INTERPRETING CISG ARTICLE 79 (1): ECONOMIC IMPEDIMENT AND THE REASONABILITY REQUIREMENT

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Juuri kohtuusharkinta nostetaankin tutkielmassa tärkeäksi tekijäksi arvioitaessa vastuusta vapautumisen edellytyksiä. Kohtuusharkintaan etsitään työkaluja muun muassa CISG:n taustalla olevista oikeusperiaatteista sekä oikeuskäytännöstä.

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1 INTRODUCTION

Contracts are concluded to be kept. Any two parties operating in good faith mean to fulfill the contract to which they have committed, and parties to contracts in international trade are generally considered equals. Most of the time things go as planned, but in spite of the best of intentions trouble arises at times.

Even in difficulties parties can generally come to an agreement as to how to deal with the situation since creating and maintaining good business relationships and a reputation as a pleasant, flexible trade partner is in every reasonable business operator's interest. However, sometimes a dispute arises, and especially if the parties have not prepared for difficulties when in the drafting phase of the contract between them, there is a need to rely on international trade law.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is an international sales law aimed at managing these situations. Since 1980 it has served as a tool to unify international sales legislation.

When it comes to this or any other unification pursuit including the correct application of the CISG, the homeward trend is a major threat. The homeward trend means the natural tendency of law professionals to look at any given situation from the point of view of their national legal culture. Even clearly written legislation cannot free the global legal community from the homeward trend's influence as concepts and terms often get interpreted to be similar to those of national legal cultures even when they are not. Another problem altogether is that an international legal instrument such as the CISG is most often the result of lengthy negotiations, a compromise, and as such, relatively vaguely worded. This thesis aims to contribute to the acknowledgement of the danger of the homeward trend, and therewith, a more correct interpretation of the CISG.

When it comes to international commercial disputes, CISG article 79 (1) governs situations, where an unforeseeable difficulty, an impediment, has arisen and the impediment is affecting a party of a contract who is unable to reasonably overcome the impediment. When the requirements set by this article are met, the party is not liable for damages for its failure to fulfill the contract. An impediment can be physical, such as a war or a trade embargo, or economic, which means it is a difficulty that is caused by an increase in the costs of fulfilling a contract. The aim of this thesis is to provide an analytical view of the requirements set out by CISG article 79 (1) for an exemption from damages due to an economic impediment.

2 AVOIDING THE HOMEWARD TREND

2.1 General guidelines for interpreting the CISG

General guidelines for interpreting the CISG are written in CISG article 7:

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

The second part of this article clearly stipulates that national laws are the last resort. When it comes to matters not specifically determined in the CISG, in other words gaps in the CISG, they are to be either filled with the underlying principles of the CISG or by determining an applicable national law by using the rules of private international law, and applying that law. The wording of the article clearly states that the underlying principles are to be turned to first, and a national law is only to be applied if there are no general underlying principles of the CISG to be found[1].

This distinction is often called differentiating between internal and external gaps in the CISG. Internal gaps are the matters that are governed but not expressly settled by the CISG, and they are to be resolved by using the underlying principles of the

[1] Visser, chapter VII.

CISG[2]. An example of an internal gap is the reasonability standard: several articles of the CISG call for a reasonability assessment, but the more precise definition and criteria is not spelled out.

External gaps are matters, which are not covered by the CISG at all. Rules of private international law is used to find the applicable national law to be used to fill external gaps[3]. An example of an external gap is the issue of contract validity, which is specifically left outside of the scope of the CISG[4].

Absent from this last resort recourse to an applicable domestic law, it is important that the CISG is interpreted autonomously. In addition to the CISG's language itself, the CISG's legislative history, international scholarly writing, and court and arbitral decisions can be used as non-binding tools to help with the interpretation.

The UNIDROIT Principles have been claimed to be "*international commercial practice"*[5] and, thereby, applicable as a gap filling tool to use in the interpretation of the CISG[6]. This can be seen as being in line with CISG article 7 (1). However, when it comes to gap filling, priority should be given to the wording of CISG article 7 (2) and the interpreter should turn to either the underlying principles of the CISG or applicable national law depending on whether the gap is an internal gap or an external gap. The UNIDROIT Principles, while widely accepted, are not derived from the CISG, and when searching for the underlying principles of the CISG, the convention itself and legal material directly related to it, such as the CISG's legislative history, international scholarly writing, and court and arbitral decisions on the CISG should be used to find the underlying principles as previously mentioned. Parties always have the right to include the UNIDROIT Principles in the contract

[2] CISG article 7 (2); Visser, chapter II, part 2.
[3] CISG article 7 (2); Visser, chapter II, part 2.
[4] CISG article 4 (a).
[5] RF CCI 13.5.2008.
[6] RF CCI 13.5.2008; HvC 19.6.2009.

between them, and if they have chosen not to do so, party autonomy must be respected.

2.2 The homeward trend

Homeward trend is a term used to describe the natural inclination of law professionals to interpret new or foreign legal instruments from the point of view of their national legal system. This constitutes a considerable threat to all unification efforts, including the CISG. The main advantages of international law or legislation, predictability and international neutrality, disappears if the interpretation of said law or legislation is dependent on the country, in which the interpreter has received their legal education or acted as a legal professional. This would also lead to an increase in forum shopping when a party would have the opportunity to seek out legal professionals, whose nationally colored view would lead to a favorable interpretation for said party. This is counterproductive as one of the reasons behind creating the CISG was an aim to reduce forum shopping[7].

A blatant example of the homeward trend is US courts' use of case law on the Uniform Commercial Code, i.e. US trade law, when interpreting the CISG[8]. For example, the United States Court of Appeals for the Second Circuit has found, that:

> *"Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ("UCC"), may also inform a court where the language of the relevant CISG provisions tracks that of the UCC."*[9]

[7] Ferrari 2009, p. 15-18.
[8] USCA 2nd Circuit, 6.12.1995; USDC SDNY 20.8.2008; USDC SDNY 16.4.2008; USCA 7th Circuit 23.5.2005; USDC EDNY 19.3.2005; USCA 4th Circuit 21.6.2002; USDC NDI 6.7.2004.
[9] USCA, 2nd Circuit, 6.12.1995.

This view completely fails to recognize that the language and concepts of the CISG are not interchangeable with any national law, and because of this it would be a gamble to blindly assume that the actual contents of a CISG article and a national law provision were uniform even if the wording of these provisions were exactly the same[10]. It is also in direct violation of CISG article 7[11].

Fortunately, many courts are aware of the homeward trend and abstain from trying to interject the concepts and interpretation style of their national legal systems into the CISG[12].

It is of utmost importance that attempts to introduce foreign elements to the CISG, or any international legal instrument, are not successful. Parties to a contract are already free to exclude the CISG or derogate from or vary the effect of any parts of it (apart from article 12)[13] if they so choose. An important underlying principle of the CISG and a clear expression of its international character, the need to promote uniformity in its application and the observance of good faith in international trade is party autonomy. Courts and tribunals are obliged to honor it and keep to applying the CISG autonomously, only modified by the contract between the parties.

[10] Ferrari 2009, p. 27.
[11] Visser, chapter III, part 4.
[12] LG Aachen 14.5.1993; TC Monza 14.1.1993.
[13] CISG article 6.

3 ECONOMIC IMPEDIMENT IN THE SCOPE OF CISG ARTICLE 79 (1)

CISG article 79 (1) reads:

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

The article clearly describes exceptional circumstances. When the impediment mentioned is caused by economic reasons, the situation must be especially exceptional. A brief look at the typical situations when a breaching party has claimed to be exempted under this article is in order to ground further analysis of exempting circumstances in reality.

3.1 Grounds for damages in situations associated with economic impediments

One of the two most typical situations where a party attempts to be exempted from liability for damages due to an exempting economic impediment under CISG article 79 (1) is a situation of an increase in the market price of the sold goods after the conclusion of a contract. In this situation the seller then has refused to supply goods at the price stipulated by the contract and the buyer has claimed damages for the price difference between the contract price and the price the buyer has paid in order to obtain substituting goods from another source,[14] for the price difference between

[14] ICC 6281; OLG Hamburg 28.2.1997; ARB Maastricht 9.7.2008.

the contract price and current price for similar goods,[15] or reimbursement for the value of undelivered goods[16].

The opposite situations have occurred in an eight-year framework agreement when a buyer has refused to accept goods due to the buyer's customer's decision to reduce the price it would pay for the goods, and a one-time contract as the buyer has simply refused to accept goods due to a drop in market price. In these cases, sellers have been awarded damages for storing the undelivered goods and lost profits due to the buyer's breach[17].

Other damages claimed in proceeding where an exempting impediment has been found are legal costs for obtaining counsel in a situation where it has been unclear to whom the contractual price should be paid[18].

3.2 The general requirements of CISG article 79 (1)

To determine if an impediment can be an increase in costs, the general requirements for an exemption under CISG article 79 (1) have to first be examined. The general conditions for an exemption under CISG article 79 (1) are narrow by design[19]. An exemption from liability is granted rarely[20], and the burden of proof on the exempting impediment is on the party claiming to be exempted[21]. This is because contracts are generally to be fulfilled and any possible losses or losses of profit are a part of business risk. The wording of CISG article 79 (1) defines a four-part requirement for an exemption: the failure to perform has to be caused by an impediment, the impediment must be beyond the party's control, the impediment and its

[15] OLG Hamburg 4.7.1997.
[16] Sąd Najwyższy 8.2.2012.
[17] CdC 30.6.2004; RvK Hasselt 2.5.1995.
[18] Amtsgericht Willisau 12.3.2004.
[19] Schwenzer in Schwenzer, p. 1063.
[20] CISG-AC Op. No. 7, Comments.
[21] Flechtner, p. 392.

consequences must be unforeseeable, and unavoidable. In this chapter, this requirement is looked at keeping in mind the grounds for exemption described in the previous chapter.

3.2.1 Causal link to an impediment

The first requirement for an exemption under CISG article 79 (1) is that the failure is due to an impediment, in other words an overwhelming difficulty[22]. For a party to be exempted the impediment must be the sole reason for the failure to perform[23]. If the exempting impediment consists of several events, all of the events must fulfill all of the requirements for an exempting impediment[24].

Proving a causal relationship between the impediment and the failure to perform is generally relatively easy. When it comes to different aspects of the difficulties and determining all of the circumstances that have a causal relationship with the failure to perform, caution is to be exercised since even one causing difficulty that is, for example, foreseeable at the time of the conclusion of the contract means that there can be no exemption from damages.

When it comes to the typical grounds for damages in cases involving claims of an exempting economic impediment, proving this requirement is not so simple. As most of the cases concerning an exempting economic impediment are about either the buyer or the seller simply refusing to fulfill the contract due to economic reasons, it can be questioned whether there is an alternative motive. However, as the changes in economic circumstances are usually relatively easy to prove, there are no published cases where the court or the arbitral tribunal has made a point to question the motive for the refusal.

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[22] CISG-AC Op. No. 7, Comments.
[23] Schwenzer in Schwenzer, p. 1069.
[24] Schwenzer in Schwenzer, p. 1070.

3.2.2 Unforeseeability

In reality, all possible impediments are foreseeable at some level[25]. It has to be noted that unforeseeability in the sense of CISG article 79 (1) does not mean that an event is unthinkable or not considered even remotely possible. A foreseeable event is determined from an objective third party's point of view as to be relatively likely to happen[26]. The required degree of unforeseeability is reached when said third person in the actual circumstances of the contract conclusion should not have foreseen the event[27].

It needs to be stressed that the unforeseeability requirement should be interpreted narrowly. Many events, that are unforeseeable in the sense of article 79 (1) CISG, such as fires, are foreseeable, for example, in the sense that parties regularly take out insurance policies against them. This kind of a vague foreseeability does not exclude a party from being exempted.

When it comes to economic impediments, the most common ones claimed are either increases or decreases in market prices of goods. It has to be kept in mind that changes in market prices are generally foreseeable and a part of the business risk all buyers and sellers have to bear. However, this does not mean any and all market price fluctuations are foreseeable: there is a limit to which a party should have reasonably taken them into account, and this is where CISG article 79 (1) draws the line of exemption.

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[25] Secretariat Commentary, article 65.
[26] Atamer in Kröll/Mistelis/Perales Viscasillas, p. 1075-1076.
[27] Schwenzer in Schlechtriem/Schwenzer, p. 1068.

3.2.3 Impediment beyond a party's control

Overwhelming external difficulties are said to fall outside the party's sphere of risk[28]. This is one of the key requirements for an exemption: clearly, simply refusing to act to fulfill a contract cannot be a ground for exemption. However, a party is not required to go to any lengths. Finding the limits of the sphere of risk is an integral part of assessing grounds for exemption.

The sphere of risk is a concept used to describe the risks a party has to bear. It is influenced by contractual risk allocation and practices and usages, but some factors that are commonly seen to fall within a party's sphere of risk can be named. For example financial capacity, personal circumstances, and liability for own personnel are risks that belong to a party's sphere of control, and thereby do not usually constitute an impediment[29].

When it comes to the elements of risk, that are usually seen to fall inside a party's sphere of risk, they can constitute an exempting impediment only in exceptional cases. An example of such a risk is procurement risk,[30] which is generally born by the seller. However, difficulties in procuring parts for a machine can form an exempting impediment if a third party, that was supposed to provide the parts, is unable to do so because of an exempting impediment[31].

Increases and decreases in market prices are generally beyond any one business operator's control. Therefore, when it comes to economic impediments, the requirement of being beyond the non-performing party's control is generally not an issue. This means that risk allocation is the main question to be determined when analyzing whether an economic impediment is grounds for exemption.

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[28] Schwenzer in Schlechtriem/Schwenzer, p. 1067.
[29] Schwenzer in Schlechtriem/Schwenzer, p. 1067.
[30] Schwenzer in Schlechtriem/Schwenzer, p. 1067.
[31] CISG article 79 (2).

3.2.4 Unavoidability

A party is generally obliged to fulfill the contract if it is at all possible. This also includes the duty to offer a commercially reasonable substitute if the circumstances at hand allow that, and to bear additional costs to overcome difficulties. When it comes to economic impediments the requirements of being beyond a party's control and the unavoidability requirement are closely connected: the extent to which a party is required to take action to fulfill the contract is also generally determined by contractual risk allocation[32].

The unavoidability requirement is a key element when addressing the issue of an economic impediment. Assessing contractual risk allocation can be difficult, and it depends strongly on the quality of contract drafting if it can be done unambiguously. When the contract in question provides no clear guidance, the reasonability requirement in the CISG article 79 (1) gives the assessors fairly great freedom but also mean, that the quality of the assessment heavily depends on the objectivity and expertise of the assessors.

3.3 Grounds for exemption in case of an economic impediment

In order for a party to be exempt from liability, the economic impediment must fulfill the requirements set out by CISG article 79. The causality requirement and the requirement of being beyond the breaching party's control are generally easy to verify: if, for example, an increase in prices or the destruction of goods sold is a result of the non-performing party's actions. However, the requirement of unforeseeability should be looked into carefully, as price fluctuations and other economic developments are generally foreseeable and belong to the general business risk all parties have to accept. Therefore, the change in economic circumstances must be very exceptional and surprising to amount to an impediment.

[32] Schwenzer in Schlechtriem/Schwenzer, p. 1069.

Another more challenging requirement is in a sense the essence of whether or not an economic change does amount to an exempting impediment. The question of whether or not the breaching party could reasonably overcome the impediment or its consequences comes down to determining how big of an increase in costs is reasonable for the non-performing party to bear in each case individually. Once again, some level of an increase in costs in contained within the risk whose consequences all parties have to bear.

It can be tempting for a party to claim to be exempted because of an economic impediment whenever a contract is no longer desirable due to an increase in costs. This exemption, however, should be only granted in extreme cases, as as a rule, ending up with an unprofitable transaction is a part of the business risk all operators in international trade have to accept. The exemption, if granted, should be granted primarily for damages for a delay when performing the contract is mostly difficult within the contract's time frame and much less difficult when given more time. When making these decisions, the standard set by the words "could not reasonably be expected" should be followed. Assessing the reasonability requirement is looked at in more detail in section 5.3.

4 INTERPRETING CISG ARTICLE 79 (1)

4.1 *Travaux preparatoires*

In order to shed light on the drafting process of CISG article 79 (1), and thereby provide a more detailed understanding of how the article was meant to be interpreted, a look at the *travaux preparatoires* of the CISG and its predecessor, ULIS, is in order.

4.1.1 The revision of the ULIS

The Convention relating to a Uniform Law on the International Sale of Goods (ULIS) of 1964 is the predecessor of the CISG. ULIS article 74 (1) covers the same area later covered by article 79 (1) CISG:

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

Reasonability assessments were already present in applying ULIS article 74 (1) as, when determining what circumstances a party would have to take into account, avoid or overcome, "*in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have*

intended."[33] In other words, reasonability assessment was a tool to help deal with situations of insufficient contract drafting.

The drafting of the CISG began by a revision of the ULIS, and, as it happens, by a proposition to widen the applicability of a reasonability assessment to interpreting contracts. In 1973, in the first addendum to the Analysis of Comments and Proposals by Governments Relating to Articles 71 to 101 of ULIS, the representative of the United Kingdom's statement reflected their national legal background as they stated: *"Excuses for non-performance falling short of frustration should be either expressly provided for in the contract or ignored."* In their opinion, only circumstances making it "*impossible"* to perform the contract should be regarded as grounds for exemption, unless otherwise specifically stated in the contract.[34]

This view seems to have not stood the test of time. However, it has to be kept in mind that the word impossible was not used in the meaning of a physical or legal impossibility, but in conjunction with the concept of frustration, which does leave some room for extreme difficulties that do not make performance physically or legally impossible. The representative also expressed their support for the ULIS article by their statement, that unforeseen rises in prices causing a seller to deem performance uneconomic should not be a ground for exemption unless the parties or reasonable third persons in their places had specifically so intended[35].

The representative of the United Kingdom's suggestion for the wording of CISG article 79 (1) was:

> *"Where one of the parties has not performed one of his obligations, he shall neither be required to perform nor be liable for his non-performance if he can prove either that performance has become impossible owing to*

[33] ULIS article 74 (1).
[34] A/CN.9/WG.2/WP.17/Add. 1, p. 5.
[35] A/CN.9/WG.2/WP.17/Add. 1, p. 3.

> *circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome, or that, owing to such circumstances, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract; if the intention of the parties in these respects at the time of the conclusion of the contract was not expressed regard shall be had to what the party who has not performed could reasonably have been expected to take into account or to avoid or to overcome."*[36]

In practice, the wording does leave room for an economic impediment of the magnitude that would radically change the performance of the contract, most likely because of the difference between a physical or legal impossibility and impossibility in the sense of frustration.

The representative of Norway offered slight changes to the wording of the British proposal[37]. The representative of Ghana expressed their confidence in international business operators' drafting skills as they stated, that grounds for exemption "*have traditionally been best*" left to be determined by the parties in the contract[38]. As the drafting of what would later become CISG article 79 (1) proves, the view of the representative of Ghana was disregarded.

In the second addendum to the same document and as comment to the first addendum, the representative of Hungary stated, not surprisingly, that in their opinion the introduction of the concept of frustration as limit for grounds for exemption would not change the scope of ULIS article 74. Furthermore, they called for a more autonomous wording of the article as they criticized the suggestion of the

[36] A/CN.9/WG.2/WP.17/Add. 1, p. 5.
[37] A/CN.9/WG.2/WP.17 p. 7-8.
[38] A/CN.9/WG.2/WP.17/Add. 1, p. 7.

representative of the United Kingdom for being complicated, and stated that as ULIS tried to use terms common to most legal systems, using the common-law term frustration or the term impossibility, which is understood to mean only legal and physical impossibility in most civil law systems, would not be advisable. This view proved to be accepted wholeheartedly as the drafters later chose to use the word impediment instead of frustration or impossibility precisely for the reason named by the representative of Hungary.

The representative of Hungary then made a reference to the term "economic impossibility" used by German scholars, and stated, that combining it with legal and physical impossibility, would lead to much the same outcome as using the term impossibility in the sense of frustration. They suggested using the wording "*or did not fall within his sphere of risk*" to rule out price increases as ground for exemption.

With regards to both of these addendums, it is clear that the drafters intended to rule out hardship-like increase in prices as grounds for exemption, but allowed for grounds also of economic nature, and in every case in a broader sense than a classic *force majeure*.

4.1.2 The CISG in its early stages

At the end of the fifth session of the working group in 1974, the working group expressed their inability to agree on a precise wording for the article, and presented the following alternatives for it[39]: A:

> *"Where a party has not performed one of his obligations in accordance with the contract and the present law, he shall not be liable in damages for such non-performance if he proves that, owing to circumstances which have occurred without fault on his part, performance of that*

[39] UNCITRAL Yearbook 1975, Volume VI, p. 106.

obligation has become impossible or has so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account, or to avoid or to overcome the circumstances."

B:

"*Where a party has not performed one of his obligations [in accordance with the contract and the present Law], he shall not be liable [in damages] for such non-performance if he proves that it was due to an impediment [which has occurred without any fault on his side and being] of a kind which could not reasonably be expected to be taken into account at the time of the conclusion of the contract or to be avoided or overcome thereafter."*[40]

Due to the differences in opinions, the expressions *force majeure,* impossibility, and supervening disability had been used to describe what would later take the form of impediment[41]. It has to be noted that both of these alternatives introduced reasonability as a definer of both the unforeseeability and unavoidability requirements: this proved to be a lasting solution as it persisted all the way to the final article.

In 1975 in the sixth session of the working group, alternatives A and B were discussed. The representative of the Union of Soviet Socialist Republics preferred alternative A[42], whereas the representative of Austria saw alternatives A and B to be

[40] UNCITRAL Yearbook 1975, Volume VI, p. 60.
[41] UNCITRAL Yearbook 1975, Volume VI, p. 106.
[42] UNCITRAL Yearbook 1975, Volume VI, p. 84.

consistent in content[43]. The representative of Norway submitted, that the exemption should also cover the duty to perform, and that for this reason they preferred alternative B amended as follows:

> *"Where a party has not performed one of his obligations in accordance with the contract and the present law, he shall neither be required to perform nor be liable in damages for such non-performance if he proves that it was due to an impediment [which has occurred without fault on his side and being] of a kind which a party in his situation could not reasonably be expected either to take into account at the time of the conclusion of the contract or to avoid or overcome."*[44]

The representative of the United Kingdom presented their study the on the convention. They proposed, that as there is a difference between the circumstances when the contract can be entirely avoided, and when a party is exempt from damages, there should be a clear indication of this in the language of the convention. In other words, as there are both circumstances when no performance whatsoever is necessary (avoidance) and when performance is necessary, but there is no liability for damages for, for example, delivering goods without packages for which the contract also calls, this should be clearly visible from the article. For this reason they submitted that the test of radical change should be deleted from alternative A. They also expressed their view, that the fact that impossibility is interpreted differently in different legal systems, and because, therefore, the term itself is vague, the test of radical change should be left out to avoid further vagueness. Once again recognizing the need to make the language of the article such, that it would encourage autonomous interpretation, was, once again, a view that later proved to be generally recognized as there are problems with the homeward trend to this day.

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[43] UNCITRAL Yearbook 1975, Volume VI, p. 71.
[44] UNCITRAL Yearbook 1975, Volume VI, p. 82.

The representative of the United Kingdom then presented alternative C to address the issues they mentioned:

> *"Where a party has not performed one of his obligations in accordance with the contract and the present law, he shall not be liable in damages for such non-performance if he proves that it was due to an impediment which has [or to circumstances which have] occurred without fault on his part. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment [the circumstances]."*[45]

The study of the representative of the United Kingdom explains the view of the representative of Austria: the test of radical change was not intended to introduce the concept of hardship to the CISG in spite of the similarity of its wording to that of a common definition of hardship, it was meant to describe the difficulties. The test of radical change would most likely deem economic impediments as grounds for exemption since it is much more lenient and points less to physical impossibility than the previously used *force majeure,* impossibility, and supervening disability. As discarding the test of radical change was justified by avoiding vagueness and difficulties in interpretation, it should not be seen as a move to define the grounds for exemption more towards physical impossibility.

The *Revised text of the Convention on the international sale of goods as approved or deferred for further consideration by the Working Group on the International Sale of Goods at its first six sessions* was published after the sixth session. The wording of article 50 (1), which would later become CISG article 79 (1) was finalized as:

> *"Where a party has not performed one of his obligations, he shall not be liable in damages for such non-performance if he proves that it was due*

[45] UNCITRAL Yearbook 1975, Volume VI, p. 84-85.

> *to an impediment which has occurred without fault on his part. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment."*[46]

In 1976 the Draft Convention on the International Sale of Goods was published[47]. Article 50 (1), which was later to become CISG article 79 (1), read:

> *"If a party has not performed one of his obligations, he is not liable in damages for such non-performance if he proves that it was due to an impediment which occurred without fault on his part. For this purpose there is deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment."*[48]

In the commentary it published together with the Draft Convention, the UNCITRAL Working Group did not address the question of economic impediments. However, it did state that a loss of "500 tools" was to be borne by the seller if the tools were destroyed[49]. This loss is obviously minor and, therefore, this statement brings no clarity to the issue at hand.

The representative of Australia called for further provisions when it comes to difficulties to perform. They submitted, that the convention is inadequate as it only exempts a party from liability in extreme cases, and that there should be a provision that would allow for a more flexible adjustment of rights in situations where none of the parties are responsible for the change in circumstances, especially in case of

[46] UNCITRAL Yearbook 1975, Volume VI, p. 68.
[47] UNCITRAL Yearbook 1976, Volume VII, p. 89-96.
[48] UNCITRAL Yearbook 1976, Volume VII, p. 94.
[49] UNCITRAL Yearbook 1976, Volume VII, p. 130.

delayed delivery as the delivery could be very different from the one called for by the contract when time has passed[50]. This view, again, brings up the question of hardship.

The representatives of Austria and the Federal Republic of Germany proposed the following wording:

> *"If a party has not performed one of his obligations, he is not liable in damages for such non-performance if he proves that it was due to an impediment which he could not reasonably have been expected to take into account or to avoid or to overcome."*

They also expressed their concern that use of the word fault would lead to confusion with the understanding of fault of national legal systems[51]. This statement showed insight, as nationally colored views when interpreting the CISG are a problem to this day.

The representative of Czechoslovakia also expressed discontent with the terms used to describe fault stating that objective responsibility was more suitable. They also called for a more definite expression for the difficulties calling them *force majeure,* and stated that unforeseeability was not a valid requirement as, for example, wars are often foreseeable but qualify as *force majeure* in their opinion. They then submitted, that the paragraph should more clearly indicate that the moment of conclusion of contract as decisive when determining unforeseeability should the requirement persist[52]. The representative of Denmark stated, that an impediment that

[50] UNCITRAL Yearbook 1977, Volume VIII, p. 110.
[51] UNCITRAL Yearbook 1977, Volume VIII, p. 111, 117.
[52] UNCITRAL Yearbook 1977, Volume VIII, p. 113-114.

existed at the time of the conclusion of a contract should also qualify for an exemption from damages[53].

The representative of Norway proposed the following wording:

> *"Where a party has not performed one of his obligations he is not [shall neither be required to perform nor be] liable in damages for such non-performance if he proves that it was due to an impediment beyond his control and of a kind which a party in the same situation could not reasonably be expected neither to take into account at the time of the conclusion of the contract not to avoid or overcome."*

They also stated, that it should be made clear that the exemption does not cover price reduction and avoidance, and if the article does not clearly state this, it would be left up to national laws[54]. This concern is not very valid since grounds for both price reduction and avoidance are expressly settled by the CISG, and, therefore, no national law is to be applied[55].

The representative of Sweden submitted, that the wording of article 50 was unsatisfactory both in content and in wording, and it should be redrafted. They also proposed, that performance should be excluded, as a party could otherwise force performance. They actually stated, that, for example, when a shortage makes delivery particularly difficult, a party should be exempted[56]. In this statement they clearly advocated for exemption due to an economic impediment. However, this proposal was significantly more lenient than the later accepted final article.

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[53] UNCITRAL Yearbook 1977, Volume VIII, p. 114.
[54] UNCITRAL Yearbook 1977, Volume VIII, p. 124.
[55] CISG articles 7; 49; 50.
[56] UNCITRAL Yearbook 1977, Volume VIII, p. 130.

The representative of Poland requested for an amendment in article 50 that would give the parties the right to have the contract renegotiated in a case of hardship. They also called for a provision that would concern penalties to promote uniformity[57]. The fact that these proposals were denied further speaks for the view that a gap was left in the CISG when it comes to contractual penalties, and that hardship was intentionally left out. This is because the handling of contractual penalties is a question of validity, which is intentionally deemed to be outside of the scope of the CISG,[58] and thereby to be governed by an applicable national law. The concept of hardship, however, is a matter of substantive law, and it is left out entirely.

The representative of the Union of Soviet Socialist Republics proposed that the wording of article 50 (1) would be clarified to begin with: *"If a party has not performed one of his obligations, he is not liable for such non-performance if he proves…"*[59] This wording does not specify if the liability for non-performance only means damages or not, so it is questionable if this, in fact, would be a clarifying amendment.

The representative of the United States of America proposed article 50 (1) to be worded as follows:

> *"If a party has not performed one of his obligations, he is not liable in damages for such non-performance if he proves that it was due to an impediment which has occurred without fault on his part and whose non-occurrence was an implied condition of the contract. For this purpose there is deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to [take] have taken the impediment into account at the time of the conclusion of the contract or*

[57] UNCITRAL Yearbook 1977, Volume VIII, p. 127.
[58] CISG article 4 (a).
[59] UNCITRAL Yearbook 1977, Volume VIII, p. 131.

to [avoid] have avoided or [to] overcome [the impediment] it after it occurred."[60]

This wording would suggest a stricter interpretation of impediment. As implied conditions are difficult to show, accepting this proposal would have, most likely, resulted in even greater difficulties in applying this article than the current ones, so the fact that it was rejected is fortunate.

The representative of the International Chamber of Commerce submitted, that the conditions for exemption are in line with the traditional interpretation of *force majeure*, and considered this a welcome change from ULIS article 74, as they saw its requirements as referring to "some very hypothetical situations". They stated that the narrow requirements are a positive thing, as the article is not meant to introduce vagueness to contractual clauses, but to provide minimum security in cases when the contract has been inadequately drafted and, therefore, a *force majeure* clause is left out. They saw no problem in use of the word fault as the concept was defined specifically, and were pleased that the provision did not address the duty to perform as the choice to avoid the contract should be left to the performing party[61]. These comments show a very practical view on the CISG, as time has shown that parties often draft a choice of law clause that points to different rules of law than the CISG.

The representative of the International Chamber of Commerce shows disillusionment when it comes to the international meaning of the convention: they see it as a safety net in case of insufficient contract drafting and evaluates it as such instead of looking for the perfect law to be applied to the bulk of international sales contracts. Sadly for the advocates of the CISG, time has shown them to have been right.

[60] UNCITRAL Yearbook 1977, Volume VIII, p. 133.
[61] UNCITRAL Yearbook 1977, Volume VIII, p. 142.

The Committee of the Whole I established by the UNCITRAL reviewed the propositions of the working group. It chose to delete the words “in damages” as it noted that if performance could be forced, exemption from liability would be without meaning. It also removed the word fault, and used the expression to be beyond a party’s control instead while stating, that circumstances that are due to a party’s actions do not constitute an impediment, and chose to include the specification that the unforeseeability is evaluated at the time of the conclusion of a contract. It also specifically rejected the proposed article on hardship, and, thereby, ultimately formulated the article 79 (1) as it stands in the CISG[62].

4.2. Effects of the homeward trend on the interpretation of CISG article 79 (1)

Three instances, which have proven especially problematic when it comes to avoiding the homeward trend, are *force majeure*, the validity of and distinction between liquidated damages and contractual penalties, and hardship. There have been attempts to introduce the concepts of *force majeure* and hardship from national legal cultures into the CISG, and the question of whether the exemption from damages provided by CISG article 79 also applies to liquidated damages and contractual penalties has been asked.

4.2.1 *Force majeure*

The concepts of impediment and *force majeure* are used as synonyms at times[63]. This is to be avoided strictly. The concept of *force majeure* and an exempting impediment under the CISG must be kept separate from another because an exempting impediment under the CISG differs from both the traditional concept of *force majeure* and the *force majeure* provisions of national legal systems. A

[62] UNCITRAL Yearbook 1977, Volume VIII, p. 56-57.

[63] Schmidt-Ahrend, p. 19; Berger, p. 89-91; Sandvik, p. 656; BTTP 12.2.1998; ICAC at the UCCI 23.1.2012.

traditional *force majeure* refers to a practical impossibility, while an impediment constitutes a more flexible concept[64]. It has to be noted that the concept of an impediment in the sense of CISG article 79 (1) also differs from the *force majeure* provisions of any national legal systems[65]. On a continuum from a hardship, the equilibrium of a contract being changed without any actual difficulties to perform necessary[66], to the practical impossibility of a traditional *force majeure*, an impediment lays somewhere in the middle.

The drafters of the CISG clearly expressed, that the term *force majeure* is not to be used when referring to the exemption under CISG article 79. This can be expressly read from the drafting history of the CISG[67]. Imprecise use of terminology and supplementing concepts of the CISG with terms from national legal cultures is very likely to worsen the problem of the homeward trend. It is also likely to lead to incorrect interpretation of the CISG and, therefore, a situation where parties cannot rely on the provisions of the law they have chosen to govern the contract between them to be used to govern their contractual relationship in the way the parties have intended. The drafters of both CISG article 79 and its predecessor, ULIS article 74, have refrained from using the term *force majeure*, the appliers of the provisions should do the same.

4.2.2 Liquidated damages and contractual penalties

It is not expressly stated in the CISG whether or not exemptions under CISG article 79 also apply to liquidated damages and contractual penalties. The wording of CISG article 79 (5) points to "*damages under this Convention,*" which can be interpreted either way. This constitutes a gap in the CISG[68].

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[64] Rimke, chap. IV D; CISG-AC Op. No. 7, Comments.
[65] Morrissey/Graves, p. 291.
[66] UNIDROIT Principles article 6.2.2; Berger, p. 103
[67] Secretariat Commentary, article 65; UNCITRAL Yearbook 1975, Volume VI, p. 84-85.
[68] Atamer in Kröll/Mistelis/Perales Viscasillas, p. 1060.

There are two main views concerning exemptions from liquidated damages and contractual penalties under the CISG. On one hand, there is a view that a party cannot be exempted from liquidated damages and contractual penalties under CISG article 79. This would mean that the gap is external, and applicable national law should be found by using the rules of private international law and then the national law should be used to determine the validity of the contractual clause containing liquidated damages or contractual penalties[69].

On the other hand, there is also a view that liquidated damages that come instead of conventional damages under the CISG are subject to the exemption whereas contractual penalties are not[70]. Contractual penalties are generally considered unenforceable in the Anglo-American legal tradition[71]. A strong need, which stems from said legal tradition, to differentiate between contractual penalties and liquidated damages is clearly visible in the second view. When this view is analyzed, the requirement of CISG article 7 (1) to take note of the international character of the CISG and the need to promote uniformity has to be kept in mind, and, therefore, nationally colored views are to be disregarded[72].

Accepting the first view would limit parties' contractual freedom in favor of the applicable national law as parties would be kept from pre-agreeing on a sum of damages or a formula to calculate damages when the applicable national law would deem contractual penalties unenforceable. Contractually pre-agreeing on calculation of damages provides the parties with the opportunity to allocate risk in any manner of their choosing and to gain more predictability, not to mention speeding up the legal process and sparing legal costs in case a dispute arises. However, this problem can be solved by choosing a law, under which contractual penalties are enforceable, to be applied to the penalties or liquidated damages clause.

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[69] Schwenzer in Schwenzer, p. 1083.
[70] Atamer in Kröll/Mistelis/Perales Viscasillas, p. 1060-1061.
[71] Marín García, p. 88.
[72] Ferrari 2005, p. 4-5.

During the drafting process of the CISG, representatives from Norway and the Federal Republic of Germany made suggestions to extinguish the duty to perform in cases of an impediment[73]. This would mean that liquidated damages or penalties could not be claimed. The fact that both of these suggestions were rejected suggests that the principle *impossibilium nulla est obligatio* does not apply, and thereby liquidated damages and contractual penalties can be claimed regardless of the exemption provided by CISG article 79 (1)[74].

The UNCITRAL Secretariat Commentary on the 1978 draft of what would later become the CISG, the closest thing to an official commentary of the CISG, reads:

> ”*It is a matter of domestic law not governed by this Convention as to whether the failure to perform exempts the non-performing party from paying a sum stipulated in the contract for liquidated damages or as a penalty for non-performance or as to whether a court will order a party to perform in these circumstances and subject him to the sanctions provided in its procedural law for continued non-performance.*”[75]

This suggest that the drafters of the CISG expressly meant for the question of both penalties and liquidated damages to be solved applying the applicable domestic law. Therefore, the gap in the CISG when it comes to determining the possible exemption from penalties and liquidated damages is an external gap. The gap is to be filled by turning to the law deemed applicable using rules of private international law as CISG article 7 (2) determines[76].

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[73] UNCITRAL Yearbook 1975, Volume VI, p. 82; Schlechtriem, p. 97.
[74] Schlechtriem, p. 97.
[75] Secretariat Commentary, article 65, para. 9.
[76] Visser, chapter II, part 2.

4.2.3 Hardship

Hardship is a commonly known contractual concept that is defined as a situation where performing a contract becomes drastically more burdensome than originally expected for one party while bringing significant unjust enrichment to the other party[77]. The CISG contains no specific provisions concerning hardship.

There have been some attempts to introduce the concept of hardship into the CISG. This has been attempted by either claiming that there is a gap in the CISG considering hardships that has to be filled[78] or by applying the requirements of a hardship to an economic impediment[79]. Sometimes the terms hardship and economic impediment have even been seen as synonyms[80].

If one would follow the view that there is a gap in the CISG when it comes to hardship, the question would once again be whether the gap is external, and should be filled with an applicable national law, or internal, and should be filled by turning to the underlying principles of the CISG[81]. CISG article 7 (2) deems underlying principles as the primary source for filling gaps. Possible ways of finding said underlying principles is looking to the principle of good faith in CISG article 7 (1), or searching CISG article 79 (5) for ways for a court or a tribunal to determine what the parties owe each other and thereby adapt the contract in question[82]. It has to be noted that this approach is very broad and does not serve the need to promote uniformity and predictability. Seeking all possible means and justifications to introduce new elements into the CISG is a slippery slope. When it comes to seeing gaps when there are elements that have been deliberately left out of the CISG, it will eventually lead to an even greater lack of consensus as there is most likely a train of

[77] UNIDROIT Principles article 6.2.2; Berger, p. 103.
[78] Atamer in Kröll/Mistelis/Perales Viscasillas, p. 1089.
[79] CISG-AC Op. No. 7.
[80] Garro in Felemengas, p. 241-245.
[81] Garro in Felemengas, p. 245.
[82] Garro in Felemengas, p. 246.

thought for each national concept to be somehow in line with underlying principles of the CISG, such as good faith. This is true also when it comes to an external gap considering hardship: it cannot be seen that any concept that is not mentioned in the CISG shows a gap that is to be filled with applicable national law.

The drafters of the CISG specifically named the intent not to introduce the *theorie de l'imprevision,* the French equivalent to hardship, as a reason not to accept a Norwegian proposal to modify the wording of what would become CISG article 79 (3)[83]. They also specifically dismissed a proposed provision on hardship[84]. This provides further proof that there is no gap: the drafters meant that parties should not be able to make claims of hardship to avoid damages or to have the contract modified by a court or an arbitration tribunal.

Parties, who wish to include elements of hardship into their contractual relationship are able to do so by implementing a choice of law clause calling for the CISG to be supplemented with, for example, the UNIDROIT Principles. The CEAC model choice of law clause (option b) is an example of such a clause:

> "*The contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) without regard to any national reservation, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts and these supplemented by the otherwise applicable national law."*

[83] A/CONF 97/C.1/SR.27, p. 10; Schlechtriem, p. 97.
[84] UNCITRAL Yearbook 1977, Volume VIII, p. 57.

The concept of hardship was intentionally left out of the CISG. Therefore, parties should not be able to successfully make claims relying on hardship when the CISG is applied unsupplemented[85].

[85] TC Monza 14.1.1993; Flambouras in Felemengas, p. 500.

5 ECONOMIC IMPEDIMENT AND REASONABILITY

5.1 Economic impossibility

Peter Schlechtriem accepted economic difficulties or "unaffordability" as a ground for exemption in his book *Einheitliches UN-Kaufrecht,* which was based on the notes he took during the CISG drafting conference and published in 1981. He described an economic impediment but did not use the term itself[86].

German scholars have used the term "economic impossibility" *(wirtschaftliche Unmöglichkeit)* from early on when interpreting the wording *"reasonably be expected to - - - have avoided or overcome it or its consequences"* of CISG article 79 (1)[87]. It has to be noted that the whole concept of *wirtschaftliche Unmöglichkeit* is an important German doctrine that was adopted by German legal scholars and legislation specifically to fight the effects of the massive inflation in Germany after the First World War[88], and the effect of the concept's meaning and importance in German law is clearly visible in the German interpretation of CISG article 79 (1). Once again, views stemming from national legal systems are to be discarded[89].

5.2 From the limit of sacrifice to what is reasonable

In modern scholarly works there is a growing consensus that at least a rapid, unforeseeable, and extreme increase in costs constitutes an impediment, but drawing the line is difficult and should be done in each case individually taking all

[86] Schlechtriem, p. 96.
[87] Rimke, chap. III 4.
[88] Huber 1999, p. 656.
[89] Ferrari 2005, p. 4-5.

circumstances into account[90]. The limit of sacrifice standard is accepted, for example, by the CISG Advisory Council as it describes the circumstances that can lead to exemption on the basis of economic impediment as:

> *""economic impossibility" which, while short of an absolute bar to perform, imposes what in some legal systems is conceptualized as a "limit of sacrifice" beyond which the obligor cannot be reasonably expected to perform"*.

To help determining how big of an increase in costs parties have to bear, the concept of a limit of sacrifice has been introduced. To amount to an economic impediment under the CISG, the increase in costs has to cross a limit of sacrifice above which the party cannot reasonably be expected to fulfill the contract[91]. This limit must be defined for each case individually, and it should be applied sparingly and to extreme cases only. As a rule, a 100 per cent increase in cost does not yet constitute an economic impediment, and in case of speculative transactions, even a 300 per cent increase may not[92]. When the ultimate limit of sacrifice will not be crossed, a party has the duty to do everything in its power to perform the contract[93].

The limit of sacrifice is not to be looked at as a matter of numbers. A loss of a specific amount of money can be irrelevant to a bigger operator in the field of international trade, and potentially fatal to a smaller one. Therefore, it cannot be simply stated, that when the increase in costs is less than a specific percentage, there can be no economic impediment. In specific instances, when a small company relies on few transactions that are big to it to keep operating, a relatively small increase in costs in one of these transactions can be very detrimental to it, and even make it insolvent.

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[90] Schwenzer in Schwenzer, p. 1076; CISG AC Op. No. 7; Magnus in Honsell, p. 988; Huber/Mullis 2007, p. 261-262; Piltz, p. 219; Ferrari 2012, p. 902; Garro in Felemengas, p. 245.

[91] Schwenzer in Schwenzer, p. 1076.

[92] Schwenzer in Schwenzer, p. 1076; CIETAC 2.5.1997; RvK Hasselt 2.5.1995; OLG Hamburg 28.2.1997.

[93] Schwenzer in Schwenzer, p. 1076.

Again, it has to be noted that the wording of CISG article 79 (1) sets the limit to which a party has to go to fulfill a contract to "*reasonably be expected - - - to have avoided or overcome it or its consequences."* Therefore, reasonability clearly is a key concept in analyzing each individual case.

Historically, the reasonability requirement has been closely tied with the concept of an economic impediment from early on. Frenchman Denis Tallon described what essentially is an economic impediment in the *Bianca/Bonell* commentary in 1987:

> *"If an object is lost at sea and can be fished out in good condition although at great cost, the final solution will not be the same if the said object is a highly valuable sculpture or merely a machine tool."*[94]

Thereby, he implied that as the increase in costs in fishing up a machine tool would be so great in relation to the value of the tool, the increase in costs would exempt a party from liability (most likely of a late delivery as a substitute machine tool could probably be easily obtained). This introduces the element of commercial reasonability, and thereby exemption grounds due to an increase in costs i.e. economic impediment, to examples 65 A-C of the Secretariat Commentary[95].

The Secretariat Commentary itself contains the concept of commercial reasonability: it is stated, that in the case of an unanticipated imposition of exchange controls or a similar impediment, the buyer is only exempted from liability for damages if there is no commercially reasonable substitute form of payment or other similar way to overcome the impediment[96].

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[94] Bianca/Bonell, p. 582.
[95] Secretariat Commentary, example 65 A-C.
[96] Secretariat Commentary, article 65, chapter 10.

Respectively, in example 65 D it is stated, that when a contract calls for plastic packaging but it is not available due to an exempting impediment, the seller is required to use a commercially reasonable substitute packaging if it is available rather than refuse to deliver to avoid being liable for damages even when this would mean that the buyer would be entitled to a price reduction[97]. When it comes to this example, both the price and usefulness of the substitute packaging should be considered when it is determined what is commercially reasonable. If the buyer will have to repackage the goods the limit should be set low, but if the buyer can make use of the goods as they are in the substitute packaging, it is commercially reasonable for the seller to bear more costs for the substitute packaging. The loss of profit this will cause the seller is a part of the business risk the seller has to bear.

5.3 Assessing reasonability

When assessing reasonability it has to be kept in mind that generally it is very reasonable for two equally powerful professional business operators to fulfill the contract to which they have committed even if there are difficulties and additional costs. It can be very tempting for a party to try to avoid unfavorable transactions caused by what are essentially reckless business decisions by keeping from fulfilling a contract and then claiming exempting circumstances. This cannot be allowed. Exempting impediments are very exceptional situations and the grounds for exemption are to be interpreted narrowly.

Generally, reasonability is evaluated by utilizing the reasonable person test. This means, that a fictional reasonable person with the attention, knowledge, intelligence, and judgment of an average operator is pictured. The instance evaluating reasonability then deducts how the reasonable person would act in the situation and with the knowledge of the party evaluated in the situation in question[98].

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[97] Secretariat Commentary, example 65 D.
[98] Berger, p. 8; Magnus, 5 (5).

Reasonability, like other concepts of the CISG, has to be interpreted as CISG article 7 (1) provides. This means the CISG should be interpreted autonomously, and the concept of reasonability should not be seen from the viewpoint of any national legal system[99]. As exemption from damages is governed by the CISG but the definition of reasonability is not expressly settled by the CISG, the definition of reasonability can be seen as an internal gap in the CISG. Therefore, the underlying principles of the CISG are to be taken into account when assessing reasonability[100].

A generally well-accepted, but not necessarily exhaustive list of the underlying principles was compiled by Ulrich Magnus, a German scholar, in 1995. In his list he included the following principles: party autonomy, good faith, estoppel (disputed), place of performance of monetary obligations, burden of proof (of the claimant or beneficiary), full compensation, dispatch principle (the mailbox rule), informality (no writing requirement), mitigation, trade usages or customs, set-off (disputed), interest, pro-contractuality, and fair trading[101]. Which of and to what extend these principles prove useful when assessing reasonability, depends on the situation at hand.

When it comes to the situations described in section 3.1 of this thesis, in the instances of the seller's non-performance due to an increase in the market price of the sold goods after the conclusion of a contract and when the buyer has simply refused to accept goods due to a drop in market price, the principle of pro-contractuality would speak against accepting the exemption. When it comes to the buyer's non-performance in the instance it has refused to accept goods due to the its customer's decision to reduce the price it would pay for the goods, the same could be said especially since it could be seen as unreasonable to allow a party exemption from a contractual relationship to which it has committed simply because its chosen third party contractual partner has refused to honor its contractual obligation.

[99] Ferrari 2005, p. 9.
[100] CISG article 7 (2).
[101] Baasch Andersen in Baasch Andersen/Schroeter, p. 28-29.

However, in all three cases it could be argued that the principles of good faith and even fair trading, depending on the parties, would direct the interpreter towards accepting the exemption. It is noticeable that the underlying principles of the CISG share a common weakness with other elements of the CISG: ambiguity. Moreover, it is hard to imagine that the bulk of the underlying principles, such as the dispatch principle and informality, would prove to be useful in a great number of situations.

One of the underlying principles of the CISG is the principle of party autonomy[102]. This principle overrides all reasonability assessments if parties choose to utilize the opportunity provided by CISG to "*derogate from or vary the effect of any of its provisions*"[103]. Contract provisions clearly containing an exhaustive list of exempting circumstances supersede CISG article 79 (1)[104]. However, if it is not clearly indicated that a contract provision contains an exhaustive list of grounds for exemption, it can be seen as a way to expand CISG article 79 (1). As parties can simply exclude CISG article 79 (1) from the contractual relationship between them altogether by a simple sentence in a contract, absent from a clearly worded exclusion, *force majeure* clauses or other clauses about possible difficulties with fulfilling the contract should not be seen as superseding to CISG article 79 (1)[105].

CISG article 9 (2) states:

> *"The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."*

[102] Flechtner, p. 43.
[103] CISG article 6.
[104] RF CCI 17.10.1995.
[105] Flechtner, p. 393.

This has to also be taken into account when assessing reasonability in each individual case: established usages, of which the parties have or should have been aware, are considered to be a part of the contract. Therefore, even if the presence of the established usages leads to circumstances, which would otherwise be considered grounds for exemption from damages due to unreasonability, the exemption cannot be granted. This is because an established usage is seen as an implied expression of party autonomy, which is equated with a contract provision calling for the derogation from or varying the effects of the reasonability requirement of the CISG. The trade mentioned in the article may be restricted to the trade of a certain product, trade in a certain region or a particular set of trading partners[106].

CISG article 77 deems the non-breaching party also responsible to contribute to the fulfilment of the contract at the risk of losing its right to damages as there is a duty to mitigate damages. Therefore, if the seller is faced with an economic impediment, any inactivity from the buyer has to be taken into account when determining the reasonable additional costs the seller will have to bear to fulfill the contract. If the buyer does not fulfill its duty to mitigate damages, there is no need to go through the entire process of evaluating all of the grounds for exemption when it comes to the losses the buyer could have mitigated as the buyer's right to these damages is directly limited by CISG article 77. However, the costs of these mitigations may be claimed as damages,[107] and as these damages are damages under the CISG in the sense of CISG article 79 (5), the seller can be exempted from liability from them if there is an exempting impediment.

It has to be noted that in extreme cases the reasonability requirement provides a level minimum protection to a weaker party. This can be the case, for example, when a small company sells one highly specialized item a year, and this item it is providing a large company is unexpectedly destroyed. It cannot be reasonably expected, that the small company purchases a replacement for 100 per cent of its yearly production

[106] Secretariat Commentary, article 8, chapter 3.
[107] Flechtner, p. 368.

at a price greatly above the amount it will get from selling said replacement, as this would most likely make the small company insolvent, especially if a delay in procuring the item is close to irrelevant to the large company. In this instance the small company should be exempted from damages for a delay, if not for not delivering the item at all. On the other hand, if the large company is selling a part to the small company's item, and the part is destroyed, the large company can be reasonably expected to purchase a replacement when this monetary loss is close to irrelevant to it, but the delay or non-delivery is detrimental to the small company. Such imbalances between the parties should ideally be dealt with by means of contract drafting, but as mentioned, the reasonability requirement itself acts as a minimum level safety net in extreme cases[108].

5.4 Jurisprudence

There have been several instances of parties claiming to be exempted due to an economic impediment. In most cases they have been unsuccessful[109].

In ICC case 6281/1989 the seller had agreed to sell 80.000 metric tons of steel bars for a set price, but later refused due to an increase in the price of steel. At the time of the conclusion of the contract, the price of steel had already begun to increase slightly. The court did deem the CISG to not be applicable, as it had not yet been entered into force. However, the court did consider the CISG's grounds for exemption and found that a price increase of about 13 per cent did not suffice, especially considering the foreseeability of price fluctuations especially in this case[110]. The District Court of Monza, Italy, found similarly in a case where it did not find the CISG applicable but nevertheless considered, that a price increase of 30 per cent did not suffice as grounds for exemption[111].

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[108] UNCITRAL Yearbook 1977, Volume VIII, p. 142.
[109] RvK Hasselt 2.5.1995; Flechtner p. 391.
[110] ICC 6281.
[111] TC Monza 14.1.1993.

The Belgian Commercial Court of Tongeren found that as the price of steel had unexpectedly risen by about 70 per cent after the conclusion of the contract but before delivery, the seller was exempted, but called the increase in price an economic hardship. This decision was later overturned by the Court of Appeal in Antwerp, which found that there is a gap in the CISG when it comes to economic hardship, and applied a national law. The Belgian Supreme Court found that the there was a gap in the CISG to be filled by general principles of international trade, and that there were no grounds for exemption, and that the duty to renegotiate the contract was a legal consequence of an economic hardship[112].

The Appellate Court of Hamburg, Germany, ruled that when it came to a case of an approximately 34 per cent increase in tomato prices due to heavy rains, there were no grounds for exemption as the seller could have fulfilled the contract[113]. The same court has also stated that the seller bears the risk for an increased market price when a substitute transaction is to be made. It found that a 300 per cent increase in price did not cross the limit of sacrifice as the transaction in the case at hand was highly speculative, and thereby, this increase in price was insufficient to amount to an exempting economic impediment[114].

On the other hand, the Arbitration Court of the Chamber of Commerce of Hamburg specifically listed *"force majeure, economic impossibility or excessive onerousness"* as grounds for exemption. In the case it was considering, the buyer and the seller had concluded a basic agreement for their co-operation, and a commercial contract for specific goods. The buyer had withheld payments under previous contracts and as a Chinese sub-supplier of the seller had lost its state credit, a lack of funds had kept the sub-supplier from performing. The Arbitration Court found that the grounds for exemption were not present neither when it came to the basic contract, as a

[112] HvC 19.6.2009.
[113] OLG Hamburg 4.7.1997.
[114] OLG Hamburg 28.2.1997.

payment of the due debts would have solved the sub-suppliers lack of funds, nor when it came to the contract for specific goods, as there was a pre-payment clause in contract for specific goods that deemed the seller to be the bearer of the contractual risk as the buyer had made the pre-payment[115].

The Supreme Court of Poland reversed a ruling of a Court of Appeals and remanded the case as the Court of Appeals had failed to consider if a price increase could be an exempting impediment in 2012. A German buyer had concluded a contract for several shipments of coke fuel with a Polish seller, but as the price of coke fuel had doubled after the conclusion of the contract, the seller had refused to continue shipments at the agreed price. The buyer then had avoided the contract and sued for damages[116].

This case is very interesting as the Supreme Court hints that such a low increase in price could be an exempting impediment under CISG article 79 (1). The case has been reversed and remanded by the Supreme Court of Poland already once before this last ruling in 2008.[117] Therefore, it might take some time before there is a final ruling.

When the increase in costs for fulfilling the contract is due to a single contractual partner of the breaching party, a simple refusal or changing of mind does not constitute an exempting impediment. French Supreme Court found, that when a buyer's customer reduced the price it would pay for the goods, not only was the reduction of the repurchase price by the predictable at the time of conclusion of the contract, but it was up to the buyer, who was aware of entering into a long-term business relationship, to provide for mechanisms of renegotiation for the case of changes of circumstances[118].

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[115] Handelskammer Hamburg 21.3.1996.
[116] Sąd Najwyższy 8.2.2012.
[117] Sąd Najwyższy 9.10.2008.
[118] CdC 30.6.2004.

The Swiss Court of First Instance of Willisau found that a buyer was exempt from damages for a delayed payment of the sales price because two parties claimed to be the rightful assignees of said price, which resulted in a court order freezing the original payment. The court specifically names the risk of double payment as an exempting impediment:

> "*Thus, there were undoubtedly objective circumstances that hindered the payment. Due to these circumstances, [Buyer] could not be sure, to whom it could pay without the risk of double payment.*"[119]

Thereby, it is implied that a 100 per cent increase in the costs of a timely fulfillment of a contract is already enough to count as an exempting impediment, even when, as it would have been in this case, most if not all of the extra money spent including legal and other expenses could most likely be retrieved at a later point in time.

Another interesting case is the finding of the District Court of Maastricht that in a case of a potato producer being unable to supply enough potatoes due to a bad harvest caused by extreme weather conditions, it did not matter that the seller could have procured substitute potatoes as the contract between the buyer and the seller specified that the obligation to deliver was limited to the potatoes grown by the seller[120].

The exact limit of additional costs a party has to bear varies from case to case as tribunals and courts interpret CISG article 79 (1). However, this is both predictable and a positive finding as every case and situation is to be evaluated individually when it comes to whether or not an exempting impediment is present.

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[119] Amtsgericht Willisau 12.3.2004.
[120] ARB Maastricht 9.7.2008.

6 A COMPARISON OF EXEMPTING ECONOMIC IMPEDIMENTS IN THE CISG AND IN THE FINNISH SALE OF GOODS ACT

6.1 General grounds for exemption

When the Finnish Sale of Goods Act came into force, it introduced a shift in the way exemptions from damages were seen in the Finnish legal system. Previously, damages due to a breach of contract had been seen as damages for negligence: the party, which suffered the losses, bore the burden of proof for the alleged breach and the causality between the breach and the losses suffered, and when it succeeded in proving these two things, negligence from the breaching party was assumed and damages awarded unless the breaching party could prove it had not been negligent and, thereby, be exempted from damages[121]. The grounds for an exemption from damages provided by Finnish Sale of Goods Act, on the other hand, are stricter as the concept of an exempting impediment was introduced. This meant that the party, which had allegedly breached a contract, had to prove that there were overwhelming difficulties keeping it from fulfilling the contract in order to be exempted from damages[122].

When it comes to the actual provision in which the grounds for an exemption from damages are described, section 27 (1) of the Finnish Sale of Goods Act is worded very similarly to CISG article 79 (1):

> *"The buyer is entitled to damages for losses that he suffers because of the seller's delay in delivery, unless the seller proves that the delay was due to an impediment beyond his control which he could not reasonably be expected to have taken into account at the time of the conclusion of*

[121] Mononen, p. 1389; Sandvik, p. 653-654.
[122] Mononen, p. 1391; Sandvik, p. 655.

> *the contract and whose consequences he could not reasonably have avoided or overcome."*

The grounds for exemption in this section are valid when it comes to both claims for damages due to a delay in delivery and a defect in the goods[123]. The four-part requirement of CISG article 79 (1) is repeated in this section: the requirements of a causal link to an impediment, unforeseeability, the impediment being beyond the breaching party's control, and unavoidability are all spelled out.

Similar grounds for exemption from damages apply when the buyer does not fulfill the contract[124]. However, for a delay in payment there are specific requirements:

> *"The seller is entitled to damages for losses that he suffers because of the buyer's delay in payment unless the buyer proves that the delay was due to a provision of law, general interruption of communications or payment services or to other similar impediment which the buyer could not reasonably be expected to have taken into account at the time of the conclusion of the contract and whose consequences he could not reasonably have avoided or overcome."*[125]

Although there are specific circumstances named, the four-part requirement of CISG article 79 (1) is present in this section also. However, as discussed in chapter 2 of this thesis, a mere similarity in wording does not mean that the interpretation of these provisions should be identical. For example, it has to be noted that the Finnish Sale

[123] Finnish Sale of Goods Act section 27 (1); 40 (1).
[124] Finnish Sale of Goods Act section 57 (2).
[125] Finnish Sale of Goods Act section 57 (1).

of Goods Act, unlike the CISG[126], also applies to sales of goods bought for personal, family or household use[127].

Sections 27 (4) and 40 (3) of the Finnish Sale of Goods Act name exceptions to exempting impediments: if the losses suffered by the buyer are the results of the seller being negligent or the goods not conforming to an express warranty of the seller at the time of the conclusion of the contract, the seller cannot be exempted from damages. The former part of this exception overlaps the four-part requirement for an exemption from damages, as a party obviously can avoid being negligent. The latter part can be seen to broaden the seller's liability for a defect in the goods as it applies even if the seller was not and should not have been aware of the defect[128].

6.2 Indirect losses

A clear and significant difference between CISG article 79 (1) and sections 27 (1) and 57 (1) of the Finnish Sale of Goods Act is that indirect losses are generally not recoverable under the Finnish provisions[129] unless the non-performing party has been negligent[130]. However, it has to be noted that there are exceptions to this rule: according to section 40 (3) of the Finnish Sale of Goods Act, both direct and indirect losses are recoverable if the losses are due to the goods not conforming to an express warranty of the seller at the time of the conclusion of the contract. Therefore, if the seller has committed to delivering the contractual goods with a specified property, it is irrelevant whether the damages claimed by the buyer are resulting from direct or indirect losses[131]. Similarly, if the buyer has agreed to purchase goods, which have to be especially produced or acquired for it and the buyer cancels the

[126] CISG article 2 (a).
[127] Finnish Sale of Goods Act section 1.
[128] HE 93/1986, p. 94.
[129] Finnish Sale of Goods Act section 27 (3).
[130] Finnish Sale of Goods Act section 40 (3); HE 93/1986, p. 1-2; Hoppu/Hoppu, p. 102; KKO:2009:89.
[131] KKO:2001:77.

contract after the seller has already taken action to fulfill the contract, it is irrelevant whether the seller has suffered direct or indirect losses when damages for losses caused by the cancellation are awarded[132].

The general rule of indirect losses not being recoverable means that, unless the exceptions described above apply, the breaching party does not need to be exempted from claims for damages when it comes to the following losses:

> *"Indirect loss consists of the following:*
> *(1) loss due to reduction or interruption in production or turnover;*
> *(2) other loss arising because the goods cannot be used as intended;*
> *(3) loss of profit arising because a contract with a third party has been lost or breached;*
> *(4) loss due to damage to property other than the goods sold; and*
> *(5) other similar loss that is difficult to foresee."*[133]

This is very relevant as a significant portion of the grounds for damages mentioned in section 3.1 of this thesis are indirect losses under Finnish trade law.

The Finnish Sale of Goods Act does not define direct losses, but it is apparent that losses that are not indirect are seen as direct. The *travaux preparatoires* of the section state the following:

> *"According to subsection 1 of the paragraph, loss due to reduction or interruption in production or turnover is considered indirect loss. Therefore, the loss of business income, which is caused to the buyer from losing the chance to conclude contracts with its clients or to fulfill more long term running supply contracts due to the seller's breach of*

[132] Finnish Sale of Goods Act section 52 (2); Sandvik, p. 660.
[133] Finnish Sale of Goods Act section 67 (2).

contract is indirect loss. Also the reduction of turnover because of, for example, a capacity or storage deficiency due to reduction or interruption of production, and as a result, the marketing of products becomes more difficult or weakens the competitiveness of the company as it has to reserve longer times for delivery, is indirect loss.

Also a reduction of business income because of a reduction of the goods' market value during the seller's delay, and consequently the buyer receiving a lower price when making a resale than it would have gotten had the seller delivered the goods in a timely fashion, is indirect loss. The reduction of the buyer's business income due to a piece of machinery meant for the buyer's production process and delivered by the seller not functioning properly, and therefore, the goods, which have been produced or worked on with the piece of machinery, being of less quality than usually and because of that, they can only be sold with a price lower than normally, is also indirect loss.

According to subsection 2 of the paragraph, loss other than the loss described in subsection 1 resulting from fact that the goods cannot be used in the way it was intended to be used is indirect loss. A delay in delivery of a copier or a computer, which the buyer had ordered, slowing down or complicating the routine processes of the company without resulting in direct economic loss, for example in the form of a reduction in turnover, can be named as an example. A comparable situation is in question when, for example, a piece of farming machinery acquired by a farmer or a car bought by a company is out of order for a period of time because of a defect and it does not result in or cannot be proven to result in direct economic loss.

Therefore, in case general principles of mitigation of damages call for restitution of this type of loss of use of the goods, for example in the form

of a so-called downtime payment, according to the bill it constitutes an indirect loss. As previously stated, a buyer who has to rely on outside services or rent a substitute good in order to maintain its operations, can, under specific circumstances, be entitled to restitution of these costs as direct loss.

According to subsection 3 of the paragraph, not receiving profit due to a contract with a third party being improperly fulfilled or cancelled is indirect loss. The provision applies to situations, where the buyer has concluded a contract for further selling the goods ordered or acquired from the seller, either as such or further processed, and a breach by the seller leads to the contract for further sale being cancelled. Due to this, the buyer loses the profit it would have otherwise acquired from this contract.

A profit that the buyer loses because a potential contract with a third party, which would require the seller's delivery in order to be fulfilled, is not concluded due to the seller's breach is considered indirect loss. The buyer having had ordered a specialty device in order to fulfill a particular contract, which is in the negotiation phase, and this contract being cancelled because of the seller's delay in delivery, can be mentioned as an example.

According to subsection 4 of the paragraph, damage to property other than the goods sold is considered indirect loss."[134]

As a crude rule of thumb, losses, which can be easily proven in both causality to the breach and monetary amount, such as obtaining substitute goods or services to cover for the ones called for by the contract and then producing a receipt as proof of

[134] HE 93/1986, p. 127-128.

the price paid for the substitute, are considered direct losses under Finnish sales law, whereas losses, which are visible in calculations and prognoses, such as a reduction in turnover, which is visible from a profit and loss statement, are considered indirect losses. The direct economic loss, such as a reduction in turnover, due to a piece of machinery intended for the use of the buyer is named as an exception to this rule.
It has to also be noted, that according to section 67 (3) of the Finnish Sale of Goods Act, losses caused to the non-breaching party due to its mitigation of direct losses are not considered indirect losses.

It is somewhat illogical that when the buyer is able to fully fulfill a contract with a third party, any excess costs this has caused the buyer are considered direct losses and recoverable, but if the buyer produces goods that are of a lesser quality, an insufficient quantity of goods, goods, whose value has reduced due to delay or cannot fulfill the contract with a third party at all, losses due to these circumstances are considered indirect losses and not recoverable under the Finnish Sale of Goods Act.

Expenses from clarifying the situation or locating a defect in the goods, expenses from (vainly) installing a defective good, and transporting costs due to a breach of contract are considered direct losses[135]. When a buyer sells a non-conforming good to a third party, the legal costs from court proceedings against the third party are also direct losses[136].

Losses due to payments made because of a liquidated damages or a penalty clause in a contract with a third party are seen as indirect losses, and should be dealt with by means of a liquidated damages or a penalty clause in the contract between the buyer and the seller. It should also be noted that liquidated damages and penalty clauses are valid under Finnish law[137]. In a situation where it is unclear if the losses

[135] HE 93/1986, p. 125.
[136] KKO:2012:101.
[137] HE 93/1986, p. 127.

suffered are direct or indirect losses, damages should be awarded according to whichever interpretation is stricter[138].

When it comes to the distinction between indirect and direct losses and its relation to assessing a party's alleged negligence, there are two rulings of the Finnish Supreme Court that provide insight into the matter. The first one is from the year 1997.

This case is about washers that were used as parts for conductor rails. The importer of the washers, the seller, had delivered the washers to the buyer that had constructed conductor rails out of the washers and delivered the conductor rails to its customers.

Shortly thereafter there had been a short-circuit at one of the buyer's customer's production facility. Upon further inspection it was discovered that several of the washers delivered by the seller had cracked and pieces that had cracked off a washer had caused the short-circuit. The buyer had reimbursed its customer's losses due to the faulty washers and also had to inspect other conductor rails and replace faulty washers at its customers' facilities. The buyer then sued the seller claiming damages for losses caused by these actions but not for acquiring new washers. The buyer also claimed that the washers were defective due to their lack of durability.

The Court of Appeal of Helsinki agreed with the Circuit Court of Vantaa that this was an instance of the buyer choosing to subject itself to a lesser indirect loss in order to avoid greater direct loss, which cannot be interpreted against the interest of the buyer as section 67 (3) of the Finnish Sale of Goods Act provides. Therefore, the buyer had been awarded the full amount of damages it had claimed. The Finnish Supreme Court agreed that the washers were defective but overturned this ruling and found that the losses were losses due to damage to property other than the goods sold or other similar losses that are difficult to foresee described in section 67 (2) and, therefore, indirect losses. Only if the end product had been defective but physically

[138] HE 93/1986, p. 41.

intact from the time it was constructed, was there even a question of whether the losses caused were direct or indirect. As the seller had not been negligent or made express warranties in the sense of section 40 (3) of the Finnish Sale of Goods Act, the buyer's losses were not recoverable[139].

This case falls in line with the rule of interpreting the distinction between direct and indirect losses according to whichever interpretation is stricter. It also demonstrates the importance of good contract drafting, as compensation for inspecting and replacing products sold to a third party because the products are or have become defective due to defective parts bought is something that can be agreed on in the phase of contract drafting.

A case, where a seller had given an express warranty that the goods sold, laminate, would be suitable to be used as packaging for products made of potatoes was brought before the Finnish Supreme Court in 2007. In this case, packaging the potato products with this laminate had led to a batch of the products being spoiled as the laminate was not suitable for this use.

The buyer was seeking damages for various direct and indirect losses due to the defect in the laminate, including lost profits because the spoiled products could not be sold, reimbursements to consumers, shipping both the spoiled and replacement products, and costs for locating the defect. The Court of Appeal of Helsinki had found that the warranty given by the seller is the type of express warranty described in section 40 (3) of the Finnish Sale of Goods Act, and awarded the buyer all the damages it had claimed[140].

However, the Finnish Supreme Court found that for this provision to be applicable, the goods have to already exist and be specified as the contractual goods at the time of the conclusion of the contract. It is enough if it is specified that the contractual

[139] KKO:1997:61.
[140] KKO:2001:77.

goods are to be taken from a specified bunch of goods, but as the laminate had not yet been produced at the conclusion of the contract for it to be sold, the warranty given by the seller was not the express warranty described in section 40 (3) of the Finnish Sale of Goods Act. Instead, the Supreme Court found, that the losses caused to the buyer were due to the seller's negligence because of the warranty given, and awarded the buyer all the damages it had claimed[141]. This ruling might seem formalistic, but since the *travaux preparatoires* of the Finnish Sale of Goods Act define the demand for the goods to conform to the express warranty as an opposite of the goods being damaged after the conclusion of the contract,[142] it provides an important clarification to the correct interpretation the express warranty described in section 40 (3) of the Finnish Sale of Goods Act.

6.3 Exemptions from damages

A closer look at the Finnish Sale of Goods Act reveals that the CISG has been used as a model in its drafting phase[143]. Although the Finnish Sale of Goods Act was drafted for the legislative needs of domestic trade, there was a conscious effort from the Finnish legislators to avoid unnecessary differences between it and the CISG[144].

Taking this into consideration with the fact that the wordings of CISG article 79 (1) and section 27 (1) of the Finnish Sale of Goods Act are very much alike, it is clear that the similarities between these provisions are not merely lingual. The four-part requirement for an exempting impediment of CISG article 79 (1) is also confirmed by the *travaux preparatoires* of section 27 (1) of the Finnish Sale of Goods Act: the Finnish legislators name the causality requirement, the requirement for the impediment to be outside of the non-performing party's control, the unforeseeability

[141] KKO:2001:77.
[142] HE 93/1986, p. 94.
[143] Wilhelmsson/Sevón/Koskelo, p. 22; Mononen, p. 1391.
[144] HE 93/1986, p. 17.

requirement, and the unavoidability requirement as the requirements for an exemption from damages[145].

The causality requirement is defined by naming impediments, which would normally be grounds for an exemption from damages. Examples include an accident such as a fire or an explosion, a strike, and an import or export restriction. However, the mere existence of one of these events is not enough to be grounds for an exemption: the impediment has to hinder the performance of the contract. However, an absolute, objective impossibility to perform is not required[146]. This description, in its relative ambiguity, is in line with the causality requirement under the CISG.

The requirement for the impediment to be outside of the non-performing party's control is described by mentioning the concept of a sphere of control and by using examples. Circumstances resulting from actions of the non-performing party's staff (except for general strikes or similar situations not specifically caused by the non-performing party) are named as an example. Internal factors such as negligence, shortcomings in planning, organizing, administration or efficiency, and technical difficulties are also considered to be within a party's sphere of control. It makes no difference whether any fault or negligence can be found in the non-performing party's actions or not: the only significant factor is whether or not the cause of the impediment has fallen within the non-performing party's sphere of control in theory[147].

A party's sphere of control is set to be being very wide. All possible problems that are related to the party's production and business operations, including the actions of third parties for which it is reasonable, such as subcontractors and separate third parties it uses to fulfill the contract, are seen to fall under the party's sphere of control. External factors such as accidents, natural phenomena such as thunderbolts, storms, and floods, power outages, interruptions in road traffic, instances of

[145] HE 93/1986, p. 73-76.
[146] HE 93/1986, p. 73.
[147] HE 93/1986, p. 74-75; Sandvik, p. 658.

bankruptcy, and actions of authorities can fall outside of a party's sphere of control. However, each instance must be evaluated to determine if the party could have overcome it or foreseen it at the time of the conclusion of the contract[148]. This definition of the requirement for the impediment to be outside of the non-performing party's control provided by the Finnish Sale of Goods Act is very similar to the corresponding requirement of CISG article 79 (1).

The Finnish Sale of Goods Act's definition of the unforeseeability requirement is also very similar to the corresponding definition under the CISG. If, for example, a normally exempting impediment such as a general strike or an import or export restriction has been foreseeable at the time of the conclusion of the contract, these impediments are not exempting[149]. The unforeseeability requirement has also been confirmed by the Finnish Supreme Court both when applying the Finnish Sale of Goods Act and the general sales principles from before it had come to force[150].

The ruling to which the Finnish Sale of Goods Act was applied considers a situation between two natural persons, where a car racing hobbyist had sold a racing car and received a down payment. When the time had come for the rest of the purchase price to be paid, the buyer had not paid and a third person had informed the seller that the buyer had no intention to do so because he had not succeeded to receive funding. The seller had told the court that the buyer had been aware of his plan to continue with his car racing hobby, and, therefore, he knew or should have known the seller had planned to use the purchase price to pay for a new racing car. Because the seller had not received the purchase price from the buyer, he had had to make an agreement for additional time to pay for the new racing car he was buying, and this had meant he had to agree to a price increase for the new racing car. The seller had then sold the racing car the buyer had agreed to buy for a lesser price.

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[148] Mononen, p. 1392.
[149] HE 93/1986, p. 75.
[150] KKO:1944-II-131; KKO:1997:179.

The Court of Appeal of Rovaniemi found that the buyer was liable to reimburse the seller for both the price difference between the price agreed by the seller and the buyer and the price increase of the new racing car even when the buyer was not aware which car the seller had intended to buy. The Finnish Supreme Court, however, overturned that ruling and found that the buyer was only liable for the decrease of the price received for the original racing car although the buyer should have known that the purchase price would be used to buy a new racing car. This is because the buyer had not had knowledge of the seller's financial situation or the financing plans for the new racing car. The Supreme Court also hints at the unreasonability of the amount of the price increase in case the seller would be liable for it as the Supreme Court states that the price increase would be equal in amount to an overdue interest for the unpaid purchase price for approximately one and a half years[151].

This ruling is interesting for many reasons. Not only does the Finnish Supreme Court set the standard for foreseeability relatively high, as it can be expected that an average natural person does not possess the financial means to purchase a specialty vehicle, and because of this, as a natural person purchases a replacement vehicle for the one they sold and does not receiving funds from selling the old vehicle, this most likely leads to additional costs, but the Supreme Court also appears to make a statement on what is a reasonable amount for damages for additional costs due to the buyer's failure to supply the purchase price. The interpretation on what is reasonably foreseeable for a party seems stricter than the one applied under the CISG. However, this is understandable as the CISG is not applicable to purchases for personal use. When parties making business related purchases are subjected to the reasonable person standard, the pictured average reasonable person has a higher level of attention, knowledge, intelligence, and judgment than the one pictured when applying the reasonable person test to a natural person making purchases for personal use.

[151] KKO:1997:179.

A notable connection between the unforeseeability requirement and the unavoidability requirement is also described in the *travaux preparatoires* of the Finnish Sale of Goods Act: when an impediment, which has been unforeseeable at the conclusion of the contract, becomes foreseeable before the delivery of the goods, the seller has to make arrangements to overcome the impediment when it is possible[152]. The *travaux preparatoires* also specify that although section 27 (1) of the Finnish Sale of Goods Act only mentions the consequences of the impediment as something the non-performing party should not have been able to reasonably avoid or overcome, the impediment itself should also fulfill the unavoidability requirement[153]. This requirement also strongly resembles the corresponding requirement under CISG article 79 (1).

As a conclusion, the requirements for an exemption from damages under section 27 (1) of the Finnish Sale of Goods Act are in line with the requirements for an exemption from damages under CISG article 79 (1). Therefore, when it came to the Finnish drafters seeing it necessary to vary from some CISG provisions in the interest of better serving the domestic trade, it is safe to say that the four-part requirement of CISG article 79 (1) was not one of the instances when such means were seen as necessary. Section 27 (1) of the Finnish Sale of Goods Act and CISG article 79 (1) can be described as relatively similar.

6.4 Economic impediments and reasonability

An exempting economic impediment is specifically described in the *travaux preparatoires* of section 27 (1) of the Finnish Sale of Goods Act:

> *"Firstly, it is required that the delay is due to a circumstance, which hinders the timely performance of the contract. It is not enough that*

[152] HE 93/1986, p. 76.
[153] HE 93/1986, p. 76.

performing the contract becomes more difficult or more expensive than expected. On the other hand, the provision contains no demands of a so-called objective impossibility, in other words that the timely performance has become impossible to not only the seller but to any other person as well. Circumstances, which do not make the performance downright impossible, but exceptionally burdensome to the extent that they do objectively considering effectively prevent the contract from being fulfilled, can also sometimes be considered an impediment. On the other hand, other requirements set for an exemption from damages mean that only certain kinds of impediments can be successfully relied on in order to avoid liability for damages.

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As previously stated, the seller cannot usually rely on the fact that fulfilling the contract has become more expensive than expected. However, under certain circumstances economic matters can also prevent the contract from being fulfilled. Even when the seller can be freed from the duty to fulfill the contract under section 23 on the grounds, that fulfilling the contract would demand sacrifices, which would be unreasonable compared to the benefit to the buyer from the seller fulfilling the contract, this does not necessarily mean that the seller is also exempted from damages. On the other hand, difficulties to perform and impediments are in essence usually economic. In many cases it is not the case that fulfilling the contract has become downright impossible, but rather that the expenses that would need to be sacrificed in order to overcome the occurred event or its consequences would clearly exceed what could objectively be seen as conceivable contribution to fulfill said contract."[154]

[154] HE 93/1986, p. 73-74.

The former part strongly has a strong similarity to the causality requirement described in section 3.2.1 of this thesis. The description in the latter part clearly resembles the limit of sacrifice consideration described in section 5.2. The reasonability requirement is also acknowledged by the Finnish legislators in the latter part. However, similarly to the drafters of the CISG, the Finnish legislators do not define the exact requirements for exempting economic impediments, but leave it up to the Finnish courts to define them individually for each case. It can be said that the section 27 (1) of the Finnish Sale of Goods Act shares the weakest point of CISG article 79 (1) when it comes to interpreting economic impediments: vagueness. However, as the Finnish Sale of Goods Act is meant to be interpreted by Finnish legal professionals, this vagueness is not as dangerous as the CISG's. This is because when there are interpreters from many very different legal backgrounds, it is much more likely that the interpretations are not coincident, which results in a decrease in predictability. When it comes to the Finnish Sale of Goods Act, the vast majority of relevant cases are ruled on by Finnish courts, and there is a chance to apply to a court of higher instance. In case of a wrong or unusual interpretation of Finnish law, there is chance to apply to the Finnish Supreme Court[155], and as there is one court that ultimately makes the decisions on correct interpretation, wrong interpretations are very likely to get corrected and predictability attained.

A requirement of reasonability is also expressed in section 70 (2) of the Finnish Sale of Goods Act. According to the provision, if the amount of damages claimed would be unreasonable when the possibilities of the breaching party to foresee and prevent the loss as well as other circumstances are taken into account, the amount of the damages can be adjusted to a more reasonable level. This requirement of reasonability was also one of the general sales and other principles of law applied already before the Finnish Sale of Goods Act came into force, especially as it was described in the Finnish Tort Liability Act, which came into force in the year 1972[156].

[155] Finnish Code of Judicial Procedure, chapter 30, section 3.
[156] Finnish Tort Liability Act, chapter 2, section 1 (2); KKO:1985-II-51; KKO:2006:56.

The guidelines for evaluating reasonability in this sense are set in the *travaux preparatoires* of the Finnish Sale of Goods Act:

> *"Whether and to which extend the damages should be adjusted has to be evaluated taking into account the circumstances of each case. Damages can be adjusted irrespective of whether they are due to direct or indirect loss. As is stated in the provision, an adjustment is possible primarily when it comes to loss, which has been difficult for the liable party to foresee and prevent.*
>
> *When an adjustment of damages is considered, among other things the nature of the contract of sale, who the parties are, the reason for the breach, the level of negligence and other actions of the breaching party, the actions of the party suffering the loss, the extend of the loss, and possible insurance policies taken and opportunities to take out insurance policies have to be taken into account. If the breach of contract is the result of gross negligence of the liable party, there are no grounds for an adjustment unless there are exceptional, very cogent reasons."*[157]

The Finnish Supreme Court has found that in a case, where there was an increase of approximately 129 per cent in production costs of the goods sold and therefore, the contractual price would not even cover the price of the material needed for the goods, the contractual price was unreasonable to the extent that the court adjusted the amount of damages down by a third. The damages awarded by a Court of Appeal had the contractual price of the undelivered goods when the seller had refused to deliver the goods for the contractual price and the buyer had then purchased substituting goods. The price increase occurred because the market price of skim

[157] HE 93/1986, p. 131-132.

milk increased by 130 per cent due to a cancellation of a government subsidy for dairy products[158].

This ruling is interesting as the Finnish Supreme Court found that it would be unreasonable for the seller to bear the additional costs alone even when the parties had discussed the possibility of an increase in price due to governmental action as they had negotiated the contract. The District Court and the Court of Appeal had disagreed with the Supreme Court on the basis of the price increase not making it overwhelming for the seller to fulfill the contract.

It has to be noted that the Finnish Supreme Court did not apply the Finnish Sale of Goods Act to this case as the case is from before the Finnish Sale of Goods Act came into force. The applicable law was the Finnish Code of Sales. However, the scope of the Finnish Code of Sales was very limited as it only had some very general rules for sales, and it was also badly outdated being from the year 1734. To deal with this situation, Finnish courts had developed a practice of applying general principles of sales. When it comes to the general principles of sales related to the reasonability analysis and setting the amount of damages in this ruling, the general principles of sales were very much coincident with the Finnish Sale of Goods Act (apart from damages due to indirect losses in the sale of non-specific goods, in which case the indirect losses were recoverable under the sales principles even when there was no negligence)[159].

This case is a good demonstration of the eagerness of Finnish courts to redistribute the contractual risk on grounds of reasonability even when the parties have agreed on the contractual risk allocation. This tendency to interpret section 70 (2) of the Finnish Sale of Goods Act very broadly is unfortunate as the principle of party autonomy is also an important aspect of the Finnish Sale of Goods Act. However, in the view of the Finnish legislators there is a problem with relatively unlimited party

[158] KKO:1982-II-141.
[159] HE 93/1986, p. 5-7; 15.

autonomy, as the danger of a party misusing contractual freedom is present even when the parties are equals[160].

This view is overly protective. When two equal parties draft a contract and agree on the distribution of risk, their decision should be respected. The Finnish courts' practice of redistributing the contractual risk seriously and unnecessarily threatens the parties' right to freely conclude a contract and to trust in the binding nature of the contract they have concluded. The requirement for the damages awarded to be reasonable should be interpreted more similarly to article 79 (1) of the CISG: as a minimum level safety net in cases where one party is clearly in a weaker position than the other.

[160] HE 93/1986, p. 14.

7 CONCLUSIONS

Both the reasoning behind introducing the CISG and the guidelines for its interpretation in unclear cases are relatively clear and easily obtainable. In spite of this, the missing consensus in interpreting the CISG, when not entirely surprising, is in parts based on clear misinterpretations and inadequate knowledge about international legal instruments. As legal education still mostly focuses on the national law of the educational institution, it is sadly still mostly up to individual legal professionals to educate themselves to reach the level needed to correctly apply the CISG or other international legal instruments. The relative unpopularity of the CISG is a logical consequence of the varying views: parties need predictability when it comes to interpreting their contracts and the applicable law. Therefore, battling the problem of the homeward trend is an important task if there is a wish for any international legal instruments to be a complete success without there being a specific court of last instance with an extensive jurisdiction to determine the instruments' correct interpretation. The most obvious way to accomplish this would be to direct more attention to international legal instruments in legal education.

When it comes to applying CISG article 79 (1) to economic impediments, the provision itself contains the reasonability requirement. Therefore, it cannot be overlooked when searching for tools for evaluating exempting economic circumstances. Since reasonability is not expressly defined in the CISG, underlying principles of the CISG are the primary source for a more precise meaning of the concept. The reasonable person test may also prove to be useful, and above all, party autonomy has to be respected if the parties have agreed on risk allocation or have contractual clauses on exemption. Known, established trade usages are considered an implied part of the contract between the parties and, therefore, have to also be taken into consideration in both the drafting phase of the contract and in the instance a non-performing party claims to be exempted due to an economic (or regular) impediment.

As it is generally advisable for parties to exert their party autonomy with precise contract drafting, parties should agree on risk allocation in their contractual relationship in a way, which provides them with additional predictability when it comes to assessing the lengths a party has to go in order to fulfill the contract. If this fails, in the very least applying the reasonability requirement when considering possible exempting economic impediments provides a level minimum protection to a weaker contractual party.