| Pre | etace   |   | V   |
|-----|---------|---|-----|
| Ch  | apter   |   | vii |
| Ab  | breviat | ions and Terminology                                    | XV  |
|     | A. A.   |   |     |
|     |         |   |     |
| 1.  | Introd  | luction   | 1   |
|     | 1.1     | Article 80 and the Goal of Uniformity                   | 2   |
|     | 1.2     | Purpose and Relevance                                   | 4   |
|     | 1.3     | Delimitation  | 6   |
|     | 1.4     | Outline of Presentation                                 | 6   |
|     |         |   |     |
|     |         |   |     |
| 2.  | Metho   | odology Considerations                                  |     |
|     |         |   |     |
|     | 2.1     | The General Rules of Interpretation                     | 9   |
|     | 2.1.1   | Application as Customary Law                            | 10  |
|     | 2.1.2   | Relevance of State to State Regulation                  | 11  |
|     | 2.1.3   | Purpose and Political Nature of the CISG                | 13  |
|     | 2.2     | The Specific Rule of Autonomous Interpretation          | 17  |
|     | 2.2.1   | Considering the International Character of CISG         | 19  |
|     | 2.2.2   | Promoting Uniform Application                           | 22  |
|     | 2.2.2.1 | Accessibility of Case Law                               | 25  |
|     | 2.2.2.2 | Scholarly Works   | 26  |
|     | 2.2.3   | Interpreting in Good Faith                              | 27  |
|     | 2.3     | Litteral Interpretation as the Starting Point           | 30  |
|     |         | Discrepancies Between the Convention Texts              | 32. |
|     |         |   |     |
|     | 2.4     | Supplementing the Convention Text                       | 35  |
|     | 2.4.1   | How to Identify Underlying Principles                   | 36  |
|     | 2.4.2   | Implications of Having Identified Underlying Principles | 38  |
|     | 2.4.2.1 | Expansion of Scope of the CISG                          | 38  |
|     | 2.4.2.2 | Expansion of Interpretation Aids                        | 39  |

|    | 2.5   | The Use of Soft Law as Interpretation Aid              | 40 |
|----|-------|--|----|
|    | 2.5.1 | Sources of Lex Mercatoria                              | 42 |
|    | 2.5.2 | Value of Soft Law and Interpretation Aid               | 45 |
|    | 2.5.3 | Temporal Issue   | 46 |
|    | 2.5.4 | Limits to the Use of Soft Law                          | 47 |
|    | 2.6   | Sources Superseding the Convention Text                |    |
|    | 2.6.1 | The Unequivocal Agreement by the Parties               | 48 |
|    | 2.6.2 | Interpretation of the Parties' Agreement               | 49 |
|    | 2.6.3 | Relevance of Practice and Usages                       | 52 |
|    | 2.7   | The Methodology and Sources Summarised                 | 55 |
| 3  | Devel | opment   | 59 |
| 9. |       |  |    |
|    | 3.1   | ULIS and ULF   | 60 |
|    | 3.2   | The Drafting of CISG and Article 80                    | 62 |
|    | 3.2.1 | Wording and Placement                                  | 63 |
|    | 3.2.2 | Motivation to Maximise Adoption                        | 66 |
|    | 3.2.3 | A Last-Minute Inclusion                                | 67 |
|    | 3.2.4 | An Expression of an Underlying Principle               | 68 |
|    | 3.2.5 | Broad Interpretation Appropriate                       | 69 |
|    | 3.3   | Developments Compared to the Pre-CISG Rule             | 70 |
|    | 3.4   | Latest Developments in Other Instruments               | 73 |
|    | 3.5   | Concluding Argument                                    | 75 |
| 4. | Comp  | arison to Other Provisions                             |    |
|    | 4.1   | A Unique Concept of Contribution to Failure to Perform | 77 |
|    |       | Systematic Context                                     | 78 |
|    |       | The Cause of the Detriment                             | 79 |
|    |       | Impediments Beyond Control                             | 80 |
|    |       | Mitigation of Loss                                     | 81 |
|    |       | The Promisee's Contribution to Promisor's              |    |
|    |       | Non-Performance  | 82 |

|    | 4.1.3   | Foreseeability and Duty to Avoid/Overcome the Cause   |     |
|----|---------|---|-----|
|    |         | of Detriment  | 85  |
|    | 4.1.3.1 | Strict Conditions under Article 79                    | 86  |
|    | 4.1.3.2 | Less Strict Conditions under Article 77               | 87  |
|    | 4.1.3.3 | Lowest Restriction under Article 80                   | 88  |
|    | 4.1.4   | Burden of Proof                                       | 90  |
|    | 4.1.5   | Duty to Give Notice                                   | 92  |
|    | 4.1.6   | Remedies Affected                                     | 93  |
|    | *       |   |     |
|    | 4.2     | A Supplementary Rule                                  | 94  |
|    | 4.2.1   | Conformity, Article 35                                | 95  |
|    | 4.2.2   | Price Reduction, Article 50                           | 99  |
|    | 4.2.3   | Third Party Rights, Article 42                        | 100 |
|    | 4.3     | Lex Specialis   | 102 |
|    | 4.4     | Concluding Argument                                   | 103 |
| 5. | Under   | lying Principles and Good Faith                       | 107 |
|    | 5.1     | Principles Underlying Article 80                      | 109 |
|    | 5.1.1   | Positively Phrased Duties                             | 110 |
|    | 5.1.2   | Negatively Phrased Duties                             | 113 |
|    | 5.2     | A General Duty of Good Faith and Fair Dealing         | 116 |
|    | 5.2.1   | Article 80's Connection to Good Faith                 | 119 |
|    | 5.2.2   | Controversy During the Drafting                       | 122 |
|    | 5.2.2.1 | Arguments Contrary to a General Duty                  | 123 |
|    | 5.2.2.2 | Arguments in Favour of a General Duty                 | 124 |
|    | 5.2.2.3 | Subsequent Development                                | 125 |
|    | 5.2.2.4 | Common Law Development                                | 127 |
|    | 5.2.2.5 | A Common Core   | 131 |
|    | 5.3     | Article 80 as a Solution to the Dangers of Good Faith | 133 |
|    | 5.3.1   | Definition and Dangers of Good Faith                  | 134 |
|    | 5.3.2   | Overlap in Application of Article 80, Underlying      |     |
|    |         | Principles and Good Faith                             | 137 |
|    | 5.4     | Concluding Argument                                   | 141 |

## 6. Conditions for Exemption

| 6.1     | Non-performance by the Promisor                             | 143 |
|---------|---|-----|
| 6.1.1   | Non-performance Imputable to Both Parties                   |     |
| 6.1.2   | 2 Suspension of Performance as Breach of Contract           |     |
| 6.2     | Causal Link to the Promisee                                 | 147 |
| 6.2.1   | Sole Causation and Competing Causes                         | 147 |
| 6.2.1.1 | Promisee's Sole Interference                                | 148 |
| 6.2.1.2 | Mixed Causation   | 150 |
| 6.2.1.3 | Shared Responsibility                                       | 152 |
| 6.2.2   | Requirements to the Strength of the Causal Link             | 157 |
| 6.3     | Act or Omission by the Promisee                             | 162 |
| 6.3.1   | Direct Interference and Breach of Duties                    | 163 |
| 6.3.2   | Indirect Interference                                       | 164 |
| 6.3.3   | Breaking the Synallagma of Contract and Lack of Cooperation | 166 |
| 6.3.4   | Omissions   | 168 |
| 6.3.5   | Conduct by Employees, Third Parties and Agents              | 169 |
| 6.3.6   | Contractual Behaviour and Conditions                        | 171 |
| 6.4     | Burden of Proof   | 172 |
| 6.4.1   | Burden of Proof Governed by Presumptions and Principles     | 173 |
| 6.4.2   | Failing Promisor's Burden to Prove Interference             | 175 |
| 6.5     | Duty to Give Notice   | 177 |
| 6.6     | Concluding Argument   | 179 |
|         |   |     |
| Legal   | Consequences  |     |
| 7.1     | The Promisee's Position                                     | 181 |
| 7.1.1   | Remedies Following from the Convention                      | 182 |
| 7.1.2   | Remedies Following from the Contract                        | 183 |
| 7.1.3   | Remedies Following from Domestic Contract Law               | 184 |
| 7.1.4   | Remedies Following from Domestic Tort Law                   | 186 |
| 7.1.4.1 | The Non-cumul and the Pre-emption Approach                  | 188 |
| 7.1.4.2 | The Cumulative and the Merging Approach                     | 189 |
| 7.1.4.3 | The Functional Equivalent and the Protected                 |     |
|         | Interests Approaches  | 192 |

|    | 7.1.5   | The Temporal Effect of Article 80 – Excused in Total or in Part Total Exemption | 195<br>195 |
|----|---------|---|------------|
|    |         | Partial Exemption and Pro Rata Apportionment                                    | 196        |
|    |         |   |            |
|    | 7.2     | The Promisor's Position   | 200        |
|    | 7.2.1   | The Right to Counter-Performance  | 200        |
|    | 7.2.2   | Supplementary Claims  | 201        |
|    | 7.2.3   | Consequential Costs and Benefits  | 202        |
|    | 7.3     | Concluding Argument   | 203        |
| 8. | Dome    | stic Law and Homeward Trends  | 205        |
|    | 8.1     | Comparing Legal Systems   | 206        |
|    | 8.1.1   | Criteria Selected   | 207        |
|    | 8.1.2   | Selection of Countries  | 208        |
|    | 8.2     | The Three Legal Families  | 210        |
|    | 8.3     | Ignorance in Transformation   | 211        |
|    | 8.3.1   | Norway and Iceland  | 212        |
|    | 8.3.1.1 | Article 80 in NSGA  | 213        |
|    | 8.3.1.2 | Systematic Placement  | 214        |
|    | 8.3.1.3 | Already in Existence  | 214        |
|    | 8.3.2   | Denmark   | 215        |
|    | 8.3.2.1 | Article 80 Equivalent in DSGA   | 215        |
|    | 8.3.2.2 | Systematic Placement  | 216        |
|    | 8.3.3   | Finland and Sweden  | 217        |
|    | 8.3.3.1 | Article 80 Equivalent   | 218        |
|    | 8.3.3.2 | Systematic Placement  | 218        |
|    | 8.3.4   | Comparison and Effect   | 219        |
|    | 8.4     | Possible Ethnocentric Application by China and Russia                           | 223        |
|    | 8.4.1   | Article 80 Equivalent in CCRF and CCL   | 224        |
|    | 8.4.1.1 | Russia  | 225        |
|    | 8.4.1.2 | China   | 229        |
|    | 8.4.2   | Systematic Placement and Style  | 234        |
|    | 8.4.3   | Effect  | 235        |
|    | 8.5     | Concluding Argument   | 236        |

| 9.                           | Conclusions |                        |     |
|------------------------------|-------------|------------------------|-----|
|                              | 9.1         | Conclusion             | 239 |
|                              | 9.2         | The Goal of Uniformity | 241 |
|                              | 9.3         | Perspective and Future | 242 |
|                              |             |                        |     |
|                              |             |                        |     |
| Bil                          | oliogr      | aphy                   | 247 |
| Case Law and Arbitral Awards |             |                        | 260 |
| Other Materials              |             |                        | 267 |
| Index                        |             |                        | 271 |