2020

CISG advisory council opinion no. 20 — hardship under the CISG

Edgardo Muñoz, *Berkeley Law*
CISG Advirsory-Council

4 2. Die Gegenvorstellung ist jedoch unbegründet. Eine Änderung des festgesetzten Streitwerts ist nicht veranlasst, da er mit 62.700 € zutreffend bemessen worden ist.

5 Der Streitwert erhöht sich im Streitfall gem. § 45 Abs. 3 GKG – ausgehend von der Klageforderung i.H.v. 20.000 € – um 42.700 € auf 62.700 €.

6 a) Die Werterhöhung gem. § 45 Abs. 3 GKG bemisst sich bei einer hilfsweise erklärten Aufrechnung mit mehreren rechtlich selbstständigen Gegenansprüchen gegen eine bestrittene Klageforderung anhand des Gesamtwerts der rechtskraftfähig aberkannten Gegenforderungen, wenn das Gericht die Klage für begründet, die Gegenforderungen jedoch für unbegründet erachtet (vgl. Senat, Beschl. v. 6.11.1991 – VIII ZR 294/90, NJW-RR 1992, 316 unter 2 [zu § 19 Abs. 3 GKG a.F.]; OLG Düsseldorf, BauR 2010, 937 Rz. 12). Mehrere nicht verselbstständigte Teilbeträge derselben hilfsweise zur Aufrechnung gestellten Forderung – wie etwa unselbstständige Rechnungsposten eines einheitlichen Vorschussanspruchs – können hingegen nicht in einem Eventualverhältnis zueinander stehen und infolgedessen auch keine mehrfache Werterhöhung gem. § 45 Abs. 3 GKG auslösen (vgl. BGH, Beschl. v. 1.2.1995 – XII ZR 218/94, NJW-RR 1995, 508 unter [II] 2 b [zu § 19 Abs. 3 GKG a.F.]).

7 b) Danach beträgt die Werterhöhung nach § 45 Abs. 3 GKG im Streitfall 42.700 €.

8 Die Beklagte hat hilfsweise – wegen Nichtabnahme des Recyclers durch die Klägerin – mit folgenden Schadensersatzforderungen aufgerechnet:

- 5.000 € Vermittlungsgebühr für den Ersatzverkauf
- 15.000 € Differenz zwischen Inzahlungnahme eines anderen Recyclers im Rahmen des Ersatzverkaufs und tatsächlich erzieltem Erlös bei der Weiterveräußerung dieses anderen Recyclers
- 10.000 € Wertverlust des Traktors, der im Rahmen des Ersatzverkaufs ebenfalls in Zahlung genommen wurde, bislang jedoch nicht weiterveräußert werden konnte
- 12.700 € Kosten der Lagerung des streitgegenständlichen Recyclers vom 1.7.2015 bis 4.11.2015 (Zeitpunkt des Ersatzverkaufs)

9 Entgegen der Auffassung der Beklagten handelt es sich hierbei um rechtlich selbstständige Gegenforderungen und nicht etwa um unselbstständige Positionen eines einheitlichen Anspruchs. Zwar stützt die Beklagte die zur Aufrechnung gestellten Schadensersatzansprüche sämtlich auf dieselbe behauptete Pflichtverletzung der Klägerin, namentlich die Nichtabnahme des betreffenden Recyclers. Jedoch leitet sie aus dieser behaupteten Pflichtverletzung unterschiedliche Schadensersatzansprüche aufgrund jeweils verschiedener Lebenssachverhalte (zusätzliche Vermittlungsgebühr, Erlösminderung durch ungünstigen Weiterverkauf bzw. eingetretenen Wertverlust der in Zahlung genommenen Gegenstände, Lagerkosten) ab. Gegenstand der Hilfsaufrechnung sind mithin mehrere Schadensersatzansprüche, die zweifellos in einem Eventualverhältnis zueinander stehen können und deshalb – jeweils – eine entsprechende Streitwerterhöhung auslösen.

10 Über die genannten Gegenforderungen haben beide Vorinstanzen eine rechtskraftfähige Entscheidung getroffen. Die Nichtzulassungsbeschwerde hat das Berufungsurteil auch ausdrücklich in vollem Umfang zur Überprüfung durch die Revisionsinstanz gestellt.

Dokumentation

CISG Advisory Council Opinion No. 20

Hardship under the CISG

Rapporteur: Prof. Dr. Edgardo Muñoz, Universidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2–5 February 2020.

Michael Bridge, *Chair*

Yesim Atamer, Eric Bergsten, Joachim Bonell, Sieg Eiselen Lauro Gama, Alejandro Garro, Roy Goode, John Gotanda, Han Shiyuan, Johnny Herre, Pilar Perales Viscasillas, Ingeborg Schwenzer, Hiroo Sono, Claude Witz – *Members*

Milena Djordjević, *Secretary*

OPINION [BLACK LETTER TEXT]

Article 79 CISG

(1) 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.
(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
(a) he is exempt under the preceding paragraph; and
(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
(3) The exemption provided by this article has effect for the period during which the impediment exists.
(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

1. The following Rules on hardship apply, unless the contract otherwise provides.
2. The CISG governs cases of hardship.
3. A party is bound to fulfil its obligations even if performance has become more onerous, unless there is hardship.
4. There is hardship when a change of circumstances beyond the control of a party makes performance excessively onerous, if that party could not reasonably be expected to have taken the change into account or to have avoided or overcome it or its consequences.
5. Such hardship may arise when the cost of performance has increased or the value of the performance has diminished.
6. Such hardship may also arise from events occurring before the conclusion of the contract if the parties did not know and could not have been aware of these events.

7. In assessing whether hardship exists the following nonexclusive factors should be taken into account:
a) whether the risk of a change of circumstances was assumed by either party;
b) whether the contract is of a speculative nature;
c) whether and to what extent there have been previous market fluctuations;
d) the duration of the contract;
e) whether the seller has obtained the goods from its own supplier;
8. The party affected by hardship must give notice to the other party of the circumstances and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party affected knew or ought to have known of the hardship situation, it is liable for damages resulting from such non-receipt.
9. In case of hardship, nothing prevents either party from exercising any right other than to claim damages and require performance of the obligation affected by hardship.
10. The exemption due to hardship has effect for the period during which hardship exists.
11. Under the CISG, the parties have no duty to renegotiate the contract in case of hardship.
12. Under the CISG, a court or arbitral tribunal may not adapt the contract in case of hardship.
13. Under the CISG, a court or arbitral tribunal may not bring the contract to an end in case of hardship.

COMMENTS

Introduction

0.1. Unexpected changes of circumstances may constitute one of the major problems parties face in international trade, especially for those in long term or complex contracts. Trade at a global scale has augmented the likelihood for greater imponderables given the involvement of multiple actors from different countries in production and procurement of goods linked to various contracts. Changes in political and economic policies, social unrest and natural phenomena are among the events that could considerably affect the very basis of the bargain between contracting parties. There may be a global or regional pandemic, an earthquake, a flood, a terrorist attack, a sudden increase on import tariffs in one of the production countries, forcing the producer to resort to countries with much higher production costs; import or export bans may hinder the envisaged flow of goods; or price fluctuations that were not foreseeable at the time of the conclusion of the contract may make the performance by the seller unduly burdensome or may devaluate the contract performance for the buyer.

0.2. In all legal systems, the principle *pacta sunt servanda* or sanctity of contract places the burden of such changes in the original contracting conditions upon the obligor.[1] However, since the classic Roman law, the concurrent principle of *impossibilium nulla est obligatio*, or there is no obligation to perform impossible things,[2] has constituted a valid exemption to perform. Furthermore, under the canon law doctrine of *rebus sic stantibus*, an unforeseeable and extraordinary change of circumstances rendering a contractual obligation significantly burdensome was given due consideration in determining liability.[3] Since early days, impossibility, force majeure or the like have become grounds for exemption in every legal system.[4] However, the question whether simple changes in the surrounding economic conditions, also known as hardship, may exempt the debtor from liability for lack of performance has been a highly debated issue in various legal systems and under some international law instruments.[5]

0.3. Today, many civil law jurisdictions accept the theory of hardship.[6] The most recent acknowledgement by statute can be found in France.[7] English law seems to reject any notion of relief for changed circumstances that do not amount to impossibility.[8] However, an exception may be granted to this general rule under the doctrine of "frustration of contract" if the performance of the contract is rendered useless by the change of circumstances.[9] In the United States a party may be exempted if as a result of supervening events, performance of the contract, though remaining physically possible, has become severely more burdensome for that party.[10]

0.4. At the international level, the 2016 UNIDROIT Principles on International Commercial Contracts (UNIDROIT PICC),[11] as well as other uniform *soft* law projects such as the 1999 Principles on European Contract Law (PECL),[12] the 2008 Draft of a Common Frame of Reference (DCFR),[13] and the Principles of Latin American Contract Law (PLACL),[14] expressly provide for exemption of liability in case of a substantial change of circumstances. In 1985, 2003 and 2020, the International Chamber of Commerce (ICC) published model clauses on hardship.[15]

0.5. The 1980 UN Convention on the International Sale of Goods (CISG), however, does not contain a specific provision dealing with questions of hardship. Article 79 CISG relieves a party from paying damages only if the breach of contract was due to an impediment beyond its control.

1 In many legal systems this principle has been codified following Art. 1134 of the 1804 French Civil Code (CC) which is now stated in Art. 1103 of the 2016 CC (*Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits),* Art. 1104 (1) (*Les contrats doivent être négociés, formés et exécutés de bonne foi)* and Art. 1193 of the 2016 French CC *(Les contrats ne peuvent être modifiés ou révoqués que du consentement mutuel des parties, ou pour les causes que la loi autorise).* At the international level see Art. 6.2.1 UNIDROIT PICC, Art. 6:111(1) PECL. Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law* (London: OUP, 2011) at 668, para. 45.87.

2 The Digest 50.17.20185 also cited in James Gordley, 'Impossibility and Changed and Unforeseen Circumstances', *The American Journal of Comparative Law,* 52/3 (2004), 513–30 at 514.

3 Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Third edn.: Oxford Clarendon Press, 1998).: "This doctrine may be traced through the Middle Ages from the Glossattors right up to Grotius and Pufendorf; it was accepted in the Codex Maximilianeus bavaricus civilis of 1756 and then in the Prussian General Land Law of 1764". See also Dubravka Klasiček and Marija Ivatin, 'Modification or Dissolution of Contracts Due to Changed Circumstances', *IZMJENA I RASKID UGOVORA ZBOG PROMIJENJENIH OKOLNOSTI.,* 34/2 (2018), 27–55 at 29.

4 Germany § 275 CC; Italy Art. 1256 CC; France: Art. 1218 CC; United States § 265 Restatement (2d) of Contracts (Restatement), § 2-615 Uniform Commercial Code (UCC). For similar rules in other legal systems see, Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 651 et seq.

5 Zweigert and Kötz, *Introduction to Comparative Law* at 520-22. The actual trigger for this discussion was the enormous rise in prices due to World War I (1914–1918), see Hannes Rösler, 'Hardship in German Codified Private Law: In Comparative Perspective to English, French and International Contract Law', *European Review of Private Law* 15 (2007) at 491.

6 Argentina Art. 1091 CC; Armenia Art. 467 CC; Austria §§ 936, 1052, 1170 BGB a through analogy; Azerbaijan Art. 422 CC, Bolivia Art. 581(1) (4) CC; Brazil Art. 478, 479 CC; China Art. 26 PRC Contract Law Interpretation (2) and Art. 227-2 CC; Colombia Art. 868 Com C; Croatia Art. 369 Civil Obligations Act; Egypt: Art. 147(2) CC; France Art. 1195 CC; Germany § 313 BGB; Greece Art. 388 CC; Italy Art. 1467 CC, Iraq Art. 146(2) CC; Kuwait Art. 198 CC; Libya Art. 147 CC; Lithuania Art. 6.204 CC; Montenegro Art. 128 Law on Obligations; Paraguay: Art. 672 CC; Portugal Art. 437 CC; Qatar Art. 171 (2) CC; Russia Art. 451 CC; Slovenia Art. 112 Obligations Code; Syria: Art. 148(2) CC; Taiwan Art. 227-2 CC; The Netherlands Art. 6:258 CC (BW); Ukraine Art. 652 CC. See also Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 666.

7 Article 1195 of the New French Civil Code (2016) for the first time allows a private law contract to be modified in case of a change of circumstances. Before, French law was not favourable to the concept of hardship; the theory of imprévision applied to administrative contracts only. See Francois Chénedé, *Le Nouveau Droit Des Obligations Et Des Contrats: Consolidations – Innovations – Perspective* (France: Dalloz, 2016) at 142, para. 25.51; Alain Bénabent, *Droit Des Obligations* (16 edn., Précis Domat Droit Privé; France: LGDJ, 2017) at 253, para. 309.

8 H. G. Beale and Joseph Chitty, *Chitty on Contracts* (London: Sweet & Maxwell, 2010) at paras. 23-061; Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 652, para. 45.13.

9 Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 652, para. 45.13; Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (International Arbitration Law Library, 18; The Hague: Kluwer Law International, 2008) at 410.

10 United States § 2-615 UCC. The Restatement Second, Contracts 2d, reiterates this position: see American Law Institute Restatement on the Law of Contracts (2ed, American Law Institute Publishers, St Paul, Minnesota, 1981) § 261; the seminal case on this rule is Transatlantic Financing Corporation, Appellant, v. United States of America, Appellee, 363 F.2d 312 (D.C. Cir. 1966) cited in Alissa Palumbo, *Modern Law of Sales in the United States*, ed. Ingeborg Schwenzer (International Commerce and Arbitration, 17; The Hague: Eleven International Publishing, 2015) at 165, 66; Also see Larry Dimatteo, *International Contracting: Law and Practice* (Third Edition edn; The Netherlands: Wolters Kluwer, 2013) at 264, para. 7.23.

11 See International Institute for the Unification of Private Law, Principles of International Commercial Contracts, 2016 (UNIDROIT PICC) Article 6.2.3.

0.6. This opinion supports the application of Article 79 CISG to govern situations of economic impediments also known as hardship. For the sake of good order, economic impediment and hardship will be used as synonyms in this Opinion and refer to change of circumstances that fundamentally alter the equilibrium of the contract, in making performance by one party significantly more onerous or in decreasing its value considerably.

0.7. This Opinion reviewed different State court decisions and arbitral awards where the application of the CISG to hardship scenarios has been considered up to this date.[16] In one case, it was considered that Article 79 CISG did not govern hardship situations and applied, instead, domestic law.[17] In the remaining cases, the judge or arbitrator decided that hardship was a type of impediment governed by Article 79 CISG. Only in one case, did a court find that the requirements in Article 79 CISG were met *and* ordered that the parties should renegotiate the contract.[18] **Annex 1** provides a summary of the above case law, focusing on the threshold leading to an economic impediment and the remedies available under the CISG according to courts and arbitral tribunals.

0.8. This opinion also considered a good number of seminal works from scholars dealing with the issue of hardship under the CISG. Most scholars agree that hardship is a type of impediment governed by Article 79 CISG.[19] There are, nevertheless, a few differences of opinion regarding the threshold of economic impediments under Article 79 CISG and the remedies resulting from the Convention. **Annex 2** summarizes this scholarship and provides for relevant excerpts of the authors' individual views.

0.9. This opinion also makes reference to provisions in other uniform law projects -the UNIDROIT PICC, the PECL, the DCFR and the PLACL- and several domestic law provisions dealing with hardship or similar impediments from a comparative law perspective. **Annex 3** analyzes these international *soft law* and domestic law provisions.

0.10. In light of the ongoing debate in case law and doctrine regarding the application of the CISG to hardship situations, and the wide catalogue of answers provided by comparative law, this opinion furnishes an acceptable solution according to the needs of the international trade community for legal efficiency and certainty. This opinion provides the necessary guidelines to determine the existence of hardship under Article 79 CISG. It also sets out the obligations of the parties and the remedies available in hardship situations pursuant to the Convention's objective to promote uniformity in its application and the observance of good faith in international trade.[20] In particular, it clarifies that the parties have no duty to renegotiate the contract and that a court or arbitral tribunal may not adapt the contract or bring it to an end in case of hardship under the CISG.

1. The following Rules on hardship apply, unless the contract otherwise provides.

1.1. The terms of the contract should be the starting point to determine whether hardship exists and its consequences. The parties may expressly or impliedly agree upon the allocation of the risk of events leading to hardship. They may also agree upon the relevant threshold of hardship and the remedies that the aggrieved party may be entitled to. Different hardship model clauses are available for this purpose,[21] including the 1985, 2003 and 2020 editions of the ICC Hardship Clause.[22] This determination is done by contract interpretation pursuant to Article 8 CISG.

Hardship risk allocation:

1.2. It is up to the parties to define their respective spheres of risk in the contract.[23] One party may have expressly or impliedly assumed the risk for a fundamental change of circumstances or, on the contrary, certain risks may have been expressly or impliedly excluded.[24]

1.3. A hardship clause in a CISG contract may expressly exclude the possibility to rely on hardship. A similar clause may narrow down the events that may entitle a party to exemption under the same doctrine. The choice of an Incoterms rule determines the point of delivery and places the risk as regards transport, export or import control, tariffs, etc. on one of the parties. Despite such allocation of risks and duties, a party might demonstrate that delivery or performance of obligations under an Incoterms or contract clause have been affected by an impediment that meets the requirements of Article 79 CISG.

1.4. The speculative nature of long term contracts with fixed price clauses may, in some cases, be regarded as an implied acceptance of the risks of changing market conditions.[25]

1.5. Prior practices between the parties or international usages under Article 9 CISG, may integrate the contract with respect to risk allocation.

Relevant threshold:

1.6. Whether a party is affected by hardship, *i.e.* when the equilibrium of the contract has been fundamentally altered, may also be agreed upon by the parties. A provision in their contract may establish the degree of increase in the costs of performance or of the decrease in the value of performance necessary for a hardship exemption. The ICC Hardship Clause 2020, for example, states a

12 See Commission on European Contract Law, Principles of European Contract Law (PECL) Article 6:111, Comment note 1, 328.

13 See Study Group on a European Civil Code, Draft Common Frame of Reference (DCFR) Article III–1:110.

14 See the Principles of Latin American Contract Law 2018 (PLACL), Article 84, available at Rodrigo Momberg and Stefan Vogenauer, 'The Principles of Latin American Contract Law: Text, Translation, and Introduction', *Uniform Law Review/Revue De Droit Uniforme,* 23/1 (2018).

15 ICC, Force Majeure and Hardship, Paris 1985 (ICC Publ No. 421); ICC Force Majeure Clause 2003 and ICC Hardship Clause 2003, Developed by the ICC Commission on Commercial Law and Practice, Draftsman-in-chief: Charles Debattista, ICC Publication No. 650, ICC Publishing, 2003 (ICC Force Majeure and Hardship Clause 2003); ICC Force Majeure And Hardship Clauses March 2020, available at https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf.

16 These cases were gathered from the internet, using the traditional research engines, such as google, yahoo.com, etc. and from the most known CISG case law webpages, such as CISG-online, Pace CISG database, UNILEX and UNCITRAL CLOUT: Tribunale Civile di Monza, 14 January1993, CISG-online Case No. 540; Hof van Cassatie, 19 June 2009, CISG-online Case No. 1963; France Cass civ 1ère, 30 June 2004, CISG-online Case No. 870 (Goods involved: cases made from polyurethane foam); Rechtbank van Koophandel, Tongeren, 25 January 2005, No 1960, CISG-online Case No. 1106 (Goods involved: steel); Bulgarian Chamber of Commerce and Industry, 12 February 1998, CISG-online Case No. 436 (Goods involved: steel rope); Separate Award, SCC Arbitration No. V2014/078/080, 31 May 2017, CISG-online Case No.4683, paras. 2594–2597 (as an argument of the Respondent [Gazprom] that the Arbitral Tribunal neither addressed nor contradicted); Rechtbank van Koophandel, Hasselt, 2 May 1995, CISG-online Case No. 371; Cour d'Appel de Colmar, 12 June 2001, CISG-online Case No. 694; OLG Hamburg, 28 February 1997, No 167, CISG-online Case No. 261: CIETAC, 2 May 1996, CISG-online Case No. 1067 (based on frustration).

17 Tribunale Civile di Monza, 14 January1993, CISG-online Case No. 540.

18 Hof van Cassatie, 19 June 2009, CISG-online Case No. 1963.

19 Yesim M. Atamer, 'Article 79', in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods – Commetary* (München: Hart Publishing, 2011) at 1088, 89 para. 79; Michael G. Bridge, *The International Sale of Goods* (4th Fourth edn; Oxford: OUP, 2018) at 618, para. 12.72; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 213; CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Rapporteur: Professor Alejandro Garro, 12 Oct 2007; Franco Ferrari and Marco Torsello, *International Sales Law – CISG* (In a Nutshell: West Academic Publisher, 2014) at 326, 27; Harry M. Flechtner, 'The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court', *Belgrade Law Review,* 59/3 (2011) at 93; Harry M. Flechtner, 'Uniformity and Politics: Interpreting and Filling Gaps in the CISG', in Peter Mankowski and Wolfgang Wurmnest (ed.), *Festschrift Für Ulrich Magnus. Zum 70. Geburtstag* (Sellier. European Law Publishers 2014) at 200, 01; John O. Honnold and Harry M. Flechtner, *Uniform Law for International Sales* (The Hague: Kluwer Law International, 2009) at 627, para. 432.2, Ingeborg Schwenzer, 'Article 79', in Ingeborg Schwenzer (ed.), Schlechtriem *&* Schwenzer*: Commentary on the UN Convention on the International Sale of Goods* (4th edn; London: OUP, 2016) at 1142, para. 31; Yasutoshi Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', Pace *International Law Review,* 30/2 (2018) at 364–68; Joseph Lookofsky, *Understanding the CISG* (Fourth Worldwide Edition edn., Law & Business: Wolters Kluwer, 2012) at 150, para. 6.32; Peter Schlechtriem and Petra Butler, *UN Law on International Sales* (Berlin: Springer, 2009) at 203, para. 91; Peter Schlechtriem, 'Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More by Harry M. Flechtner', *Journal of Law & Commerce,* 18 (1999) at 236, 37; Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 670, para. 45.98.

20 A mandate of Art. 7 CISG.

21 See for example, Clause 16.3 (Hardship) of Standard Model Contract for International Commercial Sale of Goods and Clause 9.4 of the International Long-Term Supply of Goods, by *International Trade Centre (Itc), Mo-*

threshold for change in circumstances that may differ from the criterion found in domestic laws and international uniform law.[26]

1.7. Prior practices between the parties or international usages under Article 9 CISG may also fill the gaps in the contract on the question of threshold.

Agreed remedies:

1.8. The parties may agree upon the consequences or remedies to ensue when hardship takes place. For example, the ICC Hardship Clause 2020 edition provides that the parties are bound to negotiate alternative contractual terms that reasonably allow to overcome the consequences of the changed circumstances within a reasonable time after the invocation of the clause.[27]

1.9. The parties may plan in advance some contractual or procedural mechanisms to encourage renegotiation of their obligations in case of hardship. Stipulating an agreed sum in case of breach of renegotiations in good faith may encourage continuance and provide some certainty to traders.[28]

1.10. The parties may also agree on having the performances under a contract rebalanced by a third party in case of hardship. Different hardship model clauses provide for such a possibility,[29] perhaps influenced by the 1985 edition of the ICC Hardship Clause.[30] Long term supply contracts often contain clauses for the revision of prices combined with multi-tier dispute resolution clauses that promote preliminary talks and negotiation.[31] Adaptation may also be exercised by a named third party, usually an expert in the field,[32] often practiced in the revision of price clauses in long term contracts. But the contract might be directly or subsidiarily adapted by a court or an arbitrator, depending on the drafting of the contract. The ICC Hardship Clause 2003 had abandoned the remedy of revision of the contract by a third party. Option 3B of the latest edition of the ICC Hardship Clause (2020), reintroduces a similar option entitling the parties to request the adaption or termination of the contract by a judge or arbitrator.[33] The judge or arbitrator may decide on these two alternatives, opting for termination in those cases where adaptation is not reasonably possible.[34]

1.11. Option 3A of the ICC Hardship Clause 2020 provides that, if the parties are unable to agree on alternative contract terms, the aggrieved party may terminate the contract on its initiative. Under option 3C, either party may request the judge or arbitrator to declare the termination of the contract.

2. The CISG governs cases of hardship.

2.1. The CISG Advisory Council Opinion No. 7 has already determined that Article 79 CISG covers hardship situations.[35] Opinion No. 7 addresses the drafting history of Article 79,[36] where the question whether economic difficulties should give rise to an exemption was highly controversial.[37] This background led some scholars to argue that there was no room to consider hardship under Article 79 CISG,[38] especially during the first years after the coming into force of the Convention.[39] Yet, there was no clear exclusion of hardship from the events leading to exemption under Article 79 CISG.[40]

2.2. Today, however, it is more or less unanimously accepted in court and arbitral decisions,[41] as well as in scholarly writings,[42] that Article 79 CISG governs hardship situations. In addition, general principles underlying the CISG, such as reasonableness and duty to cooperate (e.g., Arts. 39, 46, 48 and 54 CISG) may be taken into account in the context of a situation of hardship.

2.3. Accordingly, there are no legal grounds to resort to domestic concepts of hardship,[43] as there is no gap in the CISG regarding the debtor's invocation of economic impediments.[44] If one were to hold otherwise, domestic concepts such as frustration of purpose, *rebus sic stantibus*, fundamental mistake or *Wegfall der Geschäftsgrundlage* would all have to be considered, which would undermine unification of the law of sales in a very important area.[45]

3. A party is bound to fulfil its obligations even if performance has become more onerous, unless there is hardship.

3.1. A party's right to require the other party to perform the agreed obligation follows from the binding character of the contract and the principle of *pacta sunt servanda* reflected in Articles 28, 46, 62, etc. CISG.[46] A party must perform its obligations irrespective of the burden it could face in performing.[47] In other words, the terms of the contract must nonetheless be followed even if that party experiences important losses instead of the expected profits.

3.2. However, the principle of *pacta sunt servanda* is not an absolute one. When unforeseen and unavoidable circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract, they may create an impediment exempting a party from performance and liability pursuant to Article 79 CISG.

4. There is hardship when a change of circumstances beyond the control of a party makes performance excessively onerous, if that party could not reasonably be expected to have taken the change into account or to have avoided or overcome it or its consequences.

del Contracts for Small Firms: Legal Guidance for Doing International Business (Geneva: ITC, 2010) at 54, 55, 70, 71. available at available at *http://www.intracen.org/WorkArea/DownloadAsset.aspx?id=37603;* See clauses in Patrick Ostendorf, *International Sales Terms* (München: Hart Publishing, 2014) at 121. and Ulrich Magnus, 'Application of Boilerplate Clauses under German Law', in Guiditta Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and Applicable Law* (London: Cambridge University Press, 2011) at 206, 07.

22 ICC, Force Majeure and Hardship, Paris 1985 (ICC Publ No. 421); ICC Force Majeure Clause 2003 and ICC Hardship Clause 2003, Developed by the ICC Commission on Commercial Law and Practice, Draftsman-in-chief: Charles Debattista, ICC Publication No. 650, ICC Publishing, 2003 (ICC Force Majeure and Hardship Clause 2003); ICC Force Majeure And Hardship Clauses March 2020, available at https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf.

23 *Bulgarian Chamber of Commerce and Industry*, 12 February 1998, CISG-online Case No. 436; It is also believed that the risk allocation is dependent on the parties' choice of law at the beginning: see generally Gustavo Moser, 'Choice of Law, Brexit and the 'Ice Cream Flavour' Dilemma', *Kluwer Arbitration Blog* (December 2018: Wolters Kluwer, 2018). See also Ewan McKendrick, 'Article 6.2.2', in Stefan Vogenauer (ed.), *Commentary on the Unidroit Principles of International Commercial Contracts (Picc)* (Second edn; Oxford: OUP, 2015c) at 818, para. 15. A best practice analysis of force majeure and hardship contract clauses is provided in Ostendorf, *International Sales Terms* at 121 et seq.

24 See Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 147, 48. Avery W. Katz, 'Remedies for Breach of Contract under the CISG', *International Review of Law and Economics,* 25 (2006) at 391; CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Rapporteur: Professor Alejandro Garro, 12 Oct 2007, Comment para. 39; McKendrick, 'Article 6.2.2', at 818, para. 15.: "assumption of risk need not to be express; it can be inferred from the circumstances or from the nature of the contact".

25 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 439, 40.

26 See ICC Hardship Clause 2020, para. (2)(a)(b) "2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that: a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its **reasonable** control which it could not **reasonably** have been expected to have taken into account at the time of the conclusion of the contract; and that b) it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a **reasonable** time of the invocation of this Clause, to negotiate alternative contractual terms which **reasonably** allow to overcome the consequences of the event".

27 See ICC Hardship Clause 2020, para. (2)(b), which was already in the ICC Hardship Clause 2003 para. (2)(b).

28 Pascal Hachem, *Agreed Sums Payable Upon Breach of an Obligations*, ed. Ingeborg Schwenzer (International Commercial Law, 7; The Hague: Eleven International Publishing, 2011) at 45.

29 See for example, Clause 16.3 (Hardship) of Standard Model Contract for International Commercial Sale of Goods and Clause 9.4 of the International Long-Term Supply of Goods, by the International Trade Center (an agency of the World Trade Organization): "[Option: See comment at the beginning of Article […]. Add if wished; otherwise delete. *(4). If the Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 21. The [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances or to terminate this contract at a date and on terms to be fixed"* (Itc), *Model Contracts for Small Firms: Legal Guidance for Doing International Business* at 54, 55, 70, 71. available at *http://www.intracen.org/WorkArea/DownloadAsset.aspx?id=37603.*

30 ICC, Force Majeure and Hardship, Paris 1985 (ICC Publ No. 421): "*Third alternative (5). If the Parties fail to agree on the revision of the contract within a time-limit of 90 days of the request, either Party may bring the issue of revision before the arbitral forum, if any, provided for in the contract, or otherwise the competent Courts.*", available at https://www.trans-lex.org/700650/_/icc-force-majeure-and-hardship-paris-1985.

31 See clauses in Ostendorf, *International Sales Terms* at 121. and Magnus, 'Application of Boilerplate Clauses under German Law', at 206, 07. See also Clause 9.4 of the International Long-Term Supply of Goods, by the International Trade Center (an agency of the World Trade Organization):

4.1. Article 79(1) CISG provides that a party is exempted from liability for damages only if the failure to perform is due to, first, an impediment beyond its control, second, that such party could not reasonably be expected to have taken this impediment into account at the time of the conclusion of the contract and, third, to have avoided or overcome this impediment or its consequences.[48]

4.2. Hardship may be regarded as a special type of "impediment" under Article 79 CISG; all that is added on the level of prerequisites is a clarification of the term impediment. The mere fact that performance has been rendered more onerous than could reasonably have been anticipated at the time of the conclusion of the contract does not exempt a party from performing the contract.[49] In international law instruments, hardship may be found only if the performance of the contract has become excessively onerous[50] or if the utility of performance has considerably decreased,[51] or if the equilibrium of the contract has been fundamentally altered.[52] As addressed next, a similar approach should be taken under the CISG.

Hardship as an impediment beyond control:

4.3. Only impediments that are outside of a party's sphere of control can lead to exemption under Article 79 CISG. Objective circumstances that prevent performance usually encompass nature's events such as floods, storms, fire, frosts, epidemics, etc. They also include State or human interventions, for example, new legislation, government acts, war, terrorist attacks, etc.[53] These "external" circumstances are different from personal or corporate ones which impair a party's ability to perform.

4.4. The distinction between a party's sphere of risk and external impediments will primarily result from the parties' allocation of risks in the contact, their practices or international usages under Article 9 CISG. Unless otherwise agreed, the disadvantaged party will carry the risk for circumstances that have their origin in its own person or corporation. For example, labour strikes, financial strain or difficulties, etc. Even unforeseeable illness, arrest, death of the disadvantaged party or key individuals in their corporation, attachment of assets, may *not* amount to an impediment beyond control since according to trade usages, such events are part of an organization's sphere of risks.[54]

Hardship as an unforeseeable event:

4.5. Hardship, as a type of impediment,[55] can only exempt the disadvantaged party from liability if the event causing the imbalance could not reasonably have been taken into account by that party at the time of the conclusion of the contract.[56] If the events could have been foreseen, then it must be assumed that the disadvantaged party has taken the risk, unless such risk is contractually allocated to the other party.[57]

4.6. In the case of drastic price increase due to market fluctuations, a look at historic price movements during a reasonable past period (pursuant to the Eisenberg formula[58]) may determine whether, under "a reasonable expectation test" the disadvantaged party could have foreseen the price increase leading to the hardship situation.[59] This information could also help in assessing whether or not that party could have impliedly assumed the risk of a price increase in the market concerned. Courts and arbitral tribunals applying the CISG have considered that events leading to the value alteration in some commodities are part of the risk assumed by the buyer and thus, foreseeable.[60]

Hardship as an event that cannot be avoided or overcome:

4.7. The impediment must be one that cannot reasonably be avoided or overcome.[61]

4.8. Whether a party can be expected to overcome an economic impediment has to be decided by taking the threshold for hardship into account. If the increase in costs does not exceed the relevant threshold, the disadvantaged party may be obliged to make a higher sacrifice. For example, the seller may have to turn to another supplier or consider alternative possibilities for the transportation of the goods.

5. Such hardship may arise when the cost of performance has increased or the value of the performance has diminished.

5.1. Either an increase in the cost of performance or a decrease in the value of the performance received may give rise to hardship.[62] This means that the disadvantaged party can be either the seller or the buyer. As pointed out by some authors, one may assume that a situation is unfair whenever "the supply of material need[ed] to manufacture certain goods unexpectedly becomes so reduced in quantity and inflated of price that only a minority of manufactures that require this material can continue production [...]. Comparable unfairness can result if extreme and unexpected currency dislocations make it impossible for sellers to continue to produce or buyers to purchase".[63] The UNIDROIT PICC and PLACL expressly incorporate this double aspect of economic impediment.[64]

6. Such hardship may also arise from events occurring before the conclusion of the contract if the parties did not know and could not have been aware of these events.

"[Option: See comment at the beginning of Article [...]. Add if wished; otherwise delete. *(4). If the Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 21. The [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances or to terminate this contract at a date and on terms to be fixed" (Itc), Model Contracts for Small Firms: Legal Guidance for Doing International Business at 54, 55, 70, 71.* available at *http://www.intracen.org/WorkArea/DownloadAsset.aspx?id=37603.*

32 The ICC Hardship Clause 1985 stipulates, for example, that: "*Fourth alternative, 5. Failing an agreement of the Parties on the revision of the contract within a time-limit of 90 days of the request either Party may refer the case to the ICC Standing Committee for the Regulation of Contractual Relations in Order to obtain the appointment of a third Person (or a board of three members) in accordance with the provisions of the rules for the regulation of contractual relations of the ICC. The third Person shall decide on the Parties' behalf whether the conditions for revision provided in Paragraph 1 are satisfied. If so he shall revise the contract on an equitable basis in order to ensure that neither party suffers excessive prejudice.*"

33 ICC Hardship Clause 2020, para. 3 option B.

34 See ICC Hardship Clause 2020, Comments under Option 3.

35 CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Rapporteur: Professor Alejandro Garro, 12 Oct 2007, Rule 3.2. Comment para. 38.

36 CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Rapporteur: Professor Alejandro Garro, 12 Oct 2007, Rule 3.1. Comment paras. 29 and 30. See also Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 216; Atamer, 'Article 79', at 1088, para. 78.

37 See Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 216; Atamer, 'Article 79', at 1088, para. 78.

38 CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Rapporteur: Professor Alejandro Garro, 12 Oct 2007, Rule 3.1. Comment para. 26, citing B. Nicholas, Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods, in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* § 5.02, at 5-4 (Parker School of Foreign and Comparative Law, Columbia University, ed. Nina M. Galston & Hans Smit, 1984), available at http://cisgw3.law.pace.edu/cisg/biblio/nicholas1.html.

39 Scholars taking this view include Bernard Audit, *La vente internationale de marchandises. Convention des Nations Unies du 11 avril 1980*, Paris, LGDJ, at 174,75 cited by Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 216, fn. 1100; B. Nicholas, Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods, in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* § 5.02, at 5-4 (Parker School of Foreign and Comparative Law, Columbia University, ed. Nina M. Galston & Hans Smit, 1984), available at http://cisgw3.law.pace.edu/cisg/biblio/nicholas1.html; Tallon, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987), para. 3.1.2., available at: http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html.

40 The Norwegian delegation proposed that paragraph 3 of Article 65 of the 1978 UNCITRAL Draft Convention should be changed in the following way: "[...] Nevertheless, the party who fails to perform is permanently exempted to the extent that, after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold him liable". See the Norwegian proposal (A/CONF.97/C.1/L.191/Rev.1) in United Nations Conference on Contracts for the International Sales of Goods, Vienna, 10 March-11 April 1980 (Official Records, New York, 1981) 381.

41 However, courts have often decided that the equilibrium of the contract was not fundamentally altered. Therefore, the alleged impediment was non-existent. See Bulgarian Chamber of Commerce and Industry, 12 February 1998, CISG-online Case No. 436; Rechtbank van Koophandel, Hasselt, 2 May 1995, CISG-online Case No. 371; Tribunale Civile di Monza, 29 March 1993, CISG-online Case No. 102; Cour d'Appel de Colmar, 12 June 2001, CISG-online Case No. 694; Hof van Cassatie, 19 June 2009, CISG-online Case No. 1963 granting a right to renegotiate the contract to a seller for a 70 % price increase in steel after the conclusion of the contract, Separate Award, SCC Arbitration No. V2014/078/080, 31 May 2017,

6.1. In cases of *force majeure* (objective impediments) under Article 79 CISG, it is more or less unanimously held that it is irrelevant whether the impediment arose after the conclusion of the contract or if it already existed at the time of conclusion.[65] If the specifically contracted goods had already been destroyed at the time of the conclusion of the contract, but the seller did not know about it nor could have prevented this fact, the seller may be exempted under Article 79 (1) CISG.

6.2. In cases of hardship, however, it has been argued that the changed circumstances must have occurred after the conclusion of the contract.[66] This is the position taken by domestic legal systems.[67] Similarly, the wording in international instruments is clearly based upon this assumption.[68] Although the wording of Article 6.2.1 UNIDROIT PICC seems to point in the same direction,[69] Article 6.2.2(a) PICC clarifies that hardship may be found if either the events that are causing the imbalance of the performances occur or if they become known to the disadvantaged party after the conclusion of the contract. Despite the wording of Art. 6.2.2, some submit that the imbalance must necessarily occur after the conclusion of the contract.[70]

6.3. Whether an initial gross imbalance between the performances of the parties, due to circumstances neither known to the parties nor avoidable, may amount to hardship under Article 79 CISG, one has to consider what other remedies the disadvantaged party could rely upon when discovering that, already at the time of the conclusion of the contract, there had been a gross disparity between the respective values of the agreed obligations. Most likely under domestic laws, as well as under international soft law instruments, initial circumstances, such as gross disparity between the parties' performances, will give rise to remedies for mistake.[71] These coexisting remedies may be tolerated within one single legal system; difficult problems, however, can arise when dealing with sales contracts under the CISG.[72]

6.4. As it is debated whether the CISG contains a provision on mistake, and if so to what extent, this question would have to be resolved relying on the otherwise applicable domestic law.[73] However, this may well lead to unpredictable results. For example, it might be questionable at what point in time production costs rose, be it before the conclusion of the contract or only afterwards. Furthermore, uniformity in such an important area of the sales law would be endangered by applying domestic rules on mistake to this question. It is exactly these considerations that, in the case of force majeure, compel the same treatment for initial and subsequent impediments.[74] Thus, if the goods have been destroyed at the time of the conclusion of the contract, domestic rules declaring such a contract as being void are excluded.[75] The same reasoning should apply in cases of hardship. The CISG notion of hardship or economic impediment should be interpreted and understood in the broadest sense, encompassing any change of circumstances after the conclusion of the contract, as well as initial circumstances rendering performance excessively onerous.[76]

7. In assessing whether hardship exists the following nonexclusive factors should be taken into account:
a. whether the risk of a change of circumstances was assumed by either party;
b. whether the contract is of a speculative nature;
c. whether and to what extent there have been previous market fluctuations;
d. the duration of the contract;
e. whether the seller has obtained the goods from its own supplier;
f. whether either party has hedged against market changes.

7.1. There is no fixed threshold for giving rise to a hardship excuse under Article 79 CISG. This has been recognized by other international instruments. For example, the comments to Article 6.2.2 UNIDROIT PICC,[77] in its first edition of 1994 suggested that an alteration amounting to 50 % or more would likely amount to a "fundamental" alteration, but the 2004, 2010 and 2016 UNIDROIT PICC editions, as well as other uniform law projects,[78] refrain from recommending any exact figure.[79]

7.2. Relying on a thorough comparative analysis of domestic solutions, one author has suggested that, as a general rule of thumb in standard situations, a threshold of at least 100 % should be favored.[80] However, most decisions dealing with hardship under Article 79 concluded that even a price increase or decrease of 100 % would not suffice.[81].

7.3. Even apparent excessive increases or decreases in the value of parties' performances may not render the contract economically impossible in some scenarios.[82] The price for the goods purported to be incorporated by the buyer into a final product could have doubled after the conclusion of the contract, but just before the seller had bought such inputs from a third party. If the price of the buyer's final product has been proportionally augmented, either as a consequence of an increase in the input's price or a sudden increase of its demand in the relevant marketplace, the hardship event may not have been the cause of a substantial alteration in the equilibrium of the contract. Assuming that a disruption of such "equilibrium" entails consequences for both parties, hardship is excluded in this case as long as the buyer had not a previous contract with a costumer, a cost increase to the seller not having a predictable effect on the buyer.[83]

CISG-online Case No.4683. para.2662 (as an argument of the Respondent [Gazprom] that the Arbitral Tribunal neither contradicted nor expressly accepted). These decisions can be found by searching the case number on the CISG-online website at http://www.cisg-online.ch.

42 In addition to CISG AC Opinion No. 7 see Schwenzer, 'Article 79', at 1142, para. 31; Schlechtriem and Butler, *UN Law on International Sales* at 203, para. 91; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 213; Atamer, 'Article 79', at 1088, para. 79; Honnold and Flechtner, *Uniform Law for International Sales* at 627, para. 432.2; Joseph Lookofsky, *Understanding the CISG* (Fourth Worldwide Edition edn., Law & Business: Wolters Kluwer, 2012) at 150, para. 6.32; Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', at 364, 65.

43 Honnold and Flechtner, *Uniform Law for International Sales* at 615, 27, paras. 425, 32.2; Schwenzer, 'Article 79', at 1142, para. 31; Separate Award, SCC Arbitration No. V2014/078/080, 31 May 2017, CISG-online Case No.4683. para.2662 (as an argument of the Respondent [Gazprom] that the Arbitral Tribunal neither contradicted nor expressly accepted).

44 Flechtner, 'The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court', at 97; taking a different view see Tribunale Civile di Monza, 14 January1993, CISG-online Case No. 540.

45 CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Rapporteur: Professor Alejandro Garro, 12 Oct 2007, Rule 3.1, Comment para. 26.

46 Florian Mohs, 'Article 62', in Ingeborg Schwenzer (ed.), Schlechtriem & Schwenzer: *Commentary on the UN Convention on the International Sale of Goods* (4th edn; London: OUP, 2016) at 906, para. 1; Ulrich G. Schoeter, 'Does the 1980 Vienna Sales Convention Reflect Universal Values? The Use of the CISG as a Model for Law Reform and Regional Specificities', Loy. *L.A. Int'l & Comp. L. Rev.,* 41/1 (2018) at 20.

47 See Ulrich Magnus, 'General Principles of the UN-Sales Law', *Rabels Zeitschrift fur auslandisches und internationales Privatrecht,* 59/3, 4 (1995) at 486–87: "(2) *Pacta sunt servanda*. – The basic rule that contracts are binding is not expressly mentioned in the CISG. However, it is implied in numerous provisions, such as Art. 30 and 53 CISG, which determine the duty to deliver and the duty to effect payment. Particularly Arts. 71–73 and 79 show that the binding effect of the contract cannot be avoided in cases such as a simple change of circumstances or frustration of contract, but only if the requirements listed in these provisions are present; without the binding nature of the contract these provisions would not make sense".

48 Regarding force majeure, Art. 7.1.7(1) UNIDROIT PICC; Art. 8:808(1) PECL; Art. III–3:104(1) DCFR are practically identical to Article 79(1); Art. 89 PLACL. The same holds true for the ICC Force Majeure Clause. However, the latter gives a list of events that may amount to an impediment.

49 McKendrick, 'Article 6.2.1', at 812, para. 1; Schwenzer, 'Article 79', at 1135, para 15.

50 Article 6:111(2) PECL; Article III–1:110(2) DCTR; ICC Hardship Clause 2003 para. 2(a); ICC Hardship Clause 2020 para. 2(a); Art. 84(1) PLACL.

51 Art. 84(1) PLACL.

52 Article 6.2.2 UNIDROIT PICC; See McKendrick, 'Article 6.2.2', at 824, para.2.

53 Schwenzer, 'Article 79', at 1136, 37, paras. 17, 18.

54 Ibid., at 1138, para. 19.

55 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 421.: "It has been seen above that the requirements of the force majeure and hardship exemptions are essentially the same, with the only qualification that the latter's scope is limited to those 'impediments' or events which 'fundamentally alter the equilibrium of the contract'. See also Atamer, 'Article 79', at 1089, para. 81.: "the prerequisites of hardship can be deduced by way of analogy from Art. 79(1) since both concepts aim at solving parallel problems".

56 McKendrick, 'Article 6.2.2', at 817, para. 12; Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 672, para. 45.107; Clayton P. Gillette and Steven D. Walt, *The UN Convention on Contracts for the International Sale of Goods* (New York: Cambridge University Press, 2016) at 310; Dimatteo, *International Contracting: Law and Practice* at 265, para. 7.23. Atamer, 'Article 79', at 1089, para. 81.

7.4. In order to determine whether a party may be expected to overcome a situation of hardship one may resort to "reasonable expectation test".[84] Under this test, a party may be exempted under Article 79 CISG in case the performance, though technically possible, calls for spending huge costs, grossly disproportionate to the value of the obligation. In such a case, the aggrieved party may be exempted under Article 79 CISG as long it established that the financial loss it will suffer is significantly greater than the risk of loss a "reasonable person" is expected to assume at the time of the formation of the contract.[85] In the case of devalued currency, it is suggested that if the parties were aware that the contract was one for a fixed valuation, the failing party should be exempted because that is what the parties intended, thus, expected.[86] That being said, unless otherwise agreed, the reasonable expectations of the parties at the time of the conclusion of the contract are that the seller covers the risk against falling prices while assuming the risk that prices will increase. Conversely, it is to be expected that, unless otherwise agreed, the buyer covers against the risk of raising prices, while assuming the risk that market prices may decline after the conclusion of the contract.[87]

7.5. In ascertaining whether any alteration amounts to hardship, primary consideration is to be given to the circumstances of the individual case. The following non-exclusive elements may be taken into account.

a) whether the risk of a change of circumstances was assumed by either party:

7.6. As commented above, the parties may allocate in their contract the risk for a fundamental change of circumstances.[88] Contract interpretation through Article 8 CISG is paramount in determining whether a party may rely on hardship or not. The choice of an Incoterms rule determines the point of delivery and places the risk as regards transport, export or import control, tariffs, etc. on one of the parties. Despite such allocation of risks and duties, a party might prove that delivery or performance of other obligations under an Incoterms or contract clause have been affected by an impediment that complies with the requirements of Article 79 CISG.. Prior practices between the parties or international usages under Article 9 CISG, may integrate the contract in this matter.

b) whether the contract is of a speculative nature:

7.7. If the contract is highly speculative, a party may be presumed to have assumed the risk involved in the transaction.[89] A German court of second instance did not exempt a seller from liability under Article 79 CISG even though the market price for the contract item, iron molybdenum from China, had risen by 300 %.[90] The court reasoned that in a trade sector, with highly speculative traits, the threshold for allowing hardship should be raised.[91]

7.8. Other courts and arbitral tribunals have held that, in cases of speculative transactions, a party may have to accept even a tripled market price.[92]

c) whether and to what extent there have been previous market fluctuations:

7.9. Courts and arbitral tribunals interpreting Article 79(1) CISG have been very reluctant to exempt a party affected by fluctuations of prices.[93] As such, typical fluctuations of price in the commodity trade generally will not give rise to an acknowledgement of hardship.[94]

7.10. However, in 2009 the *Cour de Cassation* of Belgium overturned the earlier decision of an appeal court in dealing with economic hardship.[95] In this case, the price of the steel sold unexpectedly rose by about 70 %. The appellate court decided that the issue regarding economic hardship was not dealt with by the CISG, applying French domestic law in allowing the seller's counterclaim for an amount based on a higher price.[96] The *Cour de Cassation* rejected the application of French domestic law, holding that there was an internal gap in the CISG (Article 7(2)) to be filled by the general principles of international trade. Where a party invokes change in circumstances fundamentally disrupting the contractual equilibrium, the Belgian highest court held that one of those principles are to be found in the UNIDROIT PICC, and entitled said party to request renegotiation of the contract.[97]

7.11. Although this decision is welcomed for discarding the application of domestic law provisions on hardship over the CISG, it has been criticized for its low standard of value alteration and the application of the UNIDROIT PICC to fill in a CISG gap that does not exist (see para. 12.7 below).[98]

d) the duration of the contract;

7.12. The time factor causes that hardship events are more likely to occur in some long-term contracts.[99] However, in principle, the same standard should apply irrespective of the duration of contracts.

7.13. A lower threshold of alteration in the parties' performance may only apply in contracts of extended duration if the disadvantaged party's financial ruin is imminent.[100] In this regard, the point in time when the hardship event takes place is relevant to calculate the value of the outstanding performances with respect to the total contract value.[101] For example, if the value of a ten year contract is forecasted by the disadvantaged party at 100 %, and the hardship events took place during the fifth year resulting in that party receiving 30 % of the fore-

57 Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods* at 310; Atamer, 'Article 79', at 1089, para. 81; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 398.

58 Melvin A. Eisenberg, 'Impossibility, Impractiability, and Frustration', *Journal of Legal Analysis,* 1/1 (2009) at 245.

59 Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', at 374, 77.

60 France Cass civ 1ère, 30 June 2004, CISG-online Case No. 870 (Goods involved: cases made from polyurethane foam); *Rechtbank van Koophandel, Tongeren*, 25 January 2005, No 1960, CISG-online Case No. 1106 (Goods involved: steel); Bulgarian Chamber of Commerce and Industry, 12 February 1998, CISG-online Case No. 436 (Goods involved: steel rope).

61 Atamer, 'Article 79', at 1089, para. 81; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 398; Schlechtriem and Butler, *UN Law on International Sales* at 201, para. 89.

62 See Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 221, 23.

63 Honnold and Flechtner, *Uniform Law for International Sales* at 628, para. 432.2.

64 Art. 6.2.2(1) UNIDROIT PICC and Art. 84(1) PLACL: "If after its conclusion, performance of the contract becomes excessively onerous or **the utility of performance considerably decreases**".

65 Schwenzer, 'Article 79', at 1134, para. 13; Atamer, 'Article 79', at 1073, para. 48; Ferrari and Torsello, *International Sales Law – CISG* at 325; Schlechtriem and Butler, *UN Law on International Sales* at 202, para. 89.

66 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 398, 99.

67 Argentina Art. 1091 CC; Armenia Art. 467 CC; Austria §§ 936, 1052, 1170 a through analogy; Azerbaijan Art. 422 CC, Bolivia Art. 581(1)(4) CC; Brazil Art. 478, 479 CC; China Art. 26 PRC Contract Law Interpretation (2); Colombia Art. 868 Com C; Egypt: Art. 147(2) CC; Iraq Art. 146 (2) CC; Kuwait 198 CC; France Art. 1195 CC; Germany § 313 BGB; Italy Art. 1467 CC; Greece Art. 388 CC; Netherlands Art. 6:258 Civil Code (BW); Portugal Art. 437 CC;: Libya: Art. 147(2); Lithuania: Art. 6.204 CC; Paraguay: Art. 672 CC; Qatar Art. 171 (2); Russia: Art. 451(2) CC; Slovenia: Art. 112 CO; Syria: Art. 148(2) CC; Taiwan: Art. 227-2 CC; Ukraine: Art. 652 CC See the position in most systems in Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 669, para. 45.96 et seq.

68 See Art. 6:111 PECL, Comment B (ii). Art. 6.2.1 UNIDROIT PICC; Art. 84 PLACL (otherwise the applicable provision is Art. 85 Frustration PLACL).

69 Art. 6.2.1 UNIDROIT PICC: "Where the performance ... becomes more onerous ..." (emphasis added).

70 See McKendrick, 'Article 6.2.2', at 817, para. 10.

71 Mm Van Rossum and J Hijma, 'Validity', in E.H. Hondius D. Busch, H.J. Van Kooten, H.N. Schelhaas, W.M. Schrama (ed.), *The Principles of European Contract Law and Dutch Law. A Commentary* (The Hague: Kluwer Law, 2002) at 193; Restatement on the Law of Contracts § 266 ("Existing Impracticability or Frustration"). The same solution is proposed by McKendrick under UNIDROIT PICC see McKendrick, 'Article 6.2.2', at 817, para. 10.: "When the event occurs prior to the conclusion of the contract, the affected party may be able to avoid the contract on the ground of mistake".

72 Patrick C. Leyens, 'CISG and Mistake, Uniform Law Vs. Domestic Law: The Interpretative Challenge of Mistake and the Validity Loophole', in Pace International Law Review (ed.), *Review on the Convention for the International Sale of Goods 2002–2003* (Munich: Sellier, 2005) at 15.

73 It is argued that a party can rely on mistake where the CISG and the domestic law provide the same remedies. For a detailed discussion about this matter see ibid., at 34; Stefan Kröll, 'Selected Problems Concerning the CISG's Scope of Application', *Journal of Law and Commerce,* 25 (2005) at 55.

74 Schwenzer, 'Article 79', at 1134, para. 13.

75 Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 670, para. 45.98.

76 Ibid.

77 McKendrick, 'Article 6.2.2', at 816, para. 8.

casted value, the adjudicator should consider the remaining 70 % forecasted value for the next five years while assessing whether the parties' performances have suffered a fundamental disequilibrium.

e) whether the seller has obtained the goods from its own supplier:

7.14. All circumstances affecting performance should be considered in determining whether a party might be exempted due to hardship. In some instances, the seller may have bought the goods or otherwise secured them from its supplier before the hardship event takes place. The price might have considerably and unforeseeably increased after that time, yet the contract might not be speculative in nature, however, if the seller receives the goods before the occurrence of the hardship event, the seller may not rightfully withhold delivery and resale the goods for a larger profit to a second buyer.

f) whether either party has hedged against market changes:

7.15. Whether any of the parties has hedged or secured against changes in the market should be considered in assessing the existence of hardship. For example, if a seller has bought insurance against hardship, the amount of such insurance may be considered in determining whether the seller can overcome the impediment or not.

8. The party affected by hardship must give notice to the other party of the circumstances and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party affected knew or ought to have known of the hardship situation, it is liable for damages resulting from such non-receipt.

8.1. Pursuant to Article 79(4) CISG, a party failing to perform shall provide timely notice of the impediment and its effect on his ability to perform.[102] This requirement is an expression of the underlying principle of cooperation in CISG contracts; it is intended to alert the other party on whether it should itself take remedial action, reduced damages under Article 77 CISG and/or – when a fundamental breach exists – avoid the contract.[103] This notice requirement applies to hardship situations and follows the same objectives as other types of impediments.[104]

8.2. The notice must be given within a reasonable time after the party affected knew or ought to have known of the hardship. In order to fulfill its purpose, the notice must describe the changes in the economic circumstances, their gravity, nature and duration with sufficient detail.[105] Notice may have to be given in multiple stages, depending on the relevant market's state (*e.g.* the degree of abruptness or fluctuation in the obligation's value) or the nature of the impediment turning the performance excessively onerous. Whether notice is given within a reasonable time depends on the circumstances and the parties' agreement, such as the means available or possibility to transmit the notice and whether the performance on time was of the essence.[106]

8.3. The notice is not subject to any form requirements. Unlike Article 27 CISG, under Article 79(4) CISG the risk that the notice fails to reach the addressee within a reasonable time is placed on the party affected by hardship.[107] However, a teleological reading of this provision, in light of the principle of good faith in Article 7(1) CISG), may exempt the aggrieved party from the obligation to give notice if the other party was aware of the relevant circumstances.[108]

8.4. A party's failure to give notice does not preclude it from invoking the exemption under Article 79 CISG. The general exemption from damages in Article 79(5) CISG remains unaffected. The consequences of a failure to give proper and timely notice of the hardship situation is liability for losses resulting from it. The other party could claim its reliance losses. These might consist of, for example, expenses incurred in reliance that the contract would be performed during the time within which the notice should have been received.[109] Lost profits may also lie in the case of late delivery affected by hardship if the buyer resells the goods to a third party after the expiration of the time when notice should have been received by the buyer.[110]

9. In case of hardship, nothing prevents either party from exercising any right other than to claim damages and require performance of the obligation affected by hardship.

9.1. Article 79(5) CISG relieves the disadvantaged party only from the obligation to pay damages.[111] Other CISG principles, including reasonableness of performance (Articles 46 and 48 CISG) and the need to interpret the remedies available to the parties in good faith (Article 7(1) CISG)[112] may also have an impact on releasing the disadvantaged party from its obligation to perform the contract while the impediment exists. Among the remedies not affected by an exemption under Article 79 CISG are the other party's right to suspend performance (Art. 71 CISG), reduce the contract price (Art. 50), avoid the contract (Arts. 48 (1) and 64(1) CISG) or any of its instalments (Art. 73 CISG), claim interest (Art. 78 CISG) or expenses incurred in the preservation of the goods (Arts. 85 and 86 CISG).[113]

78 Art. 6:111 PECL; Art. 6.2.3 UNIDROIT PICC; Section III- 1:110 DCFR; Art. 84(1) PLACL.

79 McKendrick, 'Article 6.2.2', at 816, para. 8.

80 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 428–35.

81 CIETAC, 2 May 1996, CISG-online Case No. 1067 (based on frustration); RB Hasselt, 2 May 1995, CISG-online Case No. 371; CA Colmar, 12 June 2001, CISG-online Case No. 694 (the buyer failed to prove the 50 % fall in the selling price of the goods, the [Buyer] does not prove the state of "necessity" which would allow it to terminate the contract).

82 Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods* at 312.

83 Ibid.

84 Ishida, 'Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', at 367, 68.

85 Ibid.

86 Ibid., at 371, 72.

87 John Y. Gotanda, 'Dodging Windfalls: Damages Based on Market Price, Actual Loss, and Appropriate Awards', in Villanova University (ed.), *Villanova Public Law and Legal Theory Working Paper Series* (2015) at 6., available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2683525 .

88 See Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 147, 48. Katz, 'Remedies for Breach of Contract under the CISG', at 391; CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Rapporteur: Professor Alejandro Garro, 12 Oct 2007, Comment para. 39; McKendrick, 'Article 6.2.2', at 818, para. 15.: "assumption of risk need not to be express; it can be inferred from the circumstances or from the nature of the contact".

89 *ICC Award*, 26 August 1989, No 6281, CISG-online Case No. 8; *Rechtbank van Koophandel, Tongeren*, 25 January 2005, No 1960, CISG-online Case No. 1106. See also Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 220. McKendrick, 'Article 6.2.2', at 816, para. 8.: "the threshold is likely to be higher where the parties have entered into a highly speculative contract or the contract has been concluded in a market that is highly volatile".

90 *OLG Hamburg*, 28 February 1997, No 167, CISG-online Case No. 261.

91 *OLG Hamburg*, 28 February 1997, No 167, CISG-online Case No. 261.

92 OLG Hamburg, 28 February 1997, CISG-online Case No. 261; ICC Ct Arb No. 6281, 26 august 1989,CISG-online Case No. 8 (a price increase of 13.16 % is not enough) *Tribunale Civile di Monza*, 14 January 1993, CISG-online Case No. 540 (a price increase of 43.71 % is not enough, but applying Italian domestic law: Article 1467 CC).

93 Price fluctuations are considered foreseeable by most courts and arbitral tribunals: see RB Tongeren, 25 January 2005, CISG-online Case No. 1106; France Cass civ 1ère, 30 June 2004, CISG-online Case No. 870; CA Colmar, 12 June 2001, CISG-online Case No. 694 (the buyer failed to prove the 50 % fall in the selling price of the goods, the [Buyer] does not prove the state of "necessity" which would allow it to terminate the contract)); Int Ct Bulgarian CCI, 12 February 1998, CISG-online Case No. 436; RB Hasselt, 2 May 1995, CISG-online Case No. 371; ICC Ct Arb No. 6281, 26 august 1989, CISG-online Case No. 8 (it refers to price increase but the applicable law is Yugoslavian Law); *Tribunale Civile di Monza*, 14 Jan 1993, CISG-online Case No. 540 (the applicable law was the Italian CC: Article 1467 of the Civil Code).

94 Schlechtriem and Butler, *UN Law on International Sales* at 204, para7.1.3; Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods* at 312.

95 See Hof van Cassatie, 19 June 2009, CISG-online Case No. 1963.

96 Id.

97 Id.

98 See Flechtner, 'The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court', at 98.

99 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 438.

100 Ibid., at 439.

101 Ibid., at 462, 63.

Exemption from liability in damages:

9.2. As stated in CISG-AC Opinion No. 7, if the non-performance is due to an impediment under Article 79 CISG, the disadvantaged party is relieved, first and foremost, from its obligation to pay damages during the time such impediment exists.[114] The same damages exemption should follow from a court's or arbitral tribunal's determination of hardship.[115] As stated in CISG-AC Opinion No. 10, the exemption from paying damages under Article 79 CISG includes an exemption to pay the so-called "agreed sums", *i.e.* penalty clauses or liquidated damages (if they are at all valid under the governing domestic law), unless the parties have agreed otherwise in their contract.[116]

Specific performance excluded:

9.3. Whether the exemption under Article 79 CISG also extends to the right to request performance has been a subject of considerable debate because of the wording of Article 79(5) CISG.[117] This provision states that nothing prevents either party from exercising any right other than to claim damages under this Convention.[118] The wording of 79(5) CISG would suggest that a party to the contract may claim, in principle, specific performance in spite of the impediment endured by the other. At the Vienna Conference, a proposal by the German delegation aimed at clarifying that performance could not be insisted on in case of a continued impediment was rejected.[119] It was considered that no problem would arise in practice in case the disadvantaged party suffered actual impediments, whereas the categorical removal of the right to performance could impair the accessory rights of the other party.[120] Nowadays it seems to be undisputed that performance cannot be demanded as long as the impediment exists.[121] The same consequences should follow in case of hardship, which is a type of impediment.[122]

9.4. The exemption to perform due to hardship applies to the obligation to perform the contract under Articles 46(1) and 62 CISG, to deliver substitute goods under Article 46(2) CISG and to cure any non-conformity of the goods by repair under Article 46(3) CISG.[123] The same reasoning appears in other international instruments, such as Article 7.2.2(b) UNIDROIT PICC.[124] The rule may be drawn from the possibility to request performance unless it is unreasonable under Articles 46 and 48 CISG in light of the obligation to interpret the CISG in good faith under Article 7(1) CISG.[125]

Suspension of performance:

9.5. A party has the right to suspend performance of its obligation if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of its obligations. Article 71(1)(a)(b) CISG does not expressly mention hardship among the grounds for suspension, but the disadvantaged party's "serious deficiency in his ability to perform" under Article 71(1)(a) CISG might encompass impediments like hardship.

9.6. Article 71 CISG restricts the right to suspension or stoppage in transit to situations in which performance has not yet become due. Nevertheless, a party may withhold its performance when an obligation has become due and there is an impediment under Article 79 CISG preventing the seller from delivering the goods or the buyer from paying the purchase price. A proper notice of hardship by the disadvantaged party will allow the other party to withhold performance of its obligations and, thus, avoid further losses.

Price reduction:

9.7. Article 50 CISG entitles the buyer to reduce the price of non-conforming goods in the same proportion as the value that conforming goods have at the time of delivery. A hardship exemption under Article 79 CISG can rarely occur when the non-conforming goods have already been delivered. However, a buyer may claim price reduction if, for example, the non-conformity consists in missing parts of the goods that the seller is unable to deliver due to hardship.

Avoidance by a party's declaration:

9.8. The right to avoid the contract under Articles 49(1) and 64(1) CISG presupposes that the non-performance amounts to a fundamental breach of contract. Whether such a fundamental breach exists largely depends upon the circumstances of the individual case.[126] Article 25 CISG circumscribes a fundamental breach of contract as the non-performance resulting in such detriment to the other party as substantially to deprive it of what it is entitled to expect under the contract.[127] One of the central questions in hardship cases is whether it is possible and -having regard to the other party's expectations – just and reasonable that the breach be remedied.[128]

9.9. In the hypothetical case where, after the conclusion of the contract, the acquisition costs for the seller have doubled from 100 to 200, the seller may propose delivering the goods if the buyer is willing to pay a higher purchase price, let us say 150. The buyer may opt for refusing to accept the seller's offer, proceed to a cover purchase and sue the seller for 100 (the difference between the contract price and the price of the substitute purchase). The court or arbitral tribunal should then have to decide whether the seller is exempted from its obligations due to hardship or whether the seller's willingness to deliver the goods on different terms (at 150) amounted to a fundamental breach of contract, giving the buyer the right to avoid the contract. The court here will have to consi-

102 CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Rapporteur: Professor Alejandro Garro, 12 Oct 2007, Comment para. 1.

103 Yesim M. Atamer, 'Article 79', in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods – Commetary* (Second edn; München: Hart Publishing, 2018) at 1077, para. 95; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 342.

104 Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 672, para. 45.108.

105 Schwenzer, 'Article 79', at 1147, para. 45; Atamer, 'Article 79', at 1077, para. 95; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 342.

106 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 343.

107 Atamer, 'Article 79', at 1077, para. 96.

108 In relation to impediments in general see, Schwenzer, 'Article 79', at 1147, para. 47.

109 Atamer, 'Article 79', at 1077, para. 97.

110 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 343.

111 Flechtner, 'Uniformity and Politics: Interpreting and Filling Gaps in the CISG', at 201.

112 Diana Akikol, 'Article 46', in Brunner and Gottlieb (ed.), *Commentary on the UN Sales Law* (The Netherlands: Wolters Kluwer, 2019) at 348, para. 14; Atamer, 'Article 79', at 1053, para. 39.

113 Schwenzer, 'Article 79', at 1151, para. 56; Honnold and Flechtner, *Uniform Law for International Sales* at 640, para. 435.4; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 366.

114 CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Rapporteur: Professor Alejandro Garro, 12 Oct 2007, Rule 1. Comment para. 6; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 345; Atamer, 'Article 79', at 1060, para.13; Schwenzer, 'Article 79', at 1148, para. 50; Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 663, para. 45.60. One author asserts that express exemption to pay damages was not necessary because an impediment under article 79 CISG would fall under the category of unforeseeable damages under 74 CISG, see Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', at 340. However, Ishida seems to miss the point that the foreseeability requirement in Article 74 CISG regards the damages as a possible consequence of the breach rather than the breach itself or the impediment causing the latter. He also forgets that the CISG remedies system follows the strict liability approach and that Article 79 works as an exoneration of liability rather than a damages' limitation provision.

115 Regarding the UNIDROIT PICC some authors seem to have a different view. Commenting Article 6.2.3 PICC, McKendrick considers that hardship does not in itself exclude the defendant's liability for non-performance, see McKendrick, 'Article 6.2.3', at 821, para. 10. He cites a CAM Arbitral Award, holding that Article 6.2.3 PICC does not provide the remedy of damages' exemption but a duty to renegotiate, the remedy of contract adaptation or termination by the Tribunal; and since the breaching party did not request any of those remedies, the Tribunal decided not to exempt it from damages, skipping a determination of whether hardship had taken place. In spite of such incorrect understanding, it seems clear that once hardship is found and a court or tribunal decides to adapt a contract or terminate it upon a party's request, the latter should be exempted to pay any damages arising out of the contract modification or termination, see Arbitral Award of 30 November 2006, *Centro de Arbitraje de México*, paragraph 251, available at Unilex http://www.unilex.info/case.cfm?pid=1&do=case&id=1149&step=FullText.

116 CISG-AC Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts, Rapporteur: Dr. Pascal Hachem, (2012), Rule 5. See also Hachem, *Agreed Sums Payable Upon Breach of an Obligations* at 138; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 346, 47.

117 Atamer, 'Article 79', at 1061, paras. 16, 17; Schwenzer, 'Article 79', at 1050, para. 53.

der whether, under the circumstances of the case, it would have been just and reasonable for the buyer to pay 150 (which the seller was willing to accept) rather than 200 (in a substitute transaction). Giving due regard to all circumstances, the court or tribunal might find for the seller if it considers that the buyer should have consented to renegotiate the price in order to mitigate its loss.

Right to claim interest:

9.10. A buyer that has delayed payment of the purchase price due to a temporary hardship situation under Article 79 CISG, shall pay interest on it as of the date of payment agreed in the contract.[129] The rule applies to any monetary obligation that has not been paid timely due to hardship, unless delay has been caused by the other party's conduct.[130]

10. The exemption due to hardship has effect for the period during which hardship exists.

10.1. A claim for specific performance under the original terms of the contract (Articles 46(1) and 62 CISG) will not be enforceable as long as the substantial disequilibrium in the party's performances persists.[131] Neither an obligation to deliver substitute goods (Article 46(2) CISG) nor an obligation to cure any nonconformity of the goods by repair (Article 46(3) CISG) may be enforced against the disadvantage party during the time where hardship exists.[132]

11. Under the CISG, the parties have no duty to renegotiate the contract in case of hardship.

11.1. Parties may, if they agree to do so, renegotiate their contract in case of hardship. Renegotiation of the terms of the contract is the most rational solution in some hardship cases and in others the most practical solution. If the parties voluntarily renegotiate, they could address any market or value distortion in a faster and efficient manner. CISG case law shows that parties try to solve different issues amicably, before claiming any remedies under the Convention.[133]

11.2. Renegotiation, however, as negotiation, is based on willingness and trust. Constructive and cooperative renegotiation cannot be forced upon the parties by coercion.[134] The parties' freedom to modify their contract is the primary source for a new balance between the parties' obligations. The possibility of having a contract rebalanced by common agreement primarily rests on the parties' freedom to agree, beforehand, on which steps to take in case of hardship. Different model hardship clauses state such possibility,[135] including the ICC Hardship Clause 2003 and 2020.[136]

11.3. In addition, there are factual incentives for the parties to renegotiate their contract in a hardship situation, in their best interests under the current system of CISG remedies. The traditional remedies under the CISG, in combination with the duty to mitigate any loss in Article 77 CISG,[137] may induce the parties to renegotiate their obligations and to distribute risks evenly in the uncertainty brought by every hardship situation.[138]

11.4. In comments to the CISG-AC Opinion No. 7, the question whether the parties may have a duty to renegotiate based upon the mandate to interpret the CISG in good faith (Article 7(1) CISG) was posed without further elaboration.[139] This Opinion No. 20 clarifies that, unless otherwise indicated in the contract, the CISG does not impose upon the parties an obligation to renegotiate the contract in case of hardship.

11.5. A duty to renegotiate that operates as a CISG default rule would not be suitable. An impediment under Article 79 CISG only releases the party in breach from the obligation to compensate any damages resulting such breach.[140] There is no duty to renegotiate under Article 79 CISG, and the impracticability associated with enforcing such a duty makes it advisable not to impose it.

11.6. First, it is more than questionable whether and how the breach of an obligation to renegotiate would be redressed. Article 79 CISG, like most domestic and international legal systems, does not stipulate any means to enforce the duty to renegotiate imposed upon the parties (see 11.4 above).[141] Imposing a duty to negotiate where there are no means of specific enforcement amounts to nothing more than a best practices declaration. The duty to negotiate would gain importance only if breaching it was sanctioned.[142]

11.7. Second, cases of hardship involve fact situations in which it can hardly be determined whether a party refusing or breaking off negotiations acted in bad faith.[143] Imposing renegotiation is especially unsuitable for international transactions calling for promptness and legal certainty, which militate against lengthy or tedious negotiations.[144] Parties resorting to the courts or arbitration are most likely to have exhausted their efforts to reach an amicable solution before getting involved in the costs and inconvenience of filing an action .[145] Clear cases of bad faith, however, may be taken into account upon allocating the costs of proceedings.[146]

11.8. For hardship cases, some international instruments provide an obligation to renegotiate the original contract terms that became imbalanced or excessively onerous.[147] This duty to renegotiate rests on a duty to act in good faith,[148] which is common to many civil law systems.[149] But other legal systems, not only those pertaining to the common law tradition,[150] do not impose a duty to renegotiate.[151]

118 Article 8:101(2) PECL clearly states that where a party's non-performance is excused, alongside with the right to claim damages, the right to performance is likewise excluded. See Article 8:101 PECL "(2) Where a party's non-performance is excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming **performance** and damages".

119 Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', at 343, 44.

120 See Document A/CONF.97/C.1/L.191/Rev.1 in United Nations Conference on Contracts for the International Sales of Goods, Vienna, 10 March-11 April 1980 (Official Records, New York, 1981) 381. Schwenzer, 'Article 79', at 1050, para. 53.

121 Atamer, 'Article 79', at 1065, para. 27; Honnold and Flechtner, *Uniform Law for International Sales* at 642, para. 435.5; Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', at 449–51; Peter Huber, 'Article 46', in Mistelis, Kroll, Perales-Viscasillas (ed.), *UN Convention on Contracts for the International Sale of Goods* (Hamburg: Beck, 2018) at 678, para. 19.

122 Schwenzer, 'Article 79', at 1150, 51, para. 55; Huber, 'Article 46', at 879, para. 23; Akikol, 'Article 46', at 348, 49, para. 14; Atamer, 'Article 79', at 1052, para. 35.

123 Akikol, 'Article 46', at 348, para. 14; Atamer, 'Article 79', at 1053, para. 39.

124 Article 7.2.2 UNIDROIT PICC: Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless: [...] (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive; [...].

125 Akikol, 'Article 46', at 348, para. 14; Atamer, 'Article 79', at 1053, para. 39.

126 Ulrich Schroeter, 'Article 25', in Ingeborg Schwenzer (ed.), Schlechtriem & Schwenzer: *Commentary on the UN Convention on the International Sale of Goods* (4th edn; London: OUP, 2016) at 424, paras. 13 et seq. OLG Stuttgart, 12 March 2001, CISG-online Case No. 841; *CIETAC*, 30 October 1991, CISG-online Case No. 842.

127 Similar provision is Article 7.3.1(2) UNIDROIT PICC, Article 8:103 PECL and Article III – 3:502(2) DCFR.

128 CISG AC Opinion No. 5, The buyer's right to avoid the contract in case of non-conforming goods or documents Rapporteur: Professor Ingeborg Schwenzer, 7 May 2005, Comment 3.

129 CISG-AC Opinion No. 14, Interest under Article 78 CISG, Rapporteur: Professor Dr Yeşim M. Atamer, 22 October 2013), Rule 7, Comment paras. 3.47 and 3.48.

130 Id., Comment, para. 3.47.

131 Schwenzer, 'Article 79', at 1150, 51, para. 55; Atamer, 'Article 79', at 1068, paras. 35, 36; Akikol, 'Article 46', at 349, para. 15.

132 Akikol, 'Article 46', at 348, para. 14; Atamer, 'Article 79', at 1053, para. 39.

133 Hannaford (trading as Torrens Valley Orchards) v Australian Farmlink Pty Ltd ACN 087 011 541 [2008] FCA 1591, 24 October 2008, Unilex case no. 1366 available at http://www.unilex.info/case.cfm?id=1366; ICC Arbitration Case No. 11849 of 2003 (*Fashion products case*), available at http://cisgw3.law.pace.edu/cases/031849i1.html; Republic of Korea 29 April 2010 Daegu District Court, available at http://cisgw3.law.pace.edu/cases/100429k3.html.

134 Günter Roth, '§ 313 Bgb', in Wolfgang Krüger (ed.), *Münchener Kommentar Zum Bürgerlichen Gesetzbuch* (5 edn; Muchen: CH Beck, 2007) at para. 93.

135 See for example, Clause 16.2 (Hardship) of Standard Model Contract for International Commercial Sale of Goods and Clauses 9.2 and 9.3 of the International Long-Term Supply of Goods, by the International Trade Center (an agency of the World Trade Organization): *(Itc), Model Contracts for Small Firms: Legal Guidance for Doing International Business at 54, 55, 70, 71.*, available at http://www.intracen.org/WorkArea/DownloadAsset.aspx?id= 37603.

136 See ICC Hardship Clause 2003, para. (2)(b); ICC Hardship Clause 2020, para. (2)(b).

137 See Ingeborg Schwenzer and Simon Manner, 'The Pot Calling the Kettle Black: The Impact of the Non- Breaching Party's (Non) Behaviour on Its CISG-Remedies', in Camilla Andersen and Ulrich Schroeter (eds.), *Sharing International Commercial Law across National Boundaries – Fest-*

11.9. The Belgium *Cour de Cassation* and some authors have considered that there is a gap in Article 79 CISG as far as the consequences of hardship are concerned and that this gap might be filled according to Article 7(2) CISG by relying on the UNIDROIT PICC, which requires the parties to renegotiate the contract.[152] This approach poses some difficulties. It has been disputed that Article 7(1) CISG imposes an obligation upon the parties to act in good faith during their contract conclusion and performance.[153] Besides, Article 7 CISG requires an autonomous interpretation and the filling in of internal gaps in accordance with its own principles. Thus, all solutions developed must be based on the Convention itself.[154]

12. Under the CISG, a court or arbitral tribunal may not adapt the contract in case of hardship.

12.1. Adaptation is not contemplated or allowed under the CISG.[155] The fact that the CISG provisions governing exemption do not authorize contract adaptation by a court or arbitral tribunal, does not create a "gap" in the CISG; it rather shows a rejection of the adaptation remedy, as recorded in the *travaux préparatoires*.[156] Considering that hardship is a matter governed by the CISG, the remedies available for such type of impediment should be found in Article 79 CISG. In this regard, Article 79(5) CISG specifically states that the aggrieved party may exercise any right under the Convention except for damages. Consequently, this provision expressly sets out the remedies by reference to those explicitly stated in Articles 45 and 61 CISG. Adaptation by a court or arbitral tribunal is not contemplated by those provisions.

12.2. For the same reasons, no period of grace may be granted to the disadvantaged party in a situation of hardship when the other party is entitled to a remedy for breach of contract under the CISG (Articles 45(3) and 61(3) CISG).

12.3. Moreover, it is not consistent or necessary to create a different legal remedy for economic impediments that differs from the remedy that already exists under Article 79 CISG. The solution envisaged by the remedy of contract adaptation takes out from of the parties' hands what the latter may be able to achieve better. This approach contradicts the parties' autonomy to fix the hardship situation.

12.4. It has been advocated that Article 50 CISG, on reduction of the purchase price, evidences a general principle so as to adjust a contract to changed circumstances.[157] However, the right to reduce the contract price in Article 50 CISG derives from a breach of contract incurred by the other party; in other words, it is the adverse consequence of a breach of contract and an efficient way to redress the damage caused by the breach. Granting price reduction does not depart from the parties' initial *expectations* under the contract, whereas adaptation of the contract in case of hardship works against the party not responsible for the impediment.

12.5. Furthermore, it has been suggested that adaptation may lie under a "reasonable expectation test", proposed as another of the principles upon which the CISG is based (Article 7(2) CISG): a judge or an arbitrator first determines where a party could "reasonably" be expected to overcome an impediment and, if not, he or she may adapt the contract by ordering a solution "reasonably" expected to be taken.[158] Relying on Articles 39 and 60 CISG, which allow the integration of the contract, it has been submitted that courts may in some instances rewrite CISG contracts in light of the surrounding circumstances, trade usages or prior practices.[159] However, the task of integrating a contract works under the assumption that the parties have not agreed otherwise, whereas adapting a contract calls for a departure from the original deal concluded by the parties. Adaptation of contractually agreed terms entails the exercise of extraordinary powers requiring an express provision in the CISG confirming such faculty for adjudicators.

12.6. In the last Comment of the CISG Advisory Council's Opinion No. 7, it is stated that in case negotiations fail, there are no guidelines under the Convention for a court or arbitrator to adjust, or revise the terms of the contract so as to restore the balance of the performances.[160] The same Comment also states that CISG Article 79(5) may be relied upon to open up the possibility for a court or arbitral tribunal to determine what is owed to each other, thus adapting the terms of the contract to the changed circumstances.[161] As a party in arbitration proceeding pointed out, CISG Advisory Council's statement did not suggest that the remedy of contract adaptation was contemplated in Article 79 CISG, because allowing a court or arbitral tribunal "*to determine what is owed to each other*" does not give the adjudicator the power to adjust a term of the contract.[162]

12.7. Some authors have proposed to rely on Article 6.2.3(4) UNIDROIT PICC as constituting either a general principle upon which the CISG is based under Article 7(2) CISG[163] or an international usage in the sense of Article 9(2) CISG in order to reach the desirable result of adaptation.[164] That approach also poses some difficulties. First, as stated above, there is no gap in the CISG regarding the remedies in case of hardship. Second, although there might be an overlapping between certain trade usages and some of the provisions in the UNIDROIT PICC, the latter were not conceived as a restatement of international trade usages. The remedy of contract adaptation by an arbitral tribunal or court in case

schrift for Albert H Kritzer (London: Wildy, Simmonds & Hill, 2008) at 480. For the duty to mitigate in domestic legal systems see Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 630, para. 44.256 et seq. Also see Finland § 70(1) Sale of Goods Act; Germany § 254 BGB; Norway § 70(1) Sale of Goods Act; Sweden § 70(1) Sale of Goods Act; Switzerland Art. 44 CO; Arts. 7.4.7, 7.4.8 UNIDROIT PICC, Articles 9:504 and 9:505 PECL; Arts. III.–3:704 and III.-3:705 DCFR.

138 Article 77 CISG can clearly constitute a rule for a fair distribution of risks in case of hardship despite the contrary opinion of some scholars, see Atamer, 'Article 79', at 1091, para. 85. Buyers will not automatically reject an offer to renegotiate, avoid the contract and sue for damages in case of lack of delivery at the agreed price. The costs of bringing a claim and the uncertainty of the court's decision may act as disincentives in long term distribution contracts or scenarios where the goods are to be integrated into a manufacturing process or to inventory waiting to be resold, especially at times where the hardship and related doctrines are gaining momentum in B2B transactions. In one case, for example, a court in the Netherlands held that a seller should have agreed on a change of delivery terms requested by the buyers, and ordered the seller to deliver the goods within 14 days after judgment, see Rechtbank Arnhem, 31 January 2008, CISG-online Case No. 2016.

139 CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG Rapporteur: Professor Alejandro Garro, 12 Oct 2007, Comment para. 40.

140 Schwenzer, 'Article 79', at 1148, para. 50; Flechtner, 'Uniformity and Politics: Interpreting and Filling Gaps in the CISG', at 201.

141 See for example, Armenia Art. 467 CC; Azerbaijan Art. 422 CC; France Art. 1195 CC; Lithuania Art. 5.204 CC; Russia Art. 451 CC; Ukraine Art. 652 CC. Also see Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 673, para. 45.112.

142 This is only envisaged by Article 6:111(3)(c) PECL, according to which a court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

143 These criticisms were recognized by the drafters of the DCFR, who, according to the Official Comments, decided not to impose an obligation to negotiate (although, they made an attempt at renegotiation a prerequisite to the obligor's right to obtain relief), see Art. III.–1:110, Comment C DCFR.

144 Atamer, 'Article 79', at 1091, para. 84.

145 Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', at 372.

146 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 483.

147 Article 6.2.3(1) UNDROIT PICC, Article 6:111(2) PECL 1999 as well as Article III–1:110(3)(d) DCFR; Art. 84(1) PLACL. However, McKendrick explains that in the case of UNIDROIT PICC the duty to renegotiate does not come from the wording of Article 6.2.3 ("entitled to request negotiations") but from the general principle of good faith in Article 1.7 and the parties' duty to co-operate under Article 5.1.3 PICC, see McKendrick, 'Article 6.2.3', at 819, para. 1, fn. 53.

148 Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 480, 81; McKendrick, 'Article 6.2.3', at 819, para. 1. See also ICC Award, March 1999, No 5953, Clunet 1990, 1056.

149 The principle of good faith found its way into almost every Civil Law system through the reception of Roman law. See France Article 1104(1) CC; Italy Article 1337 CC; Germany § 242 BGB; Switzerland Article 2 ZGB. The new French civil code endorsed the principle in Article 1104(1), see Chénedé, *Le Nouveau Droit Des Obligations Et Des Contrats: Consolidations – Innovations – Perspective* at 19, para. 21.24. Good faith is also a contract integration principles engrained in Latin American laws, see Edgardo Muñoz, *Modern Law of Contracts and Sales in Latin-America, Spain and Portugal*, ed. Ingeborg Schwenzer (International Commerce and Arbitration, 6; The Hague: Eleven International Publishing, 2011) at 270. Common Law systems, however, tend to refrain from accepting good faith as a general principle of contract law: see Michael G. Bridge, 'Does Anglo-Canadian Law Need a Doctrine of Good Faith?', *Canadian Bus LJ,* 9 (1984) at 426; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies', *Modern Law Review*, 61 (1998) at 11.

of hardship is contemplated in many civil law legal systems[165] and at the international level too,[166] but it is not internationally accepted.[167] Whether adaptation of the contract or some of its clauses by a third party constitutes a usage in some industries must be established pursuant to Article 9(2) CISG.

12.8. The situation may be different when the contract has already been fulfilled by one side. Thus, a buyer may have complied with its obligation to pay the price in a foreign currency of which the value, for example, increased by 100 % since the time of the conclusion of the contract, resorting to an excessively onerous bank credit and placing its financial survival at peril. Commenting on the hardship provisions in the UNIDROIT PICC, it has been stated that a remedy for hardship must relate to obligations that remain to be performed, precluding a party from claiming greater payment for work already done.[168] Yet, with few exceptions,[169] most provisions on hardship do not clarify whether a party may be exempted from obligations that have already been performed.[170] Arguably, the text of hardship provisions excusing a party from performing, such as Article 79 CISG, may be interpreted against exempting liability for performance that has been already rendered, given that the very notion of impediment calls for events which "could not have been overcome", past performance being an indication that the disadvantaged party is not in a position to claim that the "ultimate limit of sacrifice" has been exceeded.[171]

12.9. Ultimately, whether a contract may be adapted with regard to obligations already fulfilled should be answered by interpreting the parties' behavior. A party who performed under the terms agreed without having raised the issue of hardship may give rise to a presumption that the imbalance threshold has not been reached. However, if the party affected by hardship went ahead with the performance of the obligation only after receiving assurances by its counterparty of subsequent renegotiations or a set-off against future deliveries, or if it was reasonable for the disadvantaged party to rely on prior renegotiation or adaptation practices, industry usages, the parties may be deemed to have impliedly agreed to the possibility of adapting the contract after performance.[172]

13. Under the CISG, a court or arbitral tribunal may not bring the contract to an end in case of hardship.

13.1. The possibility of termination (or "avoidance" as in the language of the CISG) of the contract by a court or arbitral tribunal as a result of hardship is envisaged by the international instruments[173] and many of the legal systems considered in this opinion.[174] In common law jurisdictions, *ipso facto* termination (also called *ipso iure* termination)[175] is the only remedy under the doctrine of frustration.[176] Legal systems differ, however, with regard to the preference of the termination solution over other remedies such as negotiation or contract adaptation. In some systems, termination is clearly preferred over adaptation,[177] while in others adaptation is favoured over termination.[178]

13.2. There are also some differences in relation to the relevant mechanism by which termination operates in cases of hardship. In some legal systems termination takes effect *ex nunc* and only by an order of the court or arbitral tribunal.[179] Other legal systems follow the English remedy under the doctrine of frustration of contract, embracing the termination of the contract *ipso facto*, as of the moment the contract is frustrated.[180] Both approaches, however, contradict the CISG modern solution of termination (avoidance as in its own language) by declaration by the aggrieved party;[181] which is also the first proposed remedy under the ICC Hardship Clause 2020 should the parties fail to reach a solution through negotiation.[182] Under this mechanism a notice given by the aggrieved party is sufficient for the contract to be terminated, the effects of termination taking place upon that moment.[183] The advantages in comparison to the requirement of termination by court judgment is certainty and speed. When a contract is terminated *ipso facto*, the consequences may have taken effect without the parties being aware of it, whereas termination by court declaration will be impractical in many instances, especially where a party needs to conclude a substitute transaction in order to cover the other party's breach.

13.3. Consequently, the remedy of termination by party declaration under the CISG is the proper remedy to end contract in case of hardship.

Editor's note:

To read or download Annex 1 CISG AC Opinion No. 20 "Case Law on the CISG and Hardship" and Annex 2 CISG AC Opinion No. 20 "Scholarly writings on the CISG and Hardship" simply type https://ottosc.hm/IHR62020 in your browser's address bar.

150 See United States § 2-615 (a) UCC stating that "[d]elay in delivery or non-delivery ... is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency...." For a discussion of the impracticability doctrine in American law see, Palumbo, *Modern Law of Sales in the United States* at 165, 66.

151 See Argentina Art. 1091 CC; Italy Arts. 1467-1469 CC; The Netherlands Arts. 6:258 and 6:260 BW. See for further references, Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 480.

152 Hof van Cassatie, 19 June 2009, CISG-online Case No. 1963; Schlechtriem and Butler, *UN Law on International Sales* at 204, para. 91.

153 Bridge, *The International Sale of Goods* at 509, para. 10.41; Ingeborg Schwenzer and Pascal Hachem, 'Article 7', in Ingeborg Schwenzer (ed.), Schlechtriem & Schwenzer*: Commentary on the UN Convention on the International Sale of Goods* (4th edn; London: OUP, 2016) at 127, para. 17.

154 Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 45, para. 3.54.

155 Neither adaptation of the contract is contemplated in the following domestic laws: Italy Art. 1467 CC; Bolivia Art. 581 CC, Brazil Art. 478 and 479 CC; Slovenia Art. 112 Code of Obligations. The ICC Hardship Clause 2003 states in para 3 that "... the party invoking this Clause is entitled to termination of the contract." On Article 1467 of the Italian *Codice Civile*, see Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 506.

156 Flechtner, 'The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court', at 98.

157 Schlechtriem, 'Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More by Harry M. Flechtner', (Adhering to Schlechtriem view see, Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', at 378, 79.

158 See Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', at 359, 72, 79, 80.

159 See ibid.

160 CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Rapporteur: Professor Alejandro Garro, 12 Oct 2007, Comment 3.2, para. 40.

161 Ibid para. 40.

162 Separate Award, SCC Arbitration No. V2014/078/080, 31 May 2017, CISG-online Case No.4683, para. 2568 as an argument of the Respondent (Gazprom) that the Arbitral Tribunal neither contradicted nor expressly accepted.

163 Schlechtriem, 'Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More by Harry M. Flechtner', at 236, 37.

164 Schlechtriem and Butler, *UN Law on International Sales* at 204, para. 91; Atamer, 'Article 79', at 1091, 92, para. 86.

165 Argentina Art. 1091 CC; Armenia Art. 467 CC; Azerbaijan Art. 422 CC, Bolivia Art. 581(1)(4) CC; China Art. 26 PRC Contract Law Interpretation (2) and Art. 227-2 CC; Colombia Art. 868 Com C; Croatia Art. 369 Civil Obligations Act; Egypt Art. 147(2) CC; France Art. 1195 CC; Germany § 313(1) BGB; Greece Art. 388 CC; Iraq Art. 146(2) CC; Kuwait 198 CC; Libya: Art. 147(2); Lithuania: Art. 6.204 CC; Montenegro Art. 128 Law on Obligations; Paraguay Art. 672 CC, only in unilateral contracts; Portugal Art. 437 CC; Qatar Art. 171 (2) CC; Russia Art. 451 (2) CC; Syria Art. 148(2) CC; Taiwan Art. 227-2 CC; The Netherlands Art. 6:258 Dutch Civil Code; Ukraine Art. 652 CC.

166 Article 6.2.3(4) UNIDROIT PICC, Article 6:111(3) PECL as well as Article III – 1:110(2)(b) DCFR; Art. 84 PLACL.

167 Flechtner, 'The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court', at 102.