ARTICLE 79 REVISITED

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1 INTRODUCTION

This paper draws upon the 2010 Vis Moot problem. The facts which are relevant to
this paper are as follows. The seller supplied goods pursuant to the instructions of the
buyer who informed the seller that the goods were designed to fill a Head Contract.
The seller - after modifying the manufacturing of the goods due to a change in the
regulations in the destination country - shipped the goods as agreed in the contract on
DES Incoterms 2000. However while on route, the canal locks were damaged due to a
collision of ships causing a substantial delay in the delivery. Furthermore the
government of the head contract changed the regulations again while the goods were
at sea but after the impediment was lifted. The effect was that the head contract was
cancelled before the goods arrived at the point of destination. Simply put but for the
closure of the canal the contract would have been fulfilled as the goods would have
arrived before the second change of regulations took effect.

The claimant obviously will claim a fundamental breach under Art. 25 of the United
Nations Conventions on Contracts for the International Sale of Goods (CISG). The
respondent will allege that he supplied goods which corresponded to the contract. In
the alternative, he will claim exemptions under Art. 79. Arguably the respondent can
also claim shared responsibility by the claimant under Art. 80 of the CISG. To
successfully apply Art. 80, the respondent needs to show that the impediment was self
induced by the claimant. The advantage is that, as opposed to Art. 79, Art. 80 provides
an exemption not only from damages but also from any other remedy the claiming
party might have access to. The argument of the respondent is that the claimant should
have avoided the contract knowing that time was of the essence specifically in relation

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to a possible further change in regulations. As he has not avoided the contract he assumed the risk and therefore could arguably fall under Art. 80 CISG. For the purpose of this paper Art. 80 is not discussed any further.

The purpose of this paper is to re-examine the nature of Art. 79 specifically in light of the given set of facts and see how Arts. 25 and 79 interrelate and suggest a solution to not only the treatment of Art. 79 but also how the above hypothetical could be resolved. The CISG has been written with independent expressions which are non-technical in nature and devoid of any meaning which can be given to them by national laws. In order to enliven words and principles within the four corners of the CISG relevant facts must be applied. Without facts, legislation specifically the CISG has no life but consists merely of words.

2 ARTICLE 79

The initial problem is that specifically the doctrine of impossibility and unforeseen circumstances which has found its way into Art. 79 is considered to be a failed doctrine. Honnold even went further and noted that Art. 79 is “the convention’s least successful part of the half-century of work towards international uniformity”\(^1\).

It is not the fact that the doctrine of impossibility is not known within legal systems. Indeed it is known in all major systems and finds its roots in Roman law where it is stated that “there is no obligation to the impossible”\(^2\). What has been a failure is the inability to explain exactly “which contracts should be enforced in terms of whether their performance is possible or not”\(^3\). Flechtner argued that:

“The “Rorschach-test” nature of Art. 79 is illustrated by the different views that have been advanced concerning how the exemption provision applies when the seller delivers non-conforming goods.”\(^4\)

The obvious problem is that the temptation of a homeward trend is real. As Schlechtriem put it:

“[...] [T]he influence of the respective national law in construing the CISG is never entirely suppressible. This is especially true for French opinions since, according to French law, the commercial seller is presumed to be acting in bad faith and therefore is liable for damages -- without the possibility of


\(^3\) Ibid.

exemption -- according to French Civil Code Art. 1645. Art. 79 CISG is construed in France accordingly”

To add to the problem the principle of “impediment” is known under different guises in most legal systems. Perhaps it is not by accident that the “most obvious, conscious and direct example of the homeward trend” has been exhibit in a decision on Art. 79. This is so despite the fact that the CISG avoids words such as “force majeure and hardship just as it avoids terms which are too culturally linked with any particular country”. As an example the theory of imprévision or hardship has no application as the CISG in Art. 79 or anywhere else does not allow the parties or the judge to modify the contract.

It is undisputed that Art. 79 is only applicable when a party has breached the contract. This is made clear in subsection (5) which states that the liability – that is the “failure to perform any of his obligations” - is reduced by excluding the claim for damages from the available remedies. It should be noted that “any of his obligations” includes a breach of any collateral duty falling within the four corners of the CISG.

Stoll and Gruber note that the key role of Art. 79 is:

“[...] the result of a difficult compromise between the advocates of an absolute guarantee that the contract will be performed, in accordance with the Anglo-American model, and the proponents of the principle of fault, characteristic for most of the continental European legal systems. The compromise must not be weakened by recourse to principle of liability under national law when interpreting Article 79 [...]”

The CISG in Art. 79 uses three critical and cumulative criteria to define an impediment. It has to be an “impediment beyond his control” and that he could not reasonably be expected to have taken the impediment into account” or have “avoided or overcome it or its consequences”. The Norwegian text is helpful in this respect as it uses the term the “sphere of control” to describe the responsibilities and the risk factor. The point of examination for a court is the time when the contract was concluded.
However the content of Art. 79 does not resolve the problem of vague concepts rather it adds to the problem. Gordly and others have noted:

"Does an "impediment beyond his control" mean an impediment that he could not overcome by reasonable efforts? Does a failure to take the impediment into account when he contracted mean that, by reasonable efforts, he should have done so? If so, it would seem that a party is not liable whenever he was not at fault, a principle which cannot explain the law of any of the legal systems we have discussed."\(^{11}\)

The reading of Art. 79 clarifies one point namely that the CISG does not follow civil law which bases solutions to impediments on the doctrine of fault. What could be argued is that the question of risk allocation becomes an important issue in relation to any possible solution. The Federal Supreme Court of Germany stated:

"The possibility of exemption under Article 79 does not change the allocation of the contractual risk. According to the [CISG], the reason for the seller’s liability is that he has agreed to provide the purchaser with goods that are in conformity with the contract."\(^{12}\)

Despite vague concepts once the aspect of risk has been identified the question of impediment can be looked at in a different light. Risk always is moderated by control that is who has control over events. When time of delivery is of the essence it is the seller who controls that event. In our example the seller has control over the shipment and the buyer – it appears – controls the Head Contract.

In the absence of contractual limitations it has to be established that at the time when the contract was formed the party who has taken the risk could not have controlled the event which made the performance of the contract impossible. The question of risk is important because in reality it is only the party who assumed the risk has an interest and the ability to control the risk. Schlechtriem stated that:

"[A]s long as the risk is within the economic sphere, the seller is in a better position than the buyer to carry the risk of damages due to a delivery of defective goods ... It is a question of an allocation of risk of damages based on economic reasons and not only on the basis of control over the sphere in which damages could arise."\(^{13}\)

\(^{11}\) Gordley supra fn 2, at p. 523.


As the Art. 79 CISG does not change the allocation of the contractual risk it is not surprising that courts and tribunals have narrowly interpreted subsection (2) as far as third parties are concerned. In a Russian Arbitration proceeding the court noted that “the party who has engaged a third person to perform the obligation under the contract shall be liable for the proper fulfilment at the obligation by the third person”\textsuperscript{14}. If that were not the case then the allocation of risk would shift to a third party which is not the purpose of a contractual relationship. The German Appellate court noted:

“The sphere of liability of the seller is interpreted as being extensive. It comprises in particular the financial ability which is necessary for the contractual performance, the risk in respect to acquisition, storing, manufacturing, and conformity as well as the risk in respect to personnel and organisation.”\textsuperscript{15}

The question of ‘third party’ does however pose problems as such a party pursuant to Art. 79(2) needs to “be engaged to perform the whole or a part of the contract” therefore assisting in the performance. However it would not include third parties who are not engaged in the performance such as suppliers. The Austrian Supreme court noted that a seller “could not exempt itself though any failure on the side of its supplier; instead it was liable for their failure”\textsuperscript{16}. Any other conclusion would shift the risk allocation from the contractual party to a third party which is not within the intention of Art. 79 or the CISG as a whole. The purpose of Art. 79(2) is to avoid “that a party should be exempt from liability because he had chosen an unreliable supplier”\textsuperscript{17}.

2.1 IMPEDIMENT BEYOND HIS CONTROL

The two variables namely “impediment” and “beyond control” must be combined in order to find a solution. The term of impediment is not defined within the CISG and can only be given meaning by looking at the words within Art. 79. The first sentence notes that a party is “not liable for a failure to perform” which suggests that a certain event must have made such performance either impossible or at least difficult.

Coupled with the words “beyond his control” suggests that the event or impediment must be of such a nature that it could not have been reasonably anticipated or be within the contemplation of the breaching party. In other words only events which the breaching party cannot anticipate or make an impact on can be claimed as being an


\textsuperscript{15} Germany 5 March 2008 Appellate Court München (Stolen car case) available at: <http://cisgw3.law.pace.edu/cases/080305g1.html>.

\textsuperscript{16} Austria 21 April 2004 (Oberster Gerichtshof) [Supreme Cr] (Omnibus case) available at: <http://cisgw3.law.pace.edu/cases/040421a3.html>.

\textsuperscript{17} Schlechtriem Federal court supra fn 5.
“impediment beyond his control”. The important fact is that the impediment must be of a type that is uncontrollable.\textsuperscript{18}

The Belgian Supreme Court noted that:

“\textit{Changed circumstances […] that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances form an impediment in the sense of this provision of the treaty.}”\textsuperscript{19}

The facts were that the price of steel unforeseeably rose by 70% which in the courts view “gave rise to a serious imbalance which rendered the further performance of the contracts under unchanged conditions exceptionally detrimental for the seller”\textsuperscript{20}. Therefore impediments must not only prevent the temporary performance of a contract, it would be sufficient for a respondent to show that a serious unforeseen imbalance at the conclusion of the contract is sufficient to fall under Art. 79. The point of an event being unforeseen is crucial as seen in a decision of another Belgian court who noted:

“The Commercial Court of Hasselt has ruled that changes in prices are foreseeable and do not exempt the parties from performance of their obligations. The court stated, moreover, that the performance of the obligation in such a case would imply a financial loss, but that this did not prevent the performance of the agreement. The conclusion of a contract that is not lucrative or that is even a losing proposition is part of the risks that belong to commercial activities. […]”\textsuperscript{21}

The conclusion is that:

“\textit{CISG art. 79 does not entitle the promisor to be released from his contractual obligations due to change of the economic background on which the parties relied for the conclusion of the contract.}”\textsuperscript{22}

The difference in the two cases – and therefore the crucial point - hinges on the definition of what is foreseeable. Hence what appear to be similar facts may in some cases lead to different decisions.


\textsuperscript{20} Ibid.


Also of importance is how a particular incident is viewed, A party shipping goods regularly must be aware of the usual perils of the sea such as a closure or breaking down of the locks which would not amount to an impediment. However as the damage to the locks occurred due to a collision of two ships an argument can be advanced that this event is beyond the sellers control as ships normally are only allowed to approach the locks individually under the direction of the lock master.

Therefore a collision of two ships would be a highly unusual event causing an impediment beyond the control of the seller. In any case if parties do wish to exempt themselves from impediments, hardship or force majeure pursuant to Art. 6 CISG a clause to that effect can be included into the contract. The CISG like any other black letter law is merely the fall back position should the parties neglected to regulate certain events.

2.2 COULD NOT REASONABLY BE EXPECTED TO HAVE TAKEN IMPEDIMENT INTO ACCOUNT

By implication “beyond his control” suggests that the element of unforeseeability of the event must be present and therefore the breaching party “could not reasonably be expected to have taken the impediment into account”. It follows therefore if an event is beyond the control of the breaching party but was foreseeable – or is a coincidence - Art. 79 is not applicable. “The question whether a certain impediment was foreseeable should be considered on an objective basis”23.

In order to measure such an event, Art. 79 CISG included a general principle of reasonableness into the text. In other words the reasonable person test needs to be applied which is a person “halfway between the inveterate pessimist who foresees all sorts of disasters and the resolute optimist who never anticipates the least misfortune”24. The reasonable person test simply allocates the risk factor as in a sense all events are foreseeable.

The issue is that the measurement of risks and its allocation is taking place at the conclusion of the contract. Hence all foreseeable consequences are at the sellers risk and only those risks which could not have been reasonably anticipated fall under Art. 79. The consequences of a breach pursuant to Art. 79(5) merely exclude damages but not any other remedy.

23 Ibid.
“The meaning of Art. 79 CISG cannot be that it lends a helping hand to a party that, because of its own negligence, did not provide for this situation in its contract”\textsuperscript{25}. It is therefore obvious that the question of risk and particularly what type of risk needs to be understood. The Federal Supreme Court of Germany clarified the situation by stating:

\begin{quote}
“The possibility of exemption under Article 79 does not change the allocation of the contractual risk. According to the [CISG], the reason for the seller’s liability is that he has agreed to provide the purchaser with goods that are in conformity with the contract.”\textsuperscript{26}
\end{quote}

In the above hypothetical DES is part of the contract of shipping and only covers loss of or damage to the goods while in transit that is to the point where the goods are available on board at the named port.\textsuperscript{27} However DES terms assist in interpreting Art. 69 CISG which states that the risk “passes to the buyer when he takes over the goods” which pursuant to DES term A4 is on board of the vessel at the unloading point. In a strict interpretation of the contract all events which can reasonably be expected to occur are at the risk of the seller until the boat lands at the port of destination.

\section*{2.3 AVOIDED OR OVERCOME IT OR ITS CONSEQUENCES}

Even if all the elements discussed above are adhered to the breaching party still has to make attempts to avoid or overcome the impediment. Art. 79 describe clearly two paths which need to be taken in order to fall under the protection of this Art. First the seller needs to avoid the consequences of the impediment that is he needs to take “all the necessary steps to prevent the occurrence of the impediment” and secondly he needs to overcome the impediment that is to take all necessary steps “to preclude the consequences of the impediment”\textsuperscript{28}. Therefore just because the performance of the contract is rendered much more difficult, Art. 79 cannot be invoked as the prerequisite is that the “performance must be rendered impossible”\textsuperscript{29}.

In order to ascertain whether the breaching party has done all in its power to either overcome or avoid the consequences of an impediment it must be judged by the reasonable person test and with the relevant facts of the case in mind. The fact is that all impediments can be overcome one way or another “but all means are not economically possible and a party cannot be obliged to perform miracles”\textsuperscript{30}. The reasonable person test is of importance in the evaluation or avoidance or overcoming

\begin{footnotesize}
\begin{enumerate}
\item[26] See Vine Wax Case, \textit{supra} fn 12.
\item[27] See DES Incoterm 2000 specifically A3 to A5.
\item[28] See Tallon \textit{supra} fn 24, at p. 581.
\item[29] Belgium 25 January 2005, \textit{supra} fn 19.
\item[30] See Lindstrom, \textit{supra} fn 18.
\end{enumerate}
\end{footnotesize}
consequences of an impediment.\textsuperscript{31} One further point needs to be taken into consideration namely if an impediment occurs because the performance was late or delayed Art. 79 do not offer any protection.

The facts of this hypothetical indicate that the closure of the canal could not have been overcome nor avoided as performance was on time and not late. The only possible way to overcome the consequences of the closure of the canal would have been an alternate route and that only if time would not have been of the essence.

3 \textbf{THE UNIDROIT PRINCIPLES}

The UNIDROIT Principles (UP) looks at impossibility in a different way. Relief is given for hardship in chapter six and force majeure in chapter seven. Two points need to be understood in order to appreciate the importance of UP. First the 1994 edition of the Principles was the first time that hardship was recognised specifically in arbitrations independently of contractual provisions as arbitrators did not override the principle of \textit{pact sent servant}. Obviously this is only true if the arbitrators did not use the CISG or a mandatory domestic law. Secondly it is now an established fact that the UP can be used to supplement the CISG where words or principles in the CISG are not clear.

Article 6.2.2 notes:

\begin{quote}
“there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance had increased or because the value of the performance a party received has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; (d) the risk of the event was not assumed by the disadvantaged party.”
\end{quote}

Arguably therefore in order to qualify under UP 6.2.2 a party must show that all four criteria of hardship are applicable. This is so because if the first criterion is met the disadvantage party could not have assumed the risk.\textsuperscript{32}

In the above hypothetical two events could qualify for hardship; the closure of the canal and the second change of regulations. The closure of the canal does not make the performance of the contract impossible but could be classed as a typical case of hardship. It caused a delay in performance which can be remedied as the “normal effect of hardship is that the disadvantaged party is entitled to renegotiations and


\textsuperscript{32} See Kessedjian \textit{supra} fn 8, at p. 421.
adaptation of the contract with a view to restoring its equilibrium”\(^{33}\). Hence avoidance is not an option.

The second event – the change of regulations - arguably could lead to a termination of the contract as four elements are present. However the fourth exception requires discussion as the assumption of risk takes on an important role.

Before proceeding any further two questions need to be answered namely can the UP assist in the interpretation of the CISG? It is commonly recognised that - as the UP is based on general principles of comparative law – it can be used “as part of the general principles on which the CISG is based into the gap filling function of Art. 7(2)”\(^ {34}\).

Hardship does not equate to an impediment as described in Art. 79 CISG and therefore cannot be used to assist in the interpretation of Art. 79. Furthermore as there is no gap in the CISG - hardship is not a general principle – Art. 6.2.2 cannot be imported into the CISG. It would be tantamount of importing domestic laws.

Article 7.1.7 uses the words of “force majeure” which - at first glance - are dissimilar to” impediment.” However besides minor differences the UP does mirror Art. 79 except it does not contain subsection (2) CISG. However for the purpose of this analysis there is no need to take this discrepancy into consideration as the question of third party failure is not part of the hypothetical.

Taken the two articles of the UP together when comparing it with Art. 79 CISG different opinions emerge. The question has been asked whether hardship is included in Art. 79 or arguments were advanced that the CISG has rejected hardship as a principle.\(^ {35}\) What can be said is that none of the reported cases applying Art. 79 has extended the analysis to cases of economic hardship.\(^ {36}\) However the question is whether issues of hardship such as economic or legal impossibilities making it impossible to perform the contract are included in Art. 79. It is clear that a contract cannot be renegotiated under Art. 79 in cases which would have been possible had a hardship clause been incorporated into the contract. Arguably therefore cases of hardship may fall under impediments but they will be treated as a breach of contract and only the protections granted under Art. 79 are available. In conclusion it can be argued that the UP is of limited use in attempting to assist in the interpretation of Art. 79.

\(^{33}\) See Lindstrom, \textit{supra} fn 18.


\(^{35}\) Garro, A., “Exemption of Liability for Damages: Comparison between provisions of the CISG (Art. 79) and the counterpart provisions of the UNIDROIT Principles (Art. 7.1.7)” in Felemegas, \textit{supra} fn 34, at p. 242.

\(^{36}\) Ibid.
4 FUNDAMENTAL BREACH

The idea that a state must promptly compensate the investor in the event of an expropriation is well established in arbitration practice and results from the duty to provide protection and full security to the investor.

For the purpose of this paper only the question of timing is of importance. The purpose – as stated above – is to find the intersection between the principles of avoidance and impediment. The breach of contract has already been established as soon as protection under Art. 79 is claimed. It is also clear that pursuant to Art. 79(5) recourse to fundamental breach is still one of the options open to the aggrieved party. Hence, it is possible that avoidance can take place despite an Art. 79 protection. However, the problem is that both Arts. 25 and 79 must be read in conjunction with Art. 8 as both articles contain a modified version of Art. 8.

Article 25 includes two obligations namely foreseeability and knowledge of a substantial deprivation. Therefore Arts. 8(1) and 8(2) are required in order to elicit the intent of the parties which then in turn will inform the court or tribunal of how to interpret foreseeability and knowledge. Once that has been ascertained and Art. 25 applies the aggrieved party “receives the right to immediately avoid the contract without having to give any supplementary notice” pursuant to Art. 49.

As the CISG does not mandate a particular form of avoidance “some judicial effect must be given to the inaction of the parties … and must be analysed as the reciprocal manifestation of the tacit will to renounce the performance of the contract”. Hence the timing of an avoidance arguably is when the breaching party receives a timely notification. Therefore if avoidance is contemplated, it only becomes effective once a declaration of avoidance has been made pursuant to Art. 27 CISG.

However another point needs to be noted. Article 25 imposes a foreseeability factor not unlike Art. 79. The question is therefore at what time is the foreseeability factor applicable. The CISG does not expressly address this point.


39 Ibid.

40 See Koch, R. “Fundamental Breach” in Felemegas supra fn 34, at p. 127.
Koch suggests that the use of present terms in Art. 25 puts the time when the breach occurred\(^{41}\). However, this is not a clear and unambiguous definition. The French translation uses words of the past tense and not the present tense hence the formation of the contract is the relevant time which is confirmed by “the reference to the rights that the aggrieved party was entitled to expect “under the contract”\(^{42}\).

Considering the facts of the hypothetical only non-delivery is of concern. The claimant therefore has two options open pursuant to Art. 49; the starting point for a claim. First he can simply ask the court to “declare that there is a fundamental breach pursuant to Art. 25 or he can avoid this test by giving the breaching party an additional period, a Nachfrist, to perform his obligations”\(^{43}\). The obvious advantage of issuing a Nachfrist is that the fact triggering the avoidance is not the non delivery but the failure to respond to the invitation to deliver within the new time limit. It overcomes the problem of being put to a selection at the time of the first breach namely the non delivery. It allows the claimant extra time to decide what remedies he wishes to pursue and also affords the seller extra time to perform. The window of opportunity has been left open for both parties.

5 THE INTERSECTION OF ARTICLE 79 AND 25

As pointed out above Art. 79 is only applicable if the contract has been breached. The CISG in Art. 79(5) makes a concession to the breaching party by only disallowing a claim for damages as a remedy. Logically therefore from the remaining remedies avoidance has not been excluded.\(^{44}\) The question which needs to be asked is whether avoidance is a right which can be claimed at any time without taking note of Art. 79 exemptions or whether a strict time sequence has to be observed. In other words can avoidance take place after an Art. 79 event has taken place and what are the effects of risk allocations? Looking at the above example two events impinge on the outcome of this matter.

First a breach occurred when delivery was late due to the closure of the canal. Hence the contract is breached but still on foot. This is so as Art. 79 invites a response as to the intentions by the aggrieved party. In the above example the aggrieved party does not invoke their rights under the CISG and hence the changed circumstances which are accepted by the aggrieved party can be interpreted as a change in the contractual obligations. The principle of good faith would not allow the aggrieved party to subsequently – and retrospectively - rely on the breach.

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\(^{41}\) Ibid.

\(^{42}\) See Koch, supra fn 40, at p. 128.

\(^{43}\) See Zeller, supra fn 31, at p. 198.

\(^{44}\) See, Flechtner supra fn 4, at p. 42.
It is the second event namely the change of regulations which causes the problem. Indeed an argument can be raised that the event in itself constitutes a fundamental breach. However it must also be kept in mind that this event is outside the control of both parties and the question therefore is who bears the risk of such an event?

The general question is; can a fundamental breach be claimed after the contract has already been breached but not acted upon? It is argued that this cannot take place. In this case the claimant decided by implication that performance of the contract was still insisted upon. The point is that pursuant to Art. 8 the claimant by his post-contractual conduct has indicated that avoidance is not one of the anticipated remedies. It would be in breach of good faith to allow the claimant to change his mind at a later stage irrespective of further developments.

Article 79(3) also alludes to this point by noting that the “exemption provided by this Art. has effect for the period during which the impediment exists”. The impediment ceased to exist as soon as the buyer was made aware of the new arrival of the ship and as avoidance was not contemplated, the contract was in essence modified again. As all the facts and consequences of the initial breach are know and not acted upon the risk has shifted to the buyer in relation to whether the arrival of the ship falls within the time line set by the Head Contract.

It can therefore be argued that the claimant has missed the opportunity to take advantage of the first failure as the contract - once the ship passed the canal - was on foot again. Art. 79 in essence puts the aggrieved party on notice to decide its course of action. As indicated above Art. 79(5) only disallows the remedy of damages but that is all. Hence if an aggrieved party remains silent the moment to act -that is to claim avoidance - has passed and the contract is fully restored. This is specifically pertinent as to avoidance. This is so as the supplier is obliged to continue with the contract otherwise he would be in breach of his obligations and all remedies of Art. 45 including damages are open to the aggrieved party. An impediment as such is merely a breach of contract and the contract is still on foot. Once the second event, namely the change of regulations by the government is proclaimed the contract needs to be looked at afresh.

The buyer in effect has agreed on a delivery date. Furthermore the seller is not in breach as long as he delivers the goods at or before the new agreed date. As he did not elect to avoid the contract but albeit reluctantly “went along” with the delays he has accepted the risk and has to bear the losses. In addition it was the buyer who always was informed of regulation changes and ought to have had at least an inkling that new regulations were contemplated. These facts fundamentally changed the risk aspects of the parties and hence avoidance it not an option any more as the seller merely fulfils his side of the bargain. This proposition obviously only stands as long as the seller did not guarantee prospective compliance with regulations in the country of destination.
It is the buyer who assumed the risk and he has to bear the consequences. The buyer has one option open to him namely to claim an Art. 79 impediment in relation to the head contract but that will not affect the original seller at all.

In sum the important issue in relation to an Art. 79 impediment is that courts and tribunals need to determine whether an impediment exists in the light of the given facts. The next step would be to ascertain that the aggrieved party exercised their option of avoidance within the period “during which the impediment exists”. If not the window of opportunity is closed and the contract can be deemed to on foot again in an amended form. Any subsequent breaches which are not within the control of the seller, that is he performs the contract as amended, are not within the contemplation of the seller and the risk must be borne by the buyer. Declaring an impediment and exercising the available remedies such as avoidance are strictly dependent on accurate timing. Therefore time is of the essence.