Availability of Remedies other than Damages in Case of Exemption According to Art. 79 CISG

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It is almost impossible to find a topic in sales law on which Professor INGEBORG SCHWENZER has not published already. Until today her publications have shaped the discussions regarding international sales law far beyond the borders of Switzerland. Her *opus magnum*, the Global Sales Law, will certainly also be a standard reference for comparative lawyers for many years to come. It is a pleasure for me to contribute to a book published in honour of this outstanding scholar and brilliant lawyer whose commitment and enthusiasm for international collaboration and development of UN sales law has deeply inspired many of her colleagues.

I. Introduction

Art. 79 CISG is concerned with the question when the obligor is exempt from the duty to pay damages despite failing to perform an obligation. If the obligor proves that he has breached the contract due to an unforeseeable and insurmountable impediment beyond control, he is under no duty to compensate for the loss of the obligee. In such case it is the obligee that has to carry the burden of the atypical risk which hampered performance.

The scope of exemption from paying damages[1] is judged according to the effect of the impediment. For example, if the impediment is only temporary the obli-

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1 Whether the obligor is also exempt from the contractual obligation to pay penalty or liquidated damages is not expressly regulated in the Convention and therefore debated. The question was left open in Oberlandesgericht Hamburg (Germany), 25 January 2008, CISG-online 1681. Instead of rejecting the applicability of the Convention in total it seems to be more convincing to decide according to the common purpose of the parties, that is, whether they have stipulated payment of penalties besides or instead of a damages claim. If the first is the case an exemption of Art. 79 cannot save him. However, in case a claim for damages under the Convention is replaced fully by a contractual claim, a direct application of Art. 79 or at least an indirect application by using the provision as an interpretative tool should be possible. Cf. FISCHER, Die Unmöglichkeit der Leistung im internationalen Kauf- und Vertragsrecht, Berlin 2001, 123-124; TALLON, in: BIANCA/BONELL, Commentary on the International Sales Law, Milan 1987, Art. 79 CISG para. 2.10.1; MASKOW, Hardship and Force Majeure, American Journal of Comparative Law (1992) 657, 665; HEUZÉ, La vente internationale des marchandises, Paris 2000, para. 476;

gor is safe from paying damages caused by late performance; if the impediment is blocking performance as a whole and in a permanent way, the obligor will be excused from paying damages for the loss that occurred due to non-performance in general.

Art. 79(5) clearly states that an impediment beyond control merely exempts the obligor from paying damages. The contract itself is not dissolved by the fact that an obligation cannot be performed, even if this non-performance is of a lasting nature. Therefore, the possibility to resort to any other remedy given under the Convention and especially to make use of a claim for performance is not precluded by Art. 79. This rule has been much debated and criticized, since, unlike comparable national provisions, it is only concerned with the exclusion of the claim for damages but does not take account of the fact that an impediment beyond control may cause impossibility and therefore render a claim for specific performance futile.[2] Actually, parallel provisions in the soft-law instruments (Art. 7.1.7 PICC, Art. 8:108 PECL and Art. III.-3:104 DCFR), which have an almost identical wording regarding the exemption prerequisites do not include a provision corresponding to Art. 79(5). This seems to be a reaction of the drafters of these soft-law instruments to the criticism regarding Art. 79(5) and especially to its non-exclusion of the claim for performance.

Below, it shall be examined whether or not the critique regarding Art. 79(5) is justified, and how far claims other than damages are acceptable in case an unforeseeable and insurmountable impediment exists.

II. Specific performance

1. Debate regarding the specific performance claim

The reason why Art. 79(5) is criticised seems to lay in the fact that an unforeseeable impediment beyond control is automatically equated to a definitive impos-

HUBER, in: Münchener Kommentar zum BGB, Vol. 3, 5th ed., Munich 2008, Art. 79 BGB para. 27; MAGNUS, in: J. von Staudingers Kommentar zum BGB, Wiener UN-Kaufrecht, Berlin 2005, Art. 79 CISG para. 53; SCHWENZER, Die clausula und das CISG, Festschrift Bucher, Bern/Zurich 2009, 723, 734.

2 Cf. e.g. BRUNNER, Force Majeure and Hardship under General Contract Principles, Exemption for Non-Performance in International Arbitration, London 2009, 360 *et seq.*; FISCHER (n. 1), 119-122; PICHONNAZ, Impossibilité et exorbitance, Fribourg 1997, 412 *et seq.*; NICHOLAS, Impracticability and Impossibility, in: GALSTON/SMIT (eds.), International Sales, New York 1984, Ch. 5, 18 *et seq.* (Pace); TALLON (n. 1), Art. 79 CISG para. 2.10.2; HONNOLD/FLECHTNER, Uniform Law for International Sales under the 1980 United Nations Convention, 2nd ed., Austin 2009, Art. 79 CISG para. 435.5; TREITEL, Frustration and Force Majeure, 2nd ed., London 2004, paras. 15-043 and 044. Art. 74 ULIS on the contrary was also excluding the performance claim, cf. STOLL, in: DÖLLE, Kommentar zum Einheitlichen Kaufrecht, Munich 1976, Art. 74 CISG para. 14 *et seq.*

sibility.[3] If an impediment of this type exists, it is assumed, the obligation must have become impossible. Therefore, it would not make sense to speak of a claim for performance anymore. But this equation does not convince since it does not take into account that the CISG is working with a unitary concept of non-performance, meaning that the different types of breach of contract did not find entry into the Convention.[4] Article 79 only clarifies under which circumstances the remedy of damages is excluded. This claim for damages might emerge from definitive impossibility to deliver, but perfectly well also from late performance or defective performance. In the last two variants, a claim for damages is bared, if there is a reason for exemption, but this does not automatically mean that a claim for specific performance will be barred too. In the case of excused delay, the obligee can still demand performance and in the case of excused defective delivery he can ask for repair or replacement, both of which are aimed at performance.[5] Given the fact that the Convention has adopted a ‹remedy based› approach, Art. 79 is only focusing on the exclusion of a damages claim whatever the reason for non-performance may be.

In fact, the said criticism concerning Art. 79(5) disregards also that the question whether a specific performance claim is given or not has nothing in common with the question if the obligor is liable in paying damages.[6] Even if the obligor is responsible for e.g. the loss of any specific goods as there was a foreseeable and controllable impediment, or even if he has intentionally destroyed these goods a claim for specific performance cannot be granted since the goods are not existent anymore. But obviously a damages claim will have success in both cases. The existence of a performance claim is independent from the fact of whether non-

3 Cf. e.g. FLAMBOURAS, Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108 (May 2002), http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html#er (8 December 2010).

4 BASEDOW, Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG, 25 International Review of Law and Economics (2005) 487, 490-492; SCHAUER, Grundprinzipien des Leistungsstörungsrechts im ABGB, UN-Kaufrecht und in den PECL – eine vergleichende Skizze, Festschrift Kramer, Basel 2004, 627, 629; DÜCHS, Die Behandlung von Leistungsstörungen im Europäischen Vertragsrecht, Berlin 2006, 53 *et seq.*

5 MAGNUS (n. 1), Art. 46 CISG para. 2; SCHWENZER, in: SCHLECHTRIEM/SCHWENZER (eds.), Commentary on CISG, 3rd ed., Oxford 2010, Art. 79 CISG para. 52. It is also put forward for the Sales-Directive of the European Union that the buyer/consumer can resort to any of the remedies given under the Directive (repair/replacement/rescission/reduction of price) even if a case of force majeure exists. These rights are given to the consumer independent of the fact whether non-performance can be attributed to the seller or not. Cf. MAGNUS, in: GRABITZ/HILF/WOLF (eds.), Das Recht der Europäischen Union, Vol. IV, Sekundärrecht, Munich 2007, A 15 RL (EWG) 1999/44 Art. 2 para. 10 and Art. 3 para. 12; GRUNDMANN, in: BIANCA/GRUNDMANN (eds.), EU-Kaufrechts-Richtlinie, Cologne 2002, Art. 2 para. 2.

6 Cf. on this in detail ATAMER, Grenzen des Erfüllungsanspruchs im System des Leistungsstörungsrechts der PICC, PECL und des DCFR im Vergleich zum CISG – Probleme und Änderungsvorschläge, Festschrift Hopt, Berlin 2010, 3 *et seq*.

performance can be imputed to the obligor or not.[7] And *vice versa*, the claim for damages is not conditioned by the existence of a performance claim.[8] Both are remedies the obligee can resort to if their respective prerequisites are given. In that regard, the often praised approach of Art. 8:101(2) PECL and Art. III. – 3:101(2) DCFR, which both exclude a specific performance claim whenever non-performance is ‹excused›, seems to be the wrong approach and should therefore not serve as comparative reference when applying the CISG.[9]

One has to see that the wording of Art. 79 cannot be traced back to any national law provision. Although a term like «impediment beyond control» is familiar to a lawyer from every legal background, it can be associated with very different concepts like the French *‹force majeure›,* the German *‹Unmöglichkeit›* or *‹Wegfall der Geschäftsgrundlage›* or the common law notions of ‹impossibility› or ‹frustration› with the broader US concept of ‹impracticability›.[10] Given the fact that the concepts differ in prerequisites and also consequences, one should avoid interpreting Art. 79 against the background of national laws.[11]

Therefore, it should also be avoided to seek under Art. 79 for an answer to the problem of impossibility or in general the question of whether specific performance can be claimed or not. This question has to be answered by looking at Arts. 46 and 62 CISG, which are the main provisions regarding the remedy of specific performance.[12] As a matter of fact, these are also the articles which have a lacuna and do not provide for the limits of the performance claim regarding monetary and non-monetary obligations. And exactly here the soft-law instruments can serve as com-

7 Cf. also UNBERATH, Die Vertragsverletzung, Tübingen 2007, 223-224, 271-272; BACH/STIEBER, Die Unmöglichkeit der Leistung im CISG, IHR 2006, 59, 62; MÜLLER-CHEN, in: SCHLECHTRIEM/SCHWENZER (eds.), Commentary on CISG, 3rd ed., Oxford 2010, Art. 46 CISG para. 12; HUBER, in: HUBER/MULLIS, The CISG, Munich 2007, 194-195.

8 Certainly the amount of damages differs depending on the fact if the obligee asks for damages besides performance or avoids the contract and claims damages.

9 Cf. in detail ATAMER (n. 6), 3, 13-16 elaborating also on the question how this approach may have found its way into the PECL and the DCFR.

10 For a comparison see MAGNUS, Force Majeure and the CISG, in: SARCEVIC/VOLKEN (eds.), The International Sale of Goods Revisited, The Hague 2001, 1, 2 *et seq*.

11 PILTZ, Internationales Kaufrecht, 2nd ed., Munich 2008, para. 4-220; AUDIT, Vente Internationale, Paris 1990, 172 para. 180; BAASCH ANDERSEN, Uniform Application of the International Sales Law, (2007), 94-95; ZELLER, Damages under the Convention on Contracts for the International Sale of Goods, 2nd ed., Oxford 2009, 170. Cf. for such a homeward trend U.S. District Court, N.D. of Illinois (USA) 6 July 2004, *Raw Materials Inc. v. Manfred Forberich* (used railroad rail), CISG-online 925 and LOOKOFSKY/FLECHTNER, Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?, 9 Vindobona Journal of International Commercial Law and Arbitation (2005/1), 199-208.

12 Cf. for a similar approach HUBER (n. 1), Art. 46 CISG para. 18; BACH/STIEBER (n. 7), 59, 64; DÜCHS (n. 4), 93-94; cf. for further details *infra* para. II 8 and 9.

parative material since PICC, PECL and the DCFR contain provisions with a list of reasons when performance may not be required.[13]

Below, the availability of a specific performance claim despite the existence of an unforeseeable and insurmountable impediment is evaluated according to different scenarios and ways of limiting this claim and its relation with claims for damages is elaborated on. Obviously, any specific performance claim given under the CISG is only exercisable within the limits set by Art. 28. But this is irrelevant for the discussion here since Art. 28 finds only application insofar as a claim for performance under the CISG is already established.[14]

2. *When is a specific performance claim given?*

a) Generic goods

As a rule, the seller carries the risk of procurement for generic goods.[15] Therefore the buyer will retain his performance claim until risk of the goods passes on to him. The term risk here stands for ‹performance risk› and not ‹payment risk›.[16] Before the passage of risk the seller has to provide for the goods a second time even if they are destroyed due to an impediment beyond his control.[17] Arts. 67-69 (and not Art. 79) are the special provisions regarding the distribution of risk and will provide guidance about the specific performance claim as long as there is no other stipulation in the contract.[18] But in case the seller is delayed in delivering the new goods due to the same impediment, he will only be exempt from paying dam-

13 Cf. Art. 7.2.1 PICC, Art. 9:101 PECL and Art. III. – 3:301 DCFR for monetary obligations and Art. 7.2.2 PICC, Art. 9:102 PECL and Art. III. – 3:302 DCFR for non-monetary obligations and the limits a performance claim. Cf. also ATAMER (n. 6), 3, 12 *et seq*.

14 MÜLLER-CHEN (n. 7), Art. 28 CISG para. 5.

15 PILTZ (n. 11), para. 4-230; BRUNNER, UN-Kaufrecht – CISG, Bern 2004, Art. 79 CISG para. 11; SCHWENZER (n. 5), Art. 79 CISG para. 26; FISCHER (n. 1), 174 *et seq.*; cf. for comparative information JONES/SCHLECHTRIEM, para. 207 *et seq.*

16 Cf. for the terms e.g. TREITEL (n. 2), para. 3-007.

17 This was different under Art. 25 ULIS where the buyer was not entitled to require performance, ‹if it [was] in conformity with usage and reasonably possible for him to purchase goods to replace those to which the contract relate[d]›. In such case the contract was deemed to be *ipso facto* avoided as from the time when such purchase should have been effected.

18 Although Arts. 67-69 do not expressly touch the issue of performance risk, it is generally accepted that performance risk cannot pass before payment risk. Therefore the relevant provisions also provide the default rules for the distribution of performance risk. Cf. e.g. MAGNUS (n. 1), Vorbemerkungen zu Art. 66 ff. CISG para. 9; HAGER/SCHMIDT-KESSEL, in: SCHLECHTRIEM/SCHWENZER (eds.), Commentary on CISG, 3rd ed., Oxford 2010, Art. 69 CISG para. 14; BRUNNER (n. 15), Art. 66 CISG para. 10; HUBER (n. 1), Art. 66 CISG para. 15; VULLIÉTY, Le transfert des risques dans la vente internationale, Geneva 1998, 156.

ages for the delay.[19] However, in principle he cannot escape the specific performance claim.[20]

b) Monetary obligations

As a special type of generic goods, procurement risk for money is carried by the buyer.[21] He is deemed to have guaranteed his financial capacity so that a specific performance claim[22] is given even if he loses his money due to an impediment beyond control. However, if the seller claims damages for delay in payment, an exemption based on Art. 79 may be possible. If, for example, due to an unanticipated imposition of exchange controls the seller is impeded from transferring the money and it cannot be expected from him to arrange for a commercially reasonable substitute form of payment before the date of maturity, the seller's claim for performance based on Art. 62 will remain, but any claims for damages as a result of the delay (caused *e.g.* by the obligee's need to take a credit) will be excluded according to Art. 79.[23] The seller may only ask for the interest accruing on the money since this is not judged to be a damages claim.[24]

If payment in contractual currency is impossible in a persistent way, the question will arise whether the seller has the right to demand for payment in another currency, especially in the currency of the buyer's place of business or the currency of the place of payment.[25] This is mostly rejected due to the fact that such a right was under debate during the drafting of the Convention and deliberately negated.[26]

19 FISCHER (n. 1), 176.

20 Secretariat Commentary on 1978 Draft, Art. 65 (now Art. 79) para. 9, example 65 C.

21 Cf. e.g. *Arbitral Award*, Schiedsgericht der Handelskammer Hamburg (Germany) 21 March 1996, CISG-online 187; Handelsgericht des Kantons St. Gallen (Switzerland) 3 December 2002 (sizing machine), CISG-online 727; *Arbitral Award*, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Arbitration, 17 October 1995 (automatic diffractameter), CISG-online 207.

22 Cf. for the qualification of the action for the price under the Convention, contrary to common law ideas, as an action to compel performance HONNOLD/FLECHTNER (n. 2), Art. 62 CISG para. 348. See also *Arbitral Award*, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Arbitration, 21 November 2005 (Equipment), CISG-online 1520.

23 MOHS, in: SCHLECHTRIEM/SCHWENZER (eds.), Commentary on CISG, 3rd ed., Oxford 2010, Art. 57 CISG para. 20; LOOKOFSKY, Understanding the CISG, Copenhagen 2008, 155; Secretariat Commentary on 1978 Draft, Art. 65 (now Art. 79) CISG para. 10.

24 Cf. *Arbitral Award,* Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Arbitration (Russia) 30 July 2001, CISG-online 882. Cf. also *infra* V.

25 This is the solution favoured by the Unidroit Principles (cf. ATAMER, in: VOGENAUER/KLEINHEISTERKAMP, UNIDROIT Commentary, Oxford 2009, Art. 6.1.9 paras. 8-10) and proposed by BRUNNER also for the CISG (n. 15), Art. 54 CISG para. 15.

26 Official Records, p. 120 para. 3 and 362 paras. 14-20. However, cf. BRUNNER (n. 2), 170-171.

Therefore, the seller will only have a specific performance claim regarding payment in contractual currency. However, it is commonly accepted that Art. 7(1), which provides for the principle of good faith in international trade to be observed, requires the buyer to effect payment in any possible way, that is, in another currency than the one contracted for if necessary.[27] He cannot block the claim for performance on grounds of impossibility as long as payment in an alternative currency is possible.

c) Repair or delivery of substitute goods

Even if an unforeseeable and insurmountable impediment has caused the non-conformity of the goods the buyer can still make use of his supplementary performance claims given under Art. 46(2) and (3). Both claims are in principle only excluded if the respective preconditions of Art. 46 are not met. That is, in order to have a claim regarding substitute goods, the lack of conformity has to be fundamental and a demand for repair has to be reasonable under the given circumstances. If *e.g.* steel is to be delivered at a particular destination at the risk of the seller but the ship cannot enter the harbour due to an unforeseeable and insurmountable strike and the goods corrode while waiting, the buyer can ask for replacement but will hardly have the right to ask for repair, given the nature of the goods. In any case, the obligor will be exempt from paying damages due to the delay or the goods being defective.[28]

d) Surrogate benefits

An issue left open by the Convention is whether the obligee has the right to ask for transfer of any benefits, which have accrued to the obligor due to the impediment hindering him to perform.[29] Surrogate benefits *(stellvertretendes Com-*

27 HAGER/MAULTZSCH, in: SCHLECHTRIEM/SCHWENZER, Kommentar zum Einheitlichen UN-Kaufrecht. 5th ed., Munich 2008, Art. 54 CISG para. 11; MAGNUS (n. 1), Art. 53 CISG paras. 29-30; PILTZ (n. 11), para. 4-125.

28 Today the prevailing view, which is shared by the Advisory Council, is to allow for Art. 79 to be applied also to a claim for damages in case of defective delivery, cf. CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, 12 October 2007. Rapporteur: ALEJANDRO M. GARRO, New York, USA, paras. 6-13 (at http://www.cisg-ac.org) and also FLAMBOURAS, Impossibility of Performance, 13 Pace International Law Review 261, 275-276; ZELLER (n. 11), 168-169; HEUZÉ (n. 1), para. 468; MAGNUS, in: HONSELL (ed.), Kommentar zum UN-Kaufrecht, 2nd ed., Heidelberg 2010, Art. 79 CISG para. 4; MANKOWSKI, in: Münchener Kommentar zum Handelsgesetzbuch, 2nd ed., Munich 2007, Art. 79 CISG para. 19; HUBER (n. 1), Art. 79 CISG para. 3; SCHLECHTRIEM, Internationales UN-Kaufrecht, Tübingen 2007, para. 292; SCHWENZER (n. 5), Art. 79 CISG para. 6; BRUNNER (n. 2), 189 *et seq.*; PICHONNAZ (n. 2), para. 1670; LURGER, Die neuere Rechtsprechungsentwicklung zum UN-Kaufrechtsübereinkommen, JBl 2002, 750, 764.

29 It is important however to see that a claim for surrogate benefits can also be given under circumstances when the impediment was not beyond control and therefore the obligor not

modum) might be payments made by insurance companies for the goods lost or any compensation paid by the state in the case of *e.g.* confiscation. A performance claim of the obligee in regard of these benefits is generally accepted and justified either with an analogy to Art. 84(2)(b),[30] which speaks of «benefits» deriving from the goods, or with the common intention of the parties that has to be interpreted in the light of the circumstances.[31] To allow for such a claim, and therefore to facilitate to keep the contract alive, is certainly justifiable also under the principle of *favor contractus* that underlies the Convention and sees avoidance as a remedy of last resort.[32] But the prerequisites of this claim have again nothing in common with the claim for damages which can only be brought forward if *e.g.* confiscation was foreseeable.

e) Temporary impediments

According to Art. 79(3) the obligor is only exempt from paying damages for the duration of the impediment. If in that time-span specific performance is also barred since, for example, export from the country where the specific goods are coming from is stopped due to a plague, the buyer can only claim performance again once the ban is lifted. The performance claim is suspended.[33] Although Arts. 46 and 62 do not include any express statement regarding this, the idea lying behind Art. 79(3) can be applied by analogy.

f) Partial impediments

According to Art. 51 the buyer can make use of his specific performance claim partially if the seller delivers only a portion of the goods or if a part of the goods delivered is not in conformity with the contract.[34] If this partial non-delivery or defective delivery was caused by an unforeseeable impediment beyond the

exempt from paying damages. With the same arguments stated above the obligee has to be given the right to ask for these benefits besides the claim for damages. However, certainly the amount of damages will be reduced by the value of the substitute. Parallel BACH/STIEBER, Die beiderseitig verursachte Unmöglichkeit, IHR 2006, 97, 98.

30 Cf. MAGNUS (n. 1), Art. 79 CISG para. 54; MANKOWSKI (n. 28), Art. 79 CISG para. 11; ACHILLES, Kommentar zum UN-Kaufrechtsübereinkommen, Neuwied 2000, Art. 79 CISG para. 14; HUBER (n. 1), Art. 46 CISG para. 19b.

31 STOLL/GRUBER, in: SCHLECHTRIEM/SCHWENZER, Commentary on the CISG, 2nd ed., Munich 2005, Art. 79 CISG para. 44.

32 PILTZ (n. 11), para. 5-406; MANKOWSKI (n. 28), Art. 79 CISG para. 11. Cf. also BONELL, in: BIANCA/BONELL, Commentary on the International Sales Law, Milan 1987, Art. 7 CISG para. 2.3.2.2; SCHLECHTRIEM/HACHEM, in: SCHLECHTRIEM/SCHWENZER (eds.), Commentary on CISG, 3rd ed., Oxford 2010, Art. 7 CISG para. 35; MAGNUS, Die allgemeinen Grundsätze im UN-Kaufrecht, RabelsZ 59 (1995), 469, 484.

33 BRUNNER (n. 2), 247.

34 See also BRUNNER (n. 2), 261.

seller's control, the buyer will retain his specific performance claim as long as the partially non-delivered goods are generic and the performance risk is still on the seller, or the obstacle is only of a temporary nature or the impediment entails partial defective performance, which can be cured according to Art. 46(2) and (3).

3. When is a specific performance claim excluded?

a) Impossibility in law or fact

As already put forward above,[35] the CISG does not contain any provision comparable to Art. 7.2.2 PICC, Art. 9:102 PECL or Art. III. – 3:302 DCFR which *inter alia* aim at excluding a specific performance claim in case performance is impossible in law or in fact. If *e.g.* a public permission which is needed for the import of the goods is refused definitely or specific goods are destroyed totally, any claim targeting performance runs futile and must be blocked somehow.

In the literature many different views are expressed. Some advocate that the contract dissolves if impossibility is total and definitive, and therefore also the claim for specific performance.[36] However, this view contradicts with the preference of the Convention to avoid any kind of automatic discharge.[37] Others favour to leave the issue to be solved by national laws based on Art. 28.[38] According to this provision a court is not bound to enter a judgement for specific performance unless it would do so under its own law in respect of similar contracts of sale. Since many laws contain special provisions regarding the effect of impossibility, a specific performance claim would be barred on national level. What is disturbing about this view is certainly that it jeopardises the idea of unifying international sales law, which the CISG is aiming at. The decision about the existence of a specific performance claim would be left to particular domestic laws without any

35 See s*upra* n. 13 and text.

36 TALLON (n. 1), Art. 79 CISG para. 2.10.2; GARRO, Exemption from Liability for Damages, in: FELEMEGAS (ed.), An International Approach to the Interpretation of the UN CISG (1980) as Uniform Sales Law, Cambridge 2007, 236, 240.

37 MAGNUS (n. 1), Art. 78 CISG para. 59. Cf. also *infra* III.

38 Secretariat Commentary on 1978 Draft, Art. 65 (now Art. 79) para. 9; LANDO, in: BIANCA/BONELL, Commentary on the International Sales Law, Milan 1987, Art. 28 CISG para. 2.2; HONNOLD/FLECHTNER (n. 2), Art. 79 CISG para. 435.5; FLAMBOURAS (n. 28), 261, 275-276; ZELLER (n. 11), 181; HERBER/CZERWENKA, Internationales Kaufrecht, Munich 1991, Art. 79 CISG para. 23; NEUMAYER/MING, Convention de Vienne sur les Contrats de Vente Internationale de Marchandises, Lausanne 1993, Art. 46 CISG para. 2; VAHLE, Der Erfüllungsanspruch des Käufers nach UN-Kaufrecht im Vergleich mit dem deutschen Kaufrecht, ZVglRWiss 98 (1999), 54, 61; RYFFEL, Die Schadensersatzhaftung des Verkäufers nach dem Wiener Übereinkommen über internationale Warenkaufverträge, thesis, Bern 1992, 98.

guarantee of a uniform application.[39] Further to that, it does not convince that exclusion of claims for damages shall be governed by the CISG whereas national laws shall set the limits to the claim for specific performance.[40]

This is also why the prevailing view prefers to develop the barrier to the specific performance claim from within the rules of the Convention. However, the methodology applied by the respective commentators varies. Whereas some prefer to go for a restrictive interpretation of Art. 79(5),[41] others see a lacuna in the Convention which has to be filled in line with the general principles of the CISG (Art. 7(2)). These principles are developed from the rationale underlying Arts. 79, 80 and 66 on the passage of risk[42] or from the rules adopted in the PICC regarding the limits of the performance claim.[43] Whichever way is chosen, the result will not change: a claim for specific performance is barred. This theoretical question, however, still deserves some reflection.

In this author's view, it is not Art. 79 where the limits to the specific performance claim should be sought for. As already mentioned above,[44] be it excused or not, whenever specific goods perish, a performance claim is barred.[45] This is independent of the fact that they perished due to an impediment beyond control or simply due to negligence. In the first variant both, specific performance and damages cannot be claimed, in the second, damages can still be asked for. One should not disregard the fact that Art. 79(5) does not state that a specific performance claim is always given even though the impediment is beyond control. It just states that all other claims beside damages can be exercised if the prerequisites of their respective provisions are given. Therefore a performance claim is given as long as Arts. 46 or 62 allow for it.

However, Art. 46[46] lacks any kind of express limit to the performance claim, be it the primary claim regarding delivery of the goods or the supplementary claim

39 BRUNNER (n. 2), 363; MANKOWSKI (n. 28), Art. 79 CISG para. 9; MAGNUS (n. 1), Art. 79 CISG para. 58; FISCHER (n. 1), 119.

40 SCHWENZER (n. 5), Art. 79 CISG para. 53.

41 FISCHER (n. 1), 120-121; BRUNNER (n. 2), 363-365; MÜLLER-CHEN (n. 7), Art. 28 CISG para 14.

42 MAGNUS (n. 1), Art. 78 CISG para. 59; HUBER (n. 1), Art. 46 CISG para. 18; MANKOWSKI (n. 28), Art. 79 CISG para. 9; SCHWENZER (n. 5), Art. 79 CISG para. 53; SCHNYDER/STRAUB, in: HONSELL (ed.), Kommentar zum UN-Kaufrecht, 2nd ed., Heidelberg 2010, Art. 46 CISG para. 30.

43 PICHONNAZ (n. 2), para. 1804.

44 Cf. above II.1.

45 BACH/STIEBER (n. 7), 59, 62.

46 Below, only limits to Art. 46 will be elaborated on since it is seldom the case that payment becomes impossible so that the need arises to restrict Art. 62. Should one of these rare impediments occur the views expressed above are also applicable to monetary claims.

regarding replacement.[47] Only in relation with the right to require repair does the Convention demand this claim to be reasonable, having regard to all the circumstances. It has to be admitted that Art. 46 CISG has a gap, which needs to be filled according to the basic underlying principles of uniform law and by reasoning from specific provisions by analogy.[48]

According to one approach, the limit to the specific performance claim can be deduced from Art. 46(1) itself since it blocks such a claim whenever it is ‹inconsistent› with another remedy the obligee has resorted to. To claim the impossible is inconsistent with the specific performance claim itself.[49] It is submitted that Arts. 82 and 84, which are the sole provisions using the term ‹impossibility› in the Convention in the context of restitution, could be a source for analogy since their underlying ratio is that the impossible cannot be delivered. Certainly, Art. 79 itself is also based on the idea that there might be impediments which hinder performance. Finally, the restriction of Art. 46(3), stating that the request for repair must not be «unreasonable», shows again that to claim performance of the impossible is not desired. All in all, there are enough indicators in the Convention to come to the conclusion that as a general principle performance cannot be claimed under Art. 46 whenever it is impossible to fulfil the claim.

b) Disproportionality

Another issue, which is left open under the CISG and where the applicability of Art. 79 is in question, is the destiny of the specific performance claim in case it has become unreasonably burdensome or expensive for the obligor to perform.[50] Other than impossibility in law or fact, performance is still possible but has become extremely onerous for the obligor. Just like in the case of impossibility, the question of whether performance can be claimed under such changed circumstances has to be judged independent of the question of liability. Even if the obligor is not excused, the right to require performance is blocked whenever it is unreasonably burdensome or expensive to fulfil the obligation.[51] However, the obligor

47 Cf. for regulatory techniques e.g. Art. 7.2.2(a) PICC: «Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless (a) performance is impossible in law or in fact …» See also Art. 9:102(2)(a) PECL und Art. III. – 3:302(3)(a) DCFR.

48 See BONELL (n. 32), Art. 7 CISG para. 2.3.2.

49 BACH/STIEBER (n. 7), 59, 62-63; DÜCHS (n. 4), 93-94.

50 Cf. e.g. the critics of NICHOLAS: «If performance is physically possible, but impracticable within the meaning of Art. 79 paragraph (1), we have the curious result that the seller is not liable in damages for not performing and yet can be compelled to perform.» NICHOLAS (n. 2), Ch. 5, 18 (Pace).

51 Cf. e.g. Art. 7.2.2(b) PICC (‹the other party may require performance, unless … performance or, where relevant, enforcement is unreasonably burdensome or expensive›); parallel: Art. 9:102(2)(b) PECL and Art. III. – 3:302(3)(b) DCFR. Cf. also § 275 II BGB (‹The obligor may

certainly will remain liable in damages for non-performance if the preconditions of Art. 79 are not met.

The reason for excluding a specific performance claim in such a case is the idea that the law should not encourage economically irrational behaviour. Whenever there is a blatant disproportion between the changed costs of performance and the interest of the buyer in receiving performance in kind, the seller ought to have the right to refuse a performance claim. What has to be done is a cost-benefit analysis. Each time one comes to the result that a claim for specific performance would be vexatious, the seller should have a defence. If *e.g.* a special machine subject to the sales agreement sunk together with the ship and the costs of salvage are enormous, the claim for specific performance can be blocked.[52]

The seller can only use this defence if the buyer's interest in performance stays the same whereas the seller's costs rise due to changed circumstances after contract conclusion. The comparison does not focus on the price of the goods. Cases where, for example, the value of the goods has risen dramatically on the market, do not give the right to block the performance claim based on this argument since the buyer's interest in receiving performance will also rise respectively. It would not be vexatious for the buyer to claim performance. Here a case of hardship ought to be considered, where the main question is, whether the aggrieved party has a right to demand adapting the contract or to avoid it.[53]

The facts of the famous *Suez Canal* cases could serve as an example to illustrate the problem of disproportionality.[54] In 1956 and again in 1967 the Suez Canal was blocked due to armed conflicts in the Middle East. All the sales contracts under dispute included CIF terms according to which the seller charges an inclusive

refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee […]›).

52 Cf. for the example derived from German law CANARIS, Die Reform des Rechts der Leistungsstörungen, JZ 2001, 499, 501.

53 Other than in the case of disproportionality where a specific performance claim may be blocked if it is vexatious, in hardship cases the major issue is neither the specific performance claim nor the claim for damages. Insofar as adaptation is accepted a changed specific performance claim will be given. For example, if the price for oil has overnight doubled obviously the seller will try to find a way out of the contract whereas the buyer will insist on performance according to contractual terms, which is not vexatious. In such case either the price is adapted to the new circumstances and thereby also the content of the specific performance claim is changed, or the obligor is given the right to avoid the contract without paying damages. Whether this is possible under the CISG is very much debated. Cf. for details SCHWENZER, Force Majeure and Hardship in International Sales Contracts, 39 VUWLR (2008), 725 *et seq.*; ATAMER, in: KRÖLL/MISTELIS/PERALES VISCASILLAS (eds.), UN-Convention on the International Sales of Goods (CISG), Munich 2011, Art. 79 CISG paras. 78-86.

54 For details regarding the *Suez Canal* cases see TREITEL (n. 2), paras. 4-071 to 4-083; BRUNNER (n. 2), 325-327.

price covering the cost of the goods, insurance and freight. The goods were to be transported *e.g.* CIF Hamburg from Port Sudan via the Canal. After the blockage the seller's best option was to send them pass the Cape of Good Hope, which would have raised the cost considerably. The question is if the buyer can still insist on performance or not. Relevant factors are whether the buyer's interest in the goods has also risen parallel to the cost of transport, due to *e.g.* shortage of the goods on the market. If the answer is yes and the cost-benefit gap is not extreme, the seller will not be able to block the specific performance claim. Whereas, if the goods can be obtained easily on the German market, the insistence on performance could be judged as vexatious.

However, this judgement certainly does not preclude any claim for damages. There, the prerequisites of Art. 79(1), which look for an unforeseeable impediment beyond control and not for an unreasonable disproportionality, will be decisive. If, for example, the closure of the Canal was foreseeable, the seller is certainly liable for damages the buyer might encounter due to *e.g.* effecting a substitute transaction. Even if the closure of the Canal was not foreseeable, but the obligor could have overcome the effects of the closure by making reasonable efforts, a claim for damages will be given.[55] As a principle, a substantial loss due to additional costs encountered in overcoming the impediment is not enough to exempt the obligor from paying damages.[56] In fact, American and English courts denied in the Suez Canal cases, though not under the CISG regime, exempting the sellers and carriers on grounds of increased costs involved with carriage. The courts found that carriage via the Canal was not stipulated as an exclusive route of transportation, neither expressly nor impliedly. Therefore, an alternative route via the Cape had to be taken by the seller/carrier even if that would involve significant additional expenses and time. CIF contracts or voyage charters by their very nature were considered by the courts as contracts where the seller/carrier had taken the risk of changes in freight rates. An exemption from paying damages for non-performance was not granted.

The different angle of looking at the performance claim and the claim for damages can be shown best with an example: If the costs of sending the goods via the Cape amount to 5,000 more than via the Canal and the buyer can obtain substitute goods by paying 2,000 more than the purchase price, it is unreasonable and

55 PICHONNAZ (n. 2), para. 1751. Cf. *Arbitral Award*, ICC 8790/2000, 1 January 2000 (processed food), CISG-online 1172 where the Tribunal did not elaborate on the question if the seller could be required to procure raw material from 300 km away if there were shortages due to drought in the area where his plant was located.

56 SCHWENZER (n. 5), Art. 79 CISG para. 14. In Hanseatisches Oberlandesgericht Hamburg (Germany) 28 February 1997 (iron-molybdenum), CISG-online 261 the court speaks of the «absolute limit of sacrifice» *(äusserste Opfergrenze)* which has to be reached before the seller is exempt from his duty to procure generic goods.

economically irrational to insist on specific performance. But the question whether the seller shall be liable for the buyer's loss of 2,000 has to be judged according to the risk distribution clauses of the contract or the default rule of Art. 79(1).

Just like in the case of impossibility in law or fact, the justification for the obligor's defence in case of disproportionality should not be sought for under Art. 79. Given that it is a defence against the performance claim of the buyer the answer lies in Art. 46.[57] In fact, Art. 46(3) itself states that a claim for repair can be blocked whenever such request is unreasonable. It has to be submitted that the same principle can be applied by way of analogy whenever the performance claim under Art. 46(1) as such is unreasonable. On the other hand Art. 79(1) also supplies a parallel argument which can be generalised under Art. 7(2) since it exempts the obligor from liability in damages if he could not «reasonably» be expected to have overcome the consequences of the unforeseen impediment. Certainly this idea deserves to be applied whenever a claim for performance becomes unreasonable. However, other than in Art. 79 it is not a matter of foreseeability.[58] Even if it was foreseeable that the Canal was going to be closed, a specific performance claim can be barred if it is unreasonably burdensome to perform in comparison to the profit the buyer would gain from specific performance. Instead, he would be referred to a damages claim.

III. Avoidance

Different from, for example, the common law system, the legal consequence of an insurmountable impediment under the CISG is not a complete and automatic discharge of the contract like it would be under the doctrine of frustration.[59] The contract stays valid despite the supervening event and it only gets discharged if the other party uses its right to terminate it where the prerequisites of Art. 49 or of an anticipatory breach are given.[60] This choice of the Convention makes sense espe-

57 Cf. *supra* n. 46.

58 Cf. e.g. LANDO/BEALE (eds.), Principles of European Contract Law, Parts I and II, Dordrecht 2000, 396, Comment E on Art. 9:102. Cf. also BRUNNER (n. 2), 223 and 365.

59 Cf. for English law e.g. TREITEL (n. 2), para. 6-048. For a comparison of English law and the CISG see BRIDGE, International Sale of Goods, Oxford 2007, para. 12.61 *et seq.*

60 NICHOLAS (n. 2), 18 (Pace); HEUZÉ (n. 1), para. 475; TREITEL (n. 2), para. 15-043; BRIDGE (n. 59), para. 12.62; SCHWENZER (n. 53), 709, 722. The approach of the CISG was also taken over by Art. 7.3.1 PICC and is parallel e.g. to Art. 1184 French civil code. Although the PECL seem to follow this solution in Art. 8:108 too, Art. 9:303 (4) deviates from this by introducing an automatic termination for all cases where a total and permanent impediment is existent (cf. LANDO/BEALE (n. 58), at 381 Comment D). Also according to paragraph (4) of Art. III.-3:104 DCFR an obligation is automatically extinguished whenever the impediment is of a permanent nature. The same is valid for any reciprocal obligation. Cf. on this ATAMER (n. 6), 3, 18 *et seq.*

cially in the case of temporary impediments hindering delivery for only a certain period, or impediments causing delivery of damaged goods, given the fact that the obligee may prefer to wait for the impediment to pass or may choose to claim price reduction, repair or replacement. As rightly put by NICHOLAS, the remedy of automatic discharge is inappropriate because of its inflexible, all or nothing character.[61]

IV. Price reduction

If the seller fails to deliver conforming goods, the buyer may reduce the price according to the formula set forth in Art. 50. Already applied under Roman law, the *actio quanti minoris*[62] differs from a damages claim in that it is independent of the fact whether defective performance was caused by an unforeseeable impediment or it is attributable to the seller. It only aims at re-establishing the contractual equilibrium disturbed by the defect and therefore serves a different purpose than compensating any damage.[63] Consequently the buyer can ask for a price reduction although the delivery of defective goods was not attributable to the seller under Art. 79.[64]

V. Interest on money due

Whenever the buyer is not able to effect payment on time due to *e.g.* changes in exchange control regulations which were unforeseeable and insurmountable, the seller is precluded from claiming any damages due to late payment. However, he can always ask for interest on money due since interest is assessed as a compensation for the enrichment of the buyer during the time he can keep the money longer than he should.[65] In fact the wording of Art. 78, which grants a claim for interest «without prejudice to any claim for damages recoverable», already shows that the

61 NICHOLAS, Force Majeure and Frustration, 27 American Journal of Comparative Law (1979) 231, 241-242. Cf. also BRIDGE (n. 59), para. 12.61.

62 Cf. e.g. ZIMMERMANN, The Law of Obligations: Roman Foundations of the Civilian Tradition, Oxford 1996, 318 *et seq.*

63 GARRO (n. 36), 236, 240.

64 Cf. above n. 28.

65 GARRO (n. 36), 236, 241; MAGNUS (n. 1), 1, 23; MANKOWSKI (n. 28), Art. 79 CISG para. 13; FISCHER (n. 1), 41; SCHWENZER (n. 5), Art. 79 CISG para. 56; BRUNNER (n. 2), 377-378. Cf. also KLEINHEISTERKAMP, in: VOGENAUER/KLEINHEISTERKAMP, UNIDROIT Commentary, Oxford 2009, Art. 7.1.7 para. 30. This is e.g. expressly stated in Art. 7.4.9(1) PICC: an interest claim is given ‹whether or not the non-payment is excused›.

CISG differs between the claim for interest and the one for damages and that therefore one cannot be excused according to the same principles as the other.[66]

VI. Conclusion

The above reflections aim at showing that Art. 79(5) CISG does not deserve the critical remarks made in the literature. The provision is in fact a natural outflow of the remedy-based approach of the Convention. Art. 79 is only concerned with the question when a claim for damages is excluded. However, Art. 79 does not deal with the question whether or not remedies other than damages are given or if they are barred too. This is left to their respective provisions and Art. 79(5) does not state anything more. In fact, the existence of the right to avoid the contract or to reduce the price or claim interest even if the obligor is exempt from paying damages based on Art. 79 is not debated at all. It is undisputed that these claims are given independent of the question of liability in paying damages.

The critiques concentrate on the specific performance claim. Here it is often assumed that an impediment beyond control automatically causes a definitive impossibility, therefore rendering a claim to perform futile. But this view is narrowing down non-performance to impossibility thereby ignoring all the cases where a claim for performance is perfectly reasonable despite an impediment beyond control is given. For example when the impediment caused delay in performance or defective performance. Whether or not performance can be claimed has, just like avoiding or reducing the price, nothing to do with the question whether or not non-performance is attributable to the obligor. Therefore the limits to a performance claim have to be sought for under Art. 46 and 62 CISG and not under Art. 79. Art. 28 CISG cannot be the cure since this article finds only application insofar as a claim for performance is already established under the CISG. The enforcement of a specific performance claim may be blocked on national level due to Art. 28, but whether or not a claim is given is governed by the CISG alone. Consequently the lacuna in the CISG has to be filled from within the Convention by applying the general principles on which it is based. All in all, there are enough indicators in the Convention to come to the conclusion that as a general principle performance cannot be claimed whenever it is impossible or disproportioned to fulfil the claim.

66 But cf. *Arbitral Award*, Hungarian Chamber of Commerce and Industry Arbitration, 10 December 1996 (caviar), CISG-online 774, which rejects a claim for interest for the period of the UN embargo on Yugoslavia impeding payment of the sales price. According to the Tribunal interest on the outstanding amount can only accrue after the UN sanctions were suspended, which is clearly contradicting Art. 78 and the logic of this article.