# HARDSHIP WITHIN THE SCOPE OF THE CISG

## HARDSHIP INDENFOR ANVENDELSESOMRÅDET AF CISG

af STINE MATHILDE EGGERS

*As it is disputed whether a contracting party is entitled to invoke hardship as a defence under the CISG and since the CISG does not contain an explicit provision regarding hardship, this master's thesis analyses the legal status on hardship within the CISG. In the attempt to clarify the legal status, the thesis applies the interpretation and gap-filling methodology prescribed by CISG Art 7. Throughout the analysis, it is discovered that the legal status is far from clear and that at least four opposing solutions appear to exist. In the interpretation of CISG Art 79 the issue is whether a situation of hardship constitutes an 'impediment' within the meaning of Art 79. In particular, it depends on whether an impediment equals impossibility. An extensive interpretation which establishes that the matter of hardship is settled and allowed as a defence under the CISG, is supported by a significant amount of CISG scholars including a CISG-AC Opinion. Contrario, a narrow, more literal and teleological interpretation might lead to the result that hardship cannot be invoked under the CISG. Since it cannot be established sufficiently that hardship is either excluded or included, the thesis regards that it is most probable that the CISG contains a gap on the matter. The following issue is whether the gap-filling procedure prescribed by Art 7(2) includes recourse to international principles and allows for a solution that settles the matter in conformity with UPICC Art 6.2.1-6.2.3. Such a solution is supported by limited CISG case law and some scholarly opinions, although it clearly violates the procedure prescribed by Art 7(2).*

*The thesis concludes that the CISG should not be stretched beyond its borders through extensive interpretation and expansionistic gap-filling in order to solve the issue within the four corners of the CISG. As a result, the thesis favors an approach that respects the limits of the CISG and involves recourse to Private International Law. The thesis emphasizes the real issue regarding hardship under the CISG, which is the lack of legal certainty. Uniform interpretation and application is only possible if the CISG provides for a uniform approach. The current legal status, which includes at least four different approaches, lacks predictability. Consequently, the thesis recommends that the CISG undergoes a reform, as an unambiguous black letter text appears to be the best solution in order to promote uniform application.*

*Da det er omtvistet, hvorvidt en kontraherende part har ret til at påberåbe sig 'hardship' under CISG, og idet CISG ikke indeholder en bestemmelse som regulerer problemstillingen, har dette speciale til formål at analysere retsstillingen. I sit forsøg på at afklare retstillingen, anvender specialet fortolknings- og udfyldningsmetoden foreskrevet af CISG Art 7. Det viser sig dog, at retsstillingen er alt andet end klar, idet der synes at være mindst fire forskellige løsninger. Ved fortolkningen af Art 79 vedrører første problemstilling, hvorvidt 'hardship' udgør en 'hindring' i Art 79's forstand. Dette afhænger især af, hvorvidt en hindring er lig med umulighed. En udvidende fortolkning af Art 79 der medfører, at 'hardship' kan påberåbes, er understøttet af en række CISG teoretikere samt en udtalelse fra CISG-AC. På den anden side vil en snæver ordlyds- og formålsfortolkning føre til det resultat, at 'hardship' ikke kan påberåbes under CISG. Da det ikke er muligt at fastslå med sikkerhed, om 'hardship' falder indenfor eller udenfor anvendelsesområdet af CISG, er det formentlig mest korrekt*

*at fastslå, at der er tale om et 'hul' i CISG. I den forbindelse er spørgsmålet, om udfyldningsmetoden jævnfør Art 7, stk. 2 involverer anvendelse af internationale principper og giver mulighed for en løsning, hvor problemstillingen bliver løst i overensstemmelse med UPICC Art 6.2.1-6.2.3. En sådan løsning understøttes af begrænset CISG retspraksis og enkelte udtalelser fra CISG teoretikere. Dog er der meget der tyder på, at løsningen strider med proceduren i Art 7, stk. 2.*

*Specialet konkluderer, at CISG ikke bør strækkes via udvidende fortolkning og udfyldning for at løse problemstillingen. Derfor er det mest korrekt at respektere grænserne for anvendelsesområdet af CISG, hvilket indebærer anvendelse af international privatret. Specialet har til formål at fremhæve det reelle problem med hensyn til 'hardship' under CISG, hvilket er manglen på retssikkerhed. En ensartet fortolkning og anvendelse er kun mulig, når der er en ensartet tilgang. En retsstilling der omfatter mindst fire forskellige tilgange mangler forudberegnelighed. Derfor anbefaler specialet, at CISG gennemgår en reform, idet en bestemmelse med en utvetydig ordlyd synes at være den bedste løsning for at fremme ensartet anvendelse.*

# Table of contents

## Abstract
When the circumstances on which the contract was based suddenly change after the conclusion of the contract, either of the parties might have an interest in being released from the contractual obligation which is otherwise legally binding. The legal doctrine of hardship provides the degree of flexibility which is necessary in order to maintain the contract, without endangering its integrity as a binding force. Hardship usually provides for renegotiation and adaptation of the contract with the view to restore its equilibrium by adapting its original terms to the changed circumstances. However since the CISG does not contain an explicit provision regarding hardship, it is disputed whether a contracting party is entitled to invoke hardship as a defence under the CISG. Consequently, this master's thesis '*Hardship within the scope of the CISG*', which presupposes that hardship is a matter governed by the CISG, aims at clarifying the legal status on hardship within the CISG.
By application of the interpretation and gap-filling methodology prescribed by CISG Art 7, the thesis discovers that the legal status is far from clear, as there might be at least four different solutions to the issue. Through an extensive interpretation of CISG Art 79, the court might find that *impediment* does not equal *impossibility*, which means hardship might qualify as an impediment under Art 79(1), and that any of the contracting parties might invoke hardship as a defence under the CISG. On the basis of an extensive stretch of the good faith principle and Art 79(5), the CISG might even provide for renegotiation and adaptation of the contract. However a narrow, literal and teleological interpretation of Art 79 might lead to the result that hardship cannot be invoked under the CISG, which means that a party facing hardship nevertheless have to perform the contractual obligation or face liability. The thesis finds that it cannot be sufficiently established that hardship is either excluded or included, which means that it is most probable that the CISG contains a gap regarding hardship. Subsequently, it appears that the court might settle the issue in conformity with UPICC Art 6.2.1-6.2.3 as recourse to international principles might be allowed as a supplement to general CISG principles, although it clearly violates the procedure prescribed by Art 7(2).
The thesis finds that the CISG should not be exhausted by application of extensive and expansionistic gap-filling in order to solve the issue within the four corners of the CISG, as the procedure under Art 7(2) is capable of solving the issue. Consequently, the thesis recommends that the court should recourse to the applicable law by virtue of Private International Law. Depending on the applicable sales law, the court may be able to relieve the obligor from its obligations under the contract. The purpose of the thesis is to emphasize that there is not a clear solution to the issue. Legal certainty is promoted when the CISG is interpreted and applied uniformly, which is possible only if the CISG provide for a uniform approach. The current legal status, which includes at least four different approaches, lacks predictability. Consequently, this thesis recommends that the CISG undergoes a reform, as an unambiguous black letter text appears to be the best solution in order to promote uniform application.

# 1 Problem definition

## 1.1 Introduction
When contracting parties validly enter into a contract, it is binding. This binding force makes the contract enforceable, which creates legal certainty in sales transactions as the parties can legally rely on each other's performance. The binding character of a contractual agreement is reflected in the principle of *pacta sunt servanda*, which means agreements must be kept.[1] At the time of the conclusion of the contract, the contract is a reflection of the parties' respective interests. The buyer has an interest in the goods based on his business activity, while the price is set in accordance with the value

[1] UPICC Art 1.3

of the goods and the costs of performance. A disputed issue in international trade arises in situations where the circumstances on which the contract was based suddenly change after the conclusion of the contract, so that it no longer reflects both parties' interests. The issue depends on the flexibility of *pacta sunt servanda*.[2] It is not reasonable if contracts are binding in cases where external circumstances suddenly change, and it may even put a string on international trade as parties would be reluctant to enter into contracts. Contrario, it would have a negative impact on predictability in international trade, if contracts are avoided due to even the slightest changes, as the contract would lose its effect as a binding legal transaction.
The principle *rebus sic stantibus,* which means things thus standing modifies *pacta sunt servanda* in case of changed circumstances. The principle is reflected in the concept of *vis major* where an impediment renders performance impossible and in the concept of hardship, where changed circumstances alter the equilibrium of the contract. Concepts such as force majeure and hardship provide flexibility without endangering the integrity of the contract as a binding force.[3] However, force majeure is a somewhat strict concept which, under narrow conditions, might exempt the non-performing party from liability. Hardship is a more flexible concept which aims at amending the contract to the changed circumstances in order to maintain the contract. Thus, it usually provides for renegotiation and adaptation in cases where performance is not impossible, but excessively onerous[4] or in cases where the circumstances on which the contract was concluded have changed so drastically that the economic purpose of the contract is lost.[5]
The UN Convention on Contracts for the International Sale of Goods of 1980 (CISG) aims to promote international trade by providing a modern, uniform and fair regime. The CISG is considered one of the core international trade law conventions, which as far as possible must be interpreted in a uniform manner and whose universal adoption is desirable. However, the CISG does not explicitly provide for a provision on hardship and therefore it is highly disputed how the court of a Contracting State (CS) should rule in a situation where hardship is invoked as a defence.

## 1.2 Problem statement

How may the court of a Contracting State solve the case in a situation where an obligor from a CISG Contracting State invokes hardship as a defence due to an event which has rendered the performance of the contractual obligation excessively burdensome, but not impossible?

Invocation of hardship might be relevant in a case like the following: Buyer A situated in CISG Contracting State X enters into a contract with seller B situated in CISG Contracting State Y. The price is set in the currency of State Z. After the conclusion of the contract, but before the delivery and the payment is due, an unpredictable and unpreventable crisis leads to a sudden devaluation of 80 % of Z's currency. The occurrence of the crisis renders the contract extremely burdensome for the buyer and the equilibrium is fundamentally altered.[6] Pursuant to the CISG Art 1(1)(a), the CISG applies to the contract and the subsequent question is whether the disadvantaged party is entitled to invoke hardship as a defence under the CISG.

## 1.3 Structure and methodology

The paper aims at clarifying the legal status on hardship within the scope of the CISG by an application of the legal dogmatic method. The paper analyses whether hardship falls within the scope of the

[2] Fontaine and De Ly, *Drafting International Contracts* at 453
[3] Lindström, *Changed Circumstances* at 1 ff.
[4] Essesiva onorosità
[5] Wegfall der Geschäftsgrundlage
[6] Based on the illustration in UPICC Art 6.2.2, comment 3 and inspired by Lookofsky's '*Devaluation nightmare'*

CISG through research with the objective of clarifying and systematizing the principles, rules and concepts governing the legal field of hardship in international trade. Through the analysis, the paper aims to clarify and systematize the existing law.[7] It purports to describe, prescribe and justify. Based on a description and understanding of the existing law, the paper searches for the solution which fits the legal system best and ultimately aims at prescribing the approach which the court should adopt.[8] First the paper describes hardship, based on general international contract principles and domestic legal doctrines and concepts. Following the definition of hardship including the delineation to force majeure, the paper describes the interpretation and gap-filling methodology prescribed by CISG Art 7. Then the paper examines the prerequisites pursuant to CISG Art 79 and clarifies what the test requires. The paper aims to examine, systematize and clarify the solutions provided through the methodology under Art 7 in regards to whether hardship is settled by Art 79. Particularly it examines whether *impediment* equals *impossibility* and to what extent international principles might supplement the CISG. Finally, the various solutions are assessed, after which the paper seeks to recommend which approach the court should adopt.

## 1.4 Delimitation of research object

In the assessment of the legal status of hardship within the scope of the CISG, the paper does not attempt to examine the specific content of the *hardship threshold test*. Furthermore the paper is not concerned with the issue of *preëmption or competition of uniform and domestic remedies*. Consequently, the paper does not assess whether CISG Art 79 preëmpts the application of domestic hardship rules. The paper does not include a comparative analysis of the domestic concepts on hardship, as it merely highlights some common characteristics and deviations. Furthermore the paper is aware of the fact that some domestic legal systems consider hardship a validity-related issue,[9] which entails that hardship falls outside the scope of the CISG, cf. CISG Art 4(a). However since this paper assumes that hardship is governed by the CISG, it is not concerned with this view.
Since the CISG is a default regime, this paper assumes that the contract prescribed under section 1.2 in regards to hardship, is subject to no other binding forces, pursuant to CISG Art 6 and Art 9.
The paper is aware of the fact that termination of the contract releases both parties from their main obligations[10] and transforms the contract from being a future-oriented ongoing relationship into a backward-oriented restitution relationship, where other rights and obligations under the contract continue to bind the parties.[11] Accordingly, *termination of the contract* within the meaning of this paper entails that the main obligations are terminated and *redirected.*[12]

## 1.5 Sources of law

The CISG which is one of the world's most important treaty governing commercial contracts, is sanctioned by a legislative body composed by delegates from all-over the world and the provisions are legally binding.[13] In the interpretation of the CISG, a *lex specialis* procedure is provided for under CISG Art 7, whereas The Vienna Convention on the Law of Treaties of 1969 (VCLT) sets forth a general rule of interpretation in Art 31 and provides for supplementary means of interpretation in Art 32. In determining the meaning of the CISG, recourse may be had to supplementary means of inter-

[7] Smits, *What Is Legal Doctrine?* at 210
[8] Ibid at 213
[9] See the Danish Contracts Act, *Aftalelov* § 36
[10] CISG Art 81; UPICC Art 7.3.5
[11] Magnus, *The Remedy of Avoidance* at 430 ff.
[12] Schlechtriem, *Uniform Sales Law*, at 107
[13] Slater, *Overcome by Hardship* at 238

pretation, including preparatory work. However, as the CISG is not accompanied by an official commentary, the Secretariat Commentary to the 1978 draft is the closest counterpart and probably the most authoritative source in the interpretation of the official text.
As CISG legislative history provides limited authority, CISG case law has become a more significant supplementary means of CISG treaty interpretation.[14] CISG case law is summarized in the CISG Digest. Due to the UNCITRAL's neutrality policy, all cases are objectively reported without criticism. The CISG is absent of a supranational court with the authority to settle differentiating decisions by the domestic courts. Thus, CISG case law is not authoritative. Due to the limited legislative history and the fact that CISG case law is unauthoritative, scholarly opinions have become a more relevant, although a less significant secondary source of CISG law.[15] Opinions by scholars who participated during the drafting of the CISG might be relevant when examining the intent behind the official text. However the opinions often reflect the individual scholars' personal views during the discussions. CISG Advisory Council (CISG-AC) is a private body which was formed due to the lack of interpretation means. The CISG-AC has a tendency to include issues which the UNCITRAL working group was unable to solve when the CISG was drafted. Thus, the CISG-AC has undertaken a law-making role without the approval from the CS and therefore the AC opinions are not authoritative.[16]
The UNIDROIT Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL) reflect and organize general international principles. In contrast to the CISG which is enforceable legislation, The UPICC and the PECL are considered soft law, which means that they are legal instruments that do not have a legal binding force. Whether parties under Private International Law (PIL) may choose non-state law as the law governing the contract is highly disputed and probably limited to arbitration.[17] However, this paper focuses on dispute resolution before state courts and not arbitration tribunals, which means that soft law cannot be chosen as the law governing the contract. The UPICC and the PECL provide legal guidelines, whereas the CISG provides rights and responsibilities through authoritative, prescriptive and binding law. As soft law instruments do not provide for authority, they are at a lower level in the stage of international harmonization. However the UPICC is increasingly being used in international contract practice as parties may incorporate soft law by reference.[18]

# 2 Definition of hardship

## 2.1 Hardship pursuant to general contract principles of international law

The term hardship is widely known to describe a situation where changes in circumstances have caused that an obligor is bound by an unbearable obligation and by a contract that will have lost its economic purpose.[19] The CISG does not provide for a definition of hardship. However, the UPICC and the PECL explicitly include provisions on hardship and the International Chamber of Commerce (ICC) has drawn up a hardship clause.

[14] Lookofsky, *Understanding the CISG* at 32
[15] Ibid at 33 ff.
[16] Steensgaard, *Boundaries for Expansive Interpretations* at 47
[17] Fogt, *International privatret* at 491
[18] Bonell, *Two Complementary Instruments* at 101
[19] Fontaine and De Ly, *Drafting International Contracts* at 455

### 2.1.1 Definition of hardship

#### *2.1.1.1 UPICC Art 6.2.2*

The UPICC hardship definition is inspired by commercial practice and although it does not origin from any domestic legal system, it resembles some features from several legal systems of doctrines on changed circumstances. Pursuant to UPICC Art 6.2.2 hardship is defined as a situation where the occurrence of an event fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, which essential means that the contract becomes extremely burdensome for one of the parties. The change in circumstances often leads to the result of an economic burden thrusted upon one of the parties.[20] Hardship is thus a situation where it is not impossible to perform, but merely excessively more onerous compared to the situation which the contract was concluded upon.

Under Art 6.2.1 the contract as a starting point has to be performed even if it becomes more onerous for one of the parties. It is an essential requirement in order to invoke hardship that the equilibrium has been fundamentally altered. A fundamental alteration may consist of either an increase in the cost of the performance or in a decrease in the value of the performance received by one party. When the price for performing increases substantially, it may be due to an increase in raw material or to new safety regulations which require a more expensive production. A decrease in the value of the performance received by one party may be due to an extraordinary change in the market conditions such as a price inflation. However it has to be objectively measurable. It may also be due to a frustration of the purpose of the contract, but only if the purpose was known or at least ought to have been known to both parties.[21] Furthermore it is required that the event occurs or become known after the conclusion of the contract. This requirement relates to risk assumption, as it is presumed that if the party had known about the event causing hardship when entering in to the contract, it would have been able to take it into account at that time. Therefore, it will have assumed the risk and may subsequently not rely on hardship as a defence. A regularly devaluation of the currency may be foreseeable, but a huge depreciation due to a political crisis is not. It is not a requirement that the party did not expressly take on the risk, as it may follow from the nature of the contract that the party bears the risk. In a speculative transaction, the party will in general be presumed to have assumed the risk.[22] Hardship is by its definition relevant only when the contractual obligation is not yet performed and in most cases only relevant in regards to long-term contracts.[23]

#### *2.1.1.2 PECL Art 6:111*

The definition of hardship based on the PECL is very similar to the definition of hardship under UPICC. Although the PECL does not explicitly require that the event has to be beyond the control of the party, it can be implied. The UPICC requires that the event occur or become known to the disadvantaged party after the conclusion of the contract, whereas PECL Art 6:111(2)(a) requires that the change of circumstances occur after the time of the conclusion of the contract. This does not have an impact, as the outlet of both provisions is the same. The issue deals with the fact that the risk of the occurrence of the event cannot have been assumed by the party. If the party knew of those events when entering into the contract, it would have been able to take the event into account. The observance of the contract under Art 6:111(1) marks the balance between *pacta sunt servanda* and *rebus sic stantibus* and allows for a contract to become inapplicable, if there is a fundamental change of circumstances.[24] As it is required that performance is excessively onerous, it is clear that it takes more

[20] Flambouras, *The Doctrines of Impossibility* at 279
[21] UPICC Art 6.2.2, comment 2
[22] Ibid comment 3
[23] Ibid comment 4-5
[24] Lindström, *Changed Circumstances* at 5

than just a lost profit.[25] This indicates that there is a certain threshold of how much the disadvantages party must endure. Since the performance does not have to be impossible, but merely excessively onerous, there is a limit. Although a profit loss is not enough, the obligor cannot be expected to perform if it is ruinous. The doctrine of hardship is less strict compared to force majeure, but it is not an easy escape.

#### *2.1.1.3 ICC Hardship Clause 2003*

The ICC Hardship Clause is similar to the definition under the PECL and the UPICC. The explicit reference to *pacta sunt servanda* establishes that the requirements under the clause are to be understood strictly.[26] The requirement that the obligor did not assume the risk is not explicitly provided for in the hardship clause. However it requires that the obligor could not have taken the event into account at the time of the conclusion of the contract. The hardship clause is not limited to situations where the events occurred after the time of the conclusion of the contract. Thus the party may invoke hardship if he did not know and could not have known of the existence of the event at the time of the conclusion of the contract.[27] The hardship clause explicitly provides for the requirement that the party could not reasonably have avoided or overcome the event or its consequences. This emphasizes that there is a sacrifice threshold.

### 2.1.2 Effects of hardship

Due to the changes in circumstances, the disadvantaged party has an interest in being released from the contractual obligations. Both UPICC Art 6.2.3 and PECL Art 6:111(3) prescribe that the disadvantaged party is entitled to request renegotiations with the view to adapting the original terms of the contract to the changed circumstances. Based on the general principles of *good faith* and *fair dealing* and to the *duty of cooperation*, both parties must negotiate constructively. If renegotiation fails, the court may either adapt the contract in order to restore its equilibrium or it may terminate it. Similarly the ICC Hardship Clause prescribes that the parties are bound to renegotiate the contract and in case alternative contractual terms cannot be agreed upon, the party invoking hardship is entitled to terminate the contract. Adaptation of the contract involves a fair distribution of the losses between the parties in accordance with the risk allocation. Termination of the contract does not require a fundamental non-performance when the event has caused a fundamental change in the equilibrium. Thus, the court may terminate the contract *at a date on terms to be fixed*, cf. UPICC Art 6.2.3(4)(a).

## 2.2 Some domestic doctrines on changed circumstances

### 2.2.1 Imprévision

The doctrine of *Imprévision* is governed by Art 1195 of the French Civil Code. It deals with a situation where an unforeseeable change in circumstances makes the obligations unbalanced and subsequently excessively burdensome for one of the parties. The doctrine allows the disadvantaged party to require renegotiation of the contract and if the renegotiation fails, the parties may agree to terminate the contract. If the parties cannot reach an agreement the court may revise the contract or terminate it. Under the doctrine, it is an essential requirement that the economic imbalance is extremely disproportionate and therefore it is a rather strict doctrine. Under French contract law *pacta sunt servanda* is fundamental and therefore the French court in principle refused to apply *Imprévision* to commercial contracts before the principle was incorporated into the French Civil Code in 2016.[28]

[25] Lando, *Salient Features of the PECL* at 367 ff.
[26] ICC Hardship Clause, Note c)
[27] Ibid, Note d)
[28] Fontaine and De Ly, *Drafting International Contracts* at 454

### 2.2.2 Wegfall der Geschäftsgrundlage

The theory of *Wegfall der Geschäftsgrundlage* which means disappearance of the foundations of the contract is governed by the German Civil Code, the Bürgerliches Gesetzbuch section 313. It is a rather flexible approach which regards that all contracts have a basic purpose that originates from the basic intention of the parties, which cannot be achieved if the existing environment is changed. Thus it has been considered to be very similar to *rebus sic stantibus*. According to the *Geschäftsgrundlagenlehre* the court may change the terms of the contract or terminate it. Since the doctrine aims at an adaptation of the contract, it is regarded to be close to the meaning of hardship.[29]

### 2.2.3 Frustration

In England, the courts have developed the doctrine of f*rustration*, which is based on the interpretation of the intent of the parties. The doctrine of *frustration* originates from the doctrine of *impossibility*, and therefore *frustration* covers both cases of Impossibility and cases where the contract has been rendered purposeless. Under the doctrine of frustration, the contract is considered to be frustrated if its execution is fundamentally and essentially different from what the parties had intended when the contract was concluded. The reasoning behind the doctrine is that the contract would amount to a completely new contract if it was still to be performed. A contract may be frustrated by impossibility or by a change in circumstances and therefore it covers situations where performance is not completely impossible, which makes the scope of application wider than the concept of force majeure. Nevertheless it is narrow in application. It differs from some of the other domestic doctrines including the concept of hardship, as it does not provide for renegotiation or adaptation of the terms of the contract. Instead of adapting the contract to the new situation, the court may simply discharge the contract.[30]

### 2.2.4 Impracticability

The American concept of *impracticability* is based on the doctrine of *impossibility.* It is a commercial concept which reliefs a party's obligation to perform even if the occurrence of an event has not rendered the performance completely impossible. Thus a party may be exempted from the obligations if the performance has become excessively difficult, expensive or harmful by an unforeseen contingency. However it takes a lot for the court to exempt the party, as the test is rather strict and close to *impossibility*. The concept differs from hardship, as it does not provide for an adaptation of the contract.[31]

## 2.3 Hardship compared to force majeure

Force majeure provides for an exemption of the obligations in case performance is rendered impossible. Since there is a slight difference in how the various domestic legal systems define the concept, the international definition of force majeure contains some overall characteristics and originates from international trade practice. Pursuant to UPICC Art 7.1.7, force majeure is defined as a situation where the non-performing party is excused due to an impediment beyond its control which it could not reasonably have been expected to take into account at the time of the conclusion of the contract, or to have avoided or overcome. Put in another way, force majeure is an unforeseeable and unavoidable event which is beyond the party's control. Force majeure leads to a suspension of the main obligations of both contracting parties, which means that non-performance is excused and that liability

[29] Rimke, *Force Majeure and Hardship* at 207 ff.
[30] Ibid at 203
[31] Ibid at 205

for damages is exempted. In cases where the impediment prevents any performance at all, the parties are released from the contractual obligations.
The main characteristics of both hardship and force majeure are firstly the existence of an impediment. Force majeure requires an impediment to perform, whereas hardship entails an occurrence of an event which fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished. Another common requirement is that the obligor did not assume the risk of the occurrence of the event. Moreover, only external events which are beyond the control of the obligor are relevant. Causation is required in regards to both force majeure and hardship. Furthermore both concepts require that the event could not reasonably have been overcome, which indicates that there is a certain threshold for what the parties might endure.
Both force majeure and hardship extinguish the right to require performance by virtue of UPICC Art 7.2.2. Impossibility in law or fact prevents specific performance by its very nature. Moreover, a drastic change in circumstances after the conclusion of a contract might have the impact that performance of the contract becomes so onerous that it would be a violation of the general principles of good faith and fair dealing to require it. Consequently, specific performance cannot be required when the performance is unreasonable burdensome or expensive.
Although hardship and force majeure share some operative facts, they are two distinct concepts. Under hardship the performance might be excessively burdensome, although not impossible, whereas a force majeure event completely prevents the performance either temporally or permanently.
Furthermore, hardship and force majeure cause very different legal effects. Hardship will usually lead to a renegotiation or adaption of the relevant terms of the contract in order to restore the balance of the contract or as a last resort a termination of the contract. Force majeure on the other hand suspends the performance until the event, which has rendered the performance impossible, no longer exists or, only in a case of completely impossibility, terminates the contract.[32] Force majeure does not affect other remedies than the right to claim damages. Pursuant to UPICC Art 7.1.7(4), a party may still exercise a right to terminate the contract or to withhold performance or request interest on money due. Hardship, however allows for renegotiation, adaptation or termination of the contractual terms of the entire contract.
To sum up, force majeure aims to settle issues arising from the non-performance, whereas hardship aims at an amendment of the contract.[33] Consequently, force majeure directs the contract to a settlement, whereas hardship to a greater extent maintains the contract as a future-oriented ongoing relationship, although on the basis of revised terms. By providing two different systems the drafters have ensured that the legal consequences are sufficiently flexible.

## 2.4 Economic force majeure

Traditional force majeure excuses the obligor under the very strict condition that performance has been rendered impossible. The concept of *impossibility* includes both physical impossibility where specific goods have been destroyed as a result of third parties or natural disasters and legal impossibility where the performance is rendered impossible by an act of public authority.[34] Economic force majeure, on the other hand, is a situation of *quasi-impossibility*, where the performance is possible, but at a cost which would be ruinous for most obligors. Some domestic legal systems regard that force majeure entails impossibility, e.g. the French doctrine of force major, which is rather strict,

[32] Fontaine and De Ly, *Drafting International Contracts* at 456
[33] Rimke, *Force Majeure and Hardship* at 197 ff.
[34] Brunner, *Force Majeure and Hardship* P 78

whereas other legal systems apply the rule even in cases, where performance is not physically impossible, but rather ruinous.[35]
Some regards that impossibility and economic impossibility should not be treated differently, since it would require a clear distinction between the two types of impossibilities. And all impediments will eventually have an economic consequence. Moreover, an impediment will only excuse non-performance if it cannot reasonably be overcome, i.e. at reasonable additional costs. Subsequently, economic force majeure may occur in a situation where a factual impediment can only be overcome at an additional cost. A scenario where performance is completely impossible is extremely rare in the modern world of trade with technological developments and expanding worldwide procurement opportunities.[36] However, this paper regards that a distinction between force majeure and economic force majeure is necessary, since traditional force majeure is a strict concept that requires impossibility in law or in fact either temporarily in order to suspend the performance or permanently in order to terminate the contract.
Furthermore it might be argued that economic force majeure differs from hardship. Economic force majeure is a situation where the cost of performance has increased while the obligee's interest in the performance stays unaffected, which causes a gross disproportion between the obligor's increased cost and burden compared to the obligee's performance interest. Hardship, is either a situation where the cost of performance has increased or a situation where the value performance received by the other party has decreased. However the two concepts seem extremely similar.
It has been argued that economic force majeure differs from hardship in regards to the effect, so that the consequence of economic force majeure is that the obligor is exempted from his obligation to perform, whereas the consequences of hardship are renegotiation, adaptation or termination of the contract.[37] However, this paper maintains that economic force majeure and hardship should be treated alike. Both concepts regard a situation where performance is theoretically possible, but at a cost which is more ruinous or onerous. Since hardship and economic force majeure deal with the same factual issue, it does not make sense to infer two different concepts with two different legal effects. Subsequently, this paper assumes that economic force majeure and hardship is the same.

## 2.5 Conclusion

The domestic doctrines provide for a wide range of concepts with different remedies. Some doctrines are more flexible and aim at keeping the contract alive, whereas others simply pursue to terminate it. The international concept of hardship in drafted international commercial soft-law principles is flexible and aims at restoring the balance of the contract by amending the contractual terms.
The following definition is subject to the meaning of hardship within this paper: A situation where an occurrence of an event fundamentally alters the equilibrium of the contract, which subsequently makes the performance of the contractual obligation extremely onerous or meaningless for one of the parties, but not impossible. The legal effects of hardship are renegotiation, adaptation or termination of the contract.

[35] Lando, *Salient Features of the PECL* at 366
[36] Brunner, *Force Majeure and Hardship* P 215
[37] Ibid P 214

# 3 Uniform interpretation, application and gap-filling

## 3.1 Uniform international law of sales

A unified sales law is fundamental in international trade in order to remove legal barriers and avoid conflicts of law. The CISG is the outcome of a long process of unification in international trade law.[38] The two preceding conventions from 1964, the Convention relating to a Uniform Law on the International Sale of Goods (ULIS) and the Convention regulating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), show that the intent to draft an international convention for the sale of goods existed before the drafting of the CISG. As only 9 states ratified the ULIS and ULF, it was decided to draft a new convention.[39] The first draft of the CISG was made in 1978. In 1980 it was finalized and approved at a diplomatic conference in Vienna, after which it was ratified by 11 states. The CISG which entered into force in 1988 is today ratified by 84 CISG states.[40] According to the preamble of the CISG, the adoption of the CISG is based on the establishment of an international economic order and the objective to develop international trade on the basis of equality and mutual benefits in order to promote friendly relations among the CS. The consideration behind the adoption of the uniform rules which govern contracts for the international sale of goods, is that a uniform sales law will contribute to remove legal barriers and promote the development in international trade. Without the CISG, PIL would determine the applicable law, which eventually would result in less predictability in international trade. By virtue of the CISG, it is possible to predict the legal position.

## 3.2 CISG Art 7

Art 7 defines the procedure for the interpretation of the Convention. First the court has to interpret whether the matter is settled by the CISG. Secondly, if the matter is governed but not expressly settled it has to be solved in conformity with the general principles on which the CISG is based. If it is not possible to settle the issue within the CISG, the matter has to be settled in conformity with the law applicable by virtue of PIL. Art 7 aims at settling the matter within the four corners of the CISG, which entails uniform application and legal certainty.

### 3.2.1 Interpretation and application pursuant to Art 7(1)

CS courts must have regard to the international character of the CISG and to the need to promote uniformity. The two requirements are corelated, as the overall aim is to ensure that the CISG is respected as an international autonomous and uniform law of sales. Furthermore courts are required to interpret the CISG in a way that promotes the observance of good faith in international trade.

Uniform interpretation is obtained when different courts attribute the same meaning to the text, whereas uniform application leads to similar outcomes. Uniform interpretation thus enhances the chances of achieving uniform application. Uniform application entails legal certainty, as similar cases are treated similarly. Domestic courts have a tendency to have regard to what is familiar when settling an issue, especially when the terminology is reminiscent. Furthermore, the CISG has been criticized due to the fact that there might be more than one interpretation attached to some of the key provisions, which increases the risk of non-uniform application. However, to have regard to the international

[38] Vienna Analysis of Comments and Proposals
[39] Slater, *Overcome by Hardship* at 236
[40] List of CS

character means to disregard domestic principles and concepts. Courts thus have to steer clear of the homeward trend in order to interpret and apply the CISG uniformly.[41]

In the interpretation of the CISG, the first step is to look into the plain meaning of the black letter text. However, as not all provisions have a clear meaning, it might be necessary to supplement the CISG with secondary sources of CISG law. Based on the legislative history, it might be possible to derive the intention behind the text. However the legislative history is limited due to the fact that there is not an official commentary and since the Secretariat Commentary to the 1978 draft does not provide for any authority on how to interpret the 1980 text. Moreover, the relevance of the proposals and discussions during the drafting of the CISG is debatable. To have regard to the international character furthermore means to take foreign CISG case law into account. However it does not imply a strict requirement, which attributes foreign precedents a binding authority.[42] Accordingly, several courts have expressly stated that foreign precedents merely have a persuasive, non-binding authority.[43] The CISG Digest provides for a limited source of CISG law, as it does not evaluate the persuasiveness of precedents.[44] This issue relates to the fact that there is not any supranational court at the top of the pyramid to clear out any differences. Schlechtriem has stated that the requirement in Art 7(1) compels a discipline that members of an orchestra without a conductor must exercise.[45] Correspondingly Lookofsky has stated that many reasonable examples of harmonious application of the CISG have been provided by CS courts. However since they *do not play the same tone*, the aim of harmonization is not reached. This emphasizes the need for an international court on the top of the pyramid to act as *the conductor* in order to reach the aim of uniformity. Since the legislative history is limited and the CISG case law is unauthoritative, there is a greater need for scholarly opinions, when the wording of the text is not clear. However the scholarly opinions must of course be ranked as a less significant secondary source of CISG law. Moreover scholarly opinions might not reflect a *uniform view*, and some CS have a tendency to rely on homegrown scholars.[46]

Since the CISG has not been modified since it came into force in 1980, it might require a dynamic interpretation in order to ensure that it is possible to adapt the CISG to circumstances which were not known at the time of the drafting of the CISG in order to maintain its relevance. Dynamic interpretation means to interpret the convention in accordance with external circumstances like time and legal context and therefore a dynamic interpretation entails an interpretation in both the historical and the current context. Contrario, static interpretation means to interpret the CISG in accordance with the original intent of the drafters. [47]

In the interpretation of the CISG, domestic methods must be set aside. Some jurisdictions have a tendency to read more into the text than what the black letter text suggests, whereas other jurisdictions stick to the wording of the text. Furthermore there might be differences in how much weight the secondary sources of law are attributed based on the jurisdictions. Legislative history might be fundamental in some jurisdictions, whereas case law is essential in others. Uniformity is reached only when the CISG consistently is interpreted the same way and since there is not a common method of interpretation, uniformity is diminished. The matter of narrow and extensive interpretation relates to

[41] Lookofsky, *Understanding the CISG* at 28
[42] Ibid at 32
[43] CISG Digest, Art 7, para 8
[44] Lookofsky, *Walking the Tightrope* at 88
[45] Schlechtriem, *Bundesgerichtshof* at 2
[46] Lookofsky, *Understanding the CISG* at 35
[47] Jiang, *Dynamic Interpretation* at 4 ff.

the determination of the boundaries of the CISG, and since some courts have an expansionistic and dynamic approach, the boundaries of the CISG are stretched and the scope broadened.[48] It is disputed whether extensive or narrow interpretation is best suited in the interpretation of the CISG. Bonell has argued that there is not a valid reason to adopt a narrow interpretation. Instead of sticking to its literal and grammatical meaning, courts are expected to take a much more liberal and flexible attitude and look to the underlying purposes and policies of individual provisions as well as of the CISG as a whole.[49] Contrario, Steensgaard has argued that since the CISG is based on compromises, it is of great importance to respect its limits. Consequently CS cannot impose overly extensive or restrictive interpretation practices from domestic law.[50] According to Lookofsky, most national courts prefer a narrow CISG interpretation. Nevertheless, most CISG academics prefer the expansive interpretation which they often refer to it as the *prevailing opinion.*[51]

### 3.2.2 Gap-filling pursuant to Art 7(2)

Through interpretation in accordance with Art 7(1), it is ascertained whether an issue is governed and settled. A matter that is governed but not expressly settled is considered an *internal gap*. A matter that is excluded from the CISG is considered an *external gap*, which is to be settled through the domestic law applicable by virtue of PIL. Under Art 7(2) internal gaps are to be settled in conformity with general CISG principles and only as a last resort, the matter may be settled in conformity with the applicable law by virtue of PIL. Art 7(2) provides for a significant gap-filling tool, as the CISG does not have a supranational court that might settle internal gaps. Furthermore some matters were left unsettled, as the UNCITRAL working group could not reach an agreement.

The gap-filling tool aims at avoiding recourse to domestic law in order to solve matters within the four corners of the CISG, which ensures a higher degree of harmonization, uniformity and legal certainty. Art 7(2) offers a balanced middle way between two roads that both put a string on harmonization. Too much freedom in the interpretation of the CISG might lead to law-making, which violates harmonization. On the other hand, it defies the aim of uniformity if courts turn to domestic law when settling issues within the CISG. However the scholars who generally favour an expansionistic interpretation of the CISG prefer to avoid resorting to domestic law and they therefore tend to be bold when applying the Art 7(2) rule. They might even settle issues, which were unsolvable at the time of the drafting of the CISG.[52]

#### *3.2.2.1 General principles on which the CISG is based*

Recourse to general CISG principles promotes uniformity in the application of the CISG. The general CISG principles are inferred from underlying principles of the provisions. Some general principles are reflected in the wordings of the provisions, which means that they are regulated within the CISG and apply to the CISG as a whole. Other principles might be found through an analysis of several provisions which all serve an overlapping purpose.[53]

[48] Lookofsky, *Not Running Wild* at 141
[49] Bonell, *Article 7* at 73
[50] Steensgaard, *Boundaries for Expansive Interpretations* at 43
[51] Ibid at 43
[52] Lookofsky, *Understanding the CISG* at 42
[53] Janssen and Kiene, *The CISG and Its General Principles* at 271

#### *3.2.2.2 International principles*

It is expressly stated in the UPICC Preamble, that it may be used to interpret and supplement international uniform law instruments,[54] and therefore it is of great relevance to examine whether or not and to what extent the UPICC may supplement the CISG in interpretation and gap-filling.

Some scholars have argued that international principles do not play a role in regards to the CISG, as the UPICC was drafted later than the CISG, which means that it could not have been the intent that the CISG should be supplemented by the UPICC in its interpretation and gap-filling. Accordingly, a literal interpretation of the wording *general principles on which the CISG is based* indicates that only general CISG principles are relevant. However, Ferrari considers that external principles such as the UPICC might be useful to collaborate a solution reached through the application of the CISG rules.[55] Garro regards that since the CISG does not inform which provisions are considered to be the general CISG principles, the UPICC are a part of the underlying principles.[56] He finds that it is more fair to stick to international standards than to fall back on domestic law that might unfairly benefit one of the parties. Moreover the application of the UPICC is more consistent with the aim to unify legal rules. Subsequently Garro argues that the court should resort to the UPICC when filling a gap, since recourse to domestic law should be the last resort.[57] Accordingly, in *Netherlands Arbitration Institute, 10.02.2005* the arbitral tribunal found that the UPICC are principles in the sense of Art 7(2).[58] Bonell favors a more balanced solution, where the court must try to solve the issue autonomously within the CISG and only if it is not possible to do so, the solution should at least be found on the basis of standards which are generally adopted in other legal systems.[59] He finds it formalistic and non-convincing that just because the CISG was drafted before the UPICC, it does not have any relevance. On the other hand, he finds it too excessive to justify the use of UPICC to interpret or supplement the CISG just because they are general principles of international commercial contracts. Bonell thus argues that in order for the individual provisions of the UPICC to be used to fill the gap, pursuant to Art 7(2), they have to reflect the general principles underlying also the CISG.[60] Flechtner regards that UPICC may be consulted as a non-authoritative source of opinions about general CISG principles, but they cannot provide for any authority to declare which principles the CISG is based upon.[61] Even if the UPICC and the PECL are not considered general CISG principles, they might still play a role. In *Rechtbank Zwolle, the Netherlands, 05.03.1997* the courts found that the UPICC may help determine the precise meaning of general CISG principles.[62] Correspondingly, it has been argued that autonomous interpretation does not mean that the solution has to be found within the four corners of the CISG, as external principles might play a significant role. Primarily because of the need for a dynamic interpretation, which should include a methodology that involves applying international principles, such as the UPICC before resorting to domestic law.[63]

It is probably too extensive to conclude that international principles such as UPICC and PECL are CISG principles. Consequently, it seems questionable that CISG matters are to be settled in conformity with UPICC as *general CISG principles*. However it remains inconclusive whether international principles may be applied as a supplement in the procedure of settling matters.

---

[54] UPICC Preamble, comment 5
[55] Ferrari, *Gap-filling and Interpretation* at 90
[56] Garro, *The Gap-Filling role of the UPICC* at 1156
[57] Ibid at 1159
[58] CISG Digest, Art 7, para 34
[59] Bonell, *Article 7* at 81 ff.
[60] Bonell, *Two Complementary Instruments* at 110
[61] Flechtner, *The Exemption Provisions* at 97
[62] CISG Digest, Art 7, para 35
[63] Viscasillas, *The Role of the PECL and the PECL* at 301

#### *3.2.2.3 Domestic principles*

In accordance with the procedure prescribed by Art 7(2), recourse to domestic law by virtue of PIL must be the last resort.[64] Courts should thus avoid domestic principles when settling matters. Accordingly, the court stated in *Amtsgericht Hamburg-Altona, Germany, 14.12.2000*, that general principles of domestic law cannot be used to fill the internal gaps, as it would violate the principle of uniform application. Consequently, the court may settle the matter in conformity with the applicable law by virtue of PIL, only when the matter cannot be settled in conformity with the general CISG principles.

## 3.3 Conclusion

The CISG aims to harmonize domestic rules and to promote international trade by providing a modern, uniform and fair regime for contracts for international sale of goods. The application of the CISG avoids recourse to domestic law, which creates a higher degree of legal certainty and predictability in international trade.[65] The CISG has to be interpreted in accordance with its purpose and objective to promote international trade. Since the states did not want to give up sovereignty to a supranational CISG court, it is crucial that domestic courts fulfil the obligations under Art 7.[66]

Since the CISG aims at being an autonomous and uniform sales law, it is important that courts interpret and apply the CISG uniformly. Uniform interpretation is challenging due to the limited legislative history combined with the homeward trend, as domestic courts might infer different meanings from the provisions. Elastic and unclear terms and wordings might end up having several different meanings if courts interpret them in accordance with domestic concepts and principles, which counteract uniform application.[67] Accordingly, the best way to avoid the homeward trend is to ensure that there are no vague terms.

Due to legal, social and economic differences some issues had to be excluded from the scope of the CISG, while other issues were left more or less unsettled.[68] This has to be kept in mind in the interpretation and gap-filling of the CISG. Art 7(2) provides for a tool which makes it possible to settle matters within the four corners of the CISG without resorting to domestic law. As the procedure is a balanced middle way between two extreme approaches that both have a negative impact on uniformity and predictability, it is imperative to respect the limits of the gap-filling tool and the CISG as whole when a solution does not exist within the CISG. Courts should accept that there is a gap, which cannot be filled and subsequently recourse to domestic law, rather than indirectly having domestic law influencing the solution.

[64] CISG Digest, Article 7, para 10
[65] UNCITRAL, Texts and Status
[66] Keily, *Harmonisation and the CISG* at 10 ff.
[67] Lookofsky, *Understanding the CISG* at 32
[68] Bonell, *Two complementary instruments* at 101

# 4 CISG Art 79

## 4.1 The intention behind the adoption of CISG Art 79

The binding force of contracts entail that non-performance is considered a breach of contract, which the party is liable for regardless of fault. Art 79 provides for an exemption from the strict liability and constitutes the counterbalance of *pacta sunt servanda*, which is otherwise applicable under the CISG.[69] CISG Art 79 originates from ULIS Art 74 and requires that the non-performance was due to an unforeseeable impediment beyond the obligor's control, which he could not be expected to avoid or overcome.

Pursuant to ULIS Art 74, the party is not liable for non-performance if it can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account, or to avoid or to overcome. Because of the wording of ULIS Art 74, the provision was criticized for excusing the obligor too easily for non-performance of the contract on the grounds of changed circumstances. With the revision of the provision the intent was to restrict the grounds for exemption and as a result the interpretation of Art 79 is rather strict.[70]
The requirements for exemption in ULIS 74 was narrowed by replacing exemption based on *circumstances* with *due to an impediment* because of the concerns that a reference to *circumstances* could make it look like it was possible to be granted exemption in cases where the performance became more difficult or unprofitable.[71]
The intention behind Art 79 was to create an autonomous provision with its own definition, in order to ensure that domestic concepts would not influence its meaning. Thus the CISG avoided reference to the various domestic theories of force majeure and hardship and developed an autonomous system.[72]
The legislative history and the nature of the provision as an exemption to the otherwise strict liability of the CISG, indicate that the provision has to be interpreted narrowly and strictly.

## 4.2 The elements of CISG Art 79

Non-performance is considered a breach of contract, which the party is liable for. However, under Art 79(1)-(5), a party is exempted from liability provided that the following prerequires are met: The non-performance was (1) due to an impediment (2) beyond the party's control, (3) the impediment was unforeseeable at the time of the conclusion of the contract and (4) the party could not be expected to avoid or overcome the impediment. The party claiming the exemption has the burden of proof.[73]
Provided that the prerequisites are met, the party may be exempted. However, as a starting point, the exemption is temporarily, since the exemption has effect for the period during which the impediment exists. In order to be granted an exemption, the non-performing party must notify the other party of the impediment and its effect on his ability to perform within a reasonable time. Furthermore Art 79(2) provides for an exemption in cases where the party's non-performance is due to a third persons fault. Finally, Art 79(5) prescribes that remedies other than damages may still be claimed.

[69] Lindström, *Changed Circumstances* at 1 ff.
[70] Rimke, *Force Majeure and Hardship* at 211
[71] Honnold, *Uniform Law* at 484
[72] Tallon, *Article 79* at 574
[73] Lookofsky, *Understanding the CISG* at 149

### 4.2.1 Due to an impediment

The adoption of the word impediment aimed at emphasizing the objective nature of the hindrance rather than its personal aspect.[74] Personal aspects such as insolvency or aspects within the supply chain cannot amount to an impediment, since a party in general assumes the risk of his own inability to perform.[75] Based on the fact that the CISG is subject to strict liability combined with the legislative history, it is clear that *impediment* most probably indicates an external barrier to performance. Since *impediment* is not defined in the CISG and since the provision does not provide for an exhaustive list of examples, it is difficult to define what exactly is regarded an *impediment* within the meaning of Art 79(1). According to the principle of *impossibilium nulla obligatio est*, there is no obligation to do impossible things. Events such as war, export- and import bans and natural disasters will in most cases live up to the premise.[76] While impossibility is recognized as an impediment, it is disputed whether a situation, where the performance has become much more difficult, yet not impossible, may constitute an impediment within the meaning of Art 79.

### 4.2.2 Beyond the party's control

The occurrence of an impediment is not in itself enough. It is fundamental that the impediment is beyond the control of the obligor, which essentially means that the obligor is responsible for all events that normally are within its control and therefore the actual ability to control the occurrence of the impediment in question is not decisive. The element is an indication of the external character of the impediment.[77] The obligor's sphere of control is wide and there will rarely exist an impediment beyond his control.[78] The obligor is always responsible for impediments when he could have prevented them, but failed to do so.[79] The issue relates to the risk assumption. In order for an impediment to be beyond the obligor's scope of control, the impediment has to be beyond the scope of risk assumed by the party.

### 4.2.3 The impediment was unforeseeable at the time of the conclusion of the contract

Furthermore, it is a precondition that the party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, which means that the impediment has to be unforeseeable. If the obligor does not take a foreseeable event into account in any provisions of the contract, he is considered to have assumed the risk of its occurrence.[80] As the prerequisites are cumulative, the obligor is liable for damages if the event is foreseeable, even in a case where the non-performances is caused by an event beyond the obligor's control. Since the prerequisite requires that the party could not have taken the impediment into account at the time of the conclusion of the contract, the party may also be exempted in case where the non-performance is caused by an impediment which existed at the time of the conclusion of the contract. If the party did not know or could not be expected to know about the existing impediment, the requirement is met.[81] As the obligor has to prove that he could not reasonably have foreseen the impediment, the subsequent question is what the obligor is expected to reasonably take into account. According to Tallon the requirement is a reference to *the reasonable person* otherwise known as *bonus pater familias*, who is a person halfway between the pessimist who foresees all sorts of disasters and the optimist who never anticipates

[74] Tallon, *Article 79* at 579
[75] Lookofsky, *Understanding the CISG* at 168
[76] Secretariat Commentary, *Guide to Art 79*, para 5
[77] Tallon, *Article 79* at 581
[78] Huber and Mullis, *The CISG* at 259
[79] Schlechtriem, *Uniform Sales Law* at 101
[80] Tallon, *Article 79* at 580
[81] Secretariat Commentary, *Guide to Art 79*, para 4

the least misfortune.[82] If an export ban is a foreseeable event to a reasonable person at the time of the conclusion of the contract, the export ban, even if it is an impediment beyond the obligor's control, cannot exempt the party from its liability. This element has been defined as the most difficult one to prove, as nearly all potential impediments to performance are foreseeable in the modern commercial environment.[83] Based on Tallon's reference to *the reasonable person*, the test thus involves the question of whether a person with the same knowledge would have taken the occurrence of the impediment into account at the time of the conclusion of the contract. The party is thus required to take into account all relevant measures when entering into the contract, or else he will be presumed to have assumed the risk.

### 4.2.4 The impediment could not have been avoided or overcome

The obligor is required to take reasonable efforts in order to avoid or overcome the impediment and its consequences. Only if the impediment is unavoidable, the obligor may be granted an exemption. According to Tallon, *to avoid* means taking all necessary steps to prevent the occurrence of the impediment. This element relates to the prerequisite that the impediment has to be an external event beyond the obligor's control. Similarly, Tallon argues that *to overcome* means to take all necessary steps to preclude the consequences of the impediment. Again *the reasonable person* is the reference point. In order for the impediment to be considered unavoidable for the obligor, he must have taken all the same measures as *the reasonable person* would have taken. An impediment within the meaning of Art 79 thus corresponds to an event, which is considered an external impediment beyond a reasonable person's influence.[84] Since Art 79 is vague, it is difficult to distinguish between impossibility of performance and difficulty of performance. As generic goods mostly will be replaceable, it is in general not an issue to overcome an impediment involving generic goods, as the performance would still be possible. However if the goods are of a limited kind, e.g. a rare metal produced in a single country, an export ban might constitute an impediment. If a product is lost at sea, but it might be retrieved at great costs, it depends on the characteristics of said product, whether the obligor is required to do what it takes to fulfill the obligations. [85] However, this issue relates to the discussion of whether Art 79 deals only with physical impossibility or whether also economic impossibility is covered.
As already stated, almost all impediments are surmountable. It is only an issue of how much the obligor is required to sacrifice in order to perform in accordance with the contractual obligations.
Under Art 79, the exact threshold, if any, for when it becomes too expensive to perform has not been established. Instead it depends on the individual case assessment.[86] Other elements, such as the time of the occurrence of the impediment might be included in this assessment, since an occurrence of an impediment long before the performance is due might be easier to overcome compared to an impediment that occurs just before the contract has to be performed. As for Art 79(1) in whole, the assessment has to be strict and allow for an exemption only in extraordinary cases. Accordingly Tallon considers that even if the CISG appears to refer to a more flexible standard than that of traditional force majeure, it is undoubtedly stricter than f*rustration* or *impracticability*[87]

### 4.2.5 Effects of impediment

A party is not liable for damages when an impediment causes non-performance. However, under Art 79(5), the existence of an impediment does not affect any right other than to claim damages. The

[82] Tallon, *Article 79* at 580 ff.
[83] Secretariat Commentary, *Guide to Art 79*, para 5
[84] Rimke, *Force Majeure and Hardship* at 216
[85] Tallon, *Article 79* at 581
[86] Ibid at 582
[87] Tallon, *Article 79* at 592

aggrieved party has the right to declare avoidance of the contract even though the breach of contract is excused and the liability is exempted, provided that the breach is fundamental. The effect of avoidance is subsequently that the parties are released from their contractual obligations.

During the drafting of Art 79, it was discussed whether Art 79 should affect other remedies than damages. The German delegate proposed that paragraph (5) should state that: *Nothing in this article prevents either party from exercising any right other than to claim damages or to require performance under this Convention*. However concerns were expressed that it would exempt the obligor from other contractual remedies connected with the obligation to perform,[88] such as interest.[89] Moreover, it would not make sense to refer to specific performance under Art 79, since performance in case of *impossibility* by definition is impossible.[90] The proposal was thus rejected by 19 votes to 15.[91] Consequently, the existence of an impediment does not extinguish specific performance. However, it should be noted that avoidance and specific performance preclude each other.

### 4.3 Criticism of CISG Art 79

As stated above, the consideration behind Art 79 was to create an autonomous provision with its own definition. However, the autonomy makes the interpretation of Art 79 extremely difficult, as the provision leaves room for judicial interpretation and courts have a tendency to resort to the domestic concepts for guidance.[92]

Several commentators have found that Art 79 is a vague and imprecise provision that contains elastic words which might be interpreted by the courts in the view of the domestic legal systems. It has been regarded a *chameleon-like* example of *superficial harmony* that may be interpreted in conformity with the reader's background.[93] According to Tallon *impediment* creates several contradictions and ambiguities and some courts might be tempted to rely on domestic provisions such as *Imprévision*, f*rustration* and *impracticability* instead of finding the solution within the CISG.[94] Nicholas considers that the weak link of the provision is reflected in the prerequisite that the non-performance was due to an impediment, as both *due to* and *impediment* are elastic words, which are difficult to interpret uniformly by domestic courts.[95] The elastic words combined with the different approaches in the domestic systems result in an unclear and non-uniform application of the provision. French law is very strict in regards to force majeure as it requires factual impossibility, whereas other approaches are more lenient. Since Art 79 is a rather young provision supplemented by a little amount of case law, the risk that the elastic terms will be read in context with domestic law is even more probable.[96] The prospect of achieving uniform application is greater when the terms and provisions are interpreted uniformly. The vague and imprecise nature of Art 79 puts a string on this aim, as domestic courts are further tempted by the homeward trend and the tendency to read the provision in light of domestic rules. Thus it is imperative that the courts steer clear of the homeward trend in accordance with Art 7(1). However that requires a clear legal status.

Furthermore the provision is incomplete, as it does not provide for a clear solution on the disputed matter of whether hardship is included. Even if hardship is allowed as a defence within the meaning

[88] Vienna Diplomatic Conference, 28th meeting, para 25
[89] Schlechtriem, *Uniform Sales Law* at 102
[90] Vienna Diplomatic Conference, 28th meeting, para 26
[91] Ibid para 44
[92] Tallon, *Article 79* at 574 and 594
[93] Kritzer, *International Contract Manual* at 642, cited in Rimke, *Force Majeure and Hardship* at 219, note 99
[94] Tallon, *Article 79* at 591
[95] Nicholas, *Impracticability and Impossibility* at 5-4
[96] Rimke, *Force Majeure and Hardship* at 227

of Art 79, the provision remains incomplete since it does not provide for the typical hardship remedies of renegotiation and adaptation of the contract.

### 4.4 Conclusion

Although Art 79 has an autonomous meaning, the neutral language in fact compromises the aim of uniform application, as it is too vague and elastic. The provision resembles UPICC Art 7.1.7 and seems to speak in terms of force majeure. In general it can be said that all the conditions are cumulative and correlated and that the test is rather strict. Since the CISG does not favor an easy exemption, Art 79 should probably be limited to situations where the impediment prevents performance.[97]

## 5 Does hardship fall within the scope of the CISG?

Based on the methodology under Art 7, the paper now analyses whether hardship falls within the scope of Art 79. The starting point for the assessment is the prerequisite that hardship is governed by the CISG. The subsequent questions are whether it is settled within Art 79 and in case it is not settled, whether the CISG contains a gap that may be filled with either general CISG principles or international principles such as the UPICC

### 5.1 Does CISG Art 79 settle the matter of hardship?

While impossibility may constitute an impediment, it is relevant to consider whether Art 79 applies when it is theoretically possible to perform the obligation, but it would be meaningless or extremely onerous. Whether hardship falls within the scope of Art 79 depends on whether *impediment* strictly requires that performance is impossible. The discussion relates to the issue of what a party should overcome, since it is generally possible to overcome an economic impediment. Economic impossibility is thus the limit of sacrifice beyond which the obligor cannot be reasonably expected to perform.[98] The wording of Art 79 suggests that the obligor must make a reasonable effort to perform, but it does not imply that the party is obliged to take on extraordinary obligations.[99] UPICC Art 6.2.1 and PECL Art 6:111 both state that even if the performance has become more onerous, the obligor has to perform. The obligor thus bears the risk of the performance becoming more onerous, even if that includes a heavy loss instead of the anticipated profit.[100] An event causing a price increase is an avoidable impediment under UPICC and PECL and thus assumingly also under CISG.[101]

#### 5.1.1 CISG Case law

In *Cour d'appel Colmar, France, 12.06.2001*, a Swiss seller and a French buyer concluded an eight year contract where each delivery was dependent on the end costumer's needs. As the market collapsed the end costumer decided to reduce the repurchase price, which resulted in the buyer refusing to take delivery. The court held that a reduction in the repurchase price was predictable and that a buyer who enters into a long-term agreement should protect itself against a predictable event as such. The case demonstrates how difficult it is to prove that the non-performance was caused by an economic impediment due to an unforeseeable event, which the obligor could not have taken into account. A reduced price in a long-term agreement is in general considered a foreseeable event, for which the party has assumed the risk. Similarly, a significant drop in market prices that arises after

[97] Honnold, *Uniform Law* at 478
[98] AC Opinion 7, para 38
[99] Lindström, *Changed Circumstances* at 8 ff
[100] UPICC Art 6.2.1, comment 1
[101] Lindström, *Changed Circumstances* at 5

the conclusion of the contract, is considered a foreseeable event. In *Rechtbank van Koophandel, Hasselt, Belgium, 02.05.1995*, the court found that a significant drop in the market price of the purchased goods after the conclusion of the contract did not constitute an impediment under Art 79. According to the court, price fluctuations are foreseeable events in international trade, which do not render the performance impossible. The economic loss caused by the significant price drop is a risk well included in the normal risk of commercial activities. Even though increased costs might impede the performance, the inability to make a profit is not enough in itself.[102] The two cases implies that even if an economic impediment is to be considered an impediment within the meaning for Art 79, there is a certain threshold for what the parties must endure in order to carry out the contractual obligations under the contract. Hardship requires that the performance has become excessively more onerous. Therefore, the obligor bears the risk of the performance getting more expensive or burdensome, even if it could not reasonably have been foreseen at the time of the conclusion of the contract. The buyer bears the risk of a decrease in the market price or a value loss in the purchased goods, whereas the seller bears the risk of a subsequent increase in the market price or an increase in the cost of performance.[103] In *Tribunale Civile di Monza, Italy, 14.01.1993*, the seller claimed avoidance of the contract for hardship due to a price increase of the goods by approximately 30 % between the conclusion of the contract and the delivery time. The court held in dicta that Art 79 requires that the performance is rendered impossible and that the CISG does not provide for a hardship remedy either in Art 79 or elsewhere and therefor the seller could not require an adaptation or termination of the contract. In the Arbitral Award, *Bulgarian Chamber of Commerce and Industry, 12.02.1998*, the seller was not obligated to accept the buyer's offer to modify the contract in a situation where the buyer asked the seller to stop deliveries and only paid a part of the price. Furthermore Art 79 did not cover the negative development in the market situation, problems with the storage of the goods, revaluation of the currency of payment and a decrease of trade volume in the construction industry, as those events are a part of the buyer's commercial risk. The case demonstrates that the CISG does not provide for hardship remedies and that the parties assume the risk of the contract becoming more onerous than expected.

Only one case supports the view that the CISG settles and allows hardship. In *Landgericht Aachen, Germany, 14.05.1993*, the court held in dicta that the application of the CISG precludes recourse to domestic law and that the German doctrine *Wegfall der Geschäftsgrundlage* does not apply, since the matter is exhaustively covered by the CISG. The case implies that the German court perceives that the issue is governed and settled, which is probably too broad of an interpretation.[104]

Based on several courts decisions, it is clear that negative market developments and fluctuations do not constitute an impediment within the meaning of Art 79. There seems to be an attitude that the CISG is a harsh regime and that there is a risk on market terms. Furthermore CISG case law seems to indicate that the CISG does not provide for hardship remedies, even if economic impediments are considered an impediment within the meaning of Art 79.

### 5.1.2 CISG legislative history

In accordance with VCLT Art 32 the drafting history of Art 79 is significant in the interpretation of whether hardship is settled under the CISG. However, it does not provide for a clear conclusion on whether hardship was intended to be included or excluded from Art 79. The fact that the word *circumstances* was changed into *impediment* suggests that the provision must be interpreted narrowly. Furthermore the intent was to create an autonomous meaning different from doctrines on changed

[102] Lookofsky, *Understanding the CISG* at 152
[103] Brunner, *Force Majeure and Hardship* P 214
[104] Slater, *Overcome by Hardship* at 257

circumstances such as hardship. It was considered to adopt a provision that would allow a party to *claim an adequate amendment of the contract or its termination* due to *excessive difficulties.* However the proposal was explicitly rejected[105] and overall, there was consensus against including hardship under the CISG.[106]

During the discussions[107] it was proposed by the Norwegian delegate to amend paragraph (3) so that the obligor would be exempted if *after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold him liable*.[108] Moreover it was suggested that if no agreement could be reached, the word *only* should be removed. The Norwegian proposal was rejected in its first alternative by 12 votes to 25 and the amendment of the omission of *only* was adopted by 19 votes to 12. Tallon regards that the amendment has no significance, but others have held that the intention behind the removal was to leave open the possibility that the exemption might continue even after the period during which the impediment existed.[109] However, even if interpretation may lead to a result as such, it would be unrealistic to assume that the court would reach that interpretation on the basis of an omission of a single word.[110] Lindström finds it unacceptable to interpret the omission of the word *only* as being equal to the content of the first proposal, as it would force a certain meaning into Art 79.[111] Furthermore, it should be noted that Honnold who considers that the removal has a great significance, strongly supported the Norwegian proposal.[112] Thus it seems more appropriate that the rejection of the Norwegian proposal implies that the intention was to exclude hardship. Moreover, the Secretariat Commentary states that neither Art 65, which is the counterpart to Art 79, nor any other provision would exempt the obligor due to a major change in the circumstances causing that the contract was no longer that originally agreed.[113] On the basis of the rejections of the proposals and the expressed concerns that doctrines such as *frustration* and *Imprévision* would be introduced, it seems incomprehensible that the intention was to include hardship. Since the test is rather strict and Art 79 has to be interpreted in accordance with the general view of the majority during the discussions, the legislative history seems to indicate that hardship is not allowed as a defence pursuant to Art 79.

### 5.1.3 Scholarly opinions

According to Nicholas it is out of place in the context of sale of goods to excuse an obligor due to changed circumstances which has made performance unexpectedly onerous. He regards that since the CISG does not provide for definition of hardship, it is difficult to define sufficiently what kind of changed circumstances that would allow for an excuse, which ultimately causes non-uniform application.[114] It has been argued that the term impediment seems to cover an insurmountable obstacle, which means that Art 79 is limited to cases involving a greater obstacle than hardship.[115] Since the CISG is rather strict and reflects a more traditional view of *pacta sunt servanda*, the CISG is limited to those impediments that result in impossibility of performance but not *impracticability, frustration*

[105] Honnold, *Documentary History* at 350
[106] Ibid at 185 and 252
[107] Vienna Diplomatic Conference, 27th meeting
[108] Vienna Diplomatic Conference, Summaries Article 79 and 80
[109] Honnold, *Uniform Law* at 491; Schlechtriem, *Uniform Sales Law* at 102, note 423; Nicholas, *Impracticability and Impossibility* at 5-17; Art 79 match-up with 1987 draft Art 65
[110] Nicholas, *Impracticability and Impossibility* at 5-18
[111] Lindström, *Changed Circumstances* at 11
[112] Vienna Diplomatic Conference 27th meeting, para 65.
[113] Secretariat Commentary, *Guide to Art 79*, note 5; Before the deletion of the word *only*
[114] Yearbook at 66 ff.
[115] Slater, *Overcome by Hardship* at 254

or *Imprévision*.[116] Flambouras has stated that the majority opinion is that hardship is not within the scope of the CISG Art 79 and therefor the CISG does not adopt the *clausa rebus sic stantibus* doctrine.[117] Lookofsky has stated that he would not solve the nightmare scenario, on which this paper is based, in favor of the disadvantaged party and he does not regard that the Danish court would either.[118]

Nevertheless, since case law is limited and the legislative history is not clear, several commentators have argued that economic hardship is settled by the CISG. Lando has stated that the CISG covers cases where it would be ruinous to perform the contract.[119] According to Schlechtriem, the general view during the discussions was that both physical and economic impossibility could exempt an obligor. Although the intent behind the revision of Art 79 was to restrict the grounds for exemption, Schlechtriem finds that it cannot be concluded on the basis of the change in terminology from *circumstances* to *impediment*, that an impediment constitutes impossibility, as it under very narrow conditions may constitute unaffordability.[120] Similarly, Honnold has stated that although the grounds for exemption has been narrowed, Art 79(1) seems to leave room for exemptions based on economic dislocations that provide an *impediment* to performance comparable to non-economic barriers that excuse failure of performance. Honnold considers that impossibility is not a precondition of an impediment. A change in circumstances that makes the performance excessively more difficult may constitute an impediment, if it constitutes a barrier to performance that is comparable to other types of exempting causes. [121] Likewise, Rimke has stated that the barrier evoked by the use of the term *impediment* is not limited to physical or legal bars to performance. Even though *impediment* probably requires an obstacle which prevents performance, it might refer to a more flexible standard than force majeure. How insurmountable the impediment has to be depends on a case-by-case analysis. Rimke thus argues that Art 79 might cover a situation between difficulty of performance and absolute impossibility.[122] Based on the presented opinions, it has been concluded that the prevailing view is that hardship is allowed as a defence under Art 79, as Art 79 does not only apply to cases where it is physically impossible to perform, but also cases where the performance has become excessively more burdensome.[123] The view has been 'codified' in the AC Opinion 7, which regards that hardship may qualify as an *impediment*, since the language of Article 79 does not expressly equate the term *impediment* with an event that makes performance absolutely impossible. Consequently, a party that finds itself in a situation of hardship may invoke hardship under Art 79.[124] Practical considerations are imperative for this view, as it is crucial to find a solution within the four corners of the CISG.[125] Based on the importance to promote the CISG as a uniform sales law, it has been argued that all available means should be exhausted in order to find a solution within the four corners of the CISG before resorting to domestic law,[126] since leaving the decision to the domestic court will create an unpredictable legal status due to diversity in the decisions.

[116] Jenkins, *Exemption for Nonperformance* at 2024
[117] Flambouras, *The Doctrines of Impossibility* at 278
[118] Lookofsky, *Not Running Wild* at 161
[119] Lando, *Salient Features of the PECL* at 366
[120] Schlechtriem, *Uniform Sales Law* at 101 ff.
[121] Honnold, *Uniform Law* 484 ff.
[122] Rimke, *Force majeure and Hardship* at 226
[123] Schlechtriem, *Uniform Sales Law* at 102 ff.; Rimke, *Force Majeure and Hardship* at 223 and 226
[124] AC Opinion 7, opinion 3.1
[125] Schlechtriem, *Uniform Sales Law* at 102, note 422a
[126] AC Opinion 7, comment 35

### 5.1.4 The effect of hardship as an impediment within the meaning of Art 79

Under the UPICC *excuse of non-performance* means that the aggrieved party cannot claim specific performance or damages, which entails that hardship extinguishes specific performance. However Art 79 does not affect any right other than to claim damages, which means that specific performance may be required even though the non-performance is excused and the liability for damages is exempted. The fact that Art 79 does not extinguishes specific performance entails that if hardship was to be allowed as an excuse under the CISG, the obligor would be exempted from liability in a situation where performance is physically possible, but extremely burdensome, but he may nevertheless be required to perform. A comprehension as such is conflicting and clearly not in line with the drafter's intent. This furthermore underlines that Art 79 probably requires impossibility.

Nicholas has stated that if Art 79 should deal with changed circumstances, it would require a special scheme of remedies.[127] More precisely it requires that the CISG provides for renegotiation, adaptation or termination of the contract.[128] However, since the legal status is not clear, common law CS might find it absurd if 'civil law remedies' find their way into the CISG. Furthermore, interpretation of Art 79 does not necessarily imply that hardship remedies are allowed. According to Tallon, the only available remedy other than damages is avoidance, since the CISG does not explicitly allow for adaptation.[129]

The existence of an impediment does not affect other remedies than the right to claim damages, which means that only one remedy is affected and not the entire contract. Hardship, however allows for renegotiation of the contractual terms and in case such alternative terms cannot be agreed upon, it allows for the court to terminate or adapt the entire contract. It seems very extensive to allow for remedies that affect the entire contract without a clear legal basis, which indicates that hardship cannot be allowed as a defence under the CISG.

Allowing for hardship as a defence might lead to ambiguities in the application of Art 79 due to the differences in the domestic perception of *hardship*.[130] Even if Art 79 includes economic impediments, the legal effect pursuant to Art 79 is exemption, which means that in case of an extreme economic dislocation, the obligor cannot require renegotiation or adaptation of the contract. This perception is not in accordance with the meaning of hardship within this paper. Consequently, it appears that hardship cannot be invoked as a defence under the CISG.

However, although the CISG does not in itself provide authority for a court to renegotiate or adjust the contract, the AC opinion 7 has stated that *in a situation of hardship under Article 79, the court may provide further relief consistent with the CISG and the general principles on which it is based.* Accordingly, in case renegotiation fails, the court may decide what the parties owe each other in order to rebalance the contract. In other words, the court may adapt the contract pursuant to Art 79(5).[131] This interpretation however is probably too extensive.

### 5.1.4 Conclusion

In conclusion, *impediment* does not cover a situation where performance merely becomes more difficult or unprofitable. Even though it is somewhat clear that market fluctuations in most cases are not to be considered an impediment under CISG Article 79, it is disputed whether wild and totally unexpected market fluctuations in goods or currency could be covered by the meaning of an impediment

[127] Yearbook at 67
[128] Hardship within the meaning of this paper is equivalent to UPICC Art 6.2.1-6.2.3
[129] Tallon, *Article 79* at 592
[130] Flechtner, *The Exemption Provisions* at 97
[131] AC Opinion 7, comment 40

in rare instances.[132] Through interpretation, two overall opinions may be derived. A literal and teleological interpretation of Art 79 may conclude that the CISG is a harsh regime, which reflects *pacta sunt servanda* and thus only provides for an exemption under very narrow conditions, which cannot be extended to situation of *quasi-impossibility*. On the other hand, extensive interpretation may lead to the conclusion that since the term impediment is flexible and does not require impossibility, an extreme situation of hardship may be allowed under Art 79.
Consequently, the court may decide that hardship is settled and excluded under the CISG, so that the obligor has to perform the original contract. However, the court may also reach the decision that Art 79 does not require impossibility and to the extent renegotiation fails, it may provide further relief and allow for an adaptation or a termination of the contract without liability. Provided that hardship falls within Art 79, the next challenging issue is determining the hardship threshold test.[133]

## 5.2 Does the CISG contain a gap regarding hardship?

To the extent that the CISG does not settle hardship, it is relevant to consider that the CISG contains an internal gap. Since hardship is neither expressly excluded from the CISG nor expressly included in the text and since there are indications that hardship may not fall within the meaning of an impediment pursuant to Art 79, a gap concerning hardship is probable.[134] On the basis of the legislative history, it cannot be concluded sufficiently that the intent was to exclude hardship. The intention might as well have been to leave the issue unsettled, since it was not possible to reach an agreement. It is therefore probable that hardship is a matter which is governed but unsettled by the CISG. Based on the presumption that the CISG contains a gap concerning hardship, the procedure of Art 7(2) is adopted. The following assessment analyzes to what extend the internal gap may be filled.

### 5.2.1 Is it possible to fill the gap with general principles on which the CISG is based?

The principle *favor contractus* which means to maintain the contract, is broadly considered to be an underlying CISG principle and it is therefore relevant to examine to what extend it settles the issue of hardship. *Favor contractus* demands cooperation, a favorable interpretation and sometimes even an adaptation of the contract.[135] The principle prescribes that approaches which aim at keeping the contract alive should prevail over approaches which aim at terminating the contract. Although contracts have to be observed, PECL Art 6:111 and UPICC Art 6.2.3 prescribe that in case of hardship the parties may require renegotiation and the court may adapt the contract to the new circumstances. In contrast, Art 79 does not prescribe for a solution that will 'save' the contract. Renegotiation and adaptation of the contract in a situation where the equilibrium is lost, favors the contract and ensures that the contractual burdens are rebalanced. *Favor contractus* thus suggests a more flexible understanding of contractual bonds and the contract will survive even if some parts of it have to be updated in accordance with the changes in circumstances. In fact, by adapting the contract it is ensured that the original purpose and interests of both parties are preserved. Likewise, it is less intrusive to adapt a contract than to kill it entirely. Keller considers that a contract is no straitjacket, but a vivid relation between living parties.[136] Consequently, *favor contractus* may provide for a hardship remedy under the CISG. Contrario, Slater finds that since *favor contractus* means to favor the performance of the contracts when possible, hardship cannot be allowed as a defence. Hardship per definition is a situation, where performance is rendered more difficult, yet still feasible.[137] However it is not apparent

[132] Ibid, comment 39
[133] However this assessment falls outside the scope of this paper.
[134] Slater, *Overcome by Hardship* at 255
[135] Keller, *Favor Contractus in the CISG* at 247
[136] Ibid at 265 ff.
[137] Slater, *Overcome by Hardship* at 257

that the courts will find that the principle is a sufficient justification for neither denying relief to a party faced with hardship nor allowing hardship as a defence.
The principles of *good faith* which is a general CISG principle might be applied when settling the issue of hardship. On the basis of good faith and fair dealing, it would be unfair for a party to benefit from the contract getting more profitable at the expense of the disadvantaged party. However allowing for hardship based on good faith is probably be too big of a stretch. Tallon has stated that such a solution is unacceptable, as it would endanger uniformity if the principle was the ground for a doctrine of changed circumstances.[138] However, the AC opinion 7 has claimed that in a situation of hardship under Art 79, the court may provide further relief consistent with the CISG and the general CISG principles. The good faith principle may impose a duty to renegotiate the contract in order to restore the balance.[139] However Lookofsky argues that there is no general CISG principle that allows for further *hardship* relief. [140]
Consequently, it cannot be established with certainty that there is a CISG principle that settles the issue. It is probably too much of a stretch to comprehend that Art 79 involves hardship solely by resorting to unwritten CISG general principles when the CISG does not mention hardship or any remedies used to solve hardship disputes.[141]

### 5.2.2 Is it possible to fill the gap with international principles such as UPICC?

With reference to the discussion under section 3.2.2.2, it is disputed whether international general principles are regarded general CISG principles. It is therefore relevant to consider to what extent international principles such as the UPICC might fill the gap concerning hardship. Since the UPICC Preamble states that the principles *may be used to interpret or supplement international uniform law instruments,* it might be justified that relevant provisions can be used to fill internal gaps within the CISG.[142]
Since the UPICC is not a binding legal instrument, it aims to set forth the best solutions, even if those are not generally adopted yet.[143] Consequently, it may derogate or expand the CISG. The CISG has no explicit provision on hardship, probably because it was not possible to reach an agreement. Contrarily, the UPICC has 3 provisions on hardship.[144]
The UPICC was not intended to supplement the CISG and a literal interpretation of the black letter text excludes recourse to UPICC. On the other hand, it has been argued that *having regard to the international character of the CISG* implies that it is better to find the solution internationally with recourse to international principles rather than resorting to domestic principles. Moreover, it is more fair to settle the matter internationally, rather than finding a domestic solution which might favor one of the parties unfairly. Since the concept of hardship is defined on the basis of the UPICC 6.2.1-6.2.3,[145] it furthermore seems fitting to settle the issue in conformity with those provisions. Recourse to international principles such as the UPICC would require an extra step to the procedure under Art 7(2). However the existence of such a legal basis seems questionable. According to Slater, it is not even acceptable to look into the UPICC in a situation where the issue cannot be settled in conformity with neither an underlying principle nor with the applicable law. Not even as a last resort. Instead the

[138] Tallon, *Article 79* at 594
[139] AC Opinion 7, comment 40
[140] Lookofsky, *Not Running Wild* at 162
[141] Ibid at 146
[142] Slater, *Overcome by Hardship* at 239
[143] Bonell, *Two Complementary Instruments* at 103
[144] Slater, *Overcome by Hardship* at 240
[145] Presupposed by this paper

party who is facing hardship will have to perform or face liability for damages.[146] Flechtner considers that the UPICC seems to favor the civil law approach over the common law approach in regards to the remedies provided in case of changed circumstances. To incorporate UPICC hardship provisions into the CISG via gap-filling appears as a backhanded way of imposing approaches which were rejected during the drafting of the CISG.[147]

However, case law has supported that the gap within the CISG may be filled in accordance with general principles incorporated in the CISG through UPICC Art 6.2.1-6.2.3.
In *Scafom International v. Lorrain Tubes*, a French seller and a Dutch buyer entered into an agreement for the delivery of steel tubes. Due to a severe increase in the market price of steel by 70 %, the seller stopped deliveries and demanded that the buyer agreed to a price adjustment. The court of first instance[148] held that the increased market price did not allow for an exemption under Art 79, as the seller should have taken such an increase into account. Since the contract did not include a price adjustment clause, the seller was presumed to have assumed the risk. According to the court, hardship is not allowed as a defence under Art 79. The appellate court[149] found a gap in the CISG in regards to remedial solutions. In order to fill the gap in accordance with Art 7(2), the court recourse to domestic law by virtue of PIL, as the gap could not be filled in accordance with a general CISG principle. Subsequently, the French doctrine of *Imprévision* was applied and the buyer was required to pay additionally 450.000. However, the Court of Cassation[150] eventually held that economic hardship may constitute an impediment under Art 79. In regards to the remedial solution, the court found a gap regarding hardship remedies of renegotiation and adaptation. The court held that in order to fill the gaps uniformly, the issue should be settled in conformity with the general principles governing the law of international trade, which is incorporated in the UPICC.
According to Lookofsky, the decision does not seem any more persuasive that the *rambling* AC opinion mentioned under section 5.2.1.[151] Accordingly, Flechtner finds it interesting that the Court of Cassation has taken the requirement under Art 7(2) and changed it into requiring a reference to general principles which govern the law of international trade. This solution is not desirable, as the general principles are found externally. [152]
In *Cour de Cassation, France, 17.02.2015*, the court took it one step further in a case between a French seller and a Polish buyer where the seller invoked hardship due to an increase in the cost of raw materials of app. 4-16 %. Under the CISG, the seller relied on UPICC Art 6.2.1-6.2.3, whereas the buyer maintained that the gap should be filled by recourse to polish law, which was the law governing the contract. The court of appeal held that since the seller had assumed the risk, he could not rely on hardship. However the seller appealed the decision and complained that the court failed to consider whether the cost increase of raw material exceeded the normal level of risk. The Cour de Cassation held that the seller had failed to prove the existence of a hardship situation. The court did not apply the procedure under Art 7(2), as it regarded the UPICC a code for international contracts issued by an international interstate organization.
Due to the controversy in the field, the matter remains inconclusive. Some scholars consider that recourse to the UPICC might be helpful in the application of CISG rules, whereas some even regards that the UPICC equals the general CISG principles. Based on a literal and teleological interpretation

[146] Slater, *Overcome by Hardship* at 262
[147] Flechtner, *The Exemption Provisions at* 97
[148] Tongeren
[149] Antwerp
[150] Hof van Cassatie
[151] Lookofsky, *Not Running Wild* at 167
[152] Flechtner, *The Exemption Provisions* at 95

of the Art 7, the gap-filling procedure under the CISG is clear and does not involve recourse to international soft law. However it has been supported by CISG case law that the CISG incorporates, as part of its general principles, the hardship provisions of the UPICC. Subsequently, it appears that the court may fill the gap concerning hardship by applying UPICC Art 6.2.1-6.2.3. Nevertheless, the court may still reach the decision that the gap cannot be filled with external principles.

### 5.2.3 To what extent may the court recourse to domestic law?

If the court regards that neither of the general principles under section 5.2.1 settle the matter of hardship sufficiently and that international principles such as the UPICC does not justify sufficiently that hardship is allowed as a defence under the CISG, the court may resort to domestic law, pursuant to Art 7(2). In *Tribunale Civile di Monza, 14.01.1993*, described under section 5.1, the court stated in dicta that since hardship is not excluded from the CISG by virtue of Art 4, the court should not integrate domestic provisions on hardship into the CISG. However this assessment does not correspond to the procedure of Art 7(2) prescribing that a matter which is neither excluded nor explicitly or implicitly included reflects an internal gap. The court may recourse to domestic law if it is not possible to settle the issue based on general CISG principles.[153]

### 5.2.4 Conclusion

Based on the assessment above, two overall approaches may be derived. The first approach entails that the court finds that the gap can be filled by the application of general CISG principles such as *good faith* and *favor contractus*, or that the matter is settled in conformity with international principles such as UPICC. Secondly, the court may regard the internal gap as a gap which cannot be filled and subsequently recourse to the law applicable by virtue of PIL in order to settle the matter.

## 6 Assessment of approaches

Based on the analysis above, the legal status is far from clear, as there seems to be at least four approaches which all have very different outcomes. Through an extensive interpretation the court may allow for hardship as a defence, which entails an outcome where the contract may be renegotiated, adjusted or terminated. Contrario, the court may interpret Art 79 narrowly and exclude hardship as a defence under the CISG, with the outcome that a breach of contract will result in liability for damages. If the court instead finds an internal gap concerning hardship that cannot be filled with general CISG principles, the court may either settle the issue in conformity with the UPICC or the applicable law by virtue of PIL. UPICC allows for renegotiation, adaptation and termination, whereas the outcome by virtue of PIL is dependent on which law is applicable in the given case.
Consequently, it is absolutely impossible to predict the legal outcome in the event of hardship.
In the Lorrain tubes case, the three domestic courts adopted three of these approaches within the same case. Since there are at least four different approaches with very different outcomes, predictability in international trade is at stake. The whole point of having a uniform sales law is to harmonize the various domestic solutions and subsequently prescribe for one autonomous and uniform approach. As the legal status is not clear, the success of the CISG as a uniform sales law is jeopardized, since contracting parties cannot rely on the CISG and as a consequence they might find it necessary to opt out of the CISG by virtue of Art 6. It is fundamental to establish which approach the court should adopt in order to reach a higher level of legal certainty. However, it is imperative that all CS courts adopt the same approach, because having four different approaches is unacceptable. Therefore, it is important to adopt an approach which is generally accepted by all CISG states. The following assessment evaluates the four solutions and recommends which approach the court should adopt.

[153] Slater, *Overcome by Hardship* at 256

### 6.1 Art 79 settles and allows for hardship as a defence

With reference to the analysis in section 5.1, Art 79 might be flexible and might not prerequisite impossibility. Thus, a party who finds itself in a situation where the performance has become excessively more onerous and the equilibrium has been fundamentally altered may invoke hardship under the CISG. The party may require renegotiation in order to restore the balance, as the CISG aims at promoting a fair regime. In case renegotiation fails, the court may either adjust or terminate the contract, pursuant to Art 79(5). Should the court adopt this approach, it would be due to practical considerations alone. Through extensive interpretation, it is possible to stretch the application of the CISG to issues which the black letter text does not include. An approach which resolves the matter within the four corners of the CISG maintains a higher degree of uniformity and predictability, as it avoids the diversity and confusion associated with recourse to domestic law by virtue of PIL. Hardship remedies provide a level of flexibility which is essential in a fair legal system in the modern world of international trade. However, to stretch the borders of the CISG to include hardship which originally was either left out or at least left unsettled, would amount to creating a solution. As courts do not have the authority of judicial or doctrinal law-making, the approach is unacceptable. Likewise, it seems questionable that an issue such as hardship which the drafters found too controversial to agree upon, should be incorporated through an extensive interpretation. Subsequent interpretation should not be used as a second attempt to introduce already dismissed ideas into the CISG.[154] Neither the wording of Art 79 nor the legislative history indicate that hardship is allowed as a defence. Moreover a target-oriented interpretation, where the pre-determined target is reached through interpretation that aims at a specific result is unacceptable.[155] Stretching the borders of the CISG in order to solve a matter which was not indented to be settled, might be even more unpredictable than resorting to domestic law by virtue of PIL. By solving the issue within the four corners of the CISG, a new border is constructed and ultimately two solutions are created. One that includes hardship and one that excludes hardship. Without a clear legal basis, some CISG states might be more reluctant to adopt the expansionistic approach and that might cause non-uniform application of the CISG. As the CISG aims at promoting uniformity, it is imperative that all domestic courts adopt the same approach. When the legal status is not clear, the court should avoid adopting an approach that goes further than what the black letter text suggests, as it cannot be presumed that all CISG states will accept that the boundaries have been pushed. In conclusion, it cannot be recommended that the court adopt this approach.

### 6.2 Art 79 settles and exclude hardship as a defence

Based on the analysis in section 5.1, a narrow and literal interpretation of Art 79 implies that hardship cannot be invoked under the CISG. A party who finds itself in a situation where the performance has become excessively more onerous will nevertheless have to perform in accordance with the agreement. Since the CISG is subject to strict liability, an exemption may only be granted under very strict conditions. A breach of contract will subsequently result in liability for damages.

It does not seem practical only to grant an exemption in cases of impossibility and therefor this approach is not the best suited approach to adopt in modern international trade. A modern international sales law should provide flexibility and allow for renegotiation and adaptation of the contract in cases where the equilibrium has been fundamentally altered. However to adopt an approach on the basis of a literal interpretation of the CISG which does not allow for hardship as a defence, provides a greater level of predictability and uniformity since domestic doctrines are not forced into the meaning of the CISG. If it is a recognized fact that CISG does not include a remedial solution in cases of hardship,

[154] Steensgaard, *Boundaries for Expansive Interpretations* at 43
[155] Lindström, *Changed Circumstances* at 16

the legal status is clear and parties who desire to include hardship will subsequently make sure to include such terms in the contract. Although this approach might ensure a higher level of uniformity and predictability compared to the approach under section 6.1, it cannot be recommended. Based on the black letter text and the legislative history alone, it is not sufficiently established that the CISG was meant to exclude hardship. Consequently, it seems more fitting that the intent was to leave the matter unsettled.

### 6.3 The internal gap concerning hardship may be filled by application of general CISG principles or general international principles

Since it cannot be sufficiently established that hardship is either excluded or included, it appears that the intention was to leave the matter unsettled, which means that there is an internal gap concerning hardship under the CISG. Based on the analysis under section 5.2.1, it seems too extensive to regard that the matter of hardship may be settled on the basis of *good faith* and *favor contractus* alone and the paper consequently assumes that the matter cannot be settled in conformity with the general CISG principles. Subsequently, this section evaluates whether or not the court should adopt the approach that settles the matter of hardship in conformity with the UPICC.

There are many arguments as to why recourse to the UPICC is the best suited approach in solving the matter of hardship. The hardship provisions under UPICC provide clear guidelines on how to rule in a case where a party invokes hardship. It seems logical to look into the UPICC, as domestic law by virtue of PIL should be the last resort. Furthermore, avoiding PIL also creates more predictability in international trade and a higher degree of uniformity. The approach might be best-suited, but it is clearly inconsistent with the structure prescribed by Art 7(2). Furthermore, the application of the UPICC as a supplementing tool seems to be reflected in the language and purpose of the UPICC and not in the text of the CISG.[156] Recourse to the UPICC will only provide for a higher degree of uniformity and predictability if the approach is adopted by all CISG states. Since the hardship provisions under the UPICC seem to favor a civil law concept of hardship, it is unlikely that common law states would adopt the approach without a clear legal basis. Furthermore, since proposals on provisions that would introduce hardship were rejected, it seems incongruous that hardship provisions find their way into the CISG through soft law. An expansion of the procedure is not acceptable, as the gap-filling instrument provided under Art 7 has to be respected in accordance with VCLT Art 31. Neither the black letter text, the legislative history nor case law authorize an approach where the UPICC is to be used when settling matters under the CISG. Although the approach appears to be supported in case law, the *Lourraine tubes case* is highly criticized and CISG case law is generally not authoritative. Since the approach is grounded solely in some scholarly opinions and a much disputed case, while it clearly contradicts the procedure under Art 7(2), it cannot be recommended that the court adopts the approach.

### 6.4 The internal gap concerning hardship cannot be filled. The matter is to be settled in conformity with the applicable law by virtue of PIL

Matters which cannot be settled in conformity with general CISG principles are to be settled in conformity with the law applicable by virtue of PIL. Several domestic legal systems provide remedies in the event of changed circumstances, which implies that the court is able to solve the matter. Although recourse to domestic law is a capable approach, it entails a diversified outcome that is dependent on which law is applicable in the given case. Based on the ambiguities involved with resorting to domestic law, it has been argued that it is better to extend the application of the CISG or find the solution by applying an international soft law instrument. However, as the legal status is unclear, it is important

[156] Slater, *Overcome by Hardship* at 249

to respect the compromises and the limits of the CISG. The fact that it was not possible to reach an agreement during the drafting of the CISG in regards to the concept of changed circumstances, indicates that the intention was to leave the issue unsettled. The very procedure of Art 7(2) was adopted to solve issues which could not be agreed upon at the time of the drafting of the CISG. It is thus most correct to respect this procedure and by doing so respect the boundaries of the CISG. The argument that it is better to solve the issue within the four corners of the CISG only prevails if it is possible to derive a uniform approach grounded in an authoritative legal basis within the CISG. In fact, the only thing worse than falling back on the rules of PIL is to force a meaning into the CISG that is not generally accepted and to adopt an approach that is not generally adopted. As long as the legal status is not clear, it is recommended that the court adopt this approach. Afterall, PIL maintains some degree of predictability. Especially when the approach is adopted uniformly.

### 6.5 Conclusion

Some scholars have argued that it is better to exhaust the CISG by using extensive interpretation and gap-filling, in order to find the answer within the four corners of CISG, rather than relying on the diverse domestic legal rules and doctrines. However that requires a clear legal status with an authoritative legal basis. A literal interpretation of the black letter text is appropriate when the wording is ambiguous, as it ensures a higher degree of legal certainty. Although a narrow and literal interpretation of CISG Art 79 seems to be in accordance with the intention of the drafters, it cannot be established sufficiently that hardship is excluded. Thus, it is most correct to find a gap and apply the procedure under Art 7(2) which reflects the compromise. Recourse to the UPICC secures flexibility and respects the international character of the CISG. Furthermore it provides for a more uniform and predictable approach compared to recourse to domestic law. However the approach is not consistent with the black letter text of Art 7(2) and in order to secure predictability it is imperative that all CS accept the solution.

It cannot be presumed that the courts of all domestic legal systems will accept that the issue which they were not willing to agree upon at the time of the drafting of the convention finds its way into the scope of the CISG through interpretation or gap-filling.

Legal certainty is promoted when the CISG is interpreted and applied uniformly, which is possible only if the CISG provides for a uniform approach. It is thus most correct to find a gap and adopt the procedure for gap-filling under Art 7(2), which entails recourse to domestic law by virtue of PIL.

## 7 Recommendations

The most desirable solution is that the CISG undergoes a reform and adopts an explicit hardship provision. Adopting the concept of hardship under the CISG provides flexibility and fair dealing, which is fundamental in modern international trade. This solution ensures that there is a clear definition in regards to the concept and the remedies provided by the CISG in case of a hardship situation. Furthermore having an autonomous hardship provision ensures uniform application and predictability grounded in a clear legal basis. Moreover, it entails that the issue is settled within the CISG, which means that recourse to domestic law is avoided. A greater level of harmonization is reached, as an autonomous provision unifies the various domestic concepts. This paper recommends an adoption of a hardship provision based on the UPICC Art 6.2.1-6.2.3.

Recourse to external principles is unacceptable and a clear violation of the gap-filling procedure under Art 7(2), as it requires a clear legal basis in the black letter text. It is subsequently relevant to assess whether a rewrite of Art 7(2) is desirable. Including recourse to international principles might entail

a greater level of predictability and uniformity. However, recourse to external principles is not desirable, as it would lead to further ambiguities that would require a clear definition of which external principles and under which conditions recourse to external principles are allowed. Consequently, this paper does not recommend that Art 7(2) undergoes a reform to include recourse to external principles.

While the legal basis remains unclear, this paper recommends that the court adopts the approach under section 6.4. Furthermore it recommends that contracting parties who desire to invoke renegotiation, adaptation or termination of the contract include a hardship clause when entering into a contract. Moreover the paper recommends that contracting parties who desire to maintain *pacta sunt servanda* and accept the risk of the obligations becoming excessively more burdensome, include an explicit provision which excludes invocation of hardship under the contract.
If it is considered that the method under Art 7(2) lacks legal certainty, the paper moreover recommends that contracting parties include a choice of law and a jurisdiction clause within the contract.

## 8 Conclusion

The domestic legal systems provide for a wide range of concepts of hardship with different remedies. Some domestic doctrines are rather strict, whereas others are more flexible. The international definition of hardship pursuant to drafted international commercial soft-law principles is quite flexible and allows for the contract to be renegotiated or adapted with the purpose of restoring the balance.

The CISG aims to harmonize and unify domestic concepts and laws by providing an autonomous and uniform sales law. As uniform application requires uniform interpretation, it is imperative that the court has regard to the international character of the CISG when deciding whether hardship may be invoked under the CISG. As Art 79 leaves room for judicial interpretation, the court might be tempted to rely on domestic concepts and principles. Especially since the CISG is completely silent on the matter of hardship. However the court cannot interpret the CISG domestically, because different laws put a string on harmonization. And since the CISG does not have a supranational court, the success of harmonization is even more dependent on courts living op to the obligation under Art 7(1).

Due to the elastic terms of Art 79, it is almost impossible to establish whether hardship falls under its scope as the CISG does not provide for any authoritative secondary sources of CISG law. Since hardship was left unsettled as the result of a compromise, it is very probable that the various interpretations in doctrine and case law merely reflect personal or domestic views. Some scholars have a tendency to interpret the CISG with the precondition that the solution has to be found within the four concerns of the CISG, which leads to an overly extensive interpretation. Correspondingly, the view that hardship falls within the meaning of *impediment* is grounded in the necessity to avoid recourse to domestic law rather than textual interpretation, legislative literature or case law. Expanding Art 79 to include hardship involves not only a target-oriented interpretation but it also entails that a certain concept is forced into the CISG with remedies solely recognized by some domestic systems. Such an approach does not find the meaning within the four corners of the CISG. Similarly, recourse to a soft law regime is unacceptable and a clear violation of the gap-filling method, although it may be reasonable in order to avoid the recourse to domestic law. Furthermore, it cannot be presumed that all CS courts will adopt the approach without a clear legal basis. The fact that the CISG is silent on hardship does not mean that the court may construct a solution, neither through interpretation nor gap-filling. The procedure under Art 7(2) is capable of solving the issue.

However the legal status remains inconclusive and unclear. This paper clearly demonstrates that too many unauthoritative sources of law confuse the legal position even more. The current legal status which includes at least four different approaches lacks predictability, as the outcome depends on which national court is deciding the case.

The relevance and the success of the CISG are dependent on its application in international trade. If contracting parties have to include hardship provisions or UPICC under the contract in order to obtain predictability in the sales transaction, the very purpose of the CISG is diminished. Furthermore, the lack of predictability might cause that contracting parties chooses to opt out of the CISG altogether. The legal status has to be clear in order for the CISG to be relevant and successful.

Uniform application requires that all courts adopt the same approach. However, based on this paper, it seems unrealistic to obtain a uniform approach without a clear legal basis. This paper highly recommends that the CISG undergoes a reform. An unambiguous black letter text seems to be the best remedy against non-uniform interpretation and application, as it precludes judicial interpretation. An explicit provision on hardship with very clear guidelines is desirable. Since the CISG does not provide for a clear solution regarding whether a party is entitled to invoke hardship under the CISG, this paper recommends that business parties to a CISG contract include an explicit provision which addresses the issue and establishes whether or not any of the parties may invoke hardship under the contract.

So, how should the court solve the case in a situation where an obligor invokes hardship under the CISG? The court should find a gap within the CISG concerning hardship, and since no general CISG principle sufficiently settles the matter, the court should recourse to the applicable law by virtue of PIL. Depending on the applicable sales law, the court may be able to relieve the obligor from its obligations under the contract.

## Bibliography

### Cases


- Arbitral Award, Netherlands Arbitration Institute, the Netherlands, 10.02.2005, available at http://cisgw3.law.pace.edu/cases/050210n1.html
- Rechtbank Zwolle, the Netherlands, 05.03.1997, available at http://cisgw3.law.pace.edu/cases/970305n1.html
- Amtsgericht Hamburg-Altona, Germany, 14.12.2000, available at http://cisgw3.law.pace.edu/cases/001214g1.html
- Cour d'appel Colmar, France, 12.06.200, available at http://cisgw3.law.pace.edu/cases/010612f1.html
- Rechtbank van Koophandel, Hasselt, Belgium, 02.05.1995, available at http://www.unilex.info/cisg/case/263
- Tribunale Civile di Monza, Italy, 14.01.1993, available at http://www.unilex.info/cisg/case/21
- Arbitral Award, Bulgarian Chamber of Commerce and Industry, Bulgaria 12.02.1998, available at http://www.unilex.info/cisg/case/420
- Landgericht Aachen, Germany, 14.05.1993, available at http://www.unilex.info/cisg/case/23
- Rechtbank van Koophandel Tongeren, Belgium, 29.06.2005, available at http://cisgw3.law.pace.edu/cases/050125b1.html – (Tongeren)

- Hof van Beroep Antwerp, Belgium, 29.06.2006, available at http://cisgw3.law.pace.edu/cases/060424b1.html – (Antwerp)
- Hof van Cassatie, Belgium, 19.06.2009, available at http://cisgw3.law.pace.edu/cases/090619b1.html – (Hof van Cassatie)
- Cour de Cassation, France, 17.02.2015, available at http://www.unilex.info/cisg/case/1999

**Legislation**

- United Nations Convention on Contracts for the International Sale of Goods, Vienna (1980), available at https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf – (CISG)
- The Vienna Convention on the Law of Treaties (with annex), No. 18232, (1969) available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf – (VCLT)
- The Hague Convention relating to a Uniform Law on the International Sale of Goods (1964), available at https://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964 – (ULIS)
- The Hague Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (1964) https://www.cisg.law.pace.edu/cisg/text/ulf.html – (ULF)
- The French Civil Code, *Code Civil* (*2016),* English translation available at http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf
- The German Civil Code, Bürgerliches Gesetzbuch, available at https://www.trans-lex.org/600100/highlight_B%C3%BCrgerliches_Gesetzbuch/german-civil-code/#head_56
- The Danish Contracts Act, *Aftalelov*, available at https://pure.au.dk/ws/files/32350272/Danish_20Contracts_20Act.pdf

**Legal instruments**

- UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016), available at https://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf – (CISG Digest)
- Principles of European Contract Law available at https://www.trans-lex.org/400200/_/pecl/#head_101 – (PECL)
- UNIDROIT Principles of international Commercial Contracts (2016), available at https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 - (UPICC)
- ICC Hardship clause 2003, ICC Publication No. 650, available at https://www.trans-lex.org/700700/_/icc-force-majeure-clause-2003-icc-hardship-clause-2003-icc-publication-no-650/#head_13 – (ICC Hardship Clause)
- CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, available at https://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html – (AC Opinion 7)

**Legislative history**

- 1980 Vienna Diplomatic Conference, Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other

Final Clauses, UN DOC. A/CONF.97/9, 21. February 1980, available at https://www.cisg.law.pace.edu/cisg/Fdraft.html – (Vienna Analysis of Comments and Proposals)
- Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat. UN DOC. A/CONF. 97/5 available at http://www.cisg-online.ch/index.cfm?pageID=644#Article%2079 – (Secretariat Commentary)
- Text of Secretariat Commentary on article 65 of the 1978 Draft, *Guide to CISG Article 79*, available at www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html – (Secretariat Commentary, *Guide to Art 79*)
- Official Records of the United Nations Conference on Contracts for the International Sale of Goods: documents of the Conference and summary records of the plenary meetings and of the meetings of the Main Committee, Vienna, 10 March – 11 April 1980 DOC A/CONF.97/19, available at https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf – (Vienna Diplomatic Conference, Official Records)
- 1980 Vienna Diplomatic Conference, *Summary Records of Meetings of the First Committee*, 27th meeting, Friday, 28 March 1980, DOC A/Conf. 97/C.1/SR.27, available at https://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting27.html – (Vienna Diplomatic Conference, 27th meeting)
- 1980 Vienna Diplomatic Conference, *Summary Records of Meetings of the First Committee*, 28th meeting, Friday, 28 March 1980, DOC A/Conf. 97/C.1/SR.28, available at https://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting28.html – (Vienna Diplomatic Conference, 28th meeting)
- 1980 Vienna Diplomatic Conference, Report of the First Committee, 7 April 1980, DOC A/CONF.97/11, Article 65 [became CISG article 79] and Article 65 *bis* [became CISG article 80], available at https://www.cisg.law.pace.edu/cisg/1stcommittee/summaries79,80.html – (Vienna Diplomatic Conference, Summaries Article 79 and 80)
- Amendment submitted to Article 65, A/CONF.97/C.1/L.191/Rev.1, by Norway, Article 65 – (Norwegian Proposal)
- Amendment submitted to Article 65, A/Conf. 97/C.1/L.208, by the Federal Republic of Germany, Article 65 – (German Proposal)
- Legislative history of CISG article 79: Match-up with 1978 Draft to assess relevance of Secretariat Commentary, available at http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-79.html – (Art 79 match-up with 1987 draft Art 65)
- Progress report of the working group on the International Sale of Goods on the work of its fifth session, Geneva, 21 January - 1 February, A/CN.9/87 in Yearbook of the United Nations Commission on International Trade Law, 1974, Volume V, available at https://undocs.org/en/A/CN.9/87 – (Yearbook, 1974)

## Books

- Fontaine, Marcel, and De Ly, Filip. (2009) *Drafting International Contracts: An Analysis of Contract Clauses*. 2. ed., Leiden; Martinus Nijhoff Pub. – (Fontaine and De Ly, *Drafting International Contracts*)
- Lookofsky, Joseph. (2017) *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*. 5. ed., DJØF– (Lookofsky, *Understanding the CISG*)

- Smits, Jan M. *What Is Legal Doctrine?* In R. Van Gestel, H. Micklitz, & E. Rubin (Eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (2017), pp. 207-228. Cambridge: Cambridge University Press. doi:10.1017/9781316442906.006 – (Smits, *What Is Legal Doctrine?*)
- Brunner, Christoph. (2009) *Force Majeure and Hardship Under General Contract Principles : Exemption for Non-Performance in International Arbitration*. Austin, Tex: Wolters Kluwer Law & Business– (Brunner, *Force Majeure and Hardship)*
- Janssen, André and Kiene, Sörren C., *The CISG and Its General Principles* in Janssen, André and Meyer, Olaf, *CISG Methodology* (2009), pp. 261-286, Munich, Germany: Sellier European Law Publishers – (Janssen and Kiene, *The CISG and Its General Principles*)
- Viscasillas, Pilar P., *The Role of the UNIDROIT Principles and the PECL in Interpretation and Gap-filling of the CISG* in In Janssen, André and Meyer, Olaf, *CISG Methodology* (2009), pp. 287-319, Munich, Germany: Sellier European Law Publishers – (Viscasillas, *The Role of the UPICC and the PECL*)
- Huber, Peter, and Mullis, Alastair. (2007) *The CISG A New Textbook for Students and Practitioners* München: Sellier, European Law Publishers (Huber and Mullis, *The CISG*)
- Honnold, John O. (1989) *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations and Decisions That Led to the 1980 United Nations Convention with Introductions and Explanations.* Deventer: Kluwer – (Honnold, *Documentary History*)
- Fogt, Morten M., *International Privatret* in Iversen, Torsten (Eds.), Formueretlige emner. 9. udgave. København: Djøf Forlag. (2019) – (Fogt, *International privatret*)


## Online Journals


- Lindström, Niklas. (2006) *Changed Circumstances and Hardship in the International Sale of Goods*, Nordic Journal of Commercial Law (2006), available at http://www.cisg.law.pace.edu/cisg/biblio/lindstrom.html – (Lindström, *Changed Circumstances*)
- Nicholas, Barry, *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods* in Galston & Smit ed., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Matthew Bender (1984), pp. 5-1 to 5-24, available at http://cisgw3.law.pace.edu/cisg/biblio/nicholas1.html – (Nicholas, *Impracticability and Impossibility*)
- Lookofsky, Joseph. *Not Running Wild With the CISG*, Journal of Law and Commerce, Vol. 29, No. 2, 2011 (2011) – (Lookofsky, *Not Running Wild*), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376353
- Lookofsky, Joseph, Walking the article 7(2) Tightrope between CISG and Domestic Law, 25 Journal of Law and Commerce 87-105 (2005), available at http://www.cisg.law.pace.edu/cisg/biblio/lookofsky16.html – (Lookofsky, *Walking the Tightrope*)
- Magnus, Ulrich, *The Remedy of Avoidance of Contract Under CISG - General Remarks and Special Cases*. (25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods). Journal of Law and Commerce 25.1 2 (2005), available at https://www.uncitral.org/pdf/english/CISG25/Magnus.pdf - (Magnus, *The Remedy of Avoidance*)
- Slater, Scott D., *Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG*.12 Florida Journal of International Law (1998) pp. 231-262

available at http://www.cisg.law.pace.edu/cisg/biblio/slater.html – (Slater, *Overcome by Hardship*)

- Steensgaard, Kasper, *Boundaries for Expansive Interpretations of the CISG?* (2017) available at https://pure.au.dk/ws/files/127803095/Boundaries_for_expansive_interpretations_of_the_CISG.pdf - (Steensgaard, *Boundaries for Expansive Interpretations*)
- Bonell, Michael J., *The CISG and the Unidroit Principles of International Commercial Contracts: Two Complementary Instruments*, 10 International Law Review of Wuhan University (2008-2009) pp. 100-117, available at *http://cisgw3.law.pace.edu/cisg/biblio/bonell1.pdf* - (Bonell, *Two Complementary Instruments*)
- Flambouras, Dionysios P., *The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contacts for the International Sale of Goods and the Principles of European Contact Law - A Comparative analysis.(Comparison of the Principles of European Contract Law with the Uniform Commercial Code).* Pace International Law Review 13.2 (2001) available at https://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html – (Flambouras, *The Doctrines of Impossibility*)
- Lando, Ole, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC.(Comparison of the Principles of European Contract Law with the Uniform Commercial Code).*Pace International Law Review 13.2 (2001), available at https://www.cisg.law.pace.edu/cisg/biblio/lando.html#80 – (Lando, *Salient Features of the PECL*)
- Rimke, Joern, *Force Majeure and Hardship: Application in International Trade Practice With Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts*, Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer (1999-2000) pp. 197-243, available at https://www.cisg.law.pace.edu/cisg/biblio/rimke.html#91 – (Rimke, *Force Majeure and Hardship*)
- Honnold, John O., *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (1999), Kluwer Law International, The Hague, available at http://www.cisg.law.pace.edu/cisg/biblio/honnold.html - (Honnold, *Uniform Law*)
- Schlechtriem, Peter, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*, Manz, Vienna (1986), available at https://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html – (Schlechtriem, *Uniform Sales Law*)
- Schlechtriem, Peter, *Uniform Sales Law in the Decisions of the Bundesgerichtshof, in: 50 Years of the Bundesgerichtshof (Federal Supreme Court of Germany): A Celebration Anthology from the Academic Community* (2001), English translation by Fox, Todd J., available at http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem3.html (Schlechtriem, *Bundesgerichtshof*)
- Tallon, Denis, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 572-595. Reproduced with permission of Dott. A Giuffrè Editore, S.p.A., available at https://cisgw3.law.pace.edu/cisg/biblio/tallon-bb79.html – (Tallon, *Article 79*)
- Bonell, Michael J., in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 65-94. Reproduced with permission of Dott. A Giuffrè Editore, S.p.A., available at https://www.cisg.law.pace.edu/cisg/biblio/bonell-bb7.html - (Bonell, *Article 7*)
- Jiang, Zuoli, In Favor of Appropriate Dynamic Interpretation for the CISG' Legal Uniformity, available at https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/141-JIANG-Interpretation_of_the_CISG.pdf (Jiang, *Dynamic Interpretation*)

- Garro, Alejandro M., *The Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*. (Vienna Convention on Contracts for the *International Sale of Goods)(Symposium: The UNIDROIT Principles of International Commercial Contracts).* Tulane Law Review, vol. 69, no. 5 (1995) pp. 1149-1190 – (Garro, *The Gap-Filling role of the UPICC*), available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/tulr69&div=39&id=&page=
- Ferrari, Franco, *Gap-Filling and Interpretation of the CISG: Overview of International Case Law*. 7 Vindobona Journal of International Commercial Law & Arbitration (2003), pp. 63-92, available at https://www.cisg.law.pace.edu/cisg/biblio/ferrari11.html (Ferrari, *Gap-filling and Interpretation*)
- Keily, Troy, *Harmonisation and the United Nations Convention on Contracts for the International Sale of Goods* (2003) available at https://www.cisg.law.pace.edu/cisg/biblio/keily3.html – (Keily, *Harmonisation and the CISG)*
- Flechtner, Harry M., *The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court.* University of Belgrade, Belgrade Law Review, Year LIX (2011) no. 3 pp. 84-101, available at www.cisg.law.pace.edu/cisg/biblio/flechtner10.html - (Flechtner, *The Exemption Provisions*)
- Carlsen, Anja, *Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG is the Governing Law?* (1998), available at http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html - (Carlsen, Hardship Provisions in the UPICC)
- Keller, Bertram, *Favor Contractus Reading the CISG in Favor of the Contract*, available at http://www.cisg.law.pace.edu/cisg/biblio/keller1.pdf - (Keller, *Favor Contractus in the CISG*)
- Jenkins, Sarah H., *Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles -- A Comparative Assessment.* 2 Tulane Law Review (1998) pp. 2015-2030, available at https://www.cisg.law.pace.edu/cisg/biblio/jenkins.html – (Jenkins, *Exemption for Nonperformance*)


## Websites


- UNCITRAL Secretariat: Texts and Status, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), 2020: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg – (UNCITRAL, Texts and Status)
- CISG: Table of Contracting States, 2020: https://www.cisg.law.pace.edu/cisg/countries/cntries.html – (List of CS)