Change of Circumstances under the CISG

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Carolina Arroyo
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Supervisor 1: Dr. Stephan Kröll
Supervisor 2: Mr. James Faulkner
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<th>Abbreviation</th>
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<tr>
<td>BGB</td>
<td>Bürgerliches Gesetzbuch ; German Civil Code</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNIDROIT</td>
<td>International Institute for the Unification of Private Law</td>
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<td>UPICCC</td>
<td>UNIDROIT Principles of International Commercial Contracts</td>
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A. Introduction

The necessity to promote predictability and legal certainty in international trade law resulted in the adoption of one of the most successful international instruments; the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG)\(^1\). The importance of international transactions has increased dramatically and with it, the necessity to fully understand this treaty.

International commercial transactions can be affected by unforeseen events that hinder performance. Breakdown of economic systems, political tensions, exceptional conditions or circumstances may alter the settings under which parties concluded their contracts and calculated their risks, thus modifying the perceptions that defined the content of their contract. The time between the conclusion of the contract and its performance can be subject of drastic changes that might affect the economic balance between the parties. Changes that fundamentally alter the equilibrium of the contract, are those that if had existed at the moment of conclusion, would have made of the content of the contract different; the obligations between the parties different.

The CISG is based on the *Pacta Sunt Servanda* principle of the sanctity of contracts, according to which, agreements have to be performed to their terms, and it also reflects a system of strict liability. However, under its regime, certain situations may justify non-performance, when it is due to an impediment beyond the parties’ control. The adoption of the terms “hardship” and “change of circumstances” in instruments of soft-law, shows the awareness of the necessity to regulate supervening events that alter the contractual balance in international commercial transactions.

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\(^1\) Done at Vienna, 11 April, 1980, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.
This paper is intended to provide practitioners in the area of international sales of goods a guide for the understanding of the doctrine of change of circumstances under the CISG. The main purpose is to determine whether the Convention governs and settles the issue of change of circumstances and if so, how it does it. This paper argues that the term “impediment beyond his control” includes changes of circumstances as an exemption to the promisor’s liability for a failure to perform, if certain requirements are met and the Convention is interpreted by filling its gaps according to its principles and principles of international trade.

As a starting point, we have considered the Belgian decision rendered in the case Scafom International BV v. Lorraine Tubes S.A.S. of 2009. We have analyzed the arguments and interpretation of the Court of Cassation; then we have examined Art. 79(1) CISG to determine whether its scope of application covers hardship as an exemption of liability to pay damages. We have also studied the relationship of the study problem with other relevant provisions of the Convention, as well as with the relevant UNIDROIT Principles. Finally we have presented the methodological approaches to deal with the problem of hardship and the possible solutions under the CISG.

Unfortunately the CISG does not contain a provision that establishes which situations could trigger exemption for change of circumstances and if so, what is the threshold for the exemption of liability for a party in breach. In practice, how the “change of circumstances” doctrine is regulated will depend heavily on the interpretation that local courts or arbitration tribunals will give to Art. 79(1) and this doctrine. The issue will irremediably have to be addressed by judges and arbitrators in case law without any binding force. A definite answer to the problem of change of circumstances under the CISG remains unsolved; however the reader might find a useful guide in this work.

Throughout this paper the terms hardship and change of circumstances are used as synonyms, and their use does refer to the concept as understood in any particular legal tradition.
B. Scafom International BV vs Lorraine Tubes s.a.s.

I. Procedural History

This decision was rendered on June 19, 2009 by the Belgian Court of Cassation in the cassation action filed by the Company Scafom International BV. The decision dismissed the prior rulings of June 29, 2006 by the court of first Instance and the decision of February 15, 2007 issued by the Court of Appeal of Antwerp.

The case involved a Dutch company, Scafom International BV (buyer), who had concluded several contracts with the French Company, Lorraine Tubes s.a.s. (seller), for the delivery of steel tubes. The market price of steel unexpectedly rose by 70%, making the agreed price no longer accurate for the altered circumstances. The court of first instance, the Rechtbank van Koophandel Tongeren, acknowledged that the sudden rise on the price of the goods to be delivered had caused a serious economic imbalance that could result harmful to the seller. Nonetheless, it established that the CISG was the applicable law to the contract and that it did not settle the issue of hardship; thus renegotiation of the price pursuant to the seller’s request was not possible. By invoking equity as a general principle, the court ordered the buyer to pay half of the price-increase demanded by the seller.\footnote{Harry M. Flechtner, The exemptions provisions of the sales convention, including comments on “hardship” doctrine and the 19 June 2009 decision of the Belgian Cassation Court, Annals FLB-Belgrade Law Review, 2011, p. 11.}

The seller appealed this decision and the Court of Appeal of Antwerp ruled that pursuant the gap filling provision of Art 7(2) CISG, the applicable law to issues governed by the Convention but not expressly settled by it was French law. This court established that French law left did not consider the théorie de l’imprévision in private transactions, and that it did not provide remedies for the case of changes in economic circumstances. However, it applied the general principle of good faith as understood in French Law and ordered the renegotiation of the contract.
The Court of Cassation confirmed some terms of the decision of the Court of Appeal. It interpreted the wording of Art. 79(1) CISG in a broad manner and argued that hardship was not implicitly excluded from its scope. Economic hardship was seen as an “impediment” even if performance had not become literally impossible. The Court argued that the fact the CISG provided no remedies for the change of circumstances was a gap that needed to be filled. Renegotiation of the contractual price of the goods was considered possible and mandatory for the particular case. This decision became one of the first to sustain that change of circumstances are governed by the CISG and that renegotiation of the contract was a possible remedy.

II. Arguments of the Court of Cassation

The Court of Cassation argued that none of the provisions of the CISG excluded the possibility to invoke the théorie de l’imprévision. It acknowledged that the parties could have agreed on a contractual clause to foresee the adaptation of the agreed prices due to eventual changes in market prices, and that such adaptation would have not been against the principles on which the CISG is based. It argued the fact the CISG does not contain clear provisions to exempt liability due to force majeure, did not imply that the possibility to revise the price due to unexpected modifications in the market was excluded.  

The Court also argued that since the seller had informed the buyer about the unpredictable increase of the price of the goods, commercial principles of economic reality required consideration of current market prices. It determined that pursuant to Art. 7(2) CISG, the applicable to regulate this situation not expressly settled by the Convention was the French Law. According to the Court, French law displays the principle of good faith for performance and it implied the obligation to renegotiate the conditions of contracts in certain cases. According to the Court, one of those cases was the one at hand, in which after the conclusion of the contract, unforeseeable circumstances had given rise to a severe

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4 Ibid.
imbalance between the reciprocal obligations of the parties, which made the ulterior performance by one of them, unusually adverse\textsuperscript{5}.

The Court stated that the seller’s proposals to renegotiate were not unreasonable and indeed constituted a serious base for renegotiation of the terms of the contract. It established that the non-acceptance of a price adjustment and the buyer’s reluctance to renegotiate, contravened the principle of good faith under French law. The Court ordered the payment of a supplementary price plus interests in an amount of € 450000.

The rationale was that pursuant Art. 7(1) CISG, and in consideration of the international character of the Convention and the necessity to promote uniformity in its application in international trade, the price determination provision of Art. 50 and the broad wording of Art.79 CISG, sufficed to include the possibility to invoke the theory of change of circumstances. The Court relied on the interplay between the CISG and domestic statutes pursuant to Art. 7(2) CISG, and determined that there was a possibility to renegotiate the contract in light of the interpretation of the broad wording of Art.79(1) CISG and the good faith provision of the French Law.

The Court decided that changes of circumstances that could have not reasonably been foreseen at the time of the conclusion of the contract and that aggravate performance, in certain cases may constitute an impediment beyond the promisor’s control in light of Art. 79(1) CISG, and exempt them from liability to pay damages.

The Court reached the decision by interpreting the scope and meaning of Art. 79(1) in accordance with French law. However, it did not engage into the analysis of the requirements of Art. 79(1) CISG and it did not evaluate whether the change of circumstances of the particular case would trigger that provision. The Court failed to determine if the order to renegotiate the price was a remedy provided for in the Convention.

\textsuperscript{5} Ibid, p. 3.
This decision triggered the immediate reaction among academics, such as Professor Flechtner, who argues that this decision “distorts the meaning of the CISG, violates the mandate to interpret the Convention with regard for its international character and threatens the political legitimacy of the treaty”\(^6\). He suggests that the drafting history of the Convention shows that hardship was expressly rejected, as well as any provision empowering courts or tribunals to adjust or modify contractual terms. He claims the analysis of the Cassation Court was mistaken, since there is no gap in the CISG that required to be filled by Art. 7(2) CISG and domestic rules. This issue was regarded differently by Professor Schlechtriem who argued that “at the time of the drafting of the Convention the hardship problem was regarded as covered by Art. 79”\(^7\).

According to Flechtner, this approach could be seen as a parochial bias of the Court against the interpretation of the Convention with regards to its international character, because it extends its scope. Additionally for him it is highly arguable to talk about a “gap” in the Convention, and Art. 79 does not provide for the renegotiation of the contract as a remedy. From his view, the court performed a “rather perverse tour de force despite the fact that a provision to incorporate this very remedy was proposed and rejected during the drafting of the CISG”\(^8\). Opponents to the adaptation of contracts governed by the CISG will most likely argue that this decision is the result of a court “hallucinating” a gap in the Convention and threatens against the uniformity in its application.

However, the approach adopted by the Belgian court was already predicted by Professor Schlechtriem at a Workshop carried out in 1998 at the University of Pennsylvania Law School\(^9\). He acknowledged the possible reluctance of contracting states to allow judges to

\(^8\) Flechtner, The exemptions provisions of the sales convention, including comments on “hardship” doctrine and the 19 June 2009 decision of the Belgian Cassation Court, Annals FLB-Belgrade Law Review, 2011, p. 98.
\(^9\) Workshop organized by the University of Pittsburgh School of Law and the Meiji Gakuin University of Japan. Participants included leading CISG scholars from the United States, Japan and Europe, Professor Hajime Yoshino of Meiji Gakuin University and Professor Harry Flechtner of the University of Pittsburgh co-moderated the program. The other participants in the workshop were Professor John Honnold of the University of Pennsylvania, Professor Kazuaki Sono of Tezukayana University (Japan), Professor Peter Schlechtriem of the University of Freiburg (Germany), Professor Curtis Reitz of the University of
adapt contracts, but established that in cases of hardship or change of circumstances, that would be possible:

I think it would be possible to develop a similar doctrine under Art. 7(2) of the Convention by saying there is a gap in the CISG with regard to hardship rules. Then the gap could be filled by invoking the general principles of the Convention, and those general principles include good faith and fair dealing, and this requires that both parties try to adapt the contract in the event of unforeseeable developments.

Nonetheless, this decision remains controversial and it has been criticized for allegedly widening the scope of the Convention to an issue not regulated by it. On the opinion of the author, the CISG governs the issue of change of circumstances and it is necessary to interpret and complement its provisions to find proper solutions for hardship cases.

Next we will study the doctrine of Hardship or Change of Circumstances and Art 79(1) CISG in order to evaluate the decision of the Belgian Court of Cassation. The purpose is to determine whether the court considered the requirements of Art. 79(1) while assessing the facts of the case, and whether it would have reached the same or different results if it had not based its decision on French Law but solely on the CISG and its principles.

**C. Hardship or Change of circumstances and the CISG**

Supervening events relating to economic changes, political tensions, exceptional conditions or disasters, might foster the change of circumstances under which parties concluded their contracts. The contractual balance that was achieved under a set of facts might be altered if the circumstances are modified drastically causing an alteration in the original risk allocation between the parties making performance more onerous. Conceptually the problem of change of circumstances is considered to lie on the principle of good faith and it can be observed as an issue of contract interpretation, which has to be

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Pennsylvania, Professor Joseph Lookofsky of the University of Copenhagen (Denmark), Professor Shigeru Kagayama of Nagoya University (Japan), and Professor Kevin Ashley of the University of Pittsburgh.

carried out in accordance with the aforementioned principle and the relevant circumstances of the particular case\textsuperscript{11}. It can also be studied as a subcategory of force majeure.

The requirements for hardship under general contract principles are: the change of circumstances fundamentally alters the equilibrium of the contract; there has been no assumption of risk by the parties at conclusion; the events that cause the alteration are beyond the obligor’s control; performance becomes excessively onerous; the change of circumstances could not be overcome and the events supervene the conclusion of the contract\textsuperscript{12}.

\textbf{I. Brief introduction to the historic development of the concept}

The legal problem raised by the change of circumstances has been dealt historically in the Civil Law, with the \textit{clausula rebus sic stantibus}. This term was mentioned in the early 16\textsuperscript{th} century by Jason de Manyo and “this doctrine suggests that the continued enforceability of a contract depends, in accordance with its tenor and purpose, upon the continued existence of the circumstances which prevailed at the time of contracting”\textsuperscript{13}. The Canonist Christopher Saint Germain set the stage of the \textit{clausula rebus sic stantibus} when he stated that promises, in order to be binding, had to meet certain requirements and that they could be disavowed if there was a material change in circumstances\textsuperscript{14}. The concept arose in the medieval period out of the necessity to find an exception to the traditionally recognized principle of \textit{Pacta Sunt Servanda}\textsuperscript{15}.

According to Brunner, the concept has evolved and nowadays is understood to include the parties acceptance of the risk that the circumstances that prevail at the moment when the contract was concluded are subject to subsequent changes, thus the doctrine today would

\textsuperscript{11} Brunner, p.394.  
\textsuperscript{12} Ibid, p.398-399.  
\textsuperscript{13} Ibid, p. 401.  
\textsuperscript{14} Cf. Mazzacano, p. 9.  
\textsuperscript{15} Cf. Ibid, p. 11
more accurately be *clausula rebus sin non stantibus*\(^{16}\). Nevertheless, even if parties are aware of potential changes, the effects of the changes in circumstances have to be assessed in order to determine if performance remains possible.

This concept has been historically rejected in the Common Law by means of a strict interpretation of the *Pacta Sunt Servanda* principle. It was first recognized in cases of coronation delays, as the doctrine of frustration\(^{17}\), and has been developed in the doctrine of discharge in light of commercial interests. The recognition of the doctrine of frustration makes a hardship defense possible under the general principles of contract law. In the United States, exemption for non-performance is recognized restrictively in the doctrine of commercial impracticability.

The idea of an exemption for non-performance based on the change of the circumstances has been incorporated in different systems and therefore, it can be regarded as a general principle of law. In the Public Law sphere it has been recognized under Art. 62 of the Vienna Convention on the Law of Treaties of 1969.

In the private sphere the concept must be subject to some limits, since the predictability provided by the principle of sanctity of contracts appears to be irreconcilable with the dynamic and uncertain *rebus sic stantibus*. An exam concerning the viability of an exemption will require a close examination of the changes in circumstances; the type of contract and consideration of the principles of equity and fairness given the particular factual pattern\(^{18}\).

**II. Definition**

Hardship or change of circumstances can be defined as the fundamental alteration of the contractual equilibrium due to unpredictable changes in the circumstances, “where performance becomes exceptionally and unexpectedly burdensome for the obligor”\(^{19}\).

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\(^{16}\) Cf. Brunner, p. 401

\(^{17}\) Cf Mazzacano p. 17.

\(^{18}\) Cf. ICC Award Case No. 1512, 1971 abstract available at http://www.trans-lex.org/201512

\(^{19}\) Yesim M. Atamer, Para. 78.
Art. 6.2.2 of the UPICC defines hardship in the following terms: “There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished”. The conditions set by this principle in its sections are that the events occur or become known to after the conclusion of the contract; the events could not reasonably have been taken into account at the time of the conclusion of the contract; the events are beyond control; and the risk of the events was not assumed by the disadvantaged party.

Hardship is a concept that develops in the context of the economy of contracts and it demands adjustable legal consequences suitable for cases of economic “unaffordability”, which require more flexible standards. The change of circumstances does not make the performance of the obligation physically impossible, but it makes performance impractical or economically impossible under the original terms of the contract. A fundamental alteration does not only mean a loss in the intrinsic value of performance but also, somehow, the frustration of the purpose of performance when the result that was looked for can no longer be achieved.

The definition of hardship presents the elements that will be developed in the following sections:

III. Disturbance of contractual equilibrium

The disturbance in the contractual equilibrium is caused by a distortion in the equivalence of the value of performance obligations and counter-performance obligations. Questions arise in respect of what situations sufficiently alter the economic equilibrium of the contract; for instance political and economic crisis, unexpected market fluctuations, massive inflation or devaluation of currency.

In general terms, international trade is characterized by economic fluctuations; cross-border transactions are subject of more and higher risks and it is reasonable to argue that parties at
the time of conclusion have assumed the risk of changes, thus not leaving room for exemption of liability for non-performance due to those risks. However, there are circumstances that cannot be foreseen, nor the impact they might have in the contractual balance. The question that arises then is what kind of scenarios or changes in circumstances may be proposed as exceptionally "hard" cases of hardship or economic imbalance that would suffice for exemption of liability.

As a rule, the magnitude of an alteration of the equilibrium of the contract has to be judged on a case-by case basis. The standard is that there must have been a “fundamental change” in the equilibrium of the contract. According to Brunner it is not only a matter of whether the balance of the contract has changed but also “how much risk the disadvantaged party assumed”\(^{20}\). The analysis should focus on construing the contract as well as the fundamental distortion of its original terms based on objective criteria.

It is difficult to draw the borderline between situations in which an “excessive onerous burden” that makes performance economically impossible or excessively burdensome has arisen, from those cases where even though the original equilibrium has been altered, it remains manageable and performance by the party is required and expected.

**IV. Meaning of “extremely/ excessively onerous”**

Situations when performance of the contract has become excessively onerous include those in which the cost of performance has increased excessively or the value of the performance it receives has diminished excessively. The standard of “excessiveness” is addressed to determine the level of difficulty of performance that will allow an exemption, and also to prevent parties from invoking hardship in contestable situations, like when the benefit of the contract is less than originally expected.

\(^{20}\) Brunner, p. 393.
It is generally accepted that only a change in circumstances that entails almost economic impossibility should meet the requirements for an exemption. The problem is that even though performance has become extremely onerous for one party, performance interest will have probably increased accordingly for the counter-party. The level of “excessiveness” has to be determined regarding that the alteration has to be significant enough to conclude that if that had been the burden of performance at the time of conclusion, the parties had most likely not concluded the contract.

The threshold test could be “the determination of a percentage of the cost or the value of performance [that] is likely to amount to a fundamental alteration of the equilibrium of the contract”\(^{21}\). Even though such a solution might not seem accurate, because the definition of what is “fundamental” will depend on the particular facts of each case, it is a starting point to assess the impact of the change of circumstances in the possibility to perform under the contractually agreed terms.

It might be necessary to valuate the alteration of the contract in monetary terms and establish an acceptable percentage limit over which performance might be considered as “excessively onerous” to qualify for an exemption. According to Brunner,

\[
\text{an alteration in the region of an 80\%-100\% decrease in the value received, or a corresponding increase in the cost of performance of the same order of magnitude or of about 100\%-125\% may therefore be seen as a general point of reference for the hardship test under general contract principles}^{22}.
\]

It could be argued that an alteration out of those limits may hardly suffice for an exemption under hardship. Nonetheless, there might be situations in which the alteration does not fall within those ranges, but performance has still become excessively onerous or its value has diminished excessively, hence an exemption of liability would be reasonable. For instance, at the end of 1999, Ecuador\(^{23}\) suffered a rapid devaluation of 67% of its national currency and an inflation rate of 60.7%. These situations lead to the dollarization of the economy in a change rate of 25,000 Sucres\(^{24}\) per U.S dollar in January 2000\(^{25}\).

\(^{21}\) Brunner, p. 426.
\(^{22}\) Ibid, p. 431-432.
\(^{23}\) Ecuador signed the CISG without reservations on February 1, 1993.
\(^{24}\) Ecuador’s former national currency.
International contracts that had been agreed in Sucres without hardship clauses before 1999, were suddenly worth 67% less compared to their value at the time of conclusion of the contract. Although the alteration of our example does not fall within the ranges established by Brunner, that change of circumstances made the value of performance excessively burdensome and unbearable for Ecuadorean parties, particularly if one considers the socio-economic reality of the Andean country.

To deal with this kind of situations and correctly evaluate the onerosity of performance for the parties, the most widely accepted approach is an objective comparison of the value of the performance before and after the supervening events. In order to be categorized as “excessively onerous” it should reflect an excess that cannot be expected to be borne by the promisor.

V. Meaning of “ultimate/absolute limit of sacrifice”

To determine the ultimate limit of sacrifice it is necessary to assess “what effort a party can reasonably be expected to make in order to overcome the consequences of the impediment”26. The ultimate effort will set the limits out of which the party in breach cannot reasonably be expected to perform and the liability for non-performance can be exempted.

The limit does not refer to whether performance is still possible, but whether objectively the impediment is insurmountable and would make performance excessively burdensome for the party. The test should consider the economic disadvantages and the consequences that performing the contract would imply. Decisions rendered prior to the one in the Scafom case, considered that events that turned performance excessively onerous would not exempt from liability since performance was still, at least theoretically, possible.

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26 Uribe, p.193.
Courts set the threshold relatively high and the party in breach could have been expected to “sacrifice” more in order to comply with the contract. The limit was considered to depend on the type of industry and the systematic risk of the particular market. For example, Hamburg’s Court of Appeals established:

despite the triplication of market price that had to be paid for Chinese iron-molybdenum, an excess of the absolute limit of sacrifice is not given. For parties doing business in a sector that has a very speculative aspect the limits of reasonability are very high. The contract was not commercially unreasonable to an extent that it could be regarded as frustrated27.

Objective criteria must be considered to observe the magnitude of distortion from the original purpose. The analysis should provide the “upper limit of tolerability” of the party invoking hardship. A definition of the limit of sacrifice in a more detailed way would be futile since the complexity of hardship cases will require a different test on a case-by-case basis, since what is tolerable in one case might not be in a different one.

VI. Hardship under the CISG

As Brunner effectively stated “the CISG avoids referring to abstract legal doctrines or concepts which are particular to, or understood differently in, the various legal systems. Instead, it describes specific circumstances and then elaborates on the concept of the individual rule”28. For this reason, the question of hardship has to be construed from the underlying principles of the Convention.

Scholars are divided on whether the CISG regulates the situation of hardship. From the perspective of Brunner,

the CISG does not provide for hardship exemption, it is questionable whether [it] may be characterized as a general principle and relied on despite the absence of a contractual hardship clause... [however] comparative law analysis suggest that the hardship exemption may be recognized as a general principle of law (general contract principle), but must be construed very narrowly29.

The terms “hardship” or “changes of circumstances” are not used in the Convention. However, given that the Scafom decision qualified the problem of hardship as an issue

28 Brunner, p. 17.
29 Ibid, p.58.
governed by Art. 79(1) CISG, we are going to have a closer look to this provision that is considered one of the most important and complex in the CISG. It requires special attention since it is “difficult to understand, challenging to distinguish and daunting to apply”\(^{30}\), probably because it is an attempt of compromise between the civil law and the common law and their concepts of fault and strict liability\(^{31}\).

### D. Article 79(1) CISG and its requirements

Art. 79(1) reads as follows: “A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”.

The provision clearly establishes that exemption of liability will operate if: non-performance is due to an impediment, such impediment was beyond the control of the obligor, it reasonably could have not been foreseen at the time of the conclusion of the contract and the impediment nor its consequences could have been avoided or overcome by the party. The language of the provision reflects the drafting neutrality that was sought for the Convention.

According to the UNCITRAL Digest of Case Law on the CISG 2012 edition (Digest of Case Law), Art. 79 has been invoked frequently by parties to international litigations; nevertheless the successful exemption in practice has been very limited\(^{32}\).

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30 Harry M. Flechtner, The exemptions provisions of the sales convention, including comments on “hardship” doctrine and the 19 June 2009 decision of the Belgian Cassation Court, 2011, p. 4.

31 Cf. Mazzacano p.53.

I. Meaning and Scope

To understand the meaning and scope of Art. 79(1) two dimensions have to be taken into account; the delimitation of the kind of breaches which can be exempted on its basis and the remedies that will no longer be available to the obligee due to the exemption of liability. Since the provision does not establish any limits regarding the type of obligations, in principle any breach could be exempted, notwithstanding whether the obligations are principal or accessory. Any kind of failure to perform can fall within the scope of application of the provision.

The effect it has according to Art. 79(5) is the obligor’s exemption to pay damages due to the failure to perform; accordingly damage claims will have to be dismissed if Art. 79 is applicable. This approach was considered in case that involved art books, where a court in Switzerland stated that since the seller was not responsible for the mistakes of the carrier of the books, a claim for damages was rejected. Even though, the Court did not engage in an analysis of the provision, it recognized the effect the application of Art. 79 entails. The application of Art. 79 this does not preclude any other right that the parties might have under the Convention.

The main problem with the provision is that it does not settle the exact meaning of “impediment beyond control”. Its interpretation will be left to the Courts applying the CISG, which by nature entails the risk of association with national concepts. These concepts, although similar, are subject of different requirements, consequences and interpretations. For instance, a French Court ruled that the seller could benefit from the exemption pursuant Art. 79 “in the absence of bad faith in his behavior”. This approach seems to mistakenly understand that an impediment beyond control somehow equals to “à défaut de manifestation de mauvaise foi de sa part”. This apparently responds to the interpretation of the French version of the Convention that talks about "un empêchement

33 Cf. Yesim M. Atamer, para. 7.
independent de sa volonté", which could be translated into English as an impediment independent of the party’s will and the French understanding of good faith.

To address the problem, the first aspect to understand is the meaning of “impediment” as an obstacle that is objectively insurmountable. In general terms it can be established with certainty that Art. 79(1) covers the situations of force majeure, such as natural disasters, earthquakes, floods, war and the like. The requirements for an exemption based on force majeure are that the impediment does not fall in the sphere of risk of the obligor, it is an unforeseeable situation and the consequences are unavoidable. Nevertheless, whether the change of circumstances that creates an economic imbalance in the contract falls under the scope of that provision is not clear.

Despite changes of circumstances are seen as a subcategory of the force majeure exemption by some scholars, others; like Flechtner, see hardship as situation completely different from it. The distinction is based on the fact that in force majeure cases, performance is no longer possible; it becomes impossible at least temporarily, while in hardship situations, performance remains possible but with an excessive onerous burden for one of the parties.

The reason for the distinction are that the standard is different and less strict under hardship, since it includes events that do not render a party’s performance impossible but much more difficult or expensive, or that makes the return performance that a party receives much less valuable; hence altering the contractual equilibrium. Additionally, hardship provides for an attempt of the parties to renegotiate the contract, which is not available under force majeure, as it is rejected that a court will impose changed contractual terms not agreed by the parties in order to restore the contractual equilibrium.

The AC Opinion No.7 of October 2007 in paragraph 3.1 asserts that:

a change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an

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36 Almeida, p.104.
"impediment" under Article 79(1). The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79.

Nonetheless, the application of Art. 79(1) to hardship situations does not seem settled and the discussion requires an analysis of the elements of the provision.

II. Promisor’s sphere of risk vs. external circumstances

The question is what kind of economic circumstances may exempt from liability under Art. 79(1). A clear distinction has to be made between situations that constitute the promisor’s sphere of risk and those that are external circumstances to their control. The Convention contains a regime of strict liability, therefore all the circumstances that might fall within the party’s sphere of risk cannot be subject to an exemption, as long as the party can take all the necessary precautions to hinder the occurrence of an impediment or overcome its effects.

The relevant threshold for hardship has to be analyzed by assessing the distribution of risk between the parties, considering the particular circumstances of the case, and analyzing whether the impediment and its consequences can be overcome. It is necessary to observe if there has been an explicit or implicit allocation of the risk of the supervening circumstances between the parties; as correctly stated by the German Supreme Court in the vine wax case, “the possibility of exemption under CISG Art. 79 does not change the allocation of the contractual risk”.

According to professor Perillo, “it is clear from the nature of hardship… that the mere fact that the contract contains a fixed price does not allocate that risk.” For that reason, the

39 Yesim M. Atamer, para. 3.
41 Bundesgerichtshof, Germany, 24 March 1999, English translation available at http://cisgw3.law.pace.edu/cases/990324g1.html
risk distribution in cases of hardship will require a “value judgment to a somewhat larger extent as to why the risk of the aggrievement should not be left with the party concerned”\textsuperscript{43}.

The Digest of Case Law states that several decisions suggest that the essential issue is to determine whether a party claiming an exemption assumed the risk of the event that caused the party’s to failure to perform. For instance, a decision issued by the Court of Appeal of Hamburg established that “the possibility to avoid or overcome an impediment has to be judged according to the contractual allocation of risks”\textsuperscript{44}.

On the same line an award of the Hamburg Chamber of Commerce, while assessing the applicability of Art. 79 established:

the financial straits of the manufacturer and its need for cash are not an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness. Rather, the risk related to the supply is to be borne by the seller, also if the circumstances become more onerous… he [the seller] must guarantee his financial capability to perform, an aspect which belongs typically to the sphere of responsibility of the debtor. The seller is not freed from his responsibility as to his financial capability to perform even where he loses the necessary means because of subsequent, unforeseeable events… only the apportionment of the risk in the contract is relevant here, which apportionment is made clear by the pre-payment agreement… \textsuperscript{45}.

A Belgian Court in a case that involved frozen raspberries ruled that price fluctuations and other factors that affect the financial status of the contract are foreseeable and part of the normal risk assumed by the parties to an international commercial transaction and could not be categorized as an impediment beyond control\textsuperscript{46}. The same way, the Court of Appeals of Colmar established that in long term contracts, the decrease of 50% in the price of component good was a foreseeable risk:

experience shows that over a period of eight years, price fluctuations, even sudden and significant, are not exceptional and, \textit{a fortiori}, are not unforeseeable… when becoming involved in such a long and restrictive supply agreement… an experienced professional acting in the international market, should have arrange[d] either

\begin{itemize}
\item \textsuperscript{43} Brunner, p. 393.
\item \textsuperscript{44} Oberlandsgericht Hamburg, Germany, 28 February 1997, English translation available at http://cisgw3.law.pace.edu/cases/970228g1.html
\item \textsuperscript{45} Schiedsgericht der Handelskammer Hamburg, Germany, Partial Award of 21 March 1996, English translation available at http://cisgw3.law.pace.edu/cases/960321g1.html.
\end{itemize}
guarantees of performance of the contractual obligations entered into... or means of revision of these obligations. Otherwise, it should bear the risk of non-performance.

External circumstances are those that fall completely out of the sphere of control due to their unforeseeability; situations that could have not been prevented by any means or actions carried out by the promisor. Circumstances that could have been somehow predicted cannot be raised as grounds for an exemption.

This understanding was presented in the ICC award No. 6281 where the tribunal argued that a fluctuation of 13.6% in the price of steel could have been expected, since changes had already started happening at the time of conclusion of the contract, and the prices in that market were known to fluctuate. Even though the CISG was not the applicable law, the tribunal concluded that an exemption could not have been accepted accordingly under the Convention. Nonetheless, it must be considered that the fact that price fluctuations were foreseeable is not sufficient. The probability of occurrence of such fluctuation must be assessed; the likelihood of the events actually happening has to be evaluated.

What kind of circumstances can be considered as external and “beyond control” must be decided under the objective standard of the nature of the impediment; whether it has “roots outside the sphere of influence of the obligor”. For the circumstances that constitute force majeure this requirement is uncontestable, however in cases of economic alteration of the equilibrium of the contract it is harder to assess.

The burden of proof lies on the party invoking hardship; as the Court of Vigevano asserted when referring to Art. 79: “the Convention’s general principle on the burden of proof seems to be -ei incumbit probation qui dicit, non qui negat:- the burden of proof rests upon the one who affirms, not the one who denies.” Consistently, another court rejected a seller’s

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49 Yesim M. Atamer, para.47.
reliance on an impediment, since he “did not offer such evidence for its disputed statement”\(^\text{51}\).

A supervening event that was not caused by fault is not sufficient to be considered as external; consequently the conditions of the impediment have to be analyzed in order to assess if it could have been prevented by any action in the obligor’s power or if it was out of the party’s control and will suffice for an exemption.

III. Conditions for an “impediment beyond control”

1. Temporal condition/ Time Factor

The first condition that is set forward is the temporal element; when the impediment had to exist and when it became evident to the parties. The terms “at the time of the conclusion of the contract”, mean that the impediment beyond control must have not been foreseeable when the parties concluded the contract, but that it turned evident at the time of performance. This issue was accurately addressed by an award rendered in the Bulgarian Chamber of Commerce and Industry, which established that Art. 79(1) contemplated force majeure situations “that occur after the conclusion of the contract as a result of unforeseen and unpreventable events with extraordinary character”\(^\text{52}\).

Professor Schwanzer argues that the term of hardship under the Convention should be interpreted and understood in the broadest sense, “encompassing any change of circumstances after the conclusion of the contract as well as a gross disparity of the value of performances already existing at the time of conclusion of the contract”\(^\text{53}\). Nonetheless, the party’s power to do something regarding this “gross disparity” would have to be considered in the analysis.

\(^{51}\) Oberlandsgericht Zweibrücken, Germany, 7 February 2004, English translation available at: http://cisgw3.law.pace.edu/cases/040202g1.html


2. Unforeseeable

Art. 79(1) announces that the party is not liable if they could not have “reasonably” been expected to take the impediment into account the time of the conclusion of the contract. “Unforeseeability” of the impediment under this section does not mean that all possible situations that can affect performance have to be considered. A cross-examination with the likelihood the impediment occurring is required, to give the obligor the opportunity to take measures to protect performance of the obligations.

Foreseeable events at the time of the conclusion of the contract will not suffice for an exemption, since a clause evaluating the risk could have been included by the parties, and in the absence of such a clause, the “defaulting party should be considered as having assumed the risk of [their] realization”\(^{54}\). A distinction has to be made between the situations which jeopardize performance that can be controlled by periodic actions of the parties, from those that even if actions had been taken were beyond their control and became inevitable.

The foreseeability of the impediment has to be measured under the standard that the CISG contains for the interpretation of the parties’ conducts and intentions; under the “reasonable person” exam. It is based on the idea that if the impediment had been foreseeable at the time of conclusion, the party concerned would have done something to prevent it\(^{55}\). The interpreter has to assess the circumstances in a reasonable manner and accept as unforeseeable the impediments that even though could have been foreseen during the negotiations, were not considered in the contract, due to justifiable reasons from the perspective of a diligent merchant\(^{56}\).

The assessment of this factor should consider other circumstances, “such as the duration of the contract (the longer the duration, the less likely the contracting parties will be able to foresee possible impediments), the fact that the price of the goods sold tend to fluctuate in

\(^{55}\) Almeida, p. 101.
\(^{56}\) Ibid, p. 102.
the international market, or the fact that early signs of the impediment were already obvious at the time of the conclusion of the contract”57.

3. Unavoidable

Pursuant to Art. 79(1) CISG, the impediment has to be unavoidable by nature; this means that the obligor cannot act in any way to prevent the situation from happening. However, once the effects of the impediment have become evident, the party whose performance is at risk has the obligation to do anything under their control to promote timely performance.

Once the effects show up, the party must try to overcome the effects to protect performance. Case law has not developed substantially the unavoidable element regarding economic imbalance. However an initial approach was carried out by a German Appellate Court in a case dealing with tomato concentrate58. The court established that even though the tomatoes prices had increased considerably due to a harvest spoilt by rain, the consequence could have been overcome since the class of goods were not exhausted; hence the requirement of Art. 79(1) was not met. However it did not discuss the unavoidability of the consequences from the economic perspective of the contract.

The supervening event must not be caused by a contractual breach of the obligor and the party should have taken all the measures that could have been reasonably expected, to avoid the consequences of the impediment59. The Digest of case law suggests that when tribunals did not discuss the “unavoidability” requirement, but nonetheless granted an exemption, they most likely presumably believed the party involved could not have been expected to overcome the impediment60.

57 Flambouras, Pace International Law review, 2001, p. 271.
59 Almeida Prado, p.103.
60 UNCITRAL Digest of case law on the CISG 2012, footnote # 91.
4. Impediment beyond control vs. Impossibility to perform

The Convention does not regulate the situation of an impediment beyond the control that can result in impossibility to perform. This is an important point of debate because the fact the promisor might be exempted for liability does not preclude other remedies such as the claim for specific performance. Though this is a very interesting point from the academic perspective, it does not present further issues for the problem of hardship. The change in the economic circumstances would have to be measured under the standard of whether the performance became definitely impossible or not.

Scholars have argued that requiring a party to perform when the conditions of Art. 79 are met would be inconsistent with the text of the Convention and would result in an irrational outcome. According to professor Schwenzer, nowadays “it seems to be undisputed that, wherever the right to claim performance would undermine the obligor’s exemption, performance cannot be demanded as long as the impediment exists”. This suggests that a teleological interpretation should be favored, establishing a limit of sacrifice beyond which the party in breach cannot be expected to perform; as a way to avoid economically irrational behavior.

The CISG establishes specific performance as the primary remedy for the failure of obligations, but it is subject to the Courts approval under the condition that it is a remedy provided for in the domestic law. Other questions related to unreasonable disproportionality should have to be evaluated in light of the provisions that govern the issues of “unreasonable” performance.

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63 Yesim M. Atamer, para.36.
IV. Causal link between impediment and non-performance

Non performance is defined as

a failure by any party to perform any of its obligations under the contract [and] encompasses complete failure to perform and all forms of incomplete or otherwise defective performance, late performance, as well as a violation of accessory duties, such as the duty to cooperate in order to give full effect to the contract.\(^{64}\)

Exemption of liability will only be possible if there is a causal link between the impediment beyond control and the non-performance of any of the obligations. This means that the impediment has to be the only cause for the failure to perform and there is causality between the one and the other.

For the evaluation of the causal link, the interpreter should consider if the obligor was in some sort of breach of contract when the impediment or the change of circumstances occurred; to assess if non-performance was solely due to the supervening impediment, or if it was caused by the preexisting breach of contract. For instance, a Russian award decided that the seller could not rely on the bankruptcy of a bank where the payment for the goods had been transferred to, pursuant to Art. 79, since he was already in breach before the bankruptcy. The seller had acknowledged the transfer of money to his account but had not delivered the goods which proved his breach of contract.\(^{65}\)

The contractual risk allocation must also be considered while assessing the causal link. In the vine wax case,\(^{66}\) the Court determined there was not causation between the party’s non-performance and the fact the failure was due to the seller’s supplier faults in the production. It did not suffice as an excuse for non-performance, because the party’s failure to acquire proper goods was the direct cause of the breach of contract. That failure was something within the “risk of acquisition”; within the contractual allocation of risks and, thus it was not an impediment beyond control that would suffice to exempt from liability. Case law has

\(^{64}\) Brunner p.59  
\(^{66}\) Supra 38.
not addressed the causation requirement in cases of alteration of the contractual equilibrium.

According to Brunner, the concept of non-performance under the CISG is a general term covering any failure to perform, for whatever cause. It differentiates a fundamental breach from other breaches of contract and it can be subject of exemption due to non foreseeable impediments and the available remedies do not presuppose fault by the obligor. This unitary concept of non-performance is fundamental for the compromise between the different legal traditions.

On the other hand, the unitary concept of non-performance developed by soft-law instruments is a breach of any obligation arising under the contract and it includes both, excused and non-excused non-performance and it is coupled with the concept of strict liability\(^{67}\). Since both concepts are substantially similar, it would be reasonable to argue in favor of filling the gaps of the CISG, on questions related to non-performance, by referring to soft-law instruments.

Once the elements of Art. 79(1) have been established, it is reasonable to state that the change of circumstances falls within the scope of application of the article. The decision of the Belgian Court in the Scafom case seems appropriate and within the guidelines of the CISG, to the extent that it recognized the Convention governs the change of circumstances. The economic imbalance caused by the unexpected increase of the price of steel, could be seen as an impediment beyond the parties control.

Whether the 70% increase rate caused a serious economic hardship had to be considered regarding all the other relevant circumstances of the case. Unfortunately, the decision did not analyze market conditions and any other relevant facts that would support the conclusion that such a rise in the price created an excessive onerous burden that could not have been expected to be borne. Since the analysis of all the relevant circumstances was not carried out by the court it was deficient, despite its initial assessment was adequate. Change

\(^{67}\) Brunner, p. 58
of circumstances is a situation that, as its name suggest, has to be analyzed in regards of all the relevant circumstances. The fact that the Court did not provide with a solid explanation of why the rise of 70% was seen as a situation of hardship, but it simply stated an increase of such a rate created hardship, is a reasonable ground to criticize the decision, especially if you evaluate it from the perspective of a legal tradition that rejects the doctrine of change of circumstances.

At this point it appears evident that Art. 79(1) does not provide for a solution to the problem; which is supported by the fact that the Belgian court resorted to French law. Therefore it is necessary to address the issue of change of circumstances through different methodological approaches that would lead to possible remedies.

**E. Methodological approaches**

Hardship under the CISG is as a hard case of interpretation. The intentionally broad and vague wording of Art.79, presents an open-texture standard that regulates a “case governed by the Convention but not expressly settled by it”. Scholars have suggested different methods to deal with the problem; by interpreting the CISG and filling its gaps, or by referring to the international principles.

The necessity to interpret the Convention and fill the gaps that might have been left in it, was recognized since an early stage. Professor Schlechtriem stated: “we always have to be aware of the boundaries and limits of the Convention. Inside these boundaries and limits we can extend the Convention to cover issues not clearly provided for, not foreseen by the drafters”\(^{68}\).

If the problem of hardship would have to be solved within the boundaries of the Convention, without resorting to the application of domestic rules, the methods that could be used are the following:

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I. Direct application of Art. 79(1)

The first way to approach this problem would be by subsuming the facts of the supervening events in the term “impediment”. This method qualifies the term as broad and fit enough to include the change in economic circumstances under its scope of application.

From a methodological perspective this does not present major problems, because the “impediment beyond control” threshold is lower than absolute impossibility, as it has been qualified under the standard of reasonableness, which theoretically may include cases of exorbitance. However the limitation is that this method does not provide for further remedies, other than the exclusion of liability to pay damages. Additional issues related to hardship would remain unresolved. Apparently, this was the problem that the Belgian Court faced and thus it decided to resort to the applicable law pursuant to the Private International Law rules.

II. Application of Art. 79 in conjunction with the gap filling provisions

Given that the CISG does not provide solutions and answers for all the legal issues of hardship, the interpretation under the gap filling provision is required to go a step further from the exemption of liability to pay damages pursuant to Art. 79(1).

1. Art. 7(1)

Art. 7(1) establishes that “in interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade”. This provision mandates for an autonomous interpretation of the Convention.

A majority among scholars see Art. 7 as the provision that promotes uniformity, others argue that the open-texture standards of the CISG make this provision flexible enough to

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70 This paper addresses the issue of remedies in a following section.
throw different results in application of a broad provision to similar cases; and that “uniformity” refers to the methodological approach with which interpretation in hard cases has to be conducted, since some CISG provisions require tribunals to reach case specific interpretations that may differ across jurisdictions. 

An interpretation of hardship under this provision responds to the fact that some CISG provisions (Art. 79 included) were intentionally drafted in broad terms, in order to permit the flexibility of open-texture standards, and allow different results in cases that even though similar, may require a different approaches due to the interpretation of the particular circumstances.

Good faith and the hardship exemption have a close relationship; “good faith is implicit in the doctrine of excuse for non-performance, as it requires the parties to do, not what has been exactly promised, but rather that which is fair and reasonable under the circumstances”. An example of this relationship is the German approach before the reform of 2001 when § 313, Störung der Geschäftgrundlage, was included in the Civil Code. Until then, the change of fundamental circumstances was addressed by the Courts with basis on § 242 BGB; the rule of good faith.

This paper does not discuss the meaning of Art. 7(1) or if it is “a mandate for the interpretation of the Convention; a general principle to assist in gap filling; a direct positive obligation imposed upon the parties; a collective term denoting derivative general principles for gap filling; a product of international usages or practices established by the parties; or an independent source of rights and obligations which may contradict or extend the CISG”. For the purposes of this paper, it should suffice to argue that this article regulates the relationship between the provisions of the CISG and the general principle of good faith.

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72 Mazzcano, Nordic Journal of Commercial Law, issue 2011 # 2, p. 3
In the author’s opinion, even if Art. 7(1) were applicable only to the interpretation of the Convention and were not a positive obligation upon the parties, such mandate would still result in the regulation of the change of circumstances and its remedies under the CISG. The interpretation of Art. 79(1) in observance of good faith in international trade would result in the understanding of this principle as the basis for remedies, such as renegotiation or adjustment of the contract, in cases of hardship or contractual disequilibrium due to supervening circumstances.

2. Art 7(2)

This provision states: “questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”.

For most commentators, the general principles on which the CISG is based should be obtained from the text of the Convention itself. This provision requires the interpreter to look at the principles that are derived from the CISG, only at “its” principles and not to look outside of the Convention to find general international law principles. This gap filling rule has more or less the same function as the traditional method of analogy; if the interpreter can find a principle in another provision of the Convention, that principle can be used to fill a gap and address a similar problem.

This article requires a higher level of abstraction in order to interpret other provisions of the Convention based on it, since it allows the application of domestic laws according to the applicable private international law rules. In the case of hardship, the use of domestic rules would not be the most advisable approach since the doctrine of change of circumstances is subject of different requirements and interpretations in different jurisdictions.

The evolution of international commerce may require a hardship principle to underlie transactions. However, this should be an issue determined by the commercial operators and
not by legal scholars. This is because those involved in the day-to-day international transactions recognize the needs of the particular trade involved and would evaluate more objectively if hardship is recognized as an underlying principle in their field.

III. Gap filling by referring to UNIDROIT principles

Professor Ferrari has accurately stated that “it is not sufficient to rely on the rules of the CISG when importing or exporting internationally”, it has been stated that one of the companions of the CISG are the UPICC. The preamble of the UNIDROIT Principles establishes that they “may be used to interpret or supplement international uniform law instruments”. The CISG is the most successful instrument for international commercial law, thus they could be used to complement its provisions.

Some authors see the UPICC as the general principles on which the Convention is based; therefore a joint interpretation seems reasonable. However, scholars of the common law tradition reject this statement. According to Flechtner:

the general principles of the Convention and the general principles governing the law of international trade certainly seem [...] to be two quite different things. The difference is not hard to discern: the general principles on which the Convention is based are derived from the CISG itself; the general principles governing the law of international trade could be found in many sources outside the Convention, including domestic laws to the extent they have been applied in international sales or any other international transaction.

Some others consider the interpretation of the CISG in light of the UNIDROIT principles as the only mechanism that allows the evolution of contractual practice and lex mercatoria. However, since the UPICC are meant to apply to every kind of international commercial contract, due to their general scope, their accuracy for contracts of international sales of goods is under debate.

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77 Cf. Almeida, p. 111.
In order to supplement the CISG in a legitimate way, first it would be necessary to derive the underlying principle of the Convention’s provision and then determine whether the corresponding UNIDROIT principle fits with it. The setback of this approach is the principles’ lack of authority and the fact that contracting states did not bind themselves to the interpretation of the CISG’s provisions in light of the UNIDROIT principles.

On the other hand, supporters of this approach argue that they embody international standards, thus the interpretation of the CISG in light of these principles will promote the regard to its international character as required by Art. 7:

The gap-filling role of the UNIDROIT Principles is aimed at supplying those international uniform law instruments with a set of rules that the interpreter or decision-maker is unable to find, expressly or impliedly, in those instruments. The main idea is to preclude an easy resort to the domestic law indicted by the conflict of law rule from the forum, thus keeping the settlement of the dispute within its international legal habitat.

Regarding the change of circumstances, if the issue had been expressly excluded from the Convention’s scope, it would be inappropriate to argue that the UNIDROIT principles may be used to interpret Art. 7 and provide remedies for it. However, Professor Bonell, among other scholars, sees hardship as “an example of a provision of the UNIDROIT Principles which, though addressing questions falling within the scope of the CISG, [has] no counterpart on the CISG.” A different scenario would be to interpret the validity of an international sales contract, since that matter was expressly excluded from the scope of the CISG in Art. 4(a). We presume that hardship under the Convention is not an issue of validity of the contract, as is the case in some Scandinavian countries.

Another setback might be that the UNIDROIT principles do not show a compromise between the different legal traditions. Their use for the interpretation of the Convention might not be approved by interpreters of legal systems that reject concepts like hardship, portrayed in the antagonist legal tradition. However, it must be recognized that in the preparation of the UPICC,

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78 Garro, Tulane Law Review, p.1152-1153.
79 Bonell, Wuhan University International Law Review, p. 103.
“the decisive criterion was not just which rule had been adopted by the majority of countries (common core approach), but also which of the rules under consideration had the most persuasive value and/or appeared to be particularly well suited for cross-border transactions (better rule approach)”80.

The UNIDROIT included hardship among the principles not to favor the civil law tendency, but as a result of the scholars’ opinion on the need of principles governing contractual fairness81. An example of the complementary role of the UNIDROIT principle on the issue of hardship is the ICC Award No. 7365. Here, the tribunal expressly referred to the UNIDROIT Principle 6.2.3 on hardship, since the parties had agreed to the “complementary and supplementary application” of general principles of international trade law and trade usages, despite the applicable law was Iranian law. Even though the award was challenged on those grounds, it was confirmed by the competent court. The tribunal stated:

from the covenant of good faith and fair dealing…follows that in a case in which the circumstances to a contract undergo [...] fundamental changes in an unforeseeable way, a party is precluded from invoking the binding effect of the contract [...] In such restrictive and narrow form this concept [of hardship or clausula rebus sic stantibus] has been incorporated into so many legal systems that it is widely regarded as a general principle of law. As such, it would be applicable in the instant arbitration even if it did not form part of the Iranian law82.

In many aspects the Convention and the Principles complement each other since they share common grounds, rather than conflict with each other. The convergence in many areas makes it reasonable to believe that the principles are adequate for the gap filling of the CISG. In the case of hardship, the UPICC should be seen as the appropriate solution since consensus on this matter was not reached in the body of the CISG, as whether to include an express provision on the subject83. According to professor Garro, “the provisions of the UNIDROIT Principles on hardship offer the opportunity to promote the goal of unification of international sales law by supplementing Art. 79 of CISG with a suitable solution to radically changed circumstances short of impossibility to perform”84.

80 Ibid.
81 Ibid.
83 Cf. Garro, p. 1160.
84 Ibid, p. 1184.
The Convention and the UPICC have an underlying policy to preserve the enforceability of the contract, thus the solution for hardship provided by the principles seems accurate for contracts governed by the CISG. The gaps in the Convention appear to be intentional and the UPICC were adopted with the purpose of supplementing international instruments such as the CISG and the usages of international trade. The opponents respond that the UPICC are just a restatement of the international principles with non-binding character, while the CISG is binding for the signatories and therefore it is not possible to combine them.

From the author’s perspective the CISG has gaps regarding hardship and the best methodological approach, would be filling them with the UPICC. Going back to the Scafom decision, even though the Court argued based on French rules, it is reasonable to believe that had it argued it in light of the UPICC, the solution would have probably been alike and accurate; since the Belgian Court ordered to restore the contractual equilibrium a remedy.

Next we will analyze the possible solutions for hardship under the CISG.

F. Possible remedies to the problem of hardship under the CISG

The legal effects of hardship raise different issues and a solution to the problem unfortunately cannot be found solely on Art. 79(1), since it only regulates the exemption of liability to pay damages for non-performance, but it does not settle the issue of performance despite the changed circumstances. A solution for this could be found in general contract principles, in soft law instruments, or in the relation between the “other remedies available” to the parties under the Convention that focus in eventual performance of the contract.

I. Renegotiation of the contract and adjustment of contractual terms

In general terms, renegotiation of the contract is conceived as a way to preserve the Pacta Sunt Servanda principle, making the adaptation of the contract prevail over its termination.

85 Cf. Garro, p.1188.
The Belgian Court in the Scafom case ordered the adaptation of the contract due to the change of circumstances. The remedy was the result of the application of the good faith provision of French Law, since it was not expressly provided for in the CISG.

Renegotiation of the contract is a process by which the principle of *Pacta Sunt Servanda* and good faith are balanced together. The parties have the power to adapt the contract and restore the lost equilibrium. Even though there is not an explicit mandate to renegotiate, this is a solution that is highly supported by some commentators to the Convention; “the parties’ duty to renegotiate may be derived from the principle of good faith, which is the underlying legal basis of the hardship exception…is also supported by considerations of efficiency and party autonomy”\(^87\).

Parties should engage in good faith negotiations in order to work out their own solutions without the intervention of others. However, if an agreement cannot be reached either party has the right to commence court or arbitral proceedings\(^88\). The Belgian Court adequately argued that the seller’s proposals to renegotiate the contract were not unreasonable and they constituted a serious base for renegotiation of the terms of the contract. That is why the non-acceptance of a price adjustment, and the fact the buyer was reluctant to renegotiate, contravened the principle of good faith under French law.

The party who has suffered the consequences of the change of circumstances must without undue delay request the negotiation and present the arguments in support of the request; by proving the existence of hardship and justifying the consequences for the contract. The party who has been confronted with such a request “must use its best efforts when assessing the request”\(^89\). Renegotiation just as negotiation of the original terms of the contract is an adversarial process where parties should discuss the possible solutions, but there is not a duty to achieve a new agreement; one modified according to the altered circumstances.

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\(^87\) Brunner, p.480.
\(^88\) Cf. Ibid, p.483
\(^89\) Ibid, p.485
Pursuant to Art. 79(4) CISG, the party who has failed to perform has to give notice of the impediment within a reasonable time after that party knew or ought to have known about the impediment. The same time frame should be considered for the request for renegotiation of the contract. As the general rule under the CISG, the “reasonable time” will be determined on a case-by-case basis. The legal issue that might arise is whether parties may waive their rights to request renegotiation by not presenting a timely request. This should be solved considering the circumstances of the case and the good faith principle.

Professor Schwenzer argues that the Convention does not order the renegotiation of the contract, because cooperative renegotiation cannot be forced upon the parties by coercion, since it is a process that is based on willingness and trust. In addition, the complexity of hardship cases does not allow knowing whether the parties who refuse to cooperate are acting in bad faith or not\(^{90}\). Furthermore, under most domestic legislations there is not an express duty to renegotiate the contract, therefore in case of unwillingness of the parties to renegotiate in an independent manner, domestic courts may be reluctant to recognize this as duty and order it.

In principle, if the party to whom the renegotiation request has been presented refuses to cooperate, it could be considered as sufficient grounds to request the intervention of courts or arbitral tribunals; same if either of the parties refuses to continue negotiations. The aggrieved party by this behavior might request judicial assistance. However, the controversial issue is whether courts or arbitral tribunals have the power to adapt the contract and if so, to what extent they can do it.

Paragraph 3.2 of the AC Opinion No. 7 establishes: “in a situation of hardship under Article 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based.” According to Lookofsky, what the Council meant

\(^{90}\) Cf. Ingeborg Schwanzer, Victoria U. Wellington Law review, pg. 723.
by “further relief” was “relief specially tailored for hardship”91; adaptation of the contract would fall within this category of remedies.

The Court’s or arbitral tribunal power to adapt the contract is recognized in different civil law legislations such as the German, Spanish, Portuguese, Greek and Dutch. The Italian approach is somehow different; since modification of the terms of the contract is only possible once the party invoking hardship has requested the termination of the contract, given that the other party has not made an offer for an equitable renegotiation to adapt the contract92. The approach in common law countries is different since the modification of the contract due to frustration is not allowed. However, official comments of the American UCC do consider this possibility, based on good faith and equity.

International transactions require flexibility when supervening events make performance extremely onerous for one of the parties, thus judges or arbitral tribunals should be able to adapt the terms of contracts governed by the CISG, in application of the general principles under which the Convention is based. According to Brunner, the court’s power to adapt the contract should be considered as a general contract principle if allowed by the procedural law and in the case of arbitration; this issue should be regulated by the parties’ arbitration agreement and the lex arbitri.

This is opposed by scholars who argue that “the fact the CISG articles governing exemption do not authorize a tribunal to impose modified contract terms not agreed to by the parties does not create a “gap” in the Convention; it merely reflects the Convention’s rejection of the adaptation remedy, as reflected in the travaux préparatoires”93. This is one of the main reasons why the Scafom decision is considered to step aside from the objectives of the Convention and attempts against its principles.

Adaptation of the contract must be done looking for a fair distribution of the losses between the parties in light of their original risk assumption. Art. 6.2.3 UPICC establishes that the

92 Cf. Brunner, p. 498
adaptation of the contract has to restore the contractual equilibrium that was lost due to the change of circumstances, but this formula must be read in consideration of the distribution of risks among the parties. The extent of the ultimate limit of sacrifice also has to be considered, in order to make the adapted terms bearable for the aggrieved party.

Courts and arbitral tribunals must balance the parties’ interests and try to minimize the intervention in the parties’ contract. The parties’ intention should be used as a primary reference point. The question to determine is what would have the parties provided for in a change of circumstances scenario, in view of the terms of the contract and other declarations made during or after the conclusion of the contract.

In the absence of any indications about the actual hypothetical intention of the parties, an objective approach must be used, considering the likely position of reasonable persons under the same circumstances. The limit must be that the modified contract shall not be a new contract imposed on the parties; a close connection to the original terms must be sought to meet the parties’ common interests. However, some scholars reject this proposal under the CISG and see it as an “outrageous proposition [to argue] the CISG itself provides authority for a Court or arbitrator to order renegotiation or adjustment of a CISG contract”.

Professor Schlechtriem stated:

if you ask me whether there is somewhere in the Convention the principle of adjustment or adaptation of contracts, I would put forward a very provocative argument. I think the remedy of price reduction in Article 50 of the Convention is a kind of adjustment of the contract to reflect a disturbed balance between performance on one side and obligation on the other side. The defects in goods, or nonconformities on the goods, constitute a disturbance of the equilibrium or balance of the exchanged performance… you could use this principle as a springboard to develop a general rule of adjustment in hardship cases.

The decision of the Belgian Court of Cassation to order the renegotiation of the contract was from this perspective, accurate. Even though the Court of Cassation based its analysis on French law and not on Art. 50 CISG, the result does not contradict the principles of the Convention. This does not mean that the Belgian Court of Cassation carried out the

\[\text{Cf. Brunner, p. 500.}\]
interpretation process properly; from the author’s perspective it was inaccurate in the means employed, but the achieved result could have been predicted on the principles of the CISG. The rationale underlying Art.50 is to adjust the value-relation of performance and counter-performance. If we apply this to change of circumstances, adaptation of the contract would permit parties to be bound to the contract, but in a manner that reflects the change of circumstances; in fact “the price reduction concept… should be a reminder for the parties to consider other and perhaps better ways of adjustment in the case of a failed equilibrium of performance and counter-performance”\textsuperscript{97}.

According to Brunner, the termination of the contract must be seen as a particular form of adaptation and should be adopted as a last resort remedy, if adaptation is no longer possible. In light of the purpose of the CISG, termination should not be considered primarily since it is the remedy provided for cases of fundamental breach. Only when adaptation of the contract would be futile, termination could be an adequate remedy if it meets the interests of the parties and the circumstances of the case.

Case law has not developed the issue of termination or avoidance as a remedy for the change of circumstances. A Tribunal in Italy established that Art. 79 CISG contained a rule similar to Art. 1467 of the Italian Civil Code, which describes hardship or eccesiva onerosità sopravvenuta. The tribunal ruled that the Italian seller could not rely on hardship as a ground for avoidance, despite an increase of almost 30\% on the price of goods\textsuperscript{98}, because such a remedy was not contemplated in Art. 79. However it did not discussed the accuracy of the remedy.

Those who oppose to the renegotiation of the contract as a remedy provided by the combination of gap filling provisions and principles, of the CISG or international trade, might find it more accurate to rely on the principle underlying the duty to mitigate damages under the Convention, as a basis for renegotiation and adaptation of the contract. This duty

\textsuperscript{97} Schlechtriem, in Flechtner/Brand/Walter (eds), p. 186.
should work as a reasonable basis to require the aggrieved party to consider a deal offered by the party in breach due to hardship.

For the purposes of change of circumstances, Art. 9(2) is relevant because it can throw results on whether renegotiation of the contract between the parties is possible if they were bound by such a usage. This provision might also relevant for determining whether the UPICC can be considered as usages that have to be observed between the parties, which according to professor Ferrari, must be decided on a case-by-case basis99.

II. Role of Art. 9(2)

Art. 9 (2) establishes: “The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which they parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned”.

The term “usage” has to be given autonomous interpretation: “-usage- within the meaning of the CISG includes all those actions or modes of behavior (including omissions), which are generally and regularly observed in the course of business transactions in a specific area of trade or at a certain trade center”100. The usages must not only be international; local, regional or national usages may also be relevant101.

The scope of application of Art. 9(2) has to be construed narrowly, according to scholarly works and case law, the conditions that the usage in question has to meet are two: it has to be widely known and regularly observed in the particular international trade concerned and the parties must have known or ought to have known about the usage at the time of the

99 Ferrari, Trade usage and practices established between the parties under the CISG, RDAI/IBLJ, No. 5, 2003, p. 576.
100 Ibid, p. 572.
101 Cf. Ibid.
conclusion of the contract. If those requirements are met, the usage will prevail over the provisions of the CISG\textsuperscript{102}.

The second element to be considered is if the usages apply to “contracts of the type involved in the particular trade”. This requirement raises the issue of whether renegotiation of the contract due to a change of circumstances is a usage in the type of trade involved. In the case of Scafom, the question would have been whether the renegotiation of the contract due to sudden change of circumstances was a usage in the trade of steel.

This element favors the idea of renegotiation as a usage, since many industries and goods market are characterized by sudden changes and it is common that parties to international transactions renegotiate the terms of the contract, including the price, with the purpose of keeping their contracts “alive”.

III. Inclusion of hardship clauses in the contract

Hardship, as other issues the CISG governs but does not settle entirely, could be addressed by the parties in the contract through the inclusion of a hardship clause, to provide for solutions like the adaptation of the contract. Art. 6.2.3 UPICC addresses the situations that might be included in the hardship clauses.

From a practical perspective, hardship clauses are less common than \textit{force majeure} clauses, especially because there is tendency to widen the scope of the latter, thus making it the only clause in a contract dealing with the problem of change of circumstances\textsuperscript{103}. Generally hardship clauses consist of two parts, the definition of the scope of application of the clause and a part that explains the effect of the change of circumstances. Hardship clauses are usually considered in long-term contracts, particularly dealing with energy; thus its accuracy for contracts for the international sales of goods is still under debate.

\textsuperscript{102} Cf. Ibid.
They must be distinguished from other type of clauses that are usually included in order to avoid that situations of hardship arise, like escalator or index clauses; or from renegotiation clauses that can be triggered without a hardship situation but by the elapse of a period of time or the presence of a particular event agreed upon by the parties. However, the effect of the hardship clause may be seen as equal to the effect provided by a renegotiation clause, since both foster the re-establishment of the contractual terms by the parties.

The parties should determine in the clause “what changes of circumstances will suffice to trigger the right to invoke hardship”\textsuperscript{104}. In the case of a contract governed by the CISG, the parties should be careful to determine what circumstances or “impediment beyond control” will be severe enough to invoke hardship. The clause should to expressly establish what changes will be considered to “fundamentally” alter the equilibrium of the contract. Like in cases of fundamental breach under the CISG, the parties can define what represents a “fundamental” alteration the contractual balance.

Inclusion of a formula or way to calculate the “excessively onerous burden” should also be considered, since a pre-defined alteration percentage might not be adequate for all the situations that would result in hardship. These elements will void frivolous claims by any of the parties. The threshold test of the change of circumstances has special importance since it may lower or increase the standard imposed by Art. 79 CISG. This is an issue that might be subject of different interpretation by courts in different jurisdictions.

The notification procedure of the change of circumstances as well as the description of the eventual renegotiation process should also be included. It should include the available remedies and address them directly, to avoid the interpretation and discussion of what remedies are available under the CISG. As discussed before, on the author’s opinion, the remedies should be those derived from the principles on which the CISG is based, complemented by the UNIDROIT Principles.

\textsuperscript{104} Brunner, p. 514.
The language used in the clause to assess the impact of the change of circumstances should be preferably based on objective terms rather than subjective terms like “fairness”, since the clause in principle must deal with the problems the broad and open language that Art. 79 of the Convention raises; ambiguities should be avoided.

The hardship clauses should also settle the “third party” intervention for the adaptation of the contract. Parties may empower arbitrators or courts to adapt the contract to the changed circumstances and restore the contractual equilibrium, once the conditions set forth in the clause have been fulfilled and in accordance with the dispute resolution clause.

The ICC 2003 hardship clause is a good reference. The wording of section 2 of the model clause establishes the conditions for hardship: “(a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not have reasonably expected at the time of the conclusion of the contract; (b) it could not reasonably have avoided or overcome the event or its consequences…”. The requirements are basically the same as in Art. 79 CISG, although the terms “excessively onerous” have been included. It provides for renegotiation or termination as remedies.

The usefulness of hardship clauses will depend on how successful were the parties at defining the uncertain situations, and foreseeing the contingencies that could result in hardship situations.

**G. Conclusions**

The underlying principles of the CISG suggest that it would be unreasonable to argue that a change of circumstances that fundamentally alters the equilibrium of the contract should not be accepted as ground to exempt a party from liability, and consequently burden the obligor with excessive onerosity in performance.

Hardship as a subcategory of *force majeure* could be considered as a general principle of law. Nonetheless it is important to distinguish that hardship is situated in the context of
performance; even though it might have become substantially more onerous it is still possible, while in *force majeure* cases performance is no longer possible.

The CISG governs the change of circumstances but it does not settle entirely all the issues that arise in connection to this subject. It leaves discretionary powers of interpretation to the court or tribunal ruling the particular case. They will determine whether a change of circumstances could be considered as an impediment beyond the control and if it was unreasonable to expect or demand performance given the modifications in the factual circumstances. Ultimately Courts will have the last word on whether a change of circumstances that substantially altered the equilibrium of the contract existed or not. They will have to determine that in light of the principles of the Convention avoiding domestic particularities.

To argue that the issue is not covered by the CISG would allow national courts to invoke national doctrines and concepts, thus attempting with the uniformity purpose of the Convention. The tendency to interpret the Convention along national doctrines, such as the French *Théorie de la Imprévision*, the common law theories of Hardship or Frustration or the German, *Wegfalls der Geschäftsgrundlage* should be avoided. The “homeward trend” could be prevented by the use of internationally accepted principles such as the UPICC and their use should be regarded as a good way to achieve the goal of uniformity in international trade.

The legal basis for the hardship exemption is considered to lie in the principle of good faith, which weighed with the *Pacta Sunt Servanda* principle, may provide a solution for our study problem, independently of whether it is an underlying principle on which the Convention is based; a direct obligation under the Convention; or a principle for autonomous interpretation.

Exemption due to change of circumstances is a default rule that should be interpreted restrictively. The analysis of whether the requirements for the existence of the impediment beyond control are met, and whether there is a fundamental alteration in the economic
balance of the contract should be studied carefully regarding all the relevant circumstances and facts of the case. It is necessary to set a threshold test to determine when an excessive economic burden exists and the analysis has to be done carefully to avoid arbitrariness.

The Scafom Court’s approach to subsume the facts of change of circumstances in Art. 79(1) CISG, was from our perspective accurate, since it recognized that the Convention regulates the problem of hardship. However, the Court failed to identify a mechanism to provide an adequate remedy within the principles on which the Convention is based. Even though the decision might seem unacceptable for common lawyers, because contractual adaptation is strongly rejected in their legal tradition, we believe it was consistent with the underlying principles of the Convention.

The civil law and common law traditions share values and similar legal reasoning processes which lead to the conclusion that, in virtue of values of fairness and equity, in cases of contractual unbalance, adaptation of the terms of the contract should be possible and considered as an adequate solution under the CISG. Hardship clauses could be used to deal with the problem as a preventive mechanism. However, their limitations have to be considered, thus parties may want to incorporate the UNIDROIT principles to their contracts by reference.

The provisions of international treaties have to be broad and flexible enough to adequate themselves to the needs that arise in the international practice. The drafting history of the Convention shows that an express provision for hardship cases was not included, but it does not show that the issue was rejected and categorically excluded from the scope of Art. 79(1). The drafters found difficulty to create a system that would promote flexibility and predictability in the outcome of hardship cases. However, the vagueness of the wording seems intentional to foster flexible solutions for cases where unexpected circumstances drastically affect the balance of international contracts for the sales of goods.

From the author’s perspective the CISG governs the issue of change of circumstances and interpreters should make use of soft law instruments to complement the Convention and
find adequate remedies for hardship cases. This approach, just as the decision of the Scafom case, should not be seen as examples of practitioners “running wild with the CISG”\textsuperscript{105}, but as step towards finding an adequate response for the dynamic problems in international commercial law.

Bibliography


Flechtner, Harry, Article 79 of the United Nations Convention on Contracts for the international Sale of goods (CISG) as Rorschach Test: The Homeward trend and


Uribe, Rodrigo, The effect of a change of circumstances on the binding force of contracts, Metro, Maastricht, 2011.


**Court Decisions**


*Bundesgerichtshof*, Germany, 24 March 1999, English translation available at: [http://cisgw3.law.pace.edu/cases/990324g1.html](http://cisgw3.law.pace.edu/cases/990324g1.html).


