG is applicable, but the legal basis is not found in Article 80 thereof; thirdly, the focus in the evaluative comparison of the parties is subjective; and fourthly, it is not possible to delimit the consequences of each party's interference. The identified case law supports a subjective approach and a less strict causal link requirement. However, it suffers from not having identified the legal basis, which could have been done by reference to Article 80 of the CISG.

IV. Conclusion, Critique and Questions

From this investigation of international law, preparatory works, scholarly opinions and case law it can be concluded that Article 80 does in fact have an independent scope of application in the CISG. The provision also addresses situations of shared responsibility and in such situations an apportionment of the responsibility is the solution called for. However, the possibility of being partially exempt from liability by reference to Article 80 has to a large extent been overlooked in the case law, thus ignoring the potential for developing a uniform application of Article 80 and the CISG.

Regarding the requirement of a causal link between the promisee's conduct and the promisor's failure to perform, it can be concluded from the case law that a lack of cooperation, disloyal conduct or conduct that could in itself potentially have caused the failure to perform is enough for the failing party to become partially exempt from liability.

[109] China International Economic & Trade Arbitration Commission [CIETAC], China, *Raincoat Case*, 10 August 1999, <http://cisgw3.law.pace.edu/cases/990810c1.html>.
[110] China International Economic & Trade Arbitration Commission [CIETAC], China, *Hot-dipped Galvanized Steel Coils Case*, 16 December 1997, <http://cisgw3.law.pace.edu/cases/971216c1.html>.
[111] China International Economic & Trade Arbitration Commission [CIETAC], China, *Steel Channels Case*, 18 November 1996, <http://cisgw3.law.pace.edu/cases/961118c1.html>. Note that the CIETAC wrongly presumes that Portugal is a CISG state. Compare the UN Treaty collection: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=228&chapter=10&lang=en>.
[112] CIETAC, *Diaper Machines Case*.
[113] CIETAC, *Hot-rolled Coils Case;* Russia, *Russian Goods Case*; Russia, *Sensitive Russian Components Case*; Russia, *Bilateral Commission Case*; ICC, *Food Products Case*; CIETAC, *Velvet Clothes Case*; CIETAC, *Yellow Phosphorus Case*; China, *Singapore Da Guang Group v. Jiangsu Machines Import & Export Ltd. Case*; CIETAC, *Aureomycin Case*; CIETAC, *Raincoat Case*; CIETAC, *Hot-dipped Galvanized Steel Coils Case*; CIETAC, *Steel Channels Case* and CIETAC, *Diaper Machine Case*.

The investigation conducted in this paper raises a number of uncertainties that have yet to be clarified. Firstly, in theory the CISG is based on a principle of no-fault liability.[114] The core of no-fault liability is that liability for a breach is established regardless of culpability or fault. However, *'good faith'* and *'reprehensible behaviour'*, have a core of blameworthiness, thus bringing the CISG in the direction of culpability and fault – and with good reason: there is a nexus between Article 80 and the subjective principle of good faith.[115]

The precise content of the principles of good faith and reprehensible behaviour under the CISG is vague. The concept of good faith can on the one hand be seen as a narrow compendious term comprising nothing more than specific principles, or on the other hand as a broad concept from which rights and obligations can be derived.[116] Furthermore, subjectivity is not in itself unfamiliar to the CISG. It is the starting point in Article 8, when the rights and duties of the parties have to be determined prior to a possible exemption of liability under Article 80.

In the case law, the comparative evaluation of the parties seems to be based on concepts of fault and negligence. A caveat must be pointed out, namely that the case law identified is from Russia and China. It is possible that these two jurisdictions are affected by their national systems when solving international disputes: both Chinese and Russian *domestic* law allow apportionment.[117] There is no sign of the adjudicators being aware of the distinction between an objective and subjective approach. Further study is needed in this field.

Second, it cannot be clarified what standard is to be applied when assessing concepts of fault or negligence. This has the consequence that parties in international trade cannot be certain what rules or standards will apply to them. One might ask whether the parties can be allowed to prescribe this standard themselves. Alternatively, the parties could opt out of Article 80. However, this raises the question of whether Article 80 and its underlying concept of good faith are mandatory or not.

On the one hand, one should allow the parties to form the rules that apply between them in accordance with the autonomy of the parties recognized in Article 6 of the CISG. On the other hand, a concept of good faith is, at least to some extent, included in the CISG. There can be

[114] Lookofsky, p. 109.
[115] A nexus between Article 80 and the principle of good faith is supported in scholarly writings and case law. See for example Germany, Automobiles Case and Bundesgerichtshof [Federal Supreme Court], Germany, Surface Protective Film Case, 25 November 1998, <http://cisgw3.law.pace.edu/cases/981125g1.html>, Enderlein and Maskow, Article 80, para. 1.1 and Stoll and Gruber in Schlechtriem and Schwenzer, Article 80, para. 1.
[116] For an overview of the role of good faith in the CISG see: Zeller in Janssen, André and Meyer, Olaf (eds), *CISG Methodology* (Sellier, Munich, 2009), pp. 133-149.
[117] Article 404(1) of the Russian Civil Code and Article 120 of the Contract Law of the People's Republic of China, 1999. The Chinese concept of bilateral breach has been criticised by Ling, Bing, *Contract Law in China* (Sweet & Maxwell, Hong Kong, 2002), pp. 397-399.

little doubt that good faith applies to the interpretation of the CISG, as this appears directly from Article 7(1). However, whether good faith applies as a general obligation between the contracting parties is disputed.[118] A clarification regarding good faith and its mandatory character[119] in the CISG is needed, as is a prioritisation of the principles of the autonomy of the parties, certainty and good faith. Such clarification could reveal whether the parties can be allowed to exclude the application of Article 80, which has been said to be based on good faith.

Though it might be convenient if good faith could be given specific content it may not be possible to do so. The CISG suffers from being a political document where the discussion of good faith was, as has been put forward, given an *"...honourable burial..."*[120] in Article 7. Despite having been discussed, it clearly appears from the wording of Article 7 that good faith was included in the Convention. The evolution of the CISG will give the concept more specific content on an *ex post* basis.

Parties to international trade, adjudicators and law-makers would be better served by a clarification of the concept of shared responsibility: a concept that is currently in existence and is being applied without reference to the legal basis for doing so. Clear references to the appropriate Articles in the CISG will facilitate the development of concepts like the one expressed in Article 80 and the CISG as a whole.

Based on the investigation in this paper, it can be concluded that despite the uncertainties, Article 80 of the CISG does in fact have its independent scope and is applicable to situations of shared responsibility. If it is impossible to delimit the consequences of each party's contribution, an apportionment is the appropriate solution. The relevant factors, the approach and the requirements of causal link need to be investigated further.

It has been demonstrated that the case law, the CISG and other international sales laws all support a *pro rata* apportionment solution in cases of shared responsibility. The reason for this may simply be that we are observing an underlying global concept of which Article 80 of the CISG is but one manifestation. Future research may give the concept the clarity it deserves.

118 Compare Farnsworth, Allan E, 'Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws' Tulane Journal of International and Comparative Law, Volume 3, (1995), p. 56 and Bonell, Michael Joachim, 'Article 7' in Bianca and Bonell (eds) *Commentary on the International Sales Law* (Giuffrè, Milan 1987), Article 7, para. 2.4.1.
119 See for example Zeller in Janssen and Meyer, p. 143. The requirement of good faith has expressly been made mandatory under the UPICC: see Article 1.7 (good faith and fair dealing).
120 Keily, Troy, 'Harmonisation and the United Nations Convention on Contract for the International Sale of Goods' Nordic Journal of Commercial Law, Issue 1, (2003), p. 11, para. 3.4.