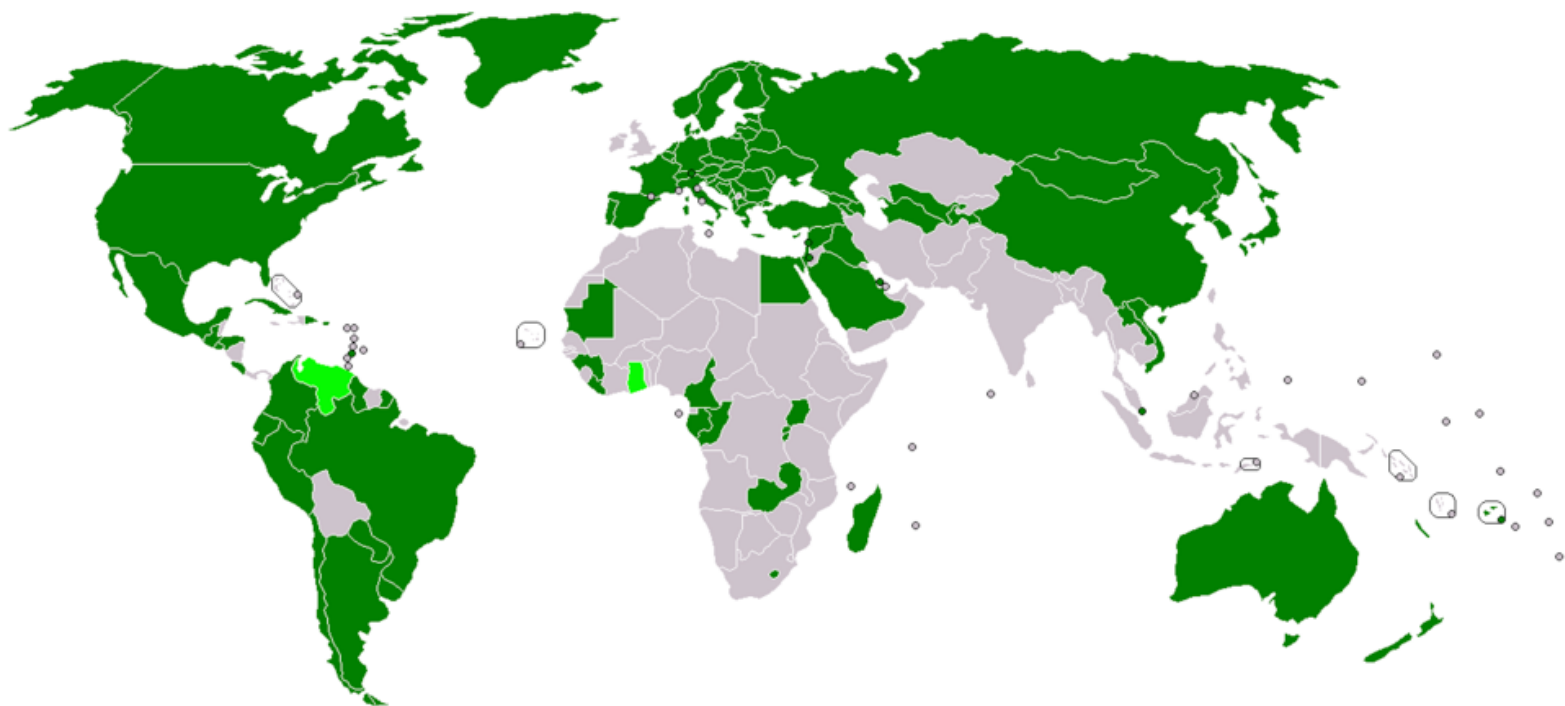


Master's Thesis

The Buyer's Remaining Remedies after Exemption from Damages under Article 79 CISG



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Resumé

Formålet med afhandlingen er at behandle køberens økonomiske retsstilling under CISG, når sælgeren er fritaget for erstatningsansvar efter artikel 79 i konventionen. Afhandlingen fokuserer på, om køberen kan opnå meningsfuld økonomisk kompensation gennem andre beføjelser end erstatningsbeføjelsen, navnlig renter, forholdsmæssigt afslag og restitution efter ophævelse af kontrakten. Derudover behandles spørgsmålet om, hvorvidt en manglende adgang til fuld kompensation bør forstås som et juridisk tomrum, der skal løses efter generelle principper efter artikel 7(2), eller som en strukturel begrænsning af fritagelse for erstatningsansvar i CISG. Afhandlingen anvender den retsdogmatiske metode med udgangspunkt i CISG-artikel 7. Artiklernes ordlyd, international retspraksis, UNCITRAL Digest of Case Law, CISG Advisory Council Opinions og juridisk litteratur inddrages med henblik på at sikre en autonom og ensartet fortolkning af konventionen. Analysen viser, at artikel 79 udgør en snæver fritagelsesregel, som kun udelukker erstatning, men ikke nødvendigvis andre retsmidler i konventionen. Afhandlingen konkluderer, at køberen i visse situationer kan opnå økonomisk værdi gennem renter, forholdsmæssigt afslag eller restitution. Den praktiske værdi for køberen afhænger dog af omstændighederne, og disse beføjelser har ikke den samme funktion som et almindeligt erstatningsansvar efter CISG-artikel 74. Beføjelserne kan give køberen økonomisk værdi i bestemte situationer, men de sikrer ikke fuld økonomisk kompensation. Afhandlingen konkluderer endvidere, at manglen på fuld økonomisk kompensation ikke bør forstås som et juridisk tomrum, der kan udfyldes efter artikel 7(2), men som en strukturel konsekvens af fritagelse for erstatningsansvar efter artikel 79. Afhandlingen viser dermed, at CISG bevarer økonomiske beføjelser efter fritagelse under artikel 79, men at konventionen samtidig begrænser køberens adgang til fuld økonomisk beskyttelse.

1. Introduction

International sales contracts are typically concluded on the expectation that performance will take place as agreed. A buyer may, for example, purchase the goods with the purpose of reselling them to a third party. Before receiving the goods, the buyer may have already entered a resale contract, arranged transport, secured a location for the goods to be stored, and obtained financing, all based on the expectation of receiving the goods as agreed. If the seller then fails to deliver, delivers too late, or delivers goods that do not conform to the contract, the buyer may suffer both immediate and consequential losses. These losses may extend further than the immediate fact that the goods were not received. They may include loss of profit from the resale contract or other losses connected to the delay or failed delivery. In such a situation, the natural immediate response for the buyer would be to claim damages.

The system of damages under the CISG is often described as a compromise between civil law and common law traditions. On the one hand, damages under Article 74 are based on what is generally considered a “strict liability / no-fault” principle¹, since liability arises from the breach itself. On the other hand, Article 79 provides an exemption from damages if the failure to perform is due to an impediment beyond the party’s control that could not reasonably have been taken into account at contract conclusion and whose consequences could not reasonably have been avoided, or overcome.² This situation resembles a situation commonly known as *force majeure*.³ The coexistence of these two elements creates a certain tension within the Convention’s remedial framework. Under Article 79, a party that meets the provision's requirements is exempt from liability for damages. However, the provision does not deprive the other party of its right to rely on other remedies under the Convention.⁴ In practice, damages are often the most important form of economic compensation for the buyer. This creates a distinction between damages, which may be excluded, and other remedies, which may remain available. The practical significance of that distinction is central to the aggrieved party. If damages are excluded, the question becomes what the buyer still has left to claim. The

¹ UNCITRAL Digest of Case Law on the CISG, Article 74, para. 12

² CISG, art. 79

³ An event or effect that can neither be anticipated nor controlled

⁴ CISG, art. 79(5)

answer is not so straightforward. The remaining remedies under the CISG all respond to different problems. Interest, price reduction, and restitution all have economic significance, but they arise in different situations and serve different functions. Interest is connected to monetary obligations, price reduction to non-conforming goods, and restitution to the reversal of performances after avoidance. Whether the buyer can obtain meaningful relief for losses may, therefore, depend heavily on the circumstances of the case. This raises a broad question about the structure of the remedial system of the CISG. Article 79 protects the seller from damages in exceptional circumstances, while Article 79(5) preserves other remedies than damages for the buyer. This is the problem examined in this thesis: whether the buyer is left with any remedies available that amount to meaningful monetary relief. In this thesis, the term “meaningful monetary relief” refers to remedies that provide the buyer with significant economic compensation. It is not a separate CISG remedy, nor a concept in the Convention, but an analytical tool used to assess the value of the remaining remedies for the buyer after the seller’s exemption.

Furthermore, this also raises a more fundamental question about the CISG. If the buyer is left with no significant compensation after the seller has been exempted from liability for damages under Article 79, does that mean there is an unresolved legal gap in the Convention, or is this a mere consequence of the exemption? The answer to this question matters to the thesis, since it determines whether the problem should be addressed through Article 7(2) as an issue that is governed but not settled, or whether it must be accepted as a part of the Convention’s design.

2. Research problem

Against this background, the following research question will be examined:

To what extent can the buyer obtain meaningful monetary relief under the CISG where the seller is exempt from damages under Article 79, and should any absence of full monetary relief be understood as a legal gap or as a structural limitation of the Convention's remedial system?

3. Methodology

3.1 Doctrinal legal method

This thesis applies a doctrinal legal method in analysing the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (CISG). The typical legal method is described as the approach used to address and resolve a specific legal problem, whether applied by courts, administrative authorities, or students.⁵ The doctrinal legal method, by contrast, concerns the systematic description and analysis of a particular area of law with the aim of reconstructing and determining the current state of the law.⁶ The starting point of the legal dogmatic method is to include all relevant sources in order to ensure the validity of the legal analysis. If certain sources are excluded, it must be established that this exclusion does not undermine the validity.⁷ This methodological framework is based on the interpretative principles set out in Article 7 of the Convention, which require that regard be had to its international character, the need to promote uniformity in its application, and the observance of good faith in international trade. Furthermore, Article 7(2) states that matters that are governed but not settled must be resolved in conformity with the general principles on which it is based, and if no such principles are to be found, in accordance with the rules of private international law.

3.2 International character, uniformity, and good faith

The interpretation method is regulated in Article 7(1) of the CISG. The provision states that both the contracting states and their courts must consider the international character of the Convention when interpreting it.⁸ This is referred to as the autonomous interpretation method. The natural starting point is that interpretation under Article 7(1) begins with the black-letter text in the provisions. This refers to a literal interpretation of the wording, and this interpretation method can only be done in the official languages in which the Convention was created.

⁵ Munk-Hansen, *Retsvidenskabsteori*, p. 193

⁶ Munk-Hansen, *Retsvidenskabsteori*, p. 204

⁷ Munk-Hansen, *Retsvidenskabsteori*, p. 206

⁸ Schlechtriem & Schwenger, *Commentary*, p. 123, para 8; Lookofsky, *Understanding the CISG*, p. 33

This includes English, French, Russian, Arabic, Spanish, and Chinese.⁹ It must, however, be understood autonomously and with consideration regarding the international character of the Convention, which means that concepts derived from domestic law are not automatically applicable in the interpretation of the CISG.¹⁰ This serves as the starting point for the interpretation, although several courts have stated that foreign court decisions have merely a persuasive, non-binding authority.¹¹ Some have, furthermore, stated that although domestic laws do not constitute an applicable interpretation method per se, they may provide interpretative guidance where the language mirrors that of domestic laws.¹² Non-CISG sources of law may, therefore, provide useful insights on how to interpret certain provisions¹³. The problem, however, with the interpretation of sources without origin in the CISG is that courts may tend to interpret the provisions of the CISG in light of their own domestic laws. This scenario is referred to as ‘the homeward trend’, which may influence the way the provision is intended to be interpreted, and courts should stay clear of this.¹⁴ Courts and tribunals must therefore seek guidance in CISG case law to achieve uniform interpretation.

However, a distinction must be made between uniform *interpretation* and uniform *application*. Uniform interpretation suggests that courts and tribunals understand the wording in the same way and would therefore produce similar outcomes in their application of it.¹⁵ This is difficult to achieve and may not always be the case. Uniformity does not require courts and tribunals to produce similar outcomes in all cases. Where the CISG provides open-ended concepts such as “reasonable” or “within a reasonable time”, the outcome must be determined by the circumstances of the case.¹⁶

⁹ Schlechtriem & Schwenger, Commentary, p. 123, para. 8-9

¹⁰ Ibid, para. 9

¹¹ UNCITRAL, Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016), Digest of Article 7, para. 8

¹² UNCITRAL, Digest of Case Law, Article 7, paragraph 6

¹³ Lookofsky, Understanding the CISG, p. 3

¹⁴ Lookofsky, Understanding the CISG, p. 33

¹⁵ Lookofsky, Understanding the CISG, p. 37

¹⁶ Schlechtriem & Schwenger, Commentary, p. 100, paragraph 16-17

3.2.1 Sources supporting Uniform Interpretation

a) **Case law databases.** In order to promote uniform interpretation, courts and tribunals often consult online CISG databases. These include CISG-online¹⁷, UNCITRAL Digest of Case Law¹⁸, and the CLOUT-case system¹⁹. These are databases containing various decisions and arbitral awards concerning the CISG and serve as valuable sources of case law. The CLOUT-system is particularly relevant because it was created by UNCITRAL to support consistency in the decisions to ensure uniform application.²⁰ UNCITRAL Digest of Case Law was established in 1993 and was the first step towards creating a system for collecting courts' decisions and arbitral awards with regard to the CISG.²¹ The UNCITRAL enlisted CISG experts to organize and capture the meaning of case law related to individual CISG provisions and issues regarding them, in an attempt to make this information available to the public. Consideration must, however, be had to the fact that a tremendous amount of case law exists, which may not be an easy task to summarize and deduce valuable information from. Furthermore, UNCITRAL follows a neutrality policy, which means that all decisions are treated equally and confines the authors to objective case-reporting.²²

b) **Scholarly sources.** Another valuable secondary source of CISG law is the CISG Advisory Council (CISG-AC)²³. These contain the opinions of fifteen CISG scholars, with the purpose of creating a uniform interpretation of the Convention. Although scholars' opinions rank lower than case law in the hierarchy of legal sources, they have nonetheless been cited by courts more often in recent years.²⁴ Another valuable source by scholars is the *Commentary on the UN Convention on the International Sale of Goods* by Peter Schlechtriem and Ingeborg Schwenzer.

¹⁷ CISG-online: <https://ciscg-online.org/home> visited May 4, 2026

¹⁸ UNCITRAL Digest of Case Law: https://uncitral.un.org/en/case_law/digests visited May 4, 2026;

¹⁹ Case Law on UNCITRAL Texts: <https://www.uncitral.org/clout/> visited May 4, 2026; Schlechtriem & Schwenzer, Commentary, p. 125, paragraph 11

²⁰ Schlechtriem & Schwenzer, Commentary, p. 125, paragraph 11

²¹ Lookofsky, Understanding the CISG, p. 38; Schlechtriem & Schwenzer, Commentary, p. 125, paragraph 12

²² Lookofsky, Understanding the CISG, p. 40

²³ Schlechtriem & Schwenzer, Commentary, p. 125, paragraph 12; Lookofsky, Understanding the CISG, p. 40

²⁴ Lookofsky, Understanding the CISG, p. 41; Schlechtriem & Schwenzer, Commentary, p. 126, paragraph 13

Although scholarly opinions do not carry the same weight as case law, this commentary is considered a persuasive scholarly source due to its status as one of the leading commentaries on the CISG.²⁵ This thesis relies on the 3rd edition of the commentary, as this was the edition available to the author. It is recognised that later editions have been published and that certain parts may have been revised. This limitation is acknowledged. However, the commentary remains a central scholarly source in the thesis, particularly in relation to the requirements for exemption under Article 79.

3.2.2 The Principle of Good Faith

Furthermore, the provision requires ‘observance of good faith in international trade.’ The role of good faith is somewhat controversial and must be understood in light of the Convention’s autonomous and international character. According to Schlechtriem and Schwenzer, the CISG does not precisely express principles of good faith in international trade, nor does it override clear intentions regarding the provisions of the CISG.²⁶ However, it can clearly be derived from cases that the UNCITRAL Digest compiled that some of the provisions reflect the principle of good faith.²⁷ It must be seen as a compromise and therefore only obliges the courts to interpret the Convention in a way that promotes good faith between the parties.²⁸ Good faith has, therefore, been cited as a general CISG principle, which in turn requires the parties to act in good faith in the performance of their obligations under the Convention.²⁹

²⁵ Lookofsky, *Understanding the CISG*, p. 33; Oxford University Press, Schlechtriem & Schwenzer *Commentary on the UN Convention on the International Sale of Goods (CISG)* <https://academic.oup.com/oxford-law-pro/book/57320> visited on May 5, 2026

²⁶ Schlechtriem & Schwenzer, *Commentary*, p. 127, para 16

²⁷ UNCITRAL, *Digest of Case Law*, Article 7, para. 9.

²⁸ Schlechtriem & Schwenzer, *Commentary*, p. 127, para. 16

²⁹ Lookofsky, *Understanding the CISG*, p. 42

3.3 Issues governed but not settled (Art. 7 (2))

As noted above, the second sentence of the Article requires that issues that are governed but not settled by the Convention are to be settled in accordance with the general principles on which the Convention is based. This is, by some courts, considered to be internal gaps within the Convention.³⁰ If no such principles can determine the outcome of the case, only then must legal rules under private international law be applied, meaning it must only be treated as a “last resort”.³¹ It is, therefore, a requirement that an attempt be made to locate a general principle within the CISG before resorting to international private law. The general principle of the right to interest in Article 78 provides a good example of this. It is expressly settled that if a party fails to pay any of its financial obligations within the agreed time, the aggrieved party is entitled to interest on the sum due.³² However, the interest rate is not settled by the Convention, nor by its general principles, which means that the parties must resort to private international law for settlement.

However, before resorting to the general principles, an examination of the parties’ intentions (Article 8)³³ and prior practices (Article 9)³⁴ must first be conducted. Furthermore, since parties may derogate or vary from any of the provisions in the Convention under Article 6³⁵, the parties may have negotiated or otherwise settled issues in the contract, of which the CISG would not have settled.

3.4 Legal sources

To answer the research question, while also considering the relevant methodology for interpretation of the Convention as presented above, this thesis will include many different legal sources.

³⁰ UNCITRAL, Digest of Case Law, Article 7, para. 10.

³¹ Schlechtriem & Schwenger, Commentary, p. 133, para. 31; Lookofsky, Understanding the CISG, p. 43

³² CISG, art. 78

³³ Lookofsky, Understanding the CISG, p. 49

³⁴ Lookofsky, Understanding the CISG, p. 50

³⁵ CISG, Article 6.

These include CISG case law, CISG Advisory Council opinions, the Secretariat Commentary, the Commentary on the UN Convention on the International Sale of Goods by Schlechtriem & Schwenzer, and UNCITRAL Digest of Case Law. Both foreign case law and provisions are only mentioned as examples to further illustrate points regarding the relevant CISG provisions.

The starting point for the analysis is the black-letter text of the provisions in the CISG itself. The wording of the relevant provisions, therefore, serves as the primary legal source. To further expand the depth of the thesis, relevant case law is used to identify how the provisions have been understood by courts in Contracting States. This is important to ensure that the thesis is based on the requirement of uniform interpretation under Article 7(1). Furthermore, the thesis makes use of the UNCITRAL Digest of Case Law and the CLOUT-system to identify how courts have approached the relevant provisions and issues. In addition to case law, the thesis uses scholarly sources, mainly the CISG Advisory Council Opinions and the *Commentary on the UN Convention on the International Sale of Goods*. These are included, since they provide a detailed analysis of the relevant provisions, and this will aid in answering in which circumstances the aggrieved party may seek meaningful monetary relief. Lastly, the Secretariat Commentary is used as an interpretive aid. It provides useful insight as to what the drafters intended the provisions to be interpreted, which in some cases may be helpful. It is, however, used with caution and only in cases where it assists in the understanding of the provisions, since it does not comment on the CISG itself, but rather the final draft Convention.

3.5 Procedure

The thesis answers the research question through a step-by-step analysis of Article 79 CISG. The analysis begins by examining the purpose and intent of Article 79, including the requirements that need to be fulfilled to be granted an exemption. This provides the basis for the analysis. The next part of the thesis examines Article 79(5), which clarifies what remedies remain other than damages. The thesis then examines three possible forms of monetary relief, which include interest, price reduction, and restitution. These remedies are then divided into three sections. First, the nature and function of the remedy are examined. Secondly, the thesis considers whether the remedy survives the exemption under Article 79. Thirdly, it questions whether the remedy provides meaningful monetary relief for the aggrieved party. This structure allows the remedies to be compared evenly and under the same conditions.

To answer the second part of the research question, the thesis examines the general principles in the Convention, to determine if the possible absence of full monetary relief is due to a legal gap or a structural limitation in the Convention.

4 The requirements for the application of Article 79

4.1 Purpose and intent of Article 79

To determine the requirements for the application of Article 79, the purpose and intent of the provision must first be examined.

Article 79 governs a party's exemption from liability for damages where that party can prove that the failure was due to an impediment beyond its control and one that it could not have reasonably foreseen at the time of contract conclusion.³⁶ Due to the wording and drafting history of the provision, it applies only to rather specific and exceptional situations involving circumstances outside the non-performing party's control.³⁷

Furthermore, the CISG is generally understood to be based on a principle of strict liability for non-performance under Article 61, with Article 79 operating as a limited exception to this regime.³⁸ The provision reflects the idea that performance obligations under the contract are generally binding and should not easily be set aside. At the same time, it recognizes that certain impediments beyond the control of the parties may affect performance, provided that such risks can be appropriately allocated within the contractual framework, including through pricing mechanisms.³⁹

Against this background, the following sections will analyse the individual requirements for exemption under Article 79 in detail.

³⁶ CISG, Article 79

³⁷ Schlechtriem & Schwenger, Commentary, p. 1063, para 1

³⁸ Lookofsky, Understanding the CISG, p 181; Schlechtriem & Schwenger, Commentary, p. 1063, para 1

³⁹ Ibid.

4.2 Impediment

For a party to be exempt under Article 79, its failure to perform must be caused by an **impediment**. The wording indicates that the provision must be interpreted narrowly and on an objective basis.

It follows from this requirement that the cause of non-performance must be external to the party. Internal or personal circumstances are therefore not sufficient. Even exceptional events, such as the death of a key employee, will normally not qualify as an impediment, since such risks are generally considered to lie with the non-performing party.⁴⁰ External factors may include, for example, war, lightning strikes, flooding, governmental measures that make performance impossible, or epidemics.⁴¹

In such cases, the non-performing party will typically be exempt from liability, provided that the event qualifies as a force majeure-type situation and that performance has become impossible rather than merely more burdensome.⁴² However, it has to be determined whether the impediment was foreseeable. In cases where droughts and floods are common, it may not be considered an impediment.⁴³ In a case concerning a sale from northern China, the seller invoked Article 79 on the basis that heavy snow was the cause of the non-delivery. However, the buyer argued that heavy snow was normal in December and was therefore something the seller should have taken into account. The tribunal, therefore, rejected the seller's defence on the basis that he had not provided sufficient evidence to prove *force majeure*.⁴⁴

Furthermore, Article 79 CISG does not limit its application to impediments arising after contract conclusion. What matters is whether the impediment was unforeseeable and beyond the party's control at the time the contract was concluded. Although the provision is particularly relevant for later events, it may also apply where the impediment already existed at that time.⁴⁵

⁴⁰ Schlechtriem & Schwenger, Commentary, p. 1067, para 11

⁴¹ Schlechtriem & Schwenger, Commentary, p. 1070, para 16

⁴² Ibid

⁴³ CISG-online 1412, American Arbitration Association – International Centre for Dispute Resolution (AAA/ICDR), USA, 23 October 2007 (*Macromex Srl. v. Globex International Inc.*)

⁴⁴ CISG-online 1067, China International Economic & Trade Arbitration Commission (CIETAC), China, 02 May 1996 (*FeMo alloy case*)

⁴⁵ Schlechtriem & Schwenger, Commentary, p.1068, para. 12-13

In those cases, however, the requirement of unforeseeability will be harder to satisfy. If the impediment was already known to both parties, the breaching party must generally have created a justified expectation that performance would still be possible despite it.⁴⁶ This explains why unforeseeability plays a central role in Article 79. The earlier the impediment exists in relation to the contract's conclusion, the more difficult it becomes to show that it could not reasonably have been taken into account from the party in breach. Unforeseeability is discussed further in section 4.4.

However, it is not enough that an event qualifies as an impediment. Article 79 also requires that the impediment be beyond the party's control.

This requirement excludes situations where non-performance is linked to risks that the party must be regarded as having assumed.⁴⁷ This is examined in the following section.

4.3 Beyond control

For an impediment to be considered beyond a party's control, certain matters must be understood as falling within the party's own sphere of responsibility. Within this sphere, the party remains liable for risks connected with its own organisation and operations, assessed according to the ordinary fault-based standard.⁴⁸

This typically includes ensuring the safe transport of goods, maintaining stable supply chains that avoid foreseeable delays, and implementing adequate organisational and internal control systems to ensure that operations function properly.⁴⁹ It also includes financial preparedness, such as maintaining sufficient liquidity, as well as general operational planning and risk management.⁵⁰

⁴⁶ Ibid.

⁴⁷ Schlechtriem & Schwenger, Commentary, p. 1067, para. 11

⁴⁸ Schlechtriem & Schwenger, Commentary, p. 1071, para. 18-19

⁴⁹ Schlechtriem & Schwenger, Commentary, p. 1067, 1073 and 1074, paras. 11, 24 and 26

⁵⁰ Ibid.

External factors, by contrast, refer to events outside this sphere of responsibility. To qualify as external, an impediment must generally be exceptional in nature and arise from events such as war, flooding, or similar large-scale disruptions, as previously mentioned.

It must be circumstances that originate outside of the party's own sphere of responsibility. For analytical purposes, these risks can be divided into different categories.

4.3.1 Responsibility for own sphere

As mentioned, the starting point is that a party is not exempted from liability for circumstances that fall within its own sphere of control. Such circumstances do not constitute impediments in the sense of Article 79 CISG, even when they involve serious personal events, such as the death of a key employee or an unforeseen illness.⁵¹

However, an exception may arise where the performance of the contract is closely connected to the abilities of a specific person. If the contract presupposes that this particular person is to perform the obligation, and this person becomes seriously ill or dies, exemption under Article 79 may be justified.⁵²

The same reasoning applies to the seller's own ability to perform. This is illustrated in a case in Germany. An Italian commercial car dealer resold a car that he had previously bought from the defendant. This car turned out to be stolen and was later seized and returned to its rightful owner by the police. The seller relied on Article 79, arguing that he had checked with the motor vehicle registration office, which did not imply that the car was stolen, and that he therefore could not have known. The German Court rejected this defence and said that Article 79 does not shift the burden of contractual risks. The seller therefore failed in proving that the requirements for exemption under Article 79 were met, and the buyer could, therefore, claim damages instead.⁵³ The case illustrates that the seller's ability to deliver goods and transfer property generally falls within his own sphere of responsibility.

⁵¹ Schlechtriem & Schwenger, Commentary, p. 1071, para. 18

⁵² Ibid.

⁵³ CLOUT Case No. 1233, Oberlandesgericht München, Germany, 5 March 2008 (7 U 4969/06)

Another important aspect of the buyer's sphere of control is its financial capacity. This conclusion is supported by Article 54 CISG, which requires the buyer not only to pay the price but also to take the steps necessary to enable payment. If, for any reason, the agreed currency becomes difficult to obtain, or if the transfer of funds becomes significantly more expensive, this does not in itself constitute an impediment under Article 79. The buyer is still required to take all necessary steps to enable payment and must therefore bear the resulting loss.⁵⁴ However, if such difficulties in obtaining the agreed currency are due to state interventions (*faits du prince*) which impair the party's ability to obtain the agreed currency, the situation may justify a different assessment under Article 79.⁵⁵ However, some arbitral tribunals are much more severe in their assessment of this issue. The *shirts case III* supports this view.

In this case, the tribunal rejected the seller's reliance on Article 79 where the seller failed to obtain and mail an export license in time, claiming that the problem was foreseeable and something the seller could have controlled within its own commercial sphere.⁵⁶

Lastly, the party in breach is also responsible for impediments that occur because of the organisational structure and the control needed for this to function. This means production failure and internal errors regarding the company will generally not lead to exemption under Article 79.⁵⁷

In summary, Article 79 does not normally exempt a party where the non-performance results from circumstances within its own organisation, personnel, or personal sphere, unless the contract is specifically tied to the performance of a particular individual.

4.3.2 Procurement risk

In sales involving generic goods, the seller is generally understood to bear the procurement risk. Therefore, the inability of the seller's supplier to deliver will not in itself amount to an impediment under Article 79, as the seller is normally expected to obtain substitute goods elsewhere.

⁵⁴ Schlechtriem & Schwenzer, Commentary, p. 815

⁵⁵ Ibid.

⁵⁶ CISG-online 1167, China International Economic & Trade Arbitration Commission (CIETAC) China, 15 December 1998 (*Shirts case III*)

⁵⁷ Ibid.

Only if the substitute performance itself is prevented by unforeseeable and uncontrollable events may exemption become relevant. The seller must therefore exhaust all possibilities to acquire substitute goods, as long as it does not exceed the ultimate “limit of sacrifice” to acquire them.⁵⁸ As a result, the threshold for exemption under Article 79 is generally high in sales concerning generic goods.⁵⁹

However, where the sale of generic goods is limited to a particular batch or stock, and the goods therefore do not have an available market substitute, the seller may be understood as having undertaken only to deliver from that specific batch or stock.⁶⁰

This suggests that, if the relevant batch or stock is destroyed or otherwise becomes unavailable due to an unforeseeable and uncontrollable event, the seller may more easily rely on Article 79, since the obligation did not extend to obtaining substitute goods elsewhere.

This also illustrates why the assessment may differ in sales involving specific goods. Where the contract concerns an individually identified item, the seller has not necessarily assumed a general procurement obligation, and exemption under Article 79 may therefore be more easily available if that item is lost due to an event beyond the seller’s control.

The issue of procurement risk is of particular importance to this thesis, since it helps define the situations in which a seller may actually be exempt under Article 79 in cases of non-delivery. Only once that threshold is crossed does the further question arise whether the buyer retains any meaningful right to monetary relief under the Convention.

The requirement that the impediment be beyond the party’s control thus excludes exemption for risks connected with the party’s own organisation, financial capacity, and ordinary procurement structure. The next question is whether the impediment was also unforeseeable at the time of the conclusion of the contract.

⁵⁸ Schlechtriem & Schwenger, Commentary, p. 1074, para. 26;

⁵⁹ Schlechtriem & Schwenger, Commentary, p. 1074, para. 26;

⁶⁰ Ibid. para. 27

4.4 Unforeseeability

Even where an impediment is beyond the party's control, exemption under Article 79 further requires that the impediment could not reasonably have been considered at the time of the conclusion of the contract.

The requirement for unforeseeability, therefore, serves to exclude exemption in cases where the risk of non-performance was already apparent, or at least was something the non-performing party *should* have considered a threat to performing the contract.⁶¹ Where this is the case, the non-performing party will generally be regarded as having assumed the risk⁶². It may, therefore, be inferred that an impediment already existing at the time of the conclusion of the contract will be more difficult to regard as unforeseeable, since the relevant risk is then more likely to have been apparent to the parties.

4.5 Unavoidability

Even if an impediment was beyond the party's control and could not reasonably have been taken into account at the time of the conclusion of the contract, exemption under Article 79 further requires that the consequences of the impediment could not reasonably have been avoided or overcome. This requirement shows that the non-performing party must prove not only that an impediment existed, but also that reasonable measures could not have avoided the impediment or overcome its consequences to ensure performance.⁶³

The assessment, therefore, concerns not only the nature of the impediment itself, but also whether reasonable steps were available to the non-performing party in order to avoid it or overcome its consequences. This may be so, even where such steps would have involved significant expense or financial loss. At the same time, the party cannot reasonably be expected to take general preventive measures against all potential risks in advance.⁶⁴ The focus is instead on whether the particular impediment could reasonably have been avoided or overcome in the circumstances of the case.

⁶¹ Schlechtriem & Schwenzer, Commentary, p. 1068, para. 13

⁶² Schlechtriem & Schwenzer, Commentary, p. 1068, para. 13

⁶³ Schlechtriem & Schwenzer, Commentary, p. 1069, para. 14

⁶⁴ Schlechtriem & Schwenzer, Commentary, p 1074, para. 27

4.5.1 Actual impossibility and economic impossibility

In the assessment under Article 79, it may be relevant to make a distinction between situations where it is physically impossible to avoid or overcome the impediment.⁶⁵ Actual impossibility refers to cases in which performance is no longer possible due to the nature of the impediment. This may be, if the contract concerns a unique good, and it is destroyed during transport. In such a case, performance becomes impossible. If exemption is granted in such a case within the meaning of Article 79, delivering substitute goods is no longer relevant, since it is physically impossible.⁶⁶

Economic impossibility, by contrast, refers to cases in which the performance remains available but only at an extraordinary burden or cost.⁶⁷ In the previous section, it is mentioned that the steps to overcome the impediment does not regard financial loss.

Economic impossibility is therefore not the same as merely an increased financial cost. It refers to exceptional circumstances in which the financial loss is so severe, that it may in fact support exemption under Article 79. The distinction, however, should be approached with caution and may only find applicability in extraordinary circumstances.⁶⁸

4.5.2 Hardship

Whether hardship may constitute an impediment has been discussed in several courts. Some courts imply that the impediment must be akin to the ‘impossibility’ standard.⁶⁹ In contrast, the Belgian Supreme Court held that unforeseeable and changed circumstances may in some cases constitute an impediment, if they disproportionately increase the burden of performance.⁷⁰ The case concerned a contract in for the sale of steel tubes. The price of these tubes increased 70% after the conclusion of the contract.

⁶⁵ Zweigert & Kötz, Introduction to comparative law. Vol II p. 211

⁶⁶ Ibid.

⁶⁷ Zweigert & Kötz, Introduction to comparative law. Vol II p. 213-214

⁶⁸ Ibid.

⁶⁹ Clout case No. 277, Oberlandesgericht Hamburg, Germany, 28 February 1997, 1 U 167/95

⁷⁰ CISG-online 1963, Hof van Cassatie van België/Cour de cassation de Belgique, Belgium, June 19, 2009, (*Scafom International BV v Lorraine Tubes S.A.S.*), p. 11, section IV.1.

The court held that this increase in price was not foreseeable and that it disproportionately increased the burden of performance, which resulted in the fact that it constituted an impediment under Article 79. This case, therefore, suggests that Article 79 is not necessarily limited to an impossibility standard. This case is further discussed later on in the thesis. Another court has linked a party's right to be exempt under Article 79 to the principle of good faith.⁷¹ It is therefore clearly a debated topic. As stated in the section above, this does not mean that every case of increased cost will constitute an impediment under Article 79. Rather, hardship can become relevant under exceptional circumstances where the contractual balance is fundamentally altered.⁷² The threshold, therefore, remains high.

4.6 Causality

Even if the breach is due to an impediment beyond control that was not reasonably foreseeable, and its effects could not have been avoided or overcome, it still might not lead to exemption under Article 79, if the non-performance is not “due to” the impediment.⁷³ The impediment must be the actual cause of the non-performance, which in turn means that if the party would have breached the contract regardless of, for example, flooding or a governmental export ban that made performance impossible, it would still not lead to exemption. In the example, the export ban must be the actual cause of the failure to perform, not merely a surrounding circumstance. If not, the necessary causal link is absent, and exemption is not granted.⁷⁴

4.7 Notice requirement

Article 79 (4) further requires that the party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform.⁷⁵ This must be done within a reasonable time after the non-performing party knew or ought to have known of it.

⁷¹ CLOUT Case No. 1503, Court of Appeal of Lyon (Cour d'appel de Lyon), France, March 27, 2014 (*No. 11/08237*)

⁷² CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG

⁷³ Schlechtriem & Schwenger, Commentary, p. 1081, para 44

⁷⁴ Schlechtriem & Schwenger, Commentary, p. 1069, para. 15

⁷⁵ Schlechtriem & Schwenger, Commentary, p. 1081, para. 43

The provision itself specifies the sanction for non-compliance: failure to do so results in liability for damages caused by the non-receipt of notice. The party is, however, only liable for damages that arise because of not notifying. The exemption under Article 79(1), however, remains unaffected for the non-performing party.⁷⁶

5. Remedies remaining after exemption under Article 79

Once exemption under Article 79 has been established, the question is no longer whether the non-performing party is exempt from damages, but which remedies remain available to the aggrieved party despite that exemption. The following analysis, therefore, proceeds on the expectation that these requirements for exemption are fulfilled. This is determined because the need for alternative monetary relief only arises after exemption has occurred.

Therefore, the purpose of this chapter is to examine the remedies preserved under the Convention and whether any of them provide meaningful monetary relief.

5.1 The concept of meaningful relief

Before examining the individual remedies, it is necessary to clarify what is meant by “meaningful monetary relief”. The concept is not derived from the CISG itself; it is used as an analytical tool to assess the practical value of the remedies that remain after the exemption, to determine whether they provide any real value to the aggrieved party. For this purpose, the understanding of the concept is split into two: either a narrow or a broad understanding. In a broad sense, a remedy is meaningful if it provides the aggrieved party with an economic benefit. It does not need to provide full compensation, but it fulfils the requirements of the concept if it improves the party’s financial position after damages have been excluded. By contrast, in the narrow sense, a remedy is meaningful if it leaves the aggrieved party in the same financial situation as if the contract had been properly performed. This includes losses, which would normally be addressed by damages under Article 74. This means that the remedy only serves as meaningful monetary relief if it comes close to resembling the aggrieved party’s financial position after claiming damages.

⁷⁶ Schlechtriem & Schwenzer, Commentary, p. 1081, para. 47

This distinction of the understanding of the concept is important, since the remaining remedies under Article 79(5) may provide monetary value in the broad sense, while still being limited in the narrow sense.

5.2 The remedial system of the CISG

The CISG provides the aggrieved party with a number of remedies in cases of non-performance. Depending on the nature of the breach and its consequences for the aggrieved party, these may include the right to performance, substitute delivery or repair, avoidance of the contract, price reduction, damages, and interest.⁷⁷ The Convention, therefore, relies on different types of remedial responses for different circumstances.

For analytical purposes, these different types of remedial responses can be divided into three categories.⁷⁸ The first one is specific relief, which compels the non-performing party to fulfil the obligations of the contract despite the breach. These include, for example, remedies such as specific performance, substitute delivery and repair. The second category is substitutionary relief, which are rules that require the non-performing party to compensate for the loss suffered by the injured party. These include remedies such as damages, and in some circumstances, interest. The last category is avoidance, which allows the injured party to fully bring the contractual relationship to an end. This is the case if the breach is of such a serious nature that it substantially deprives the aggrieved party of what they were entitled to expect under the contract.⁷⁹

Within this remedial system, damages are the primary monetary remedy. Article 79 is therefore significant because it exempts the non-performing party from liability for damages, but not necessarily the other remedies within the Convention. It is therefore necessary to examine whether any of the remaining remedies provide any meaningful monetary relief for the aggrieved party.

⁷⁷ Lookofsky, *Understanding the CISG*, p. 6.

⁷⁸ Lookofsky, *Understanding the CISG*, p 126.

⁷⁹ Lookofsky, *Understanding the CISG*, p 126 & 134

5.3 Remedies preserved under Article 79 (5)

Article 79 (1) states that, where a party is exempt under the provision, that exemption relieves the party of the obligation to pay damages for the non-performance, to the extent that the impediment caused it.⁸⁰ Article 79(5), however, clarifies the effect of that exemption. It states that nothing in Article 79 prevents either of the parties from exercising any right other than to claim damages under the Convention.⁸¹ However, Article 79 does not extinguish the breach nor bring the contract to an end. The other party may still exercise their rights to other remedies, such as avoiding the contract, where the non-performance amounts to a fundamental breach, given what's agreed upon in the contract.⁸² Thus, Article 79 does not function as a general release from all legal consequences connected to non-performance, only liability for damages. The UNCITRAL Digest illustrates the practical importance of Article 79(5). It is clearly confirmed that if an exemption under Article 79 is established, a damages claim is denied.

This is stated in the UNCITRAL Digest, where they refer to a case where the buyer's claim for damages and right to avoid the contract was rejected, because the non-performance of the seller was due to an impediment beyond its control.⁸³ However, the buyer was still able to claim price reduction. This clearly shows that remedies remain after exemption. The CISG-AC Opinion 20 states that Article 79(5) preserves the following remedies: interest, price reduction, avoidance, and preservation expenses.⁸⁴ However, the question is whether any of these can provide any meaningful monetary relief. This requires an examination of each of these remedies and in which circumstances they are applicable. The following sections will examine those remedies individually.

⁸⁰ Schlechtriem & Schwenzer, Commentary. 1082, para 49; CISG, art 79(5)

⁸¹ CISG art. 79(5)

⁸² Ibid.

⁸³ UNCITRAL, Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016), Art. 79, para. 22.

⁸⁴ CISG-Advisory Council Opinion 20, para. 9.1.

5.3.1 Interest under Article 78

5.3.1.1 *The Nature and Function of Interest under the CISG*

Interest under the CISG is a remedy connected to the late payment of a sum that is due. Under Article 78, a party is entitled to interest where the other party fails to pay the price or any other sum that is in arrears.⁸⁵ Interest is therefore most commonly relevant where the buyer fails to pay the price on the agreed date. However, it may also become relevant where the seller is obliged to repay a monetary sum to the buyer. For example, it could be following avoidance of the contract after the buyer prepaid for the goods, and the seller now must pay back the sum. This is explicitly mentioned in Article 84(1) where it is stated that a seller who is bound to refund the price must also pay interest on it from the date on which the price was paid.⁸⁶ Although both provisions concern interest, a distinction must be drawn between them. Article 84 is concerned with restitution of what has been transferred, whereas Article 78 concerns compensation for the delay in payment.⁸⁷ In that sense, interest is thus of particular importance in the present context only where the aggrieved party holds a due monetary claim against the non-performing party. The relevance of interest to the thesis, therefore, depends on whether exemption under Article 79 leaves such monetary claims unaffected.

The question is therefore whether a claim to interest under Articles 78 and 84 remains available where the non-performing party is exempt under Article 79.

5.3.1.2 *Whether interest survives exemption under Article 79*

The first issue is whether interest under Articles 78 and 84 is to be regarded as part of a claim for damages, or as a distinct remedy under the Convention. This distinction is decisive, since Article 79 excludes only liability for damages, whereas Article 79(5) preserves remedies other than damages. The wording of Article 78 supports the statement that it can be regarded as a distinct remedy.

⁸⁵ Schlechtriem & Schwenzler, Commentary, p. 1050, para 5; CISG, art. 78

⁸⁶ Schlechtriem & Schwenzler, Commentary, p. 1132, para 3; CISG, art. 84(1).

⁸⁷ CISG-AC Opinion No. 14, Interest under Article 78 CISG, No. 2

The provision states that the aggrieved party is entitled to interest “*without prejudice to any claim for damages under Article 74*”⁸⁸. This strongly suggests that interest can be claimed separately from damages.

Another support for the view that it can be regarded as a distinct remedy is CISG-Advisory Council Opinion No. 14, No. 7, which states that: “*the obligation to pay interest under Article 78 remains notwithstanding an exemption from paying damages under Article 79. However, interest does not accrue when and in so far as the failure to pay the monetary obligation was caused by the act or omission of the creditor or when the debtor has exercised its right to suspend performance.*”⁸⁹

This strongly indicates that interest should be treated as a separate monetary remedy and not as damages. Article 79, therefore, does not by itself prevent the aggrieved party from claiming interest under Articles 78 and 84 if there is an underlying monetary obligation that is due. However, the Opinion recognises limits to this. As stated, interest does not accrue if the failure to pay was caused by the creditor’s own act or omission, or if the debtor has validly suspended performance. This entails that Article 79 does not bar interest as such, but that the aggrieved party must still establish that a monetary payment was due and in arrears. This indication is supported further by the requirement for causality under Article 79. Exemption is granted only when the non-performance was caused directly by the impediment.⁹⁰ The impediment, therefore, concerns the prevention of delivery and may not automatically extend to a later failure to pay a sum due.

A possible argument against the fact that it can be regarded separately from damages is the fact that interest has a compensatory function. It compensates the aggrieved party for the missing financial capabilities during the period of the delay. Therefore, it can be argued that if the non-performance was caused by an impediment within the meaning of Article 79, the non-performing party should not be liable for interest either. A somewhat related view can be seen in the *Italian shoes case XV*. The seller claimed interest under Article 78 for the unpaid part of the contract price. The court rejected this claim because the buyer was entitled to suspend performance under Article 71(1)⁹¹. By analogy, it may be argued that when the failure is excused under Article 79, interest may not necessarily accrue.

⁸⁸ CISG, art. 78

⁸⁹ CISG-AC Opinion No. 14, Interest under Article 78 CISG, No. 7.

⁹⁰ Section 4.6

⁹¹ CISG-online 399, Landgericht Berlin (District Court Berlin), Berlin, 15 September 1994, (*Italian shoes case XV*)

Interest is, nevertheless, a monetary payment to the aggrieved party, which in theory can be regarded as damages for the non-payment. However, this statement does not support the overall structure of the CISG. As mentioned, Article 78 states that the aggrieved party is entitled to interest, without prejudice to any claim for damages recoverable under Article 74.⁹² This indicates that interest and damages should be treated separately.

Furthermore, in a case regarding a Canadian-Russian sales contract, the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (MKAC) distinguished between liability for a penalty and liability for interest in repayment. The Tribunal concluded that liability for interest remained payable regardless of exemption under Article 79.⁹³ This is particularly important, since they treated the initial breach separately from the breach of late payment. Furthermore, it shows that a claim for interest under Article 78 is preferred if a party is exempt from liability under Article 79.⁹⁴ The key distinction in this case is that it strongly indicates that interest may constitute a surviving monetary remedy if the aggrieved party has a due claim for repayment of money. This is further supported by the causality requirement under Article 79. Exemption is granted only if the breach was caused directly by the impediment.⁹⁵ The lack of payment due may not be connected to the initial breach, which in turn indicates that interest may be treated separately and therefore survive exemption under Article 79.

It follows that interest under Articles 78 and 84 does, in fact, survive exemption under Article 79, provided that there is an underlying monetary obligation that is due and in arrears. Interest is therefore treated as a distinct remedy from damages. However, its survival does not necessarily mean that it provides a meaningful monetary relief in the same way as damages do. This further raises the question of whether interest can be characterised as a monetary relief for the aggrieved party after exemption under Article 79.

⁹² United Nations Convention On Contracts for the International Sale of Goods (CISG), art. 74

⁹³ CISG-online 2103, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (MKAC), Russia, 13 May 2008, (*Canadian-Russian sales contract case*)

⁹⁴ Lookofsky, *Understanding the CISG*, p. 160

⁹⁵ Section 4.6

5.3.1.3 Interest as a meaningful monetary relief

If the term of meaningful monetary relief is understood broadly, then interest clearly falls within it. Interest under Articles 78 and 84 results in a monetary payment that, to some extent, compensates the aggrieved party for the delay in payment, which in turn might improve that party's financial position. Furthermore, it serves a more practical function. If a party has been deprived of financial capabilities due to lack of payment that is due, interest compensates for the time value of that money. This is especially relevant in cases where the buyer has prepaid the price, and the seller is later exempt for liability under Article 79 for not delivering the goods. If the contract is then avoided, the seller is obliged to refund the payment and, in his failure to do so on time, interest on this sum under Article 84. In such cases, interest may provide a meaningful monetary payment even when damages are unavailable.

If the wording is understood narrowly, a meaningful monetary relief refers to a remedy that comes close to placing the aggrieved party in the same financial position as if the contract had been properly performed. Interest does not achieve this. In the situation described above, the aggrieved party is only compensated for the delay in repayment. Transaction costs, financing costs, additional expenses regarding the contract, and other reliance-based losses are not compensated. Nor are expectation-based losses, such as lost profits or lost business opportunities. These losses may add up to a substantial amount, meaning that the aggrieved party may still be left with a significant financial loss despite receiving interest. In this sense, interest may provide some consolation but does not fully compensate the aggrieved party for the broader financial consequences of the non-performance.

5.3.1.3.1 The relevance of the interest rate

The practical value of the interest depends mostly on the rate. Even if interest survives exemption under Article 79 in principle, the rate itself determines the monetary relief for the aggrieved party. Article 78 only establishes the right to interest, but not the rate. At contract conclusion, the parties can agree upon a specific interest rate,⁹⁶ which may be a significant monetary relief. However, if the parties have not agreed upon an interest rate, the situation is more uncertain.

⁹⁶ CISG-AC Opinion No. 14, Interest under Article 78 CISG, No. 8

In the absence of such an agreement, this is an issue that is governed but not settled in the CISG, which must be settled in conformity with private international law.⁹⁷ The Opinion states that: “*the applicable rate of interest is the rate which the court at the creditor’s place of business would grant in a similar contract of sale not governed by the CISG.*”⁹⁸ In practice, this means that the practical value of the interest is determined by the legal system within the aggrieved party’s place of business. The consequence of this is that the rate varies from case to case. In some cases, the applicable rate may be high and therefore provide the aggrieved party with a meaningful monetary relief, and in others, maybe not.

The same applies to compound interest. As further stated in Opinion no. 14, compound interest may be payable if agreed upon by the parties or if it is allowed at the creditor’s place of business. This may further increase the economic value of the interest, especially if the delay in payment has occurred for a longer period. This shows that even though the right to interest is governed by the CISG, whether the monetary relief is meaningful or not depends heavily on applicable rules that fall outside of the scope of the Convention.

5.3.1.4 Interim conclusion on interest

It can therefore be concluded that interest survives exemption under Article 79, but only as a limited monetary remedy. It is not barred by Article 79, since the wording of the provision and the CISG-AC Opinion No. 14 treat interest separately from damages. In some cases, it may provide a meaningful monetary remedy, specifically in situations where the buyer prepaid for the good and is later entitled to repayment after avoidance.

However, the consequences of the breach are still present for the aggrieved party. Lost profits, transaction costs, and other economic consequences are still present, regardless of the received interest. The value of that interest also depends mostly on the applicable rate, which is not specifically stated in Article 78. This means that in some cases, interest may provide a meaningful monetary relief, but it cannot function as a general substitute for damages.

⁹⁷ CISG-AC Opinion No. 14, Interest under Article 78 CISG, No. 9; UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, no. 10.

⁹⁸ *Ibid.*

This limited function of interest makes it necessary to examine whether other remedies preserved under Article 79(5) may provide an even more meaningful monetary relief for the aggrieved party. Following this, price reduction must be considered, since it allows the buyer to reduce the price when the goods have been delivered, but do not conform with the contract under Articles 35(1) and 35(2).

5.3.2 Price reduction under Article 50

5.3.2.1 The Nature and Function of Price Reduction under the CISG

Under the CISG, price reduction refers to a situation where a seller delivers goods that do not conform to the contract, and this non-conformity entitles the buyer to a proportionate reduction in price.⁹⁹ Conformity of the goods is regulated in CISG Article 35(1), which states that the goods must match the agreed quantity, quality, and packaging.¹⁰⁰ Article 45 states that if the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: exercise his rights provided in Articles 46-52,¹⁰¹ including price reduction under Article 50. In these circumstances, the buyer may reduce the price in proportion to the reduced value of the goods.¹⁰² The provision further states that the remedy is not available if the seller has cured the defect in the goods under Articles 37 or 48, or if the buyer refuses the seller to do so.¹⁰³

Therefore, price reduction differs from damages in both its function and its conditions. It does not compensate the buyer for the consequential losses caused by the breach, but instead adjusts the price accordingly to align with the value of the goods that were delivered.

This distinction is important in the context of Article 79, because exemption only excludes liability for damages. If price reduction is understood as a separate remedy from claiming damages, it may remain available where a seller has been exempted from damages under Article 79.

⁹⁹ Lookofsky, *Understanding the CISG*, p. 147

¹⁰⁰ CISG, art. 35 (1)

¹⁰¹ CISG, art. 45

¹⁰² UNCITRAL, *Digest of Case Law* (2016) art 50, para 1

¹⁰³ *Ibid.*

The price reduction is calculated by proportionally subtracting the value that the conforming good would have had from the value of the good delivered.¹⁰⁴ Therefore, the remedy is objective in its nature. It does not depend on the buyer proving that a loss exists, but on the objective difference between the value of the agreed good and the good received. This also means that price reduction is only relevant when the good has actually been delivered. In cases of non-delivery for reasons which would otherwise lead to exemption for damages under Article 79, the provision will not apply.

5.3.2.2 Whether price reduction survives exemption under Article 79

The next issue is whether price reduction under Article 50 survives exemption under Article 79. As with interest, the question is whether it should be characterised as damages or a distinct remedy under the Convention. In theory, price reduction does impose an economic burden upon the seller, even when damages are unavailable. When the non-conformity was caused by an impediment beyond the seller's control, it may appear as if price reduction limits the practical effect of the exemption, since the seller still suffers a financial consequence of events beyond his control. Nevertheless, this argument cannot be decisive, since Article 79(5) expressly preserves remedies other than damages.

However, price reduction does not compensate the buyer for all consequential losses but only adjusts the price accordingly with what was actually received. The remedy, therefore, only concerns the connection between value and performance, not liability for damages.

This view is supported by the Secretariat Commentary from 1979, which states that:” (...) *even if the seller is excused from paying damages for his failure to perform the contract by virtue of article 65, the buyer may still reduce the price if the goods do not conform with the contract*”.¹⁰⁵

It is expressly mentioned that the buyer may claim price reduction, even if the seller is exempt from liability by Article 65 (which corresponds to Article 79 CISG). This confirms that the drafters of the Convention intended price reduction to survive exemption under Article 79.

¹⁰⁴ Lookofsky, *Understanding the CISG*, p. 147

¹⁰⁵ Secretariat Commentary on the 1978 Draft Convention on Contracts for the International Sale of Goods, Commentary to draft article 46 (which corresponds to Article 50 CISG), para 5

This conclusion is also consistent with the causality requirement under Article 79. The exemption only excludes liability for damages resulting from the non-performance that is directly caused by the impediment. Price reduction, however, does not depend on that same breach and is based on the objective difference between the goods in the contract and the goods delivered. Therefore, even when the seller is exempt under Article 79, the buyer's right to price reduction may remain available because the remedy concerns the value of the performance received, rather than compensation for loss.

The unavoidability requirement may also be connected to the seller's right to cure under Articles 37 and 48. It is previously stated that Article 79 requires that the seller must show that the impediment could not reasonably have been avoided or overcome¹⁰⁶. In cases where price reduction is excluded because the seller was able to cure the non-conformity, the seller does, in fact, overcome the impediment, subsequently making price reduction irrelevant. The provisions, therefore, both reflect the idea that the legal consequences of the non-performance depend on whether the impediment can be overcome. Price reduction may therefore only be relevant where the non-performance remains uncured or in other ways avoided.

It follows that price reduction under Article 50 does in fact survive exemption under Article 79. Therefore, it only matters whether the requirements of Article 50 are fulfilled, should an aggrieved party have the need to claim price reduction. In contrast, this also means that price reduction is only relevant when the goods have actually been delivered. In a case of non-delivery, the provision is irrelevant, since the aggrieved party has not received any devalued goods.

The next question is, therefore, whether price reduction constitutes a meaningful monetary relief for the aggrieved party.

5.3.2.3 Price reduction as a meaningful monetary relief

Compared to interest, price reduction may provide a more significant monetary relief for the aggrieved party, because it directly reduces the cost of the good to match the actual value of the good received.

¹⁰⁶ Section 4.5

It may produce an economic outcome like compensation from damages within the CISG, but it is not based on the principle of full compensation *as* damages.¹⁰⁷ Like interest, price reduction does not compensate for reliance- or expectation-based losses and may still leave the aggrieved party in a less favourable financial position than before entering the contract, despite a reduction price. However, as mentioned, it is only applicable if the goods physically arrive at the buyer's disposal.

This creates a somewhat paradoxical result. Price reduction may be a meaningful monetary remedy where the seller delivers defective goods and is exempt from damages under Article 79. Nevertheless, the remedy is unavailable in cases of total non-delivery, which in turn may be an even greater financial challenge for the aggrieved party. If, for example, the buyer needs the good for resale purposes with a third party, delivery of a defective good may be economically preferable than no delivery at all. They may still be able to resell parts or otherwise gain value from defective goods, while still being able to claim price reduction. Therefore, the paradox lies in the fact that Article 50 provides access to monetary relief in a less severe case of a defective delivery, while offering no monetary remedy in the more severe case of non-performance.

Another further question arises, when the goods are delivered to the buyer, but the damage is so severe that the goods have no remaining economic value. In this case, it may prove harder to differentiate between a total non-delivery and a defective good. Based on the wording of Article 50, the goods are still delivered, which entails that price reduction is an available remedy. In theory, since the good has no economic value, the price must be reduced to zero. This has been confirmed in case law compiled by UNCITRAL Digest regarding Article 50, which states that where delivered goods have no value, the price may be reduced to zero.¹⁰⁸

They further state that the buyer retains this right even if the party has lost its right to avoidance of the contract under Article 49(2)¹⁰⁹. This is highly significant because the buyer is not obligated to deliver back the goods but may still claim a price reduction.

¹⁰⁷ UNCITRAL Digest of Case Law, para. 21

¹⁰⁸ UNCITRAL, Digest, art. 50, para. 10

¹⁰⁹ *Ibid.*

This may leave the buyer in a more favourable position than before entering the contract, and this confirms that price reduction can be a meaningful monetary remedy in cases of delivery of defective goods.

It may seem problematic that the buyer can physically retain the goods and still reduce the price to zero. However, this is not inconsistent with the wording of Article 50. If the goods are worthless, reducing the price to zero follows the logic of the provision. The fact that the buyer keeps the goods does not amount to an additional economic benefit. This conclusion does not change when the seller is exempt under Article 79. Exemption does not require the buyer to pay the full contract price for goods that have no value. The remedy, therefore, does not overcompensate the buyer in such a case.

This illustrates that price reduction may be of commercial significance, but only where the buyer receives defective goods whose value can be reassessed. Otherwise, the provision does not provide the buyer with any meaningful monetary relief, and the aggrieved party must seek compensation in other areas of the remedial system of the Convention.

As with interest, it must also be discussed how the word “meaningful” is understood in the context of price reduction. If it is understood either narrowly or broadly, the outcomes may vary. If the word is understood broadly, then price reduction falls within its meaning. In the case of a defective delivery, the provision does provide the aggrieved party with compensation for the reduced value of the goods. It may even serve as more meaningful monetary relief than interest, since the aggrieved party can reduce the price to match the exact value of the good, compared to interest on a monetary obligation due in arrears. A price reduction that matches the value of the good may therefore serve as a meaningful relief.

However, as with interest, Article 50 does not account for reliance- and expectation-based losses, which means that if the wording is understood narrowly, the provision may not suffice. The aggrieved party must financially remain in the same position as before entering the contract, and a price reduction only satisfies this criterion to some extent.

This may only be the case if the buyer did not rely on the goods’ ability to generate subsequent value, or if it was possible for him to acquire the goods elsewhere within a reasonable timeframe.

Lastly, as stated in Article 6 of the CISG, the parties may derogate or vary from any of its provisions and therefore modify its application.¹¹⁰ This means that the parties may agree upon the minimum price of the reduction beforehand, to ensure that the aggrieved party is, in fact, compensated with a meaningful monetary relief. This, however, may be difficult for the parties to agree upon and is only relevant in cases of delivery of defective goods with some monetary value remaining.

5.3.2.4 Interim conclusion on price reduction

It can therefore be concluded that Article 50 survives exemption under Article 79. This is directly confirmed by the Secretariat Commentary, which means that it was intended by the drafters of the Convention. Price reduction, therefore, remains an available monetary remedy in cases of delivery of defective goods, if the requirements of Article 50 are fulfilled. However, in cases of non-delivery, Article 50 does not provide the aggrieved party with meaningful monetary relief, and the buyer must seek relief in other provisions within the Convention. In cases of defective delivery with damage that is so severe that the remaining goods are worthless, the result is somewhat paradoxical. Here, the provision does provide meaningful monetary relief for the aggrieved party, since the buyer may reduce the price to zero and is not obliged to return the goods. However, in the more severe case of non-delivery, the provision does not provide any relief for the aggrieved party. Price reduction may therefore serve as a meaningful monetary relief in cases of defective delivery with and without remaining value in the goods.

The limited function of price reduction as a meaningful monetary remedy makes it necessary to examine whether restitution after avoidance serves as a more meaningful monetary relief. This is relevant, since Article 50 does not provide any relief in cases of total non-delivery, which restitution may do.

¹¹⁰ CISG, art. 6

5.3.3 Restitution after avoidance of the contract under Article 81

5.3.3.1 *The Nature and Function of Restitution under the CISG*

Restitution under the CISG regards the legal consequences after a party rightfully avoids the contract.¹¹¹ Under Article 81(1), it follows that avoidance results in a cancellation of the contract, and both parties are immediately released from any of their unperformed primary obligations or obligations connected to them.¹¹² Article 81(2) further states that the party who performed either wholly or in part may claim restitution from the other party. However, the provision requires rightful avoidance. For the buyer, this is set out in Article 49(1) and for the seller in Article 64(1). Unlike the Danish rule that any delay in a sales contract may serve as grounds for avoidance, unless only an insignificant part is delayed¹¹³, the CISG only provides this in cases where the delay amounts to a fundamental breach.¹¹⁴ This entails that it takes more than a slight delay or inconvenience for the aggrieved party in order to avoid the contract. The function of Article 81 is therefore not to compensate the aggrieved party for loss, but to make sure that both parties deliver back what they have previously performed after avoidance of the contract.¹¹⁵

Restitution is especially relevant in cases where the buyer has prepaid the price and the seller fails to deliver the goods. Here, Article 81 provides the buyer with the ability to reclaim the initial payment from the seller. The provision, therefore, does not compensate for loss the same way damages do, but it merely returns what was initially performed after a contract has been avoided. This makes it necessary to examine whether restitution after avoidance survives exemption under Article 79.

5.3.3.2 *Whether Restitution after Avoidance survives exemption under Article 79*

To determine whether Article 81 survives exemption under Article 79, the requirements for rightful avoidance must first be examined.

¹¹¹ Lookofsky, *Understanding the CISG*, p. 175; Schlechtriem & Schwenger, *Commentary*, p. 1101, para 3

¹¹² Schlechtriem & Schwenger, *Commentary*, p. 1101, para 5

¹¹³ The Danish "Købeloven § 21, stk. 3", LBK nr 1853 af 24/09/2021

¹¹⁴ Lookofsky, *Understanding the CISG*, p. 133

¹¹⁵ CISG-AC Opinion No. 9, bb), 3.8

Article 25 states that a fundamental breach must be one of such detriment to the aggrieved party that it substantially deprives him of what he is entitled to expect.¹¹⁶ This concerns a situation where the goods do not match their contractual description. For example, if the goods prove dangerous for use or if they are unfit for resale, both locally and globally.¹¹⁷

The provision further requires that the party in breach, or a reasonable person of the same kind, ought to have foreseen the consequences of the breach¹¹⁸. This may sound familiar to the unforeseeability criterion under Article 79, where the non-performing party *should* have considered the impediment a threat to the performance of the contract.¹¹⁹ It may sound as if the two requirements overlap and would result in the fact that a fundamental breach and an exemption for damages under Article 79 cannot coexist. However, a clear distinction must be made between the two provisions. Article 25 only concerns whether the substantial deprivation of the breach was foreseeable. Article 79 concerns whether the impediment causing the breach could have been taken into account. It may therefore still be possible for a party to be exempt from liability for damages under Article 79 because the impediment was unforeseeable, but the consequences of the breach were foreseeable. This is important because Article 79(5) preserves remedies other than damages. Fundamental breaches are therefore relevant after exemption under Article 79, since the provision states that rightful avoidance is necessary to trigger restitution. The fact that avoidance of the contract is an available remedy for the aggrieved party is confirmed by the CISG-AC Opinion no. 20, where it is expressly mentioned that avoidance under Articles 49(1) and 64(1) survives exemption under Article 79.¹²⁰

The next topic of importance to the thesis is whether restitution under Article 81 survives exemption. Since it has been concluded that avoidance does in fact survive, this may serve as an indirect conclusion on the fact that restitution also does. Restitution is not specifically mentioned as a surviving remedy in Opinion no. 20. However, since Article 81 requires rightful avoidance, which does survive under Articles 49(1) and 64(1), this may serve as a strong indication for concluding that restitution also survives.

¹¹⁶ CISG, art. 25

¹¹⁷ Lookofsky, *Understanding the CISG*, p. 134

¹¹⁸ CISG, art. 25

¹¹⁹ Section 4.4

¹²⁰ CISG-AC Opinion 20, para. 9.1

Otherwise, the practical effect of avoidance would not be apparent in cases where delivery has already been performed. The next question is, therefore, whether restitution serves as a meaningful monetary relief for the aggrieved party.

5.3.3.3 Restitution as a meaningful monetary relief

To determine whether Article 81 serves as a meaningful monetary relief, it cannot be compared to damages as such. The provision does not concern the economic consequences of the aggrieved party but instead focuses on reversing performances already made. This ensures that the non-performing party does not retain the financial benefit from a contract that is no longer valid. This is particularly relevant in cases where the buyer has prepaid for the goods, but the seller is exempt from liability for damages under Article 79. Here, the provision obligates the non-performing party to repay the initial payment and therefore prevents the buyer from having paid for a performance that was not received. The meaningful relief for the buyer is therefore the fact that this provision makes it possible to reverse the contractual exchange. Even though it does not protect the buyer from external factors beyond the payment, it does provide the buyer with an opportunity to reverse the contractual exchange.

This distinguishes restitution from interest and price reduction. Interest provides the aggrieved party with additional payment for the delay in a monetary obligation, and price reduction provides an adjustment in the price for devalued goods. Restitution, by contrast, concerns the aggrieved party's legal position after avoidance and therefore has its focus on returning what was already performed. This gives restitution an independent economic function within the Convention and may serve as a meaningful monetary relief in cases where the buyer has prepaid.

However, where the buyer has not prepaid, and the seller has not delivered any goods, Article 81 does not provide monetary relief. After avoidance, both parties are released from their obligations, but neither of them has performed in the first place. The buyer may avoid having to pay the price, but this is different from monetary relief. In such cases, restitution has a more liberating effect rather than a monetary one. The actual monetary value of restitution arises only when one of the parties has performed, and the contract is then avoided. If the buyer has prepaid, restitution may be significant because it reverses the contractual exchange and prevents the seller from retaining the price without delivering the goods. Where no performance is made, no internal loss is suffered, and restitution does not serve to address any commercial disadvantage. The strength of the provision, therefore, lies in reversing contractual imbalances.

This effect of restitution may also be strengthened by Article 84(1). Where the seller is bound to repay the price after avoidance, the seller must also pay interest on that sum from the day the price was paid. This differs from Article 78, where the seller is only bound to pay interest where it is connected to a sum in arrears. Article 84(1) specifically concerns interest on the refund of the price after avoidance. Restitution may, therefore, be connected to interest in that sense, at least in the period of the seller's retention of the price. In such cases, restitution and interest may together serve as a clear monetary relief for the aggrieved party.

5.4 Testing the remaining remedies through hypothetical scenarios

The section above has examined interest, price reduction, and restitution as separate remedies. The analysis shows that each of them survives exemption under Article 79, but their practical value for the aggrieved party mostly depends on the circumstances of the case. This section, therefore, examines how the remedies operate in hypothetical scenarios. The scenarios include non-delivery after prepayment, non-conforming delivery, and temporary impediment causing delay.

These scenarios are chosen because they capture situations where the meaningful monetary relief for the buyer may differ significantly. In some cases, the buyer may recover money already paid. In others, the buyer may reduce the price or avoid future obligations.

These scenarios, therefore, help with the understanding of the distinction between monetary relief in the broad and narrow sense. It must also be noted that the parties have not derogated or varied from the provision under Article 6 due to a *force majeure clause*, which some courts have held would neglect Article 79 altogether.¹²¹

5.4.1 Non-delivery after prepayment

In the first hypothetical scenario, the buyer has prepaid the full contract with a sum of EUR 1,000,000 for a packaging machine that is intended to be used in the buyer's production line. Before the delivery, an unforeseeable export ban in the seller's country prevents the seller from performing the contract.

¹²¹ CLOUT Case No. 277. Oberlandesgericht Hamburg, Germany, 28 February 1997, (1 U 167/95); CLOUT Case No. 142, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, 17 October 1995, (No. 123/1992)

The requirements for exemption under Article 79 are met, and the seller is therefore exempt from liability for damages. The buyer then rightfully avoids the contract, because the goods are not delivered, and this amounts to a fundamental breach under Article 25.

Since damages are excluded, the buyer cannot claim damages for losses caused by the non-delivery. As previously concluded, this includes external losses.¹²² However, the buyer may still have a monetary claim against the seller through restitution. Since the contract is rightfully avoided, Article 81(2) allows the party to recover the full EUR 1,000,000.¹²³ This provides a clear monetary relief in the broad sense; the buyer is not left in a position where it has paid for a machine that was not delivered. The buyer may further be entitled to interest under Article 84(1) from the date on which the price was paid.¹²⁴

However, it turns out that the buyer immediately needed the machine for its production, and because of the non-delivery, the buyer suffered significant losses due to lost production capacity and additional costs of finding a new machine. These losses amount to EUR 200,000. Following a damages claim, these losses would also be compensated, due to the principle of full compensation.¹²⁵ Restitution, however, does not cover these losses, and the buyer is left with an additional loss of EUR 200,000, which may be slightly reduced due to the interest received.

This scenario shows that restitution may provide meaningful monetary relief in the broad sense. The buyer recovers his initial payment and may even receive interest on that payment. However, it does not place the buyer in the same financial position as if the contract were properly performed and thus does not constitute a meaningful monetary relief in the narrow sense.

¹²² See Section 5.3.3.3

¹²³ See Section 5.3.3.1

¹²⁴ *Ibid.*

¹²⁵ UNCITRAL Digest of Case Law, para. 21

5.4.2 Non-conforming delivery after prepayment

In the second hypothetical scenario, the buyer prepays the full contract price of EUR 100,000 for a shipment of coffee beans with the intention of reselling them. Before the delivery, the storage facility in which the beans are kept is struck by lightning, which results in a power outage.

The air conditioning system, therefore, stops working, which renders the coffee beans damaged by moisture. The power outage was beyond the seller's control and could not reasonably have been foreseen or avoided. The seller is, therefore, exempt from liability for damages under Article 79. The beans are nevertheless delivered to the buyer, but with a reduced market value of only EUR 60,000. As previously concluded, price reduction only becomes relevant when the goods are received.¹²⁶ The goods are delivered, but the moisture damage means that the goods do not match the quality that the buyer was entitled to expect under the contract. This situation, therefore, falls within the type of case where Article 50 provides the buyer with a reduction in price.¹²⁷

The contract price is adjusted to match the value of the goods received, which means that the buyer can recover EUR 40,000. This provides a different form of meaningful monetary relief than restitution. In this scenario, the contract is not reversed. The buyer keeps the goods but adjusts the price accordingly to reflect the reduced value of the goods. This illustrates that in cases of delivery of non-conforming goods, Article 50 may provide monetary relief for the aggrieved party in the broad sense. As with restitution, external losses are not recovered, meaning that the provision does not constitute a meaningful relief in the narrow sense.

5.4.3 Temporary impediment causing delay

In the last hypothetical scenario, the buyer purchases 1,000 winter jackets from the seller with the intention to resell them to customers during the winter season. The contract is concluded, but the parties agreed that the buyer would pay the price on the delivery date.

¹²⁶ See Section 5.3.2

¹²⁷ Ibid.

Before delivery, an unforeseeable cyber-attack disables the customs clearance system in the seller's country, resulting in the seller being unable to export the goods. The requirements for exemption are met. After two months, the jackets are finally delivered. However, since they arrived late, the winter season is now over, which means that the buyer could not resell them in time. This amounts to a significant commercial loss suffered by the buyer. In ordinary circumstances, these losses would be covered by damages under Article 74.¹²⁸ The remaining remedies may not be of assistance in this particular case. Restitution is not relevant, since the buyer has not prepaid the price, and there is therefore no performance to restore.¹²⁹ Price reduction is also not relevant, since the goods delivered conformed to the contract.¹³⁰ Lastly, interest is also not relevant, since the seller does not owe a monetary sum to the buyer.¹³¹ Therefore, the buyer cannot obtain any meaningful monetary relief – not even in the broad sense.

This scenario illustrates the limitation of Article 79(5). In this case, the buyer did suffer losses, but none of the remaining monetary remedies in the Convention were applicable, leaving the aggrieved party with significant losses that could not be recovered at all. The three scenarios show that the practical value of the remaining remedies depends heavily on the circumstances of the case. It further indicates the conclusion of the fact that meaningful monetary relief is possible to obtain in the broad sense, but none of them have the same function as claiming damages.

5.5 Interim conclusion on remedies remaining after exemption under Article 79

Based on the analysis above, it can be concluded that Article 79(5) does not necessarily leave the aggrieved party without meaningful monetary relief. Article 79(5) only concerns exemption from liability for damages, but other monetary remedies, including interest, price reduction, and restitution, may in some cases remain and serve as relief for the aggrieved party.

However, it is also clear that these remaining remedies do not provide the same type of protection for the aggrieved party as to claim damages under Articles 74-77.

¹²⁸ UNCITRAL Digest of Case Law on the CISG, Article 74, para. 12

¹²⁹ See Section 5.3.3

¹³⁰ See Section 5.3.2.1

¹³¹ See Section 5.3.1.1

Damages are based on the principle of full compensation and therefore also protect the buyer from the external consequences of the breach, including lost profits, lost business opportunities, and more. Its scope is, therefore, much more extensive. However, the remedies examined in this chapter are different. Interest under Article 78 (and 84) serves as relief for the delay in payment of a sum due, but whether it is meaningful is mostly dependent on the applicable interest rate. Price reduction under Article 50 adjusts the price for a delivery of defective goods to match the actual value, but may only serve as a meaningful monetary relief if there was a delivery in the first place. And lastly, restitution ensures that performances are reversed. However, it only applies after rightful avoidance and may only serve as meaningful monetary relief where one of the parties performed, especially if the buyer prepaid the price.

The analysis, therefore, shows that whether the remaining remedies serve as meaningful monetary relief depends heavily on the circumstances of the cases. Each of them is triggered by different conditions, and their meaningfulness for the aggrieved party depends on whether these conditions are met. Article 79(5), therefore, limits the protection of the aggrieved party, but it does not exclude all sources of monetary relief within the remedial system of the CISG.

This limited understanding of exemption is also reflected in the notice requirement under Article 79(4). Even when the requirements for exemption are fulfilled, the non-performing party is still obligated to give notice of the impediment and its effect on their performance. Otherwise, the aggrieved party may still claim damages for not receiving a timely notice¹³². This shows that even though the notice requirement does not in itself create a right to interest, price reduction, or restitution, an exemption under Article 79 does not release the non-performing party from all contractual obligations.

This raises a broader question about the remedial system in the CISG. If the buyer suffers losses without being able to obtain meaningful monetary relief, should this be understood as a legal gap in or a structural limitation in the Convention? This will be discussed in the following chapter.

¹³² Section 4.7

6. Structural limitation or a gap in the CISG remedial system?

The analysis in the previous chapter shows that Article 79 does not remove all remedies available to the buyer. Article 79(5) clearly states that an exemption does not prevent either party from exercising their rights to remedies other than damages. This means that monetary remedies such as interest, price reduction, and restitution may still be available for the buyer, depending on the circumstances of the case. However, the analysis also shows that these remedies do not serve as a general substitute for a claim for damages.

This raises a broader question. If the buyer suffers an economic loss without being able to obtain full monetary relief, should this be understood as a legal gap in the CISG remedial system, or did the drafters of the Convention intend for this to be the structural consequence of an exemption under Article 79? If the problem is a legal gap, then it may be considered an issue that is governed but not settled under Article 7(2). However, if the drafters intended this to happen when a seller is exempt, the buyer must accept that Article 79 protects the exempted party with a reallocation of the losses suffered by the buyer. This distinction will be examined in the coming sections.

6.1 The distinction between a structural limitation and a legal gap

As stated in the methodology section, Article 7(2) applies where a matter is governed by the CISG, but it is not expressly settled.¹³³ The courts must first determine whether the CISG settles the issue, and if not, see if the general principles of the Convention aid in doing so. If neither of them settles, only then are they forced to seek guidance in private international law.¹³⁴ This means that even if the issue is practically difficult, or if the result of the issue seems unreasonable or unjust for either of the parties, this does not in itself mean that there is a legal gap in the Convention which must be settled by private international law.

¹³³ Section 3.3

¹³⁴ Section 3.3

A distinction must, therefore, be made between the two concepts. A structural limitation refers to the situation where the CISG does provide an answer to the issue, but it does not produce an outcome or result that is satisfactory to one of the parties. In this context, the CISG would fail to provide the aggrieved party sufficient protection in cases of exemption from liability for damages under Article 79.

The question of whether Article 79 contains an internal gap has, to some extent, been debated before. The Belgian Cour de Cassation and some authors have considered whether the consequences of hardship under Article 79 can be understood as an internal gap in the Convention.¹³⁵ The court concluded that the gap might be filled according to Article 7(2), by relying on the UNIDROIT Principles. Here it is stated that “*in the case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.*”¹³⁶ This illustrates that Article 79 may raise some questions regarding internal gaps in the Convention. However, in the Belgian Court, the question was whether the parties should renegotiate due to hardship, which is not the same as whether the buyer can obtain meaningful monetary relief due to an exemption. The questions concern Article 79, but they are not identical.

The debate about hardship is nevertheless still relevant for the thesis, since it shows that even if the CISG may provide the buyer with a somewhat harsh result, it is not the same as a legal gap. The question is therefore whether Article 79(5) leaves the aggrieved party with an unresolved legal problem, or whether it already settles the dispute by leaving remedies other than damages available. This will be examined in the following section.

6.2 Whether Article 79(5) settles the remedial consequence of exemption

Since Article 79(5) has previously been examined in Chapter 5, this section concerns its implications for the question of the legal gap. If it is characterised as such, the question is whether the general principles of the Convention can settle the issue under Article 7(2).

- a) The principle of full compensation, which is derived from Article 74, may be the obvious choice.

¹³⁵ CISG-AC Opinion 20, para. 11.9.

¹³⁶ UNIDROIT Principles, Section 2: Hardship, Article 6.2.3

However, since it has been clearly stated that Article 79(5) excludes liability for damages, this principle cannot be decisive in the matter. However, Article 74 reflects the idea that the aggrieved party should be left in the same financial position as if the contract had been properly performed.¹³⁷ This view also aligns with the UNIDROIT Principles Article 7.4.2, which states that: “*the aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm*”¹³⁸. It may be argued that since this is a general principle in the Convention, it may seem somewhat limited to confine it to cases only revolving around a damages claim where Article 74 applies directly. Although Articles 7.4.2 and Article 74 are both located in the sections revolving around damages, it still reflects the broader idea of compensatory logic in the Conventions. Since Article 7(2) allows unresolved issues to be settled in conformity with the general principles on which the Convention is based¹³⁹, it may seem limited that such a principle is not relevant if it cannot be framed as an ordinary damages claim.

The provisions, however, are expressed in the section on damages, and the requirements are therefore only met in cases of such a claim. If the principle were to extend further than a damages claim and grant full compensation in cases where the seller is exempt under Article 79, it may weaken the distinction between damages and other monetary remedies in the Convention. This supports the view that this may simply be a structural limitation of the Convention.

- b) The right to interest, which is derived from Article 78, also constitutes a general principle in the Convention.¹⁴⁰ The requirements are met when the sum due is in arrears.¹⁴¹ This clearly shows that monetary relief is not limited only to damages.

¹³⁷ CISG-AC Opinion 6, para 3.4

¹³⁸ Unidroit Principles 2016, Article 7.4.2.

¹³⁹ See Section 3.3

¹⁴⁰ UNCITRAL Digest of Case Law, para. 28-29

¹⁴¹ See Section 5.3.1.1

However, the principle or provision is only relevant when the buyer has a monetary claim against the seller, for example, where the buyer has prepaid the price, and the seller is obligated to refund. It, therefore, only applies in specific circumstances, where the buyer has a monetary claim against the seller. This shows that the principle does not solve the broader issue of not compensating the buyer for external losses, which damages would do, and therefore also supports the view that this is a structural limitation of the Convention.

- c) The principle of mitigation, which is derived from Article 77, is also relevant in this context. In this context, it does, however, favor the seller and not the aggrieved party. The meaning of the provision is that the party who is entitled to damages is required to mitigate damages.¹⁴² It means that the aggrieved party must take all possible and appropriate measures to ensure additional loss is not suffered.¹⁴³ This may be understood as an expression of the principle of good faith. In this context, it shows one important aspect, which is the fact that the remedial system of the CISG is not based on the idea that all economic loss must be shifted to the party in breach. It also contains principles concerning the limitation of loss and allocation of risk between the parties. This weakens the argument that relying on the general principles in the Convention may lead to a better financial outcome for the aggrieved party.

- d) The principle of good faith may also be considered in this regard. The principle is expressly mentioned in Article 7(1),¹⁴⁴ but it only connects to the interpretation of the Convention. It is therefore safer to understand the principle as an interpretative aid rather than a basis for monetary relief. In the context of Article 79, the good faith principle may be expressed through the notice requirement in Article 79(4), where the party invoking the exemption must notify the other party of the impediment and its effects on its ability to perform.¹⁴⁵ The principle, therefore, does not provide a strong basis for monetary relief. Furthermore, Article 79 already requires an assessment of whether the impediment was beyond his control, whether it was foreseeable, or whether it could have been avoided or overcome.

¹⁴² Schlechtriem & Schwenger, Commentary, p. 1042, para 1

¹⁴³ Ibid.

¹⁴⁴ See Section 3.2.2

¹⁴⁵ See Section 4.7

The fulfilment of these requirements may entail that the non-performing party has already demonstrated that the non-performance falls within Article 79. In this case, good faith may support the interpretation of existing duties, such as the notice requirement, but it may not alter the consequences of exemption under Article 79.

- e) The discussion of hardship in the Scafom case may also be mentioned as a contrast.¹⁴⁶ The case illustrates that Article 7(2) may be relevant in cases where the CISG governs an issue but does not settle it. The question was whether the parties should renegotiate due to hardship. The seller argued that, according to French law, as a matter of performance in good faith, the parties are obliged to renegotiate the contract in cases of unforeseeable changed circumstances that alter the future performance of the contract unwarranted.¹⁴⁷ This is somewhat relevant because renegotiation may constitute a different form of monetary compensation. It may, therefore, allow the parties to adjust the contract instead of leaving the aggrieved party to rely on only the remaining remedies after exemption. In this sense, the renegotiation may soften the consequences of exemption, at least in cases of hardship, and therefore serve as practical relief. However, this thesis focuses on monetary relief, and renegotiation does not compensate the aggrieved party for losses already suffered. Nor does it make it a certainty that the buyer will actually receive practical relief. Its function is instead to ensure that the contractual balance is restored after unforeseeable changed circumstances. The CISG-AC Opinion 20 also states that the parties have *no* duty to renegotiate in case of hardship, and that the parties may only do so if they agree upon it.¹⁴⁸ Furthermore, the Opinion states that a court or arbitral tribunal may not bring the contract to an end in cases of hardship, and this may only be done by avoidance or termination of the parties' agreement.¹⁴⁹

¹⁴⁶ See Section 4.5.2

¹⁴⁷ CISG-online No. 1963, Hof van Cassatie van België / Cour de cassation de Belgique, Belgium, 19 June 2009, (Scafom International BV v Lorraine Tubes S.A.S.), p. 5, para 7

¹⁴⁸ CISG-AC Opinion 20, section 11, para. 11.1

¹⁴⁹ CISG-AC Opinion 20, section 13, para. 13.1-13-3

This limits the relevance of hardship and negotiation for this thesis, since it is clear that the parties must agree upon the relevant outcome in cases of exemption, and it does not provide the buyer with meaningful monetary relief. This further suggests that the lack of meaningful monetary relief for the buyer is due to a structural limitation of the Convention.

6.3 Structural limitation rather than a legal gap

The examination above shows that the CISG contains several principles that may affect the buyer's financial position after exemption under Article 79. However, none of them has proven to be a strong basis for concluding that the buyer's lack of full monetary relief is due to a legal gap in the Convention. They only provide aid to existing remedies, such as Article 79(4) or the general sharing of information, but they do not alter the consequences of exemption under Article 79. The better view is, therefore, that the lack of full monetary relief is due to a structural limitation in the Convention. Article 79(5) does not leave the consequences of exemption without options for the buyer. It still preserves other remedies, but only within the limits and conditions of them. It has previously been concluded that these do not provide the buyer with compensation for the external consequences of the loss suffered.¹⁵⁰ It can be concluded that this reflects a limitation of the structure of Article 79, and should, therefore, be understood as a consequence of exemption, rather than an issue that is governed but not settled under the CISG. The buyer may, therefore, obtain meaningful monetary relief in the broad sense where requirements of the remaining remedies are met, but Article 79 prevents those remedies from functioning as a general substitute for damages.

¹⁵⁰ See Section 5.3.3.3

7. Conclusion

This thesis has examined the extent to which the buyer can obtain meaningful monetary relief in cases where the seller is exempt from liability for damages under Article 79. It has also examined whether the absence of full monetary relief should be understood as a legal gap or a structural limitation in the Convention.

The starting point of the analysis was that Article 79 does not remove all remedies for the aggrieved party. It only exempts the seller from liability for damages if the requirements for exemption are met. As shown in Chapter 4, the requirements are rather specific and only apply in rather particular circumstances. The seller must prove that the failure to perform was caused by an impediment beyond its control, that the impediment could not have been taken into account at the time of contract conclusion, and that the impediment could not reasonably have been foreseen or overcome.¹⁵¹ This shows that the requirements for exemption under Article 79 operate within strict circumstances. When these requirements are met, however, the question arises whether the buyer can obtain meaningful monetary relief through relying on the remaining remedies in the Convention.

In Chapter 5, the thesis concludes that Article 79(5) is central to this very question. The provision makes it clear that either party is not prevented from exercising their rights to other remedies, only damages.¹⁵² This means that the buyer is not left without remedies, and that the remaining remedies can potentially constitute a meaningful monetary relief. However, it is also clear that these do not have the same function as claiming damages. As shown in section 5.3.1.2, interest survives exemption under Article 79 because it is better understood as a distinct remedy from damages. The wording of Article 78 supports this conclusion, since it grants interest “without prejudice to any claim for damages under Article 74”. The same view is supported by CISG-AC Opinion No. 14, which states that the obligation to pay interest remains notwithstanding an exemption from damages under Article 79.¹⁵³ This conclusion is, furthermore, consistent with the causality requirement, since an exemption does not necessarily prevent a later obligation for a monetary payment due.

¹⁵¹ See Section 4.1 – 4.5

¹⁵² See Section 5.3

¹⁵³ See Section 5.3.1.2

However, the practical relevance of interest mostly depends on the applicable rate, which is an issue that is governed but not settled in the CISG, and must be derived from private international law under Article 7(2). Interest, therefore, provides meaningful monetary relief in the broad sense, since it provides the buyer with an economic benefit. The provision does not, however, compensate for external losses and thus does not constitute a meaningful monetary relief in the narrow sense.¹⁵⁴

As shown in section 5.3.2, price reduction also survives exemption under Article 79, since it is not a damages claim. Its function is not to compensate the buyer for all losses suffered, but to adjust the price according to the reduced value of the goods received. This conclusion is supported by the Secretariat Commentary to draft Article 46, para. 5, in which it is expressly stated that the buyer may reduce the price where the seller is exempt from damages.¹⁵⁵ Price reduction, therefore, remains available when the seller delivers non-conforming goods and is exempt under Article 79. In cases where the goods have little to no value, it may provide meaningful monetary relief in the broad sense, since it ensures that the goods match the value of what was actually received. However, it only applies when the non-conforming goods have actually been delivered. The aggrieved party cannot rely on the provision when no goods are delivered. However, as with interest, the provision does not compensate for external losses and does, therefore, not constitute a meaningful monetary relief in the narrow sense.¹⁵⁶

As shown in section 5.3.3, restitution also survives exemption under Article 79. Restitution depends on rightful avoidance of the contract. Since avoidance survives exemption, it is concluded that restitution also survives. CISG-AC Opinion No. 20 supports the view that avoidance may survive exemption under Article 79. Restitution is, therefore, a consequence of avoidance and not a damages claim. Its function is to reverse performances already made, and not to compensate the aggrieved party for the loss suffered.¹⁵⁷ It is concluded that restitution is especially relevant in cases where the buyer has prepaid the price and the seller fails to deliver. In such a case, Article 81 allows the buyer to recover the prepayment. This provides meaningful monetary relief in the broad sense because the buyer is not left with having to pay for a performance that was not received.

¹⁵⁴ See Section 5.3.1.3

¹⁵⁵ See Section 5.3.2.2

¹⁵⁶ See Section 5.3.2.3

¹⁵⁷ See Section 5.3.3.2

The buyer may, furthermore, be entitled to interest under Article 84(1) from the date on which the price was paid.¹⁵⁸ In the narrow sense, however, restitution does not constitute a meaningful monetary relief. As with interest and price reduction, external losses are not covered.

The buyer may, therefore, obtain meaningful monetary relief in a broad sense. Interest, price reduction, and restitution all provide some financial gain in specific situations. However, in the narrow sense, neither of them provides meaningful monetary relief for the aggrieved party. They can, therefore, not serve as a general substitute for damages.

Chapter 6 examined whether this absence of relief should be understood as a legal gap, which should be settled from the general principles of the Convention under Article 7(2), or a structural limitation. The thesis concludes that the general principles do not provide a basis for concluding that this absence is due to a legal gap. The general principles of interest, mitigation, good faith, and hardship may support the remaining remedies, but they do not alter the consequence of exemption under Article 79. The thesis, therefore, concludes that the absence is a structural limitation of the Convention. Article 79(5) does not leave the aggrieved party without remedies, but these do not carry the same weight as damages.

The answer to the research question is, therefore, that the buyer *may* obtain meaningful monetary relief after the seller's exemption under Article 79. This relief is, however, limited and conditional. It is meaningful in the broad sense, but not in the narrow sense of full compensation. Interest, price reduction, and restitution may prove to be of financial value, but due to the structural limitation of the Convention, the buyer cannot obtain full compensation after the seller is exempt.

¹⁵⁸ See Section 5.3.3.3

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