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**United Nations Commission  
on International Trade Law**

**UNCITRAL Digest of case law on the United Nations  
Convention on the International Sale of Goods\***

*Article 79*

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

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

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

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

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

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\* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

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

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

## Overview of article 79

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

2. Article 79 (2) deals with the situation where a party engages a third person “to perform the whole or a part of the contract” and the third person fails to perform.

3. Article 79 (3), which appears not to have been the subject of significant attention in case law, limits the duration of an exemption to the time during which the impediment that justifies the exemption continues to exist. Article 79 (4) requires a party that wishes to claim an exemption for non-performance “to give notice to the other party of the impediment and its effect on his ability to perform”. The second sentence of article 79 (4) specifies that failure to give such notice “within a reasonable time after the party who fails to perform knew or ought to have known of the impediment” will make the party who failed to give proper notice “liable for damages resulting from such non-receipt”. Article 79 (4) also appears not to have attracted significant attention in case law, although one decision did note that the party claiming exemption in that case had satisfied the notice requirement.<sup>1</sup>

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

## Article 79 in general

5. Several decisions have suggested that exemption under article 79 requires satisfaction of something in the nature of an “impossibility” standard.<sup>2</sup> One decision

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<sup>1</sup> Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/386.htm>.

<sup>2</sup> Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg,

has compared the standard for exemption under article 79 to those for excuse under national legal doctrines of *force majeure*, economic impossibility, and excessive onerousness<sup>3</sup>—although another decision asserted that article 79 was of a different nature than the domestic Italian hardship doctrine of *eccessiva onerosità sopravvenuta*.<sup>4</sup> It has also been stated that, where the CISG governs a transaction, article 79 preempts and displaces similar national doctrines such as *Wegfall der Geschäftsgrundlage* in German law<sup>5</sup> and *eccesiva onerosità sopravvenuta*.<sup>6</sup> Another decision has emphasized that article 79 should be interpreted in a fashion that does not undermine the Convention's basic approach of imposing liability for a seller's delivery of non-conforming goods without regard to whether the failure to perform resulted from the seller's fault.<sup>7</sup> And a court has linked a party's right to claim exemption under article 79 to the absence of bad faith conduct by that party.<sup>8</sup>

6. Many decisions have suggested that the application of article 79 focuses on an assessment of the risks that a party claiming exemption assumed when it concluded the contract.<sup>9</sup> The decisions suggest, in other words, that the essential issue is to determine whether the party claiming an exemption assumed the risk of the event that caused the party to fail to perform. Thus in one case, a seller had failed to make a delivery because the seller's supplier could not supply the goods without an immediate infusion of substantial cash, and the seller did not have the funds because the buyer had justifiably (but unexpectedly) refused to pay for earlier deliveries.

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Germany, 28 February 1997] (suggesting that a seller can be exempt from liability for failure to deliver only if suitable goods were no longer available in the market); CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993]. But see Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/386.htm>, where the court implied that article 79 imposes something less than an impossibility standard when it held that the buyer was exempt from interest for a delayed payment of the price, even though timely payment was clearly possible—albeit not reasonably to be expected in the circumstances, according to the court.

<sup>3</sup> CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

<sup>4</sup> CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993] (see full text of the decision).

<sup>5</sup> CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (see full text of the decision).

<sup>6</sup> CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993].

<sup>7</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

<sup>8</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>9</sup> See CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (in discussing application of article 79, tribunal asserts “[o]nly the apportionment of the risk in the contract is relevant here”) (see full text of the decision); CLOUT case No. 271 [Bundesgerichtshof, Germany 24 March 1999] (“The possibility of exemption under CISG article 79 does not change the allocation of the contractual risk”). For other cases suggesting or implying that the question of exemption under article 79 is fundamentally an inquiry into the allocation of risk under the contract, see Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex; Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; ICC Court of Arbitration, award No. 8128, 1995, Unilex; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995].

The seller's claim of exemption under article 79 was denied because the buyer, as per the contract, had pre-paid for the missing delivery and the tribunal found that this arrangement clearly allocated to the seller risks relating to the procurement of goods.<sup>10</sup> The risk analysis approach to exemption under article 79 is also evident in cases raising issues concerning the relationship between article 79 and risk of loss rules. Thus where the seller delivered caviar and risk of loss had passed to the buyer, but international sanctions against the seller's State prevented the buyer from taking immediate possession and control of the caviar so that it had to be destroyed, an arbitral tribunal held that the buyer was not entitled to an exemption when it failed to pay the price: the tribunal emphasized that the loss had to be sustained by the party who bore the risk at the moment the *force majeure* occurred.<sup>11</sup> And where a seller complied with its obligations under CISG article 31 by timely delivering goods to the carrier (so that, presumably, risk of loss had passed to the buyer), a court found that the seller was exempt under article 79 from damages caused when the carrier delayed delivering the goods.<sup>12</sup>

7. Article 79 has been invoked with some frequency in litigation, but with limited success. In two cases, a seller successfully claimed exemption for a failure to perform,<sup>13</sup> but in at least nine other cases a seller's claim of exemption was denied.<sup>14</sup> Buyers have also twice been granted an exemption under article 79<sup>15</sup> but have been denied in at least six other cases.<sup>16</sup>

<sup>10</sup> See CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

<sup>11</sup> CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996].

<sup>12</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

<sup>13</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex (seller granted exemption from damages for delivery of non-conforming goods, although the court ordered the seller to give the buyer a partial refund); CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from damages for late delivery of goods).

<sup>14</sup> CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995]; Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999], *affirming* (on somewhat different reasoning) CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]; Arbitration Case 56/1995, Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; ICC Court of Arbitration, award No. 8128, 1995, Unilex; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]; Landgericht Ellwangen, Germany, 21 August 1995, Unilex. See *also* CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989] (tribunal applies Yugoslav national doctrines, but also indicates that exemption would have been denied under article 79).

<sup>15</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, 22 January 1997, Unilex (buyer that had paid price for goods granted exemption for damages caused by its failure to take delivery); Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/386.htm> (buyer granted exemption from liability for interest and damages due to late payment).

<sup>16</sup> CLOUT case No. 142 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 123/1992 of 17 October 1995]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russia, 16 February 1998, Unilex; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex; Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria,

## Breaches for which an exemption is available: exemption for delivery of non-conforming goods

8. It has been questioned whether a seller that has delivered non-conforming goods is eligible to claim an exemption under article 79. On appeal of a decision expressly asserting that such a seller could claim an exemption (although it denied the exemption on the particular facts of the case),<sup>17</sup> a court recognized that the situation raised an issue concerning the scope of article 79.<sup>18</sup> The court, however, reserved the issue because the particular appeal could be disposed of on other grounds. More recently, that court again noted that it had not yet resolved this issue, although its discussion seemed to suggest that article 79 might well apply when a seller delivered non-conforming goods.<sup>19</sup> Nevertheless, at least one case has in fact granted an article 79 exemption to a seller that delivered non-conforming goods.<sup>20</sup>

9. Decisions have granted exemptions for the following breaches: a seller's late delivery of goods<sup>21</sup>; a seller's delivery of non-conforming goods<sup>22</sup>, a buyer's late payment of the price<sup>23</sup>; and a buyer's failure to take delivery after paying the price.<sup>24</sup> Parties have also claimed exemption for the following breaches, although the claim was denied on the particular facts of the case: a buyer's failure to pay the price<sup>25</sup>; a

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12 February 1998, Unilex; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995]; CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993].

<sup>17</sup> CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

<sup>18</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

<sup>19</sup> Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at <http://www.cisg.law.pace.edu/cisg/text/020109g1german.html>.

<sup>20</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>21</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

<sup>22</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>23</sup> Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/386.htm>.

<sup>24</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, 22 January 1997, Unilex.

<sup>25</sup> CLOUT case No. 142 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 123/1992 of 17 October 1995]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russia, 16 February 1998, Unilex; CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996]; Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995].

buyer's failure to open a letter of credit<sup>26</sup>; a seller's failure to deliver goods<sup>27</sup>; and a seller's delivery of non-conforming goods.<sup>28</sup>

### Article 79 (1): "impediment" requirement

10. As a prerequisite to an exemption, article 79 (1) requires that a party's failure to perform be due to an "impediment" that meets certain additional requirements (e.g., that it was beyond the control of the party, that the party could not reasonably be expected to have taken it into account at the time of the conclusion of the contract, etc. . .). One decision has used language suggesting that an "impediment" must be "an unmanageable risk or a totally exceptional event, such as *force majeure*, economic impossibility or excessive onerousness".<sup>29</sup> Another decision asserted that conditions leading to the delivery of defective goods can constitute an impediment under article 79<sup>30</sup>; on appeal to a higher court, however, the exemption was denied on other grounds and the lower court's discussion of the impediment requirement was declared moot.<sup>31</sup> More recently, one court appeared to suggest that the non-existence of means to prevent or detect a lack of conformity in the goods may well constitute a sufficient impediment for exemption of the seller under article 79.<sup>32</sup> Yet another decision indicated that a prohibition on exports by the seller's country constituted an "impediment" within the meaning of article 79 for a seller who failed to deliver the full quantity of goods, although the tribunal denied the exemption because the impediment was foreseeable when the contract was concluded.<sup>33</sup>

<sup>26</sup> CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993]; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex.

<sup>27</sup> CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995]; Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989]; Arbitration before the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; ICC Court of Arbitration, award No. 8128, 1995, Unilex; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

<sup>28</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]; Landgericht Ellwangen, Germany, 21 August 1995, Unilex. See *also* Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex (denying exemption for seller that failed to deliver because it could not acquire conforming goods).

<sup>29</sup> CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

<sup>30</sup> CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]. The court nevertheless denied the seller claim of exemption on the facts of the particular case.

<sup>31</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]. For further discussion of the question whether a seller can claim exemption under article 79 for delivery of non-conforming goods, see *supra* para. 8.

<sup>32</sup> Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at <http://www.cisg.law.pace.edu/cisg/text/020109g1german.html>.

<sup>33</sup> Arbitration before the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex. The seller also claimed exemption for failing to deliver the goods (coal) because of a strike by its country's coal miners, but the court denied the claim because the seller was already in default when the strike occurred.

11. Other available decisions apparently have not focused on the question of what constitutes an “impediment” within the meaning of article 79 (1). In those decisions in which a party was deemed exempt under article 79, the tribunal presumably was satisfied that the impediment requirement had been met. The impediments to performance in those cases were: refusal by State officials to permit importation of the goods into the buyer’s country (found to exempt the buyer, who had paid for the goods, from liability for damages for failure to take delivery)<sup>34</sup>; the manufacture of defective goods by the seller’s supplier (found to exempt the seller from damages for delivery of non-conforming goods where there was no evidence the seller acted in bad faith)<sup>35</sup>; the failure of a carrier to meet a guarantee that the goods would be delivered on time (found, as an alternative ground for denying the buyer’s claim to damages, to exempt the seller from damages for late delivery where the seller had completed its performance by duly arranging for carriage and turning the goods over to the carrier)<sup>36</sup>; seller’s delivery of non-conforming goods (found to exempt the buyer from liability for interest for a delay in paying the price).<sup>37</sup>

12. In certain other cases, tribunals that refused to find an exemption use language suggesting that there was not an impediment within the meaning of article 79 (1), although it is often not clear whether the result was actually based on failure of the impediment requirement or on one of the additional elements going to the character of the required impediment (e.g., that it be beyond the control of the party claiming an exemption). Decisions dealing with the following situations fall into this category: a buyer who claimed exemption for failing to pay the price because of inadequate reserves of currency that was freely convertible into the currency of payment, where this situation did not appear in the exhaustive list of excusing circumstances catalogued in the written contract’s *force majeure* clause<sup>38</sup>; a seller who claimed exemption for failing to deliver based on an emergency halt to production at the plant of the supplier who manufactured the goods<sup>39</sup>; a buyer who claimed exemption for refusing to pay for delivered goods because of negative market developments, problems with storing the goods, revaluation of the currency of payment, and decreased trade in the buyer’s industry;<sup>40</sup> a seller who claimed exemption for failing to deliver because its supplier had run into extreme financial difficulty, causing it to discontinue producing the goods unless the seller provided it a “considerable amount” of financing.<sup>41</sup>

<sup>34</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, 22 January 1997, Unilex.

<sup>35</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>36</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (see full text of the decision).

<sup>37</sup> Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/386.htm>.

<sup>38</sup> CLOUT case No. 142 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 123/1992 of 17 October 1995].

<sup>39</sup> CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995].

<sup>40</sup> Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex.

<sup>41</sup> CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

13. The bulk of available decisions that deny a claimed exemption do so on the basis of requirements other than the impediment requirement, and without making clear whether the tribunal judged that the impediment requirement had been satisfied. The claimed impediments in such cases include the following: theft of the buyer's payment from a foreign bank to which it had been transferred<sup>42</sup>; import regulations on radioactivity in food that the seller could not satisfy<sup>43</sup>; increased market prices for tomatoes caused by adverse weather in the seller's country<sup>44</sup>; significantly decreased market prices for the goods occurring after conclusion of the contract but before the buyer opened a letter of credit<sup>45</sup>; an international embargo against the seller's country that prevented the buyer from clearing the goods (caviar) through customs or making any other use of the goods until after their expiration date had passed and they had to be destroyed<sup>46</sup>; a remarkable and unforeseen rise in international market prices for the goods that upset the equilibrium of the contract but did not render the seller's performance impossible<sup>47</sup>; failure of the seller's supplier to deliver the goods to seller and a tripling of the market price for the goods after the conclusion of the contract;<sup>48</sup> failure of the seller's supplier to deliver the goods because the shipping bags supplied by the buyer (made to specifications provided by the seller) did not comply with regulatory requirements of the supplier's government<sup>49</sup>; failure of a third party to whom buyer had paid the price (but who was not an authorized collection agent of the seller) to transmit the payment to the seller<sup>50</sup>; an order by the buyer's government suspending payment of foreign debts<sup>51</sup>; chemical contamination of the goods (paprika) from an unknown source.<sup>52</sup>

### Treatment of particular impediments: breach by suppliers

14. Certain claimed impediments appear with some frequency in the available decisions. One such impediment is failure to perform by a third-party supplier to whom the seller looked as the source for the goods.<sup>53</sup> In a number of cases sellers have invoked their supplier's default as an impediment that, they argued, should

<sup>42</sup> Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russia, 16 February 1998, Unilex.

<sup>43</sup> Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex.

<sup>44</sup> Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

<sup>45</sup> Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex.

<sup>46</sup> CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (see full text of the decision).

<sup>47</sup> CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993].

<sup>48</sup> CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

<sup>49</sup> ICC Court of Arbitration, award No. 8128, 1995, Unilex.

<sup>50</sup> CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995].

<sup>51</sup> CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (see full text of the decision).

<sup>52</sup> Landgericht Ellwangen, Germany, 21 August 1995, Unilex. An arbitral panel noted on the basis of domestic Yugoslavian law that a 13.16 per cent rise in the cost of steel—which the tribunal found was a predictable development—would not exempt the seller from liability for failing to deliver the steel (the panel suggested that the domestic Yugoslavian law was consistent with art. 79); see CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989] (see full text of the decision).

<sup>53</sup> This situation also raises issues concerning the applicability of article 79 (2)—a topic that is discussed *infra*, para. 21.



exempt the seller from liability for its own resulting failure to deliver the goods<sup>54</sup> or for its delivery of non-conforming goods.<sup>55</sup> Several decisions have suggested that the seller normally bears the risk that its supplier will breach, and that the seller will not generally receive an exemption when its failure to perform was caused by its supplier's default.<sup>56</sup> In a detailed discussion of the issue, a court explicitly stated that under the CISG the seller bears the "acquisition risk"—the risk that its supplier will not timely deliver the goods or will deliver non-conforming goods—unless the parties agreed to a different allocation of risk in their contract, and that a seller therefore cannot normally invoke its supplier's default as a basis for an exemption under article 79.<sup>57</sup> The court, which linked its analysis to the Convention's no-fault approach to liability for damages for breach of contract, therefore held that the seller in the case before it could not claim an exemption for delivering non-conforming goods furnished by a third-party supplier. It disapproved of a lower court's reasoning which had suggested that the only reason the seller did not qualify for an exemption was because a proper inspection of the goods would have revealed the defect.<sup>58</sup> Nevertheless, another court has granted a seller an exemption from damages for delivery of non-conforming goods on the basis that the defective merchandise was manufactured by a third party, which the court found was an exempting impediment as long as the seller had acted in good faith.<sup>59</sup>

### **Treatment of particular impediments: change in the cost of performance or the value of the goods**

15. Claims that a change in the financial aspects of a contract should exempt a breaching party from liability for damages have also appeared repeatedly in the available decisions. Thus sellers have argued that an increase in the cost of

<sup>54</sup> CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995]; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]; ICC Court of Arbitration, award No. 8128, 1995, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

<sup>55</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]; Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>56</sup> CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; ICC Court of Arbitration, award No. 8128, 1995; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]. In another case, the seller claimed that chemical contamination of the goods did not result from its processing, but the court declared that the source of the contamination was irrelevant for purposes of article 79; see Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

<sup>57</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (see full text of the decision).

<sup>58</sup> The lower court opinion is CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]. Another case also suggested that a seller's opportunity to discover a lack of conformity by pre-delivery inspection was relevant in determining the seller's entitlement to exemption under article 79; see Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

<sup>59</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

For discussion of the requirement that an impediment be beyond a party's control as applied to situations in which a seller's failure of performance is due to a default by its supplier, see para. 16 *infra*.

performing the contract should excuse them from damages for failing to deliver the goods,<sup>60</sup> and buyers have asserted that a decrease in the value of the goods being sold should exempt them from damages for refusing to take delivery of and pay for the goods.<sup>61</sup> These arguments have not been successful, and several courts have expressly commented that a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract.<sup>62</sup> Thus in denying a buyer's claim to an exemption after the market price for the goods dropped significantly, one court asserted the such price fluctuations are foreseeable aspects of international trade, and the losses they produce are part of the "normal risk of commercial activities".<sup>63</sup> Another court denied a seller an exemption after the market price for the goods tripled, commenting that "it was incumbent upon the seller to bear the risk of increasing market prices . . .".<sup>64</sup> Another decision indicated that article 79 did not provide for an exemption for hardship as defined in the domestic Italian doctrine of *eccesiva onerosità sopravvenuta*, and thus under the CISG a seller could not have claimed exemption from liability for non-delivery where the market price of the goods rose "remarkably and unforeseeably" after the contract was concluded.<sup>65</sup> Other reasons advanced for denying exemptions because of a change in financial circumstances are that the consequences of the change could have been overcome,<sup>66</sup> and that the possibility of the change should have been taken into account when the contract was concluded.<sup>67</sup>

### **Requirement that the impediment be beyond the control of the party claiming exemption**

16. In order to qualify for an exemption, article 79 (1) requires that a party's failure to perform be due to an impediment that was "beyond his control". It has been held that this requirement was not satisfied, and thus it was proper to deny an

<sup>60</sup> Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]. See also CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993] (court's opinion concerning whether article 79 would exempt a seller from liability for non-delivery where the market price of the goods rose "remarkably and unforeseeably" after the contract was concluded).

<sup>61</sup> Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex; Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex.

<sup>62</sup> See Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

<sup>63</sup> Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995.

<sup>64</sup> CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

<sup>65</sup> CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993] (see full text of the decision).

<sup>66</sup> Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

<sup>67</sup> Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989].

exemption, where a buyer paid the price of the goods to a foreign bank from which the funds were stolen and never received by the seller.<sup>68</sup> On the other hand, some decisions have found an impediment beyond the control of a party where governmental regulations or the actions of governmental officials prevented a party's performance. Thus a buyer that had paid for the goods was held exempt from liability for damages for failing to take delivery where the goods could not be imported into the buyer's country because officials would not certify their safety.<sup>69</sup> Similarly, an arbitral tribunal found that a prohibition on the export of coal implemented by the seller's State constituted an impediment beyond the control of the seller, although it denied the seller an exemption on other grounds.<sup>70</sup> Several decisions have focused on the issue whether a failure of performance by a third party who was to supply the goods to the seller constituted an impediment beyond the seller's control.<sup>71</sup> In one decision, the court found that the fact defective goods had been manufactured by a third party satisfied the requirement, provided the seller had not acted in bad faith.<sup>72</sup> Where the seller's supplier could not continue production of the goods unless the seller advanced it "a considerable amount of cash", however, an arbitral tribunal found that the impediment to the seller's performance was not beyond its control, stating that a seller must guarantee its financial ability to perform even in the face of subsequent, unforeseeable events, and that this principle also applied to the seller's relationship with its suppliers.<sup>73</sup> And where the seller's supplier shipped to the buyer, on the seller's behalf, a newly-developed type of vine-wax that proved to be defective, the situation was found not to involve an impediment beyond the seller's control: a lower court held that the requirements for exemption were not satisfied because the seller would have discovered the problem had it fulfilled its obligation to test the wax before it was shipped to its buyer<sup>74</sup>; on appeal, a higher court affirmed the result but rejected the lower court's reasoning, stating that the seller would not qualify for an exemption regardless of whether it breached an obligation to examine the goods.<sup>75</sup>

<sup>68</sup> Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russia, 16 February 1998, Unilex (abstract).

<sup>69</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, 22 January 1997, Unilex.

<sup>70</sup> Arbitration Case 56/1995 of the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex (denying an exemption because the impediment was foreseeable at the time of the conclusion of the contract).

<sup>71</sup> For further discussion of the application of article 79 to situations in which the seller's failure of performance was caused by a supplier's default, see *supra* para. 14, and *infra* paras. 17, 18 and 21.

<sup>72</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>73</sup> CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

<sup>74</sup> CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

<sup>75</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

A tribunal that finds a party exempt under article 79 presumably is satisfied that the requirement that an impediment be beyond the control of a party has been met, whether or not the tribunal expressly discusses the element. Without discussing the requirement, the following decisions held that the prerequisites for exemption under article 79 had been met: CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from damages for late delivery of goods); Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex (buyer granted exemption from liability for interest and damages due to late payment).

### **Requirement that the party claiming exemption could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract**

17. To satisfy the requirements for an exemption under article 79, a party's failure to perform must be due to an impediment that the party "could not reasonably be expected to have taken . . . into account at the time of the conclusion of the contract". Failure to satisfy this requirement was one reason cited by an arbitral tribunal for denying an exemption to a seller that had failed to deliver the goods because of an emergency production stoppage at the plant of a supplier that was manufacturing the goods for the seller.<sup>76</sup> Several decisions have denied an exemption when the impediment was in existence and should have been known to the party at the time the contract was concluded. Thus where a seller claimed an exemption because it was unable to procure milk powder that complied with import regulations of the buyer's State, the court held that the seller was aware of such regulations when it entered into the contract and thus took the risk of locating suitable goods.<sup>77</sup> Similarly, a seller's claim of exemption based on regulations prohibiting the export of coal<sup>78</sup> and a buyer's claim of exemption based on regulations suspending payment of foreign debts<sup>79</sup> were both denied because, in each case, the regulations were in existence (and thus should have been taken into account) at the time of the conclusion of the contract. Parties have been charged with responsibility for taking into account the possibility of changes in the market value of goods because such developments were foreseeable when the contract was formed, and claims that such changes constitute impediments that should exempt the adversely-affected party have been denied.<sup>80</sup>

<sup>76</sup> CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995]. For further discussion of the application of article 79 to situations in which the seller's failure of performance was caused by a supplier's default, see *supra* paras. 14 and 16, and *infra* paras. 18 and 21.

<sup>77</sup> Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex.

<sup>78</sup> Arbitration Case 56/1995 of the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex.

<sup>79</sup> CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (see full text of the decision).

<sup>80</sup> Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex (a significant drop in the world market price of frozen raspberries was "foreseeable in international trade" and the resulting losses were "included in the normal risk of commercial activities"; thus buyer's claim of exemption was denied); Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex (negative developments in the market for the goods "were to be considered part of the buyer's commercial risk" and "were to be reasonably expected by the buyer upon conclusion of the contract"); CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989] (when the contract was concluded a 13.16 per cent rise in steel prices in approximately three months was predictable because market prices were known to fluctuate and had begun to rise at the time the contract was formed; although decided on the basis of domestic law, the court indicated that the seller would therefore have been denied an exemption under article 79) (see full text of the decision).

A tribunal that finds a party exempt under article 79 presumably believes the requirement that the party could not reasonably have taken the impediment into account when entering into the contract has been met, whether or not the tribunal expressly discusses that element. Although

## Requirement that the party claiming exemption could not reasonably be expected to avoid or overcome the impediment

18. In order to satisfy the prerequisites for an exemption under article 79 (1), a party's failure to perform must be due to an impediment that the party could not reasonably be expected to have avoided. In addition, it must not reasonably have been expected that the party would overcome the impediment or its consequences. Failure to satisfy these requirements were cited by several tribunals in denying exemptions to sellers whose non-performance was allegedly caused by the default of their suppliers. Thus it has been held that a seller whose supplier shipped defective vine wax (on the seller's behalf) directly to the buyer,<sup>81</sup> as well as a seller whose supplier failed to produce the goods due to an emergency shut-down of its plant,<sup>82</sup> should reasonably have been expected to have avoided or surmounted these impediments, and thus to have fulfilled their contractual obligations.<sup>83</sup> Similarly, it has been held that a seller of tomatoes was not exempt for its failure to deliver when heavy rainfalls damaged the tomato crop in the seller's country, causing an increase in market prices: because the entire tomato crop had not been destroyed, the court ruled, the seller's performance was still possible, and the reduction of tomato supplies as well as their increased cost were impediments that seller could overcome.<sup>84</sup>

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they did not discuss the requirement, the following decisions held that the prerequisites for exemption under article 79 had been met: CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from damages for late delivery of goods); Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex (buyer granted exemption from liability for interest and damages due to late payment); Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex (seller granted exemption from damages for delivery of non-conforming goods, although the court ordered the seller to give the buyer a partial refund); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, 22 January 1997, Unilex (abstract) (buyer that had paid price for goods granted exemption for damages caused by its failure to take delivery).

<sup>81</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999], *affirming* (on somewhat different reasoning) CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]. In CLOUT case No. 271, the court generalized that a supplier's breach is normally something that, for purposes of article 79, the seller must avoid or overcome.

<sup>82</sup> CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995].

<sup>83</sup> For further discussion of the application of article 79 to situations in which the seller's failure of performance was caused by a supplier's default, see *supra* paras. 14, 16 and 17, and *infra* para. 21.

<sup>84</sup> Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

A tribunal that finds a party exempt under article 79 presumably believes the requirements that the party could not reasonably be expected to have avoided the impediment or to have overcome it or its consequences have been met, whether or not the tribunal expressly discusses these elements. Although they did not discuss these requirements, the following decisions held that the prerequisites for exemption under article 79 had been met: CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from damages for late delivery of goods); Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex (buyer granted exemption from liability for interest and damages due to late payment); Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex (seller granted exemption from damages for delivery of non-conforming goods, although the court ordered the seller to give the buyer a partial refund); Tribunal of International Commercial Arbitration at the Russian

## Requirement that failure to perform be “due to” the impediment

19. In order to qualify for an exemption under article 79 (1), a party’s failure to perform must be “due to” an impediment meeting the requirements discussed in the preceding paragraphs. This causation requirement has been invoked as a reason to deny a party’s claim to exemption, as where a buyer failed to prove that its default (failure to open a documentary credit) was caused by its government’s suspension of payment of foreign debt.<sup>85</sup> The operation of the causation requirement may also be illustrated by an appeal in litigation involving a seller’s claim to be exempt under article 79 from damages for delivering defective grape vine wax . The seller argued it was exempt because the wax was produced by a third party supplier that had shipped it directly to the buyer. A lower court denied the seller’s claim because it found that the seller should have tested the wax, which was a new product, in which event it would have discovered the problem.<sup>86</sup> Hence, the court reasoned, the supplier’s faulty production was not an impediment beyond its control. On appeal to a higher court, the seller argued that all vine wax from its supplier was defective that year, so that even if it had sold a traditional type (which it presumably would not have had to examine) the buyer would have suffered the same loss.<sup>87</sup> The court dismissed the argument because it rejected the lower court’s reasoning: according to the court, the seller’s responsibility for defective goods supplied by a third party did not depend on its failure to fulfil an obligation to examine the goods; rather, the seller’s liability arose from the fact that, unless agreed otherwise, sellers bear the “risk of acquisition”, and the seller would have been liable for the non-conforming goods even if it was not obliged to examine them before delivery. The court apparently found that, even if the seller had sold defective vine wax that it was not obliged to examine, the default would still not have been caused by an impediment that met the requirements of article 79.

## Burden of proof

20. Several decisions assert that article 79 (1)—in particular the language indicating that a party is exempt “if he proves that the failure [to perform] was due to an impediment beyond his control . . .”—expressly allocates the burden of proving the requirements for exemption to the party claiming the exemption, thus also establishing that questions concerning the burden of proof are matters within the scope of the Convention.<sup>88</sup> Such decisions also maintain that article 79 (1)

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Federation Chamber of Commerce, 22 January 1997, Unilex (buyer that had paid price for goods granted exemption for damages caused by its failure to take delivery).

<sup>85</sup> CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (see full text of the decision). See *also* Arbitration Case 56/1995 before the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex (seller’s argument that a miners’ strike should exempt it from damages for failure to deliver coal rejected because at the time of the strike seller was already in default).

<sup>86</sup> CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

<sup>87</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

<sup>88</sup> CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Bundesgerichtshof, Germany, 9 January 2002, Unilex. The latter case, however, distinguishes the question of the effect on the burden of proof of an extra-judicial admission of liability, viewing this matter as beyond the scope of the Convention.

evidences a general principle of the Convention allocating the burden of proof to the party who asserts a claim or who invokes a rule, exception or objection, and that this general principle can be used, pursuant to CISG article 7 (2), to resolve burden of proof issues that are not expressly dealt with in the Convention.<sup>89</sup> The approach and/or language of several other decisions strongly imply that the burden of proving the elements of an exemption falls to the party claiming the exemption.<sup>90</sup>

## Article 79 (2)

21. Article 79 (2) imposes special requirements if a party claims exemption because its own failure to perform was “due to the failure by a third person whom he has engaged to perform the whole or a part of the contract”. Where it applies, article 79 (2) demands that the requirements for exemption under article 79 (1) be satisfied with respect to both the party claiming exemption *and* the third party before an exemption should be granted. This is so even though the third party may not be involved in the dispute between the seller and the buyer (and hence the third party is not claiming an exemption), and even though the third party’s obligations may not be governed by the Sales Convention. The special requirements imposed by article 79 (2) increase the obstacles confronting a party claiming exemption, so that it is important to know when it applies. A key issue, in this regard, is the meaning of the phrase “a third person whom he [i.e., the party claiming exemption] has engaged to perform the whole or a part of the contract”. Several cases have addressed the question whether a supplier to whom the seller looks to procure or produce the goods is covered by the phrase, so that a seller who claims exemption because of a default by such a supplier would have to satisfy article 79 (2).<sup>91</sup> In one decision, a regional appeals court held that a manufacturer from whom the seller ordered vine wax to be shipped directly to the buyer was not within the scope of article 79 (2), and the seller’s exemption claim was governed exclusively by article 79 (1).<sup>92</sup> On appeal, the court avoided the issue, suggesting that the seller did not qualify for exemption under either article 79 (1) or 79 (2).<sup>93</sup> An arbitral tribunal has suggested that article 79 (2) applies when the seller claims exemption because of a default by a “sub-contractor” or of the seller’s “own staff”, but not when the third party is a “manufacturer or sub-supplier”.<sup>94</sup> On the other hand, another arbitral tribunal

<sup>89</sup> CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Bundesgerichtshof, Germany, 9 January 2002, Unilex; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999] (see full text of the decision).

<sup>90</sup> CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995] (denying the seller’s claim to exemption because seller was unable to prove the required facts); CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (denying the buyer’s exemption claim because buyer did not prove that its failure to perform was caused by the impediment); CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (tribunal uses language suggesting that the seller, who was claiming an exemption, had to submit the facts to substantiate the claim).

<sup>91</sup> The application of the requirements of article 79 (1) to situations in which a seller claims exemption because its supplier defaulted on its own obligations to the seller is discussed *supra* paras. 14, 16, 17 and 18.

<sup>92</sup> CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

<sup>93</sup> CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

<sup>94</sup> CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March,

assumed that a fertilizer manufacturer with whom a seller contracted to supply the goods and to whom the buyer was instructed to send specified types of bags for shipping the goods was covered by article 79 (2).<sup>95</sup> It has also been suggested that a carrier whom the seller engaged to transport the goods is the kind of third party that falls within the scope of article 79 (2).<sup>96</sup>

### **Article 79 (5): Consequences of exemption**

22. Article 79 (5) of the Convention specifies that a successful claim to exemption protects a party from liability for damages, but it does not preclude the other party from “exercising any right other than to claim damages”. Claims against a party for damages have been denied in those cases in which the party qualified for an exemption under article 79.<sup>97</sup> A seller’s claim to interest on the unpaid part of the contract price has also been denied on the basis that the buyer had an exemption for its failure to pay.<sup>98</sup> In one decision it appears that both the buyer’s claim to damages and its right to avoid the contract were rejected because the seller’s delivery of non-conforming goods “was due to an impediment beyond its control”, although the court permitted the buyer to reduce the price in order to account for the lack of conformity.<sup>99</sup>

### **Derogation from article 79: Relationship between article 79 and *force majeure* clauses**

23. Article 79 is not excepted from the rule in article 6 empowering the parties to “derogate from or vary the effect of” provisions of the Convention. Decisions have construed article 79 in tandem with *force majeure* clauses in the parties’ contract. One decision found that a seller was not exempt for failing to deliver the goods under either article 79 or under a contractual *force majeure* clause, thus suggesting that the parties had not preempted article 79 by agreeing to the contractual provision.<sup>100</sup> Another decision denied a buyer’s claim to exemption because the circumstances that the buyer argued constituted a *force majeure* were not found in an exhaustive listing of *force majeure* situations included in the parties’ contract.<sup>101</sup>

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21 June 1996] (see full text of the decision).

<sup>95</sup> ICC Court of Arbitration, award No. 8128, 1995, Unilex.

<sup>96</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

<sup>97</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, 22 January 1997, Unilex.

<sup>98</sup> Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex.

<sup>99</sup> Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

<sup>100</sup> CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

<sup>101</sup> CLOUT case No. 142 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 123/1992 of 17 October 1995]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russia, 16 February 1998, Unilex (abstract).