

### Article 79

(1) A party is not liable for a failure to perform any of its obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) He is exempt under the preceding paragraph; and

(b) The person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

### OVERVIEW

1. Article 79 specifies the circumstances in which a party "is not liable" for failing to perform its obligations, as well as the remedial consequences if the exemption from liability applies. Paragraph (1) relieves a party of liability for "a failure to perform any of his obligations" if the following requirements are fulfilled: the party's non-performance was "due to an impediment"; the impediment was "beyond his control"; the impediment is one that the party "could not reasonably be expected to have taken into account at the time of the conclusion of the contract"; the party could not reasonably have "avoided" the impediment; and the party could not reasonably have "overcome" the impediment "or its consequences".

2. Article 79 (2) applies where a party engages a third person "to perform the whole or a part of the contract" and the third person fails to perform.

3. Article 79 (3), which has not been the subject of significant attention in case law, limits the duration of an exemption to the time during which an impediment continues to exist. Article 79 (4) requires a party that wishes to claim an exemption for non-performance "to give notice to the other party of the impediment and its effect on his ability to perform." The second sentence of article 79 (4) specifies that if such notice is not received by the other party "within a reasonable time after the party who fails to perform knew or ought to have known of the impediment," the party who claims exemption is "liable for damages resulting from

such non-receipt." Article 79 (4) has been applied in a small number of decisions. Two decisions have cited the second sentence of article 74 (2).<sup>1</sup> Another decision noted that the party claiming exemption in that case had satisfied the notice requirement.<sup>2</sup>

4. Paragraph (5) makes it clear that article 79 has only a limited effect on the remedies available to a party aggrieved by a failure of performance for which the non-performing party enjoys an exemption. Specifically, article 79 (5) declares that an exemption precludes only the aggrieved party's right to claim damages, and not any other rights of either party under the Convention.

### ARTICLE 79 IN GENERAL

5. A number of decisions have addressed the level of challenge in performing that a party must experience in order to claim exemption under article 79. The Belgian Court of Cassation has indicated that the "impediment" referred to in article 79 (1) CISG may include changed circumstances that have made a party's performance a matter of economic hardship, even if performance has not been rendered literally impossible; the court emphasized that, in order to qualify as an "impediment," the change of circumstances ought not to have been reasonably foreseeable at the time of the conclusion of the contract and performing the contract must involve an extraordinary and disproportionate burden under the circumstances.<sup>3</sup> Several earlier decisions suggested that exemption under article 79 requires satisfaction of something

akin to an “impossibility” standard.<sup>4</sup> One decision compared the standard for exemption under article 79 to those for excuse under national legal doctrines of *force majeure*, economic impossibility, and excessive onerousness<sup>5</sup>—although another decision asserted that article 79 was of a different nature than the domestic Italian hardship doctrine of *ecces-siva onerosità sopravvenuta*.<sup>6</sup> It has also been stated that, where CISG governs a transaction, article 79 pre-empts and displaces similar national doctrines such as *Wegfall der Geschäftsgrundlage* in German law<sup>7</sup> and *eccesiva onerosità sopravvenuta* in Italian law.<sup>8</sup> Another decision emphasized that article 79 should be interpreted in a fashion that does not undermine the Convention’s basic approach of imposing liability for a seller’s delivery of non-conforming goods regardless of whether the failure to perform resulted from the seller’s fault.<sup>9</sup> And a court has linked a party’s right to claim exemption under article 79 to the absence of bad faith conduct by that party.<sup>10</sup> Recently, France’s Cour de cassation avoided the difficulty of recognition of hardship under the Convention by sheltering behind the findings of the trial and appeal courts, which had denied the existence, in the case, of a fundamental imbalance in the contract that might constitute a case of hardship.<sup>11</sup>

6. Several decisions have suggested that a correct application of article 79 must focus on assessing the risks that a party claiming exemption assumed when it concluded the contract.<sup>12</sup> The decisions suggest, in other words, that the essential issue is to determine whether the party claiming an exemption assumed the risk of the event that caused the party to fail to perform. In one case, a seller had failed to make a delivery because the seller’s supplier could not supply the goods without an immediate infusion of substantial cash, and the seller did not have the funds because the buyer had justifiably (but unexpectedly) refused to pay for earlier deliveries. The seller’s claim of exemption under article 79 was denied because the buyer, as per the contract, had pre-paid for the missing delivery and the tribunal found that this arrangement clearly allocated to the seller risks relating to the procurement of goods.<sup>13</sup> This risk analysis approach to exemption under article 79 is also evident in cases raising issues concerning the relationship between article 79 and risk of loss rules. Thus where the seller delivered caviar and the risk of loss had passed to the buyer, but international sanctions against the seller’s State prevented the buyer from taking immediate possession and control of the caviar so that it had to be destroyed, an arbitral tribunal held that the buyer was not entitled to an exemption when it failed to pay the price: the tribunal emphasized that the loss had to be sustained by the party who bore the risk at the moment the *force majeure* occurred.<sup>14</sup> And where a seller complied with its obligations under CISG article 31 by timely delivering goods to the carrier (so that, presumably, risk of loss had passed to the buyer), a court found that the seller was exempt under article 79 from liability for damages caused when the carrier delayed delivering the goods.<sup>15</sup>

7. Article 79 has been invoked with some frequency in litigation, but with limited success. In five cases, a seller successfully claimed exemption for a failure to perform,<sup>16</sup> but in at least 27 other cases a seller’s claim of exemption was denied.<sup>17</sup> Buyers have been granted an exemption under article 79 only four times<sup>18</sup> and have been rebuffed in at least 14 other cases.<sup>19</sup>

#### BREACHES FOR WHICH AN EXEMPTION IS AVAILABLE: EXEMPTION FOR DELIVERY OF NON-CONFORMING GOODS

8. It has been questioned whether a seller that has delivered non-conforming goods is eligible to claim an exemption under article 79. On appeal of a decision expressly asserting that such a seller could claim an exemption (although it denied the exemption on the particular facts of the case),<sup>20</sup> a court recognized that the situation raised an issue concerning the scope of article 79.<sup>21</sup> The court, however, reserved decision on the issue because the particular appeal could be disposed of on other grounds. The same court subsequently noted that it had not yet resolved this issue, although its discussion suggests that article 79 applies when a seller delivers non-conforming goods.<sup>22</sup> Nevertheless, at least one case has in fact granted an article 79 exemption to a seller that delivered non-conforming goods.<sup>23</sup>

9. Decisions have granted exemptions for the following breaches by a seller: late delivery of goods;<sup>24</sup> delivery of non-conforming goods;<sup>25</sup> failure to deliver goods;<sup>26</sup> late payment of a customs penalty.<sup>27</sup> Buyers have been held exempt for the following breaches: late payment of the price;<sup>28</sup> failure to take delivery after having paid the price.<sup>29</sup> Parties have also claimed exemption for the following breaches, although the claim was denied on the particular facts of the case: a buyer’s failure to pay the price;<sup>30</sup> a buyer’s failure to pay the interest for delay in payment;<sup>31</sup> a buyer’s failure to take delivery after paying the price;<sup>32</sup> a buyer’s failure to open a letter of credit;<sup>33</sup> a seller’s failure to deliver goods;<sup>34</sup> and a seller’s delivery of non-conforming goods.<sup>35</sup>

#### ARTICLE 79 (1): “IMPEDIMENT” REQUIREMENT

10. As a prerequisite to exemption, article 79 (1) requires that a party’s failure to perform be due to an “impediment” that meets certain additional requirements (e.g., that it was beyond the control of the party, that the party could not reasonably be expected to have taken it into account at the time of the conclusion of the contract, etc.). One decision has used language suggesting that an “impediment” must be “an unmanageable risk or a totally exceptional event, such as *force majeure*, economic impossibility or excessive onerousness”.<sup>36</sup> Another decision asserted that conditions leading to the delivery of defective goods can constitute an impediment under article 79;<sup>37</sup> on appeal to a higher court, however, the exemption was denied on other grounds and the lower court’s discussion of the impediment requirement was declared moot.<sup>38</sup> Another court appeared to suggest that the non-existence of means to prevent or detect a lack of conformity in the goods may well constitute a sufficient impediment for exemption of the seller under article 79.<sup>39</sup> Yet another decision indicated that a prohibition on exports by the seller’s country may constitute an “impediment” within the meaning of article 79 for a seller who failed to deliver the full quantity of goods; the tribunal, however, denied the exemption because the impediment was foreseeable when the contract was concluded.<sup>40</sup>

11. In some cases in which a party was deemed exempt under article 79, tribunals failed to explain whether the impediment requirement of article 79 had been met.

Presumably, those tribunals were convinced that this element had been satisfied. The impediments to performance in those cases included: refusal by state officials to permit importation of the goods into the buyer's country (found to exempt the buyer, who had paid for the goods, from liability for damages for failure to take delivery);<sup>41</sup> the manufacture of defective goods by the seller's supplier (found to exempt the seller from damages for delivery of non-conforming goods where there was no evidence the seller acted in bad faith);<sup>42</sup> the failure of a carrier to meet a guarantee that the goods would be delivered on time (found, as an alternative ground for denying the buyer's claim to damages, to exempt the seller from damages for late delivery where the seller had completed its performance by duly arranging for carriage and turning the goods over to the carrier);<sup>43</sup> seller's delivery of non-conforming goods (found to exempt the buyer from liability for interest for a delay in paying the price).<sup>44</sup>

12. In certain other cases, tribunals that refused to find an exemption use language suggesting that there was not an impediment within the meaning of article 79 (1), although it is often not clear whether the result was actually based on failure of the impediment requirement or on one of the additional elements going to the character of the required impediment (e.g., that it be beyond the control of the party claiming an exemption). Decisions dealing with the following situations fall into this category: a buyer who claimed exemption for failing to pay the price because of inadequate reserves of any currency that was freely convertible into the currency of payment, where this situation did not appear in the exhaustive list of excusing circumstances catalogued in the written contract's *force majeure* clause;<sup>45</sup> a seller who claimed exemption for failing to deliver based on an emergency halt to production at the plant of the supplier who manufactured the goods;<sup>46</sup> a buyer who claimed exemption for refusing to pay for delivered goods because of negative market developments, problems with storing the goods, revaluation of the currency of payment, and decreased trade in the buyer's industry;<sup>47</sup> a seller who claimed exemption for failing to deliver because its supplier had run into extreme financial difficulty, causing it to discontinue producing the goods unless the seller provided it a "considerable amount" of financing.<sup>48</sup>

13. Most decisions that have denied a claimed exemption do so on the basis of requirements other than the impediment requirement, and without making clear whether the tribunal judged that the impediment requirement had been satisfied. The claimed impediments in such cases include the following: theft of the buyer's payment from a foreign bank to which it had been transferred;<sup>49</sup> import regulations on radioactivity in food that the seller could not satisfy;<sup>50</sup> increased market prices for tomatoes caused by adverse weather in the seller's country;<sup>51</sup> significantly decreased market prices for the goods occurring after conclusion of the contract but before the buyer opened a letter of credit;<sup>52</sup> an international embargo against the seller's country that prevented the buyer from clearing the goods (caviar) through customs or making any other use of the goods until after their expiration date had passed and they had to be destroyed;<sup>53</sup> a remarkable and unforeseen rise in international market prices for the goods that upset the equilibrium of the contract but did not render the seller's performance impossible;<sup>54</sup> failure of the seller's supplier to deliver the goods to seller and a tripling of the market price for the goods after the conclusion of the

contract;<sup>55</sup> failure of the seller's supplier to deliver the goods because the shipping bags supplied by the buyer (made to specifications provided by the seller) did not comply with regulatory requirements of the supplier's government;<sup>56</sup> failure of a third party to whom buyer had paid the price (but who was not an authorized collection agent of the seller) to transmit the payment to the seller;<sup>57</sup> an order by the buyer's government suspending payment of foreign debts;<sup>58</sup> chemical contamination of the goods (paprika) from an unknown source;<sup>59</sup> a substantial lowering of the price that the buyer's customer was willing to pay for products in which the goods were incorporated as a component.<sup>60</sup>

#### TREATMENT OF PARTICULAR IMPEDIMENTS: BREACH BY SUPPLIERS

14. Certain claimed impediments appear with some frequency in the available decisions. One such impediment is failure to perform by a third-party supplier on whom the seller relied to provide the goods.<sup>61</sup> In several cases a seller has invoked its supplier's default as an impediment that, they argued, should exempt the seller from liability for its own resulting failure to deliver the goods<sup>62</sup> or to deliver conforming goods.<sup>63</sup> Several decisions have suggested that the seller normally bears the risk that its supplier will breach, and that the seller will not generally receive an exemption when its failure to perform was caused by its supplier's default.<sup>64</sup> In a detailed discussion of the issue, a court explicitly stated that under CISG the seller bears the "acquisition risk"—the risk that its supplier will not timely deliver the goods or will deliver non-conforming goods—unless the parties agreed to a different allocation of risk in their contract, and that a seller therefore cannot normally invoke its supplier's default as a basis for an exemption under article 79.<sup>65</sup> The court, which linked its analysis to the Convention's no-fault approach to liability for damages for breach of contract, therefore held that the seller in the case before it could not claim an exemption for delivering non-conforming goods furnished by a third-party supplier. It disapproved of a lower court's reasoning which had suggested that the only reason the seller did not qualify for an exemption was because a proper inspection of the goods would have revealed the defect.<sup>66</sup> Nevertheless, another court has granted a seller an exemption from damages for delivery of non-conforming goods on the basis that the defective merchandise was manufactured by a third party, which the court found was an exempting impediment as long as the seller had acted in good faith.<sup>67</sup>

#### TREATMENT OF PARTICULAR IMPEDIMENTS: CHANGE IN THE COST OF PERFORMANCE OR THE VALUE OF THE GOODS

15. Claims that a change in the financial aspects of a contract should exempt a breaching party from liability for damages have also appeared repeatedly in the available decisions. Thus sellers have argued that an increase in the cost of performing the contract should excuse them from damages for failing to deliver the goods,<sup>68</sup> and buyers have asserted that a decrease in the value of the goods being sold should exempt them from damages for refusing to take delivery of and pay for the goods.<sup>69</sup> These arguments have not been successful, and several courts have expressly commented that a

party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract.<sup>70</sup> Thus in denying a buyer's claim to an exemption after the market price for the goods dropped significantly, one court asserted the such price fluctuations are foreseeable aspects of international trade, and the losses they produce are part of the "normal risk of commercial activities".<sup>71</sup> Another court denied a seller an exemption after the market price for the goods tripled, commenting that "it was incumbent upon the seller to bear the risk of increasing market prices ...".<sup>72</sup> Another decision indicated that article 79 did not provide for an exemption for hardship as defined in the domestic Italian doctrine of *eccesiva onerosità sopravvenuta*, and thus under CISG a seller could not have claimed exemption from liability for non-delivery where the market price of the goods rose "remarkably and unforeseeably" after the contract was concluded.<sup>73</sup> Other reasons advanced for denying exemptions because of a change in financial circumstances are that the consequences of the change could have been overcome,<sup>74</sup> and that the possibility of the change should have been taken into account when the contract was concluded.<sup>75</sup>

#### REQUIREMENT THAT THE IMPEDIMENT BE BEYOND THE CONTROL OF THE PARTY CLAIMING EXEMPTION

16. In order for a non-performing party to qualify for an exemption, article 79 (1) requires that the non-performance be due to an impediment that was "beyond his control". It has been held that this requirement was not satisfied, and thus it was proper to deny an exemption, where a buyer paid the price of the goods to a foreign bank from which the funds were stolen, and as a consequence were never transmitted to the seller.<sup>76</sup> On the other hand, some decisions have found an impediment beyond the control of a party where governmental regulations or the actions of governmental officials prevented a party's performance. Thus a buyer that had paid for the goods was held exempt from liability for damages for failing to take delivery where the goods could not be imported into the buyer's country because officials would not certify their safety.<sup>77</sup> Similarly, an arbitral tribunal found that a prohibition on the export of coal implemented by the seller's State constituted an impediment beyond the control of the seller, although it denied the seller an exemption on other grounds.<sup>78</sup> Several decisions have focused on the question whether a failure of performance by a third party who was to supply the goods to the seller constituted an impediment beyond the seller's control.<sup>79</sup> One court found that this requirement was satisfied where defective goods had been manufactured by the seller's third-party supplier, provided the seller had not acted in bad faith.<sup>80</sup> Where the seller's supplier could not continue production of the goods unless the seller advanced it "a considerable amount of cash", however, an arbitral tribunal found that the impediment to the seller's performance was not beyond its control, stating that a seller must guarantee its financial ability to perform even in the face of subsequent, unforeseeable events, and that this principle also applied to the seller's relationship with its suppliers.<sup>81</sup> And where the seller's supplier shipped directly to the buyer, on the seller's behalf, a newly-developed type of vine wax that proved to be defective, the situation was found not to involve an impediment beyond the seller's control: a lower court held that the requirements for exemption were

not satisfied because the seller would have discovered the problem had it fulfilled its obligation to test the wax before it was shipped to its buyer;<sup>82</sup> on appeal, a higher court affirmed the result but rejected the lower court's reasoning, stating that the seller would not qualify for an exemption regardless of whether it breached an obligation to examine the goods.<sup>83</sup>

#### REQUIREMENT THAT THE PARTY CLAIMING EXEMPTION COULD NOT REASONABLY BE EXPECTED TO HAVE TAKEN THE IMPEDIMENT INTO ACCOUNT AT THE TIME OF THE CONCLUSION OF THE CONTRACT

17. To satisfy the requirements for exemption under article 79, a party's failure to perform must be due to an impediment that the party "could not reasonably be expected to have taken . . . into account at the time of the conclusion of the contract". Failure to satisfy this requirement was one reason cited by an arbitral tribunal for denying an exemption to a seller that had failed to deliver the goods because of an emergency production stoppage at the plant of a supplier that was manufacturing the goods for the seller.<sup>84</sup> Several decisions have denied an exemption when the impediment was in existence and should have been known to the party at the time the contract was concluded. Thus where a seller claimed an exemption because it was unable to procure milk powder that complied with import regulations of the buyer's state, the court held that the seller was aware of such regulations when it entered into the contract and thus took the risk of locating suitable goods.<sup>85</sup> Similarly, a seller's claim of exemption based on regulations prohibiting the export of coal<sup>86</sup> and a buyer's claim of exemption based on regulations suspending payment of foreign debts<sup>87</sup> were both denied because, in each case, the regulations were in existence (and thus should have been taken into account) at the time of the conclusion of the contract. Parties have been charged with responsibility for taking into account the possibility of changes in the market value of goods because such developments were foreseeable when the contract was formed, and claims that such changes constitute impediments that should exempt the adversely-affected party have been denied.<sup>88</sup>

#### REQUIREMENT THAT THE PARTY CLAIMING EXEMPTION COULD NOT REASONABLY BE EXPECTED TO AVOID OR OVERCOME THE IMPEDIMENT

18. In order for a non-performing party to satisfy the prerequisites for exemption under article 79 (1), the failure to perform must be due to an impediment that the party could not reasonably be expected to have avoided. In addition, it must not reasonably have been expected that the party would overcome the impediment or its consequences. Failure to satisfy these requirements were cited by several tribunals in denying exemptions to sellers whose non-performance was allegedly caused by the default of their suppliers. Thus it has been held that a seller whose supplier shipped defective vine wax (on the seller's behalf) directly to the buyer,<sup>89</sup> as well as a seller whose supplier failed to produce the goods due to an emergency shut-down of its plant,<sup>90</sup> should reasonably have been expected to have avoided or surmounted these impediments, and thus to have fulfilled their contractual



obligations.<sup>91</sup> Similarly, it has been held that a seller of tomatoes was not exempt for its failure to deliver when heavy rainfalls damaged the tomato crop in the seller's country, causing an increase in market prices: because the entire tomato crop had not been destroyed, the court ruled, the seller's performance was still possible, and the reduction of tomato supplies as well as their increased cost were impediments that seller could overcome.<sup>92</sup> Where a seller claimed exemption because the used equipment the contract called for had not been manufactured with the components that the contract specified, the court denied exemption because the seller regularly overhauled and refurbished used equipment and thus was capable of supplying goods equipped with components not offered by the original manufacturer.<sup>93</sup> In some cases, tribunals have inquired into whether the party claiming the exemption could reasonably overcome the impediment by rendering a similar performance that amounts to a "commercially reasonable substitute."<sup>94</sup>

#### REQUIREMENT THAT FAILURE TO PERFORM BE "DUE TO" THE IMPEDIMENT

19. In order for a non-performing party to qualify for an exemption under article 79 (1), the failure to perform must be "due to" an impediment meeting the requirements discussed in the preceding paragraphs. This causation requirement has been invoked as a reason to deny a party's claim to exemption, as where a buyer failed to prove that its default (failure to open a documentary credit) was caused by its government's suspension of payment of foreign debt.<sup>95</sup> The operation of the causation requirement may also be illustrated by an appeal in litigation involving a seller's claim of exemption under article 79 from liability for damages for delivering defective vine wax. The seller argued it was exempt because the wax was produced by a third party supplier that had shipped the goods directly to the buyer. A lower court denied the seller's claim because it found that the seller should have tested the wax, which was a new product, in which event it would have discovered the problem;<sup>96</sup> hence, the court reasoned, the supplier's faulty production was not an impediment beyond its control. On appeal to a higher court, the seller argued that all vine wax produced by its supplier was defective that year, so that even if it had sold a traditional type (which it presumably would not have had to examine) the buyer would have suffered the same loss.<sup>97</sup> The court dismissed the argument because it rejected the lower court's reasoning: according to the higher court, the seller's responsibility for defective goods supplied by a third party did not depend on its failure to fulfil an obligation to examine the goods; rather, the seller's liability arose from the fact that, unless agreed otherwise, sellers bear the "risk of acquisition", and the seller would have been liable for the non-conforming goods even if it was not obliged to examine them before delivery. Thus even if the seller had sold defective vine wax that it was not obliged to examine, the default would still not have been caused by an impediment that met the requirements of article 79.

#### BURDEN OF PROOF

20. Several decisions assert that article 79 (1)—in particular the language indicating that a party is exempt "if he proves that the failure [to perform] was due to an impediment

beyond his control . . ."—expressly allocates the burden of proving the requirements for exemption to the party claiming the exemption,<sup>98</sup> and that this also establishes that the burden of proof is generally a matter within the scope of the Convention.<sup>99</sup> In addition, such decisions maintain that article 79 (1) evidences a general principle of the Convention allocating the burden of proof to the party who asserts a claim or who invokes a rule, exception or objection, and that this general principle can be used, pursuant to CISG article 7 (2), to resolve burden of proof issues that are not expressly dealt with in the Convention.<sup>100</sup> The approach or language of several other decisions strongly imply that the burden of proving the elements of an exemption falls to the party claiming the exemption.<sup>101</sup>

#### ARTICLE 79 (2)

21. Article 79 (2) imposes special requirements if a party claims exemption because its own failure to perform was "due to the failure by a third person whom he has engaged to perform the whole or a part of the contract." One decision commented generally, "CISG Article 79 (2) has as its scope maintaining the responsibility of the seller if he relies on third parties for the total or partial execution of the contract. The seller's employees and suppliers are not considered third parties according to the CISG, though they are subjects who, autonomously or as independent parties, fulfil a part or the whole of the contract. More generally, the individuals that are charged—by the seller and after the conclusion of the contract—with the fulfilment of the existing obligations toward the buyer are considered third parties according to the CISG. They are, in particular, the carriers that deliver the merchandise to the seller and the subcontractors that are assigned by the seller to carry out the finish work."<sup>102</sup> Where it applies, article 79 (2) demands that the requirements for exemption under article 79 (1) be satisfied with respect to both the party claiming exemption *and* the third party before an exemption should be granted. This is so even though the third party may not be involved in the dispute between the seller and the buyer (and hence the third party is not claiming an exemption), and even though the third party's obligations may not be governed by the Sales Convention. The special requirements imposed by article 79 (2) increase the obstacles confronting a party claiming exemption, so that it is important to know when it applies. A key issue, in this regard, is the meaning of the phrase "a third person whom he [i.e., the party claiming exemption] has engaged to perform the whole or a part of the contract". Several cases have addressed the question whether a supplier to whom the seller looks to procure or produce the goods is covered by the phrase, so that a seller who claims exemption because of a default by such a supplier would have to satisfy article 79 (2).<sup>103</sup> In one decision, a regional appeals court held that a manufacturer from whom the seller ordered vine wax to be shipped directly to the buyer was not within the scope of article 79 (2), and the seller's exemption claim was governed exclusively by article 79 (1).<sup>104</sup> On appeal, a higher court avoided the issue, suggesting that the seller did not qualify for exemption under either article 79 (1) or 79 (2).<sup>105</sup> An arbitral tribunal has suggested that article 79 (2) applies when the seller claims exemption because of a default by a "sub-contractor" or the seller's "own staff", but not when the third party is a "manufacturer or sub-supplier".<sup>106</sup> On the

other hand, an arbitral tribunal has assumed that a fertilizer manufacturer with whom a seller contracted to supply the goods and to whom the buyer was instructed to send specified types of bags for shipping the goods was covered by article 79 (2).<sup>107</sup> It has also been suggested that a carrier whom the seller engaged to transport the goods is the kind of third party that falls within the scope of article 79 (2).<sup>108</sup>

#### ARTICLE 79 (5): CONSEQUENCES OF EXEMPTION

22. Article 79 (5) of the Convention specifies that a successful claim to exemption shields a party from liability for damages, but it does not preclude the other party from “exercising any right other than to claim damages”. Claims against a party for damages have been denied in those cases in which the party qualified for an exemption under article 79.<sup>109</sup> A seller’s claim to interest on the unpaid part of the contract price has also been denied on the basis that the buyer had an exemption for its failure to pay.<sup>110</sup> In one decision it appears that both the buyer’s claim to damages and its right to avoid the contract were rejected because the seller’s delivery of non-conforming goods “was due to an impediment beyond its control”, although the court permitted the buyer to reduce the price in order to account for the lack of conformity.<sup>111</sup>

The Belgian Court of Cassation, applying general principles pursuant to article 7 (2) CISG, has held that, “under these principles, as incorporated inter alia in the UNIDROIT Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance . . . is also entitled to claim the renegotiation of the contract.”<sup>112</sup>

#### DEROGATION FROM ARTICLE 79: RELATIONSHIP BETWEEN ARTICLE 79 AND FORCE MAJEURE CLAUSES

23. Article 79 is not excepted from the rule in article 6 empowering the parties to “derogate from or vary the effect of” provisions of the Convention. Decisions have construed article 79 in tandem with *force majeure* clauses in the parties’ contract. One decision found that a seller was not exempt for failing to deliver the goods under either article 79 or under a contractual *force majeure* clause, thus suggesting that the parties had not pre-empted article 79 by agreeing to the contractual provision.<sup>113</sup> Another decision denied a buyer’s claim to exemption where the circumstances that the buyer argued constituted a *force majeure* were not found in an exhaustive listing of *force majeure* situations included in the parties’ contract.<sup>114</sup>

## Notes

<sup>1</sup> District Court in Komarno, Slovakia, 12 March 2009 (Frozen peas case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); District Court in Komarno, Slovakia, 24 February 2009 (Potatoes case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>2</sup> Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu). For further discussion of article 79 (4), see the Digest for Section II of Part III, Chapter V, and the Digest for article 74.

<sup>3</sup> Hof van Cassatie, Belgium, 19 June 2009 (Scafom International BV v. Lorraine Tubes S.A.S.), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu). The court also held that, under general principles applicable pursuant to article 7 (2) CISG, the legal consequences of economic hardship included an obligation by the parties to renegotiate the contract. This aspect of the decision is addressed in the discussion of article 79 (5) below.

<sup>4</sup> Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (suggesting that a seller can be exempt from liability for failure to deliver only if suitable goods were no longer available in the market); CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993]. But see Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu), where the court implied that the standard for claiming exemption under article 79 is more lenient than “impossibility”: it held that the buyer was exempt from interest for a delayed payment of the price, even though timely payment was clearly possible—although not reasonably to be expected in the circumstances, according to the court.

<sup>5</sup> CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

<sup>6</sup> CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993] (see full text of the decision).

<sup>7</sup> CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (see full text of the decision).

<sup>8</sup> CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993].

<sup>9</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

<sup>10</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>11</sup> CLOUT case No. 1501 [Cour de cassation, France, 17 February 2015], appealing the decision of: Cour d’appel de Reims, France, 4 September 2012.

<sup>12</sup> See CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (discussing application of article 79, the tribunal asserts “[o]nly the apportionment of the risk in the contract is relevant here”) (see full text of the decision); CLOUT case No. 271 [Bundesgerichtshof, Germany 24 March 1999] (“The possibility of exemption under CISG article 79 does not change the allocation of the contractual risk”). For other cases suggesting or implying that the question of exemption under article 79 is fundamentally an inquiry into the allocation of risk under the contract, see Arrondissementsrechtbank ’s-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, Unilex; Bulgarian Chamber of Commerce and Industry, Bulgaria,

12 February 1998, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995]; CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001] (denying buyer an exemption when buyer's customer significantly reduced the price it would pay for products that incorporated the goods in question as a component; the court noted that in a long term contract like the one between the buyer and the seller such a development was foreseeable, and it concluded that it was thus "up to the [buyer], a professional experienced in international market practice, to lay down guarantees of performance of obligations to the [seller] or to stipulate arrangements for revising those obligations. As it failed to do so, it has to bear the risk associated with non-compliance.").

<sup>13</sup> See CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision).

<sup>14</sup> CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996].

<sup>15</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

<sup>16</sup> Federal Arbitration Court for the Moscow Region, Russian Federation, 4 February 2002 (Rimpi Ltd v. Moscow Northern Customs Department), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); U.S. District Court, Northern District of Illinois, United States, 6 July 2004 (Raw Materials Inc. v. Manfred Forberich GmbH & Co.), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex (seller was granted exemption from damages for delivery of non-conforming goods, although the court ordered the seller to give the buyer a partial refund); CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from damages for late delivery of goods).

<sup>17</sup> Arrondissementsrechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (the tribunal ordered the seller to evidence the impediment); CLOUT case No. 1102 [China International Economic & Trade Arbitration Commission, People's Republic of China, 25 December 2001] (DVD HiFi case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (tribunal ordered the seller to evidence the impediment); China International Economic & Trade Arbitration Commission, People's Republic of China, 9 August 2002 (Arbitral award No. CISG 2002/21) (Yellow phosphorus case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Landgericht Freiburg, Germany, 22 August 2002 (Automobile case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); China International Economic & Trade Arbitration Commission, People's Republic of China, 21 October 2002 (Arbitral award No. CISG 2002/16) (Engraving machine case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 June 2003 (Arbitral award No. 135/2002), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Oberlandesgericht Zweibrücken, 2 February 2004, Germany, (Milling equipment case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 April 2004 (Arbitral award No. 129/2003), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Oberster Gerichtshof, Austria, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (Omnibus case) (although the appellate court granted the seller's claim under article 79 (2), the Oberster Gerichtshof reversed, holding that no third parties were involved, but only a relationship between principal company and its subsidiary); Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005 (Scafoa International BV & Orion Metal BVBA v. Exma CPI SA), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 1182 [Hovioikeus/hovrätt Turku, Finland, 24 May 2005] (Radiated spice case), English editorial analysis available at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 21 November 2005 (Arbitral award No. 42/2005) (Equipment case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Efetio Lamias, Greece, 2006 (docket No. 63/2006) (Sunflower seed case), English editorial analysis available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 1235 [Oberlandesgericht Dresden, Germany, 21 March 2007] (Stolen automobile case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); China International Economic & Trade Arbitration Commission, People's Republic of China, May 2007 (Hammer mill case), English translation available on the Internet [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); U.S. District Court, Southern District of New York, United States, 16 April 2008 (Macromex Srl. v. Globex International, Inc.), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 16 March 2005 (arbitral award No. 155/1994)]; Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999], *affirming* (on somewhat different reasoning) CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]; Bulgarian Chamber of Commerce and Industry, Bulgaria, 24 April 1996, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996]; Landgericht Ellwangen, Germany, 21 August 1995, Unilex. See *also* CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)] (tribunal applies Yugoslav national doctrines, but also indicates that exemption would have been denied under article 79).

<sup>18</sup> CLOUT case No. 893 [Amtgerich Willisau, Switzerland, 12 March 2004 (Wood case)] (denying the buyer an exemption from paying interest, but granting an exemption from damages); U.S. District Court, Southern District of New York, United States, 20 August 2008 (Hilaturas Miel, S.L. v. Republic of Iraq), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award No. 155/1996), Unilex (buyer that had paid price for goods granted exemption for damages caused by its failure to take delivery); Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (buyer granted exemption from liability for interest and damages due to late payment).

<sup>19</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 30 July 2001 (Arbitral award No. 198/2000), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 1101 [China International Economic & Trade Arbitration Commission, People's Republic of China, 4 February 2002] (Steel bar case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 976 [China International Economic & Trade Arbitration Commission, People's Republic of China, 26 June 2003] (Alumina case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 1122 [China International Economic & Trade Arbitration Commission, People's Republic of China, 17 September 2003] (Australia cotton case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 893 [Amtgerich Willisau, Switzerland, 12 March 2004 (Wood case) (denying the buyer an exemption from paying interest, but granting an exemption from damages);



Clout case No. 839 [Cour de cassation, France, 30 June 2004 (Société Romay AG v. SARL Behr France)]; China International Economic & Trade Arbitration Commission, People's Republic of China, 25 May 2005 (Iron ore case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 November 2006 (Arbitral award No. 30/2006), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 142 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 October 1995 (Arbitral award No. 123/1992)]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, Unilex; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex; Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995]; CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)]; CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001].

<sup>20</sup> CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

<sup>21</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

<sup>22</sup> Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>23</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>24</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

<sup>25</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>26</sup> U.S. District Court, Northern District of Illinois, United States, 6 July 2004 (Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>27</sup> Federal Arbitration Court for the Moscow Region, Russian Federation, 4 February 2002 (Rimpi Ltd v. Moscow Northern Customs Department), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>28</sup> Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>29</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award No. 155/1996), Unilex.

<sup>30</sup> CLOUT case No. 142 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 October 1995 (Arbitral award No. 123/1992)]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, Unilex; CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996]; Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995].

<sup>31</sup> CLOUT case No. 893 [Amtegerich Willisau, Switzerland, 12 March 2004 (Wood case)] (denying the buyer an exemption from paying interest, but granting an exemption from damages).

<sup>32</sup> CLOUT case No. 839 [Cour de cassation, France, 30 June 2004 (Société Romay AG v. SARL Behr France)].

<sup>33</sup> CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)]; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, Unilex.

<sup>34</sup> CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)]; Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]; Bulgarian Chamber of Commerce and Industry, Bulgaria, 24 April 1996, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

<sup>35</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]; Landgericht Ellwangen, Germany, 21 August 1995, Unilex. See also Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex (denying exemption for seller who could not acquire conforming goods and for this reason failed to deliver).

<sup>36</sup> CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision).

<sup>37</sup> CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]. The court nevertheless denied the seller's claim of exemption on the facts of the particular case.

<sup>38</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]. For further discussion of the question whether a seller can claim exemption under article 79 for delivery of non-conforming goods, see paragraph 8 *supra*.

<sup>39</sup> Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>40</sup> Bulgarian Chamber of Commerce and Industry, Bulgaria, 24 April 1996, Unilex. The seller also claimed exemption for failing to deliver the goods (coal) because of a strike by coal miners, but the court denied the claim because the seller was already in default when the strike occurred.

<sup>41</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award No. 155/1996), Unilex.

<sup>42</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>43</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (see full text of the decision).

<sup>44</sup> Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).



<sup>45</sup> CLOUT case No. 142 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 October 1995 (Arbitral award No. 123/1992)].

<sup>46</sup> CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)].

<sup>47</sup> Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex.

<sup>48</sup> CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

<sup>49</sup> Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, Unilex.

<sup>50</sup> Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex.

<sup>51</sup> Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

<sup>52</sup> Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, Unilex.

<sup>53</sup> CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (see full text of the decision).

<sup>54</sup> CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993].

<sup>55</sup> CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

<sup>56</sup> Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex.

<sup>57</sup> CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995].

<sup>58</sup> CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

<sup>59</sup> Landgericht Ellwangen, Germany, 21 August 1995, Unilex. An arbitral panel has noted that, under domestic Yugoslavian law, a 13.16 per cent rise in the cost of steel—which the tribunal found was a predictable development—would not exempt the seller from liability for failing to deliver the steel, and suggested that the domestic Yugoslavian law was consistent with article 79. See CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)] (see full text of the decision).

<sup>60</sup> CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001].

<sup>61</sup> This situation also raises issues concerning the applicability of article 79 (2)—a topic discussed *infra*, paragraph 21.

<sup>62</sup> CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)]; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996]; Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

<sup>63</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]; Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>64</sup> CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128); CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996]. In another case, the seller claimed that chemical contamination of the goods was not the result of the seller's own processing of the goods, but the court declared that the source of the contamination was irrelevant for purposes of article 79. See Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

<sup>65</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (see full text of the decision).

<sup>66</sup> The lower court opinion is CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]. Another case also suggested that a seller's opportunity to discover a lack of conformity by pre-delivery inspection was relevant in determining the seller's entitlement to exemption under article 79. See Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

<sup>67</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex. For discussion of the requirement that an impediment be beyond a party's control as applied to situations in which a seller's failure of performance is due to a default by its supplier, see paragraph 16 *infra*.

<sup>68</sup> Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996]. See also CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993] (seller argued that article 79 exempted it from liability for non-delivery where the market price of the goods rose "remarkably and unforeseeably" after the contract was concluded).

<sup>69</sup> Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, Unilex; Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex.

<sup>70</sup> See Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

<sup>71</sup> Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995.

<sup>72</sup> CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

<sup>73</sup> CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993] (see full text of the decision).

<sup>74</sup> Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

<sup>75</sup> Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]. See also CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001] (denying buyer an exemption when buyer's customer significantly reduced the price it would pay for products that incorporated

the goods in question as a component; the court noted that in a long term contract like the one between the buyer and the seller such a development was foreseeable, and it concluded that it was thus “up to the [buyer], a professional experienced in international market practice, to lay down guarantees of performance of obligations to the [seller] or to stipulate arrangements for revising those obligations. As it failed to do so, it has to bear the risk associated with non-compliance.”).

<sup>76</sup> Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, Unilex.

<sup>77</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award No. 155/1996), Unilex.

<sup>78</sup> Bulgarian Chamber of Commerce and Industry, Bulgaria, 4 April 1996, Unilex (denying an exemption because the impediment was foreseeable at the time of the conclusion of the contract).

<sup>79</sup> For further discussion of the application of article 79 to situations in which the seller’s failure of performance was caused by a supplier’s default, see *supra* paragraph 14, and *infra* paragraphs 17, 18 and 21.

<sup>80</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>81</sup> CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

<sup>82</sup> CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

<sup>83</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]. A tribunal that finds a party exempt under article 79 presumably is satisfied that there was an impediment beyond the control of the party, even if the tribunal does not expressly discuss this requirement. The following decisions fall into this category: CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from damages for late delivery of goods); Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (buyer granted exemption from liability for interest and damages due to late payment).

<sup>84</sup> CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation 16 March 1995 (Arbitral award No. 155/1994)]. For further discussion of the application of article 79 to situations in which the seller’s failure of performance was caused by a supplier’s default, see *supra* paragraphs 14 and 16, and *infra* paragraphs 18 and 21.

<sup>85</sup> Arrondissementsrechtbank ’s-Hertogenbosch, the Netherlands, 2 October 1998, Unilex.

<sup>86</sup> Bulgarian Chamber of Commerce and Industry, Bulgaria, 24 April 1996, Unilex.

<sup>87</sup> CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

<sup>88</sup> Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, Unilex (a significant drop in the world market price of frozen raspberries was “foreseeable in international trade” and the resulting losses were “included in the normal risk of commercial activities”; thus buyer’s claim of exemption was denied); Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex (negative developments in the market for the goods “were to be considered part of the buyer’s commercial risk” and “were to be reasonably expected by the buyer upon conclusion of the contract”); CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)] (when the contract was concluded a 13.16 per cent rise in steel prices in approximately three months was predictable because market prices were known to fluctuate and had begun to rise at the time the contract was formed; although decided on the basis of domestic law, the court indicated that the seller would also have been denied an exemption under article 79) (see full text of the decision); CLOUT case No. 480 [Cour d’appel Colmar, France, 12 June 2001] (denying buyer an exemption when buyer’s customer significantly reduced the price it would pay for products that incorporated the goods in question as a component; the court noted that in a long term contract like the one between the buyer and the seller such a development was foreseeable, and it concluded that it was thus “up to the [buyer], a professional experienced in international market practice, to lay down guarantees of performance of obligations to the [seller] or to stipulate arrangements for revising those obligations. As it failed to do so, it has to bear the risk associated with non-compliance.”). A tribunal that finds a party is exempt under article 79 presumably believes that the party could not reasonably have taken the impediment at issue into account when entering into the contract, whether or not the tribunal expressly discusses that requirement. The following decisions fall into this category: CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from liability for damages for late delivery of goods); Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (buyer granted exemption from liability for interest and damages due to late payment); Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex (seller granted exemption from liability for damages for delivery of non-conforming goods, although the court ordered the seller to give the buyer a partial refund); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award No. 155/1996), Unilex (buyer that had paid price for goods granted exemption from liability for damages caused by its failure to take delivery).

<sup>89</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999], *affirming* (on somewhat different reasoning) CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]. The Bundesgerichtshof (CLOUT case No. 271) generalized that a supplier’s breach is normally something that, for purposes of article 79, the seller must avoid or overcome.

<sup>90</sup> CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)].

<sup>91</sup> For further discussion of the application of article 79 to situations in which the seller’s failure of performance was caused by a supplier’s default, see *supra* paragraphs 14, 16 and 17, and *infra* paragraph 21.

<sup>92</sup> Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex. A tribunal that finds a party exempt under article 79 presumably believes that the party could not reasonably be expected to have avoided an impediment or to have overcome it or its consequences, whether or not the tribunal expressly discusses these requirements. The following decisions fall into this category: CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from liability for damages for late delivery of goods); Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (buyer granted exemption from liability for interest and damages due to late payment); Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex (seller granted exemption from liability for damages for delivery of non-conforming goods, although the court ordered the seller to give the buyer a partial refund); Tribunal of International Commercial Arbitration at the Russian

Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award in case No. 155/1996), Unilex (buyer that had paid price for goods granted exemption from liability for damages caused by its failure to take delivery).

<sup>93</sup> CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

<sup>94</sup> International Centre for Dispute Resolution of the American Arbitration Association, United States, 23 October 2007 (Macromex Srl v. Globex International Inc.), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu), affirmed by U.S. District Court, Southern District of New York, United States, 16 April 2008, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu), affirmed by U.S. Court of Appeals (2nd Circuit), United States, 26 May 2009, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu). See also U.S. District Court, Southern District of New York, United States, 20 August 2008 (Hilaturas Miel, S.L. v. Republic of Iraq), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>95</sup> CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision). See also Bulgarian Chamber of Commerce and Industry, Bulgaria, 24 April 1996, Unilex (seller's argument that a miners' strike should exempt it from liability for damages for failure to deliver coal rejected because at the time of the strike seller was already in default).

<sup>96</sup> CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

<sup>97</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

<sup>98</sup> CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

<sup>99</sup> CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu). The latter case, however, distinguishes the question of the effect on the burden of proof of an extra-judicial admission of liability, viewing this matter as beyond the scope of the Convention and subject to the forum's procedural law.

<sup>100</sup> CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999] (see full text of the decision).

<sup>101</sup> CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)] (denying the seller's claim to exemption because seller was unable to prove the required facts); CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (denying the buyer's exemption claim because buyer did not prove that its failure to perform was caused by the impediment); CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (employing language suggesting that the seller, who claimed exemption, had to submit facts to substantiate the claim).

<sup>102</sup> CLOUT case No. 890 [Tribunale d'appello Lugano, Cantone del Ticino, Switzerland, 29 October 2003], English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (citations omitted).

<sup>103</sup> The application of the requirements of article 79 (1) to situations in which a seller claims exemption because its supplier defaulted on its own obligations to the seller is discussed *supra*, paragraphs 14, 16, 17 and 18.

<sup>104</sup> CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

<sup>105</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

<sup>106</sup> CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision).

<sup>107</sup> Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex.

<sup>108</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

<sup>109</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award in case No. 155/1996), Unilex.

<sup>110</sup> Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>111</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>112</sup> Hof van Cassatie, Belgium, 19 June 2009 (Scafom International BV v. Lorraine Tubes S.A.S.), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>113</sup> CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

<sup>114</sup> CLOUT case No. 142 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 October 1995 (Arbitral award No. 123/1992)]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, Unilex (abstract).