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THE DOCTRINES OF IMPOSSIBILITY OF PERFORMANCE AND *CLAUSULA REBUS SIC STANTIBUS* IN THE 1980 CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND THE PRINCIPLES OF EUROPEAN CONTRACT LAW – A COMPARATIVE ANALYSIS

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I. INTRODUCTION

This article compares the provisions of the United Nations Convention on Contracts for the International Sale of Goods[1] (CISG) that relate to the doctrine of impossibility of performance and change of circumstances to those of the Principles of European Contract Law[2] (PECL). The treatment that the doctrine of impossibility receives in the CISG and the PECL is of significant theoretical and practical importance because it is an exception to the basic principle of *pacta sunt servanda.*

The CISG is the uniform sales law for countries that account for two-thirds of all world trade and came into force on January 1, 1988. It has been ratified by sixty States. The PECL is the product of work carried out by the Commission on European Contract Law, a body of lawyers drawn from all of the Member States of the European Union, under the chairmanship

[1] United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, *reprinted in* [1980] XI UNCITRAL Yearbook 149, *available at* http://www.cisg.law.pace.edu [hereinafter CISG]. For arguments against implementation of the CISG, see F.M.B. Reynolds, *A Note of Caution, in* 2 THE FRONTIERS OF LIABILITY 18, 27 (Peter B.H. Birks ed., 1994).

[2] COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugo Beale eds., Kluwer Law Int'l 2000) [hereinafter PECL].

of Professor Ole Lando. The PECL does not have the status of an international convention; therefore, its application mainly relies on express or implied incorporation into a contract by the parties.[3] Furthermore, the PECL operates as a European *lex mercatoria*, and the rules articulated in the PECL serve as the governing law in the European Union in the absence of national contract laws.[4] Finally, the PECL is intended to operate as a model for judicial and legislative development of contract law, as well as a basis for harmonization of the Member States' contract laws.[5]

This article is structured as follows. First, there is reference to the relevant rules of the CISG with parallel references to the areas where there is theoretical debate. Second, there is a brief analysis of the relevant rules of the PECL, with reference to the UNIDROIT Principles of International Commercial Contracts[6] (UNIDROIT Principles). Finally, there is a comparison of the above sets of rules and an examination of whether the PECL can play a gap-filling function where there is a gap in the CISG.

II. ARTICLE 79 OF THE CISG

A. *Legislative History - Comparative Remarks*

CISG Article 79 is the principal provision governing the extent to which a party is exempt from liability for a failure to perform any of his obligations due to an impediment beyond his control. It corresponds to domestic systems' concepts of *force majeure*, frustration, impossibility of performance, commercial impracticability, etc.[7] More specifically, under CISG Articles

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[3] "These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them." *Id.* art. 1:101(2).

[4] *See* Ole Lando, *Is Codification Needed in Europe? Principles of European Contract Law and the Relationship to Dutch Law*, 1 EUROPEAN REVIEW OF PRIVATE LAW 157 (1993). *See also* PECL, *supra* note 2, art. 1:101(4) ("These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.").

[5] *See* PECL, *supra* note 2, at xxi.

[6] UNIDROIT Principles of International Commercial Contracts (Rome 1994) [hereinafter UNIDROIT Principles].

[7] *See* Dionysios Flambouras, *Apallagê Apó Tên Euthúnê Gia Mê Ekplêrôsê Têss Úmbasês Tês Pólêsês Stê Súmbasê Tês Viénnês Gia Tis Diethneís Pôléseis Kinêtón [Discharge from Liability from Nonperformance of the Contract of Sale in*

45(1)(b) and 61(1)(b), a party has a right to claim damages for the other party's nonperformance without the necessity of proving fault or lack of good faith or the breach of an express promise.[8] However, in accordance with CISG Article 79 if the nonperforming party, whether the seller or the buyer, proves (1) that the failure was due to an impediment beyond his control (impediment), (2) that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract (unforeseeability), and (3) that once the impediment materialized, he could not reasonably have avoided or overcome it or its consequences (unavoidability), then provided he gives notice of this to the other party, the nonperforming party is exempt from liability in damages.[9]

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the Vienna Convention for the International Sale of Goods], COM. L. REV. 679 (2000) (analysis of CISG Articles 79 and 80 and comparative presentation of the relevant issues in European laws); *see also* Michail Stathopoulos, *H Upó Kúrôsê Sumbasê Tôn Hnôménôn Ethnón Gia Tê Diethne Pólêsê Kinêtón Kai To Díkaio Toy Ak, Kainotomíes Epí Sumbatikôn Parabáseôn* [*The Convention (Under Ratification) of the United Nations for the International Sale of Goods and the Law of the Civil Code: Innovations in Breach of Contract*], 45 NOMIKO VIMA 1033 (1997) (general comparison of the CISG and relevant provisions of the Greek Civil Code); Athanásios Pouliadis, *H Sumbasê Tôn Hnoménôn Ethnón Gia Tê Diethné Pólêsê Kinêtón Kai To Díkaio Toy Astikoñ Kódika To Rythmistikó Prótypo Tes Enopíêsês Tôn Sumbatikón Parabáseôn* [*The United Nations Convention for the International Sale of Goods and the Law of the Civil Code: Model for the Unification of the Contractual Breach*], REV. COM. L. 19 (1998) (analysis of the consequences of contract violations and the possibility of discharge from liability under CISG Article 79); Dionysios Flambouras & Georgios Petrochilos, *H Súmbasê Tês Viénnês Gia Tê Diethnê Pôlêsê Kinêtôn Pragmátôn Ópôs Erminévêtê Apó Ta Diaitêtiká* [*The Vienna Convention for the International Sale of Goods as Interpreted by Arbitral Tribunals*], COM. L. REV. 1, 15 (2000); G.S. NIKOLAIDIS, H DIETHNÊS PÔLÊSÊ KINÊTÔN KATÁ TÊ SYMBASÊ TÊS VIÉNNÊS [THE INTERNATIONAL SALE OF GOODS UNDER THE VIENNA CONVENTION] 111-13 (2000); P. KORNILAKIS ET AL., H SÚMBASÊ TÊS VIENNÊS GIA TÊS DIETHNÊS PÔLÊSEIS KINÊTÔN [THE VIENNA CONVENTION FOR THE INTERNATIONAL SALE OF GOODS] 52-67 (2001).

[8] Under the CISG, as under English and American law, the parties guarantee that the contract will be performed in accordance with their promises. The promisor, therefore, is liable for any objective failure to perform his obligation, regardless of the reasons for the failure. *See* Hans Stoll, *Exemptions, in* COMMENTARY ON THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 600, para. 6, at 603 (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998).

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

CISG Article 79 is a revised version of the Uniform Law on the International Sale of Goods (ULIS) Article 74, which based exemption from liability for nonperformance on the occurrence of "circumstances, which according to the intention of the parties at the time of the conclusion of the contract, [the non-performing party] was not bound to take into account or to avoid or to overcome."[10] ULIS Article 74 was heavily criticized since it was thought to unjustifiably facilitate the promisor's excuse for nonperformance.[11] The UNCITRAL Working Group's introduction of the notion of impediment in the revised exemption provision was, therefore, intended to ensure a narrow and objective interpretation of CISG Article 79.[12]

With regard to the origins of CISG Article 79, its language echoes that of French law, which accepts justification or excuse for nonperformance in the face of a *force majeure* event, as far as this event is unforeseeable, insurmountable, irresistible and

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(2) If the party's failure is due to the failure by a third party whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

CISG, *supra* note 1, art. 79.

[10] Uniform Law on the International Sale of Goods, *available at* http://www.jus.uio.no/lm/unidroit.ulis.convention.1964/doc.html.

[11] For a comparison of the two provisions, see Barry Nicholas, *Force Majeure and Frustration*, 27 AM. J. COMP. L. 231, 232-45 (1979); *see also* Barry Nicholas, *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 5.01 (Nina M. Galston & Hans Smit eds., 1984) [hereinafter *Impracticability and Impossibility*] (critique of CISG Article 79). For a more detailed analysis, see D. Tallon, *Exemptions*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW 572 (C.M. Bianca & M.J. Bonell eds., 1987).

[12] *See* Stoll, *supra* note 8, para. 16, at 608.

not attributable to the promisor of the obligation.[13] However, similarities between CISG Article 79 and corresponding provisions of various domestic legal systems should not be mistaken for uniformity in the law.[14] The provisions of CISG Article 79 still differ to a considerable degree from those of other legal systems. For example, under English law the doctrine of frustration wholly discharges the contract and both parties from their contractual obligations, leaving only adjustment under the Law Reform (Frustrated Contracts) Act 1943.[15] CISG Article 79, on the other hand, only releases the nonperforming party from his liability for damages.[16]

B. *Analysis of Preconditions*

1. *Impediment Beyond Control*

Bearing in mind the need for restrictive and objective interpretation, we may conclude that (1) only objective circumstances beyond the promisor's typical sphere of responsibility shall be considered as impediments within the meaning of CISG Article 79; and (2) in interpreting the concept of "impediment" one should, in the words of Professor John O. Honnold, "purge

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[13] *See* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 525 (Tony Weir trans., Clarendon Press 3d ed. 1998) (1977); *Impracticability and Impossibility*, *supra* note 11, § 5.02.

[14] For comparative analysis of the matter, see Hans Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287 (1958); Harold J. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963); Henry Lesguillons, *Frustration*, Force Majeure, *Imprévision, Wegfall der Geschäftsgrundläge*, 5 DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL [DR. PRAT. COM. INT'L] 507 (1979); Jan Hellner, *The Influence of the German Doctrine of Impossibility on Swedish Sales Law*, *in* 2 IUS PRIVATUM GENTIUM: FESTSCHRIFT FÜR MAX RHEINSTEIN 705 (Ernst von Caemmerer et al. eds., 1969); Michael G. Rapsomanikis, *Frustration of Contract in International Trade Law and Comparative Law*, 18 DUQ. L. REV. 551 (1980); A.H. Puelinckx, *Frustration, Hardship*, Force Majeure, *Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances*, 3 J. INT'L ARB. 47 (1986); Sarah Howard Jenkins, *Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles - A Comparative Assessment*, 72 TUL. L. REV. 2015 (1998); Ugo Draetta, Force Majeure *Clauses in International Trade Practice*, 5 INT'L BUS L.J. 547 (1996).

[15] Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, c. 40, § 1 (Eng.).

[16] *See* A. H. Hudson, *Exemptions and Impossibility Under the Vienna Convention*, *in* FORCE MAJEURE AND FRUSTRATION OF CONTRACT 175 (Ewan McKendrick ed., 1991).

our minds of presuppositions derived from domestic traditions and, with innocent eyes, read the language of Article 79 in the light of the practices and needs of international trade."[17] Accordingly, impediments within the scope of CISG Article 79 should include: Acts of God (e.g. earthquake, lightning, flood, fire, storm, crop failure, etc.); events relating to social and/or political circumstances (e.g. war, revolution, riot, coup, strike, etc.); legal impediments (e.g. seizure of the goods, embargo, prohibition of the transfer of foreign funds,[18] the prohibition or restriction of foreign imports and/or exports, etc.); and other types of impediments (e.g. loss of the carrying vessel, theft, robbery or sabotage during storage or carriage, general strike, general power supply cut). The occurrence of any of the aforesaid events may (1) destroy the seller's premises or factory, (2) prevent the seller, the carrier, or the warehouse operator from delivering the goods to the buyer or his agent, (3) cause damage to or total or partial loss of the goods, or (4) prevent the buyer from paying the price.

It is important to mention, however, that such events shall not per se constitute impediments for the purposes of CISG Article 79, since the characterization of an event as an impediment will depend upon the circumstances of each individual case. For example, the destruction of the seller's premises by fire will not discharge him from his obligation to deliver the goods if the seller failed to take the most elementary precautions to protect against fire. A fire is an event within the seller's control, provided it could have been avoided if the seller had taken the appropriate measures. This situation also relates to unavoidability, discussed *infra* Part II(B)(3).

On the other hand, events within the promisor's personal sphere of responsibilities and risks shall not be considered impediments for purposes of CISG Article 79. Accordingly, business failures, personal incapability, liquidation or bankruptcy, failure of production or accounting systems, failure of data processing equipment, failure to maintain the necessary per-

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[17] JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 476 (1999).

[18] *See* ICC Arbitration Case No. 7197/1992, JOURNAL DU DROIT INTERNATIONAL [J. DR. INT'L] 1028 (1993); CLOUT, Case 104, *available at* http://www.uncitral.org/en-index.htm.

sonnel,[19] illness, death or arrest of the promisor, incapability of the promisor's supplier to provide him with raw material,[20] strike constituting internal confrontation at a factory (a general strike, however, shall constitute an impediment),[21] or excessive increase in the price of the raw material should not discharge the promisor from his obligation to perform.

Finally, of great importance is the question of whether the situations of pre-contract impossibility or mistake, i.e., where the subject matter of the contract of sale does not exist at the time of its conclusion, are within the CISG's scope of application. There have been a number of commentaries on mistake in cases in which the subject of the sale was non-existent at the time the contract was formed. These seem to acknowledge that CISG Article 79 can apply to situations in which goods had already perished at the time of the conclusion of the contract.[22]

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[19] *See* FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW § 4.1, at 322-23; Stoll, *supra* note 8, para. 28, at 613.

[20] Parties often argue that non-delivery or late delivery by the seller's supplier is an impediment for the purposes of CISG Article 79. State courts, arbitral tribunals, and scholars are starting to accept the notion that the procurement risk falls within the seller's sphere of responsibility, especially in the case of a sale of generic goods. *See* Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 141, 129 (F.R.G.); 15/16 JURISTEN ZEITUNG 791-94 (13 Aug. 1999) (commentary by Peter Schlechtriem at 794-97), *available at* http://cisg3.law.pace.edu/cases/990324g1.html; *see also* HERBERT BERNSTEIN & JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE 109 (1997); ENDERLEIN & MASKOW, *supra* note 19, § 7.2, at 326; Stoll, *supra* note 8, para. 38, at 616. However, the seller shall not bear the procurement risk where the raw material or good has disappeared from the international market. For example, if a specific type of oil was only produced in Iraq and was not obtainable due to the international embargo, a seller would not bear the risk of procurement.

[21] *See* ENDERLEIN & MASKOW, *supra* note 19, § 4.3, at 323. In the event that a strike were to occur in the supplier's business, the obligor may be discharged of his duty to perform, but only if the raw material can not be obtained from another source. *See* KORNILAKIS, *supra* note 7, at 58; HANS-JOACHIM MERTENS & ECKARD REHBINDER, INTERNATIONALES KAUFRECHT 257 (1975).

[22] *See Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, Official Records 14, at 55, U.N. Document A/CONF.97/5 (1979), *reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 404, 445 (1989) [hereinafter *Secretariat Commentary*]. As mentioned in ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, Suppl. 4 (February 1993), when the words "at the time of the conclusion of the contract" were added to CISG Article 79(1), the Secretariat Commentary was amended to read:

> The impediment may have existed at the time of the conclusion of the contract. For example, goods which were unique and which were the sub-

This solution appears appropriate for legal systems that do not follow the *impossibilium nulla obligatio est* principle, for example, the United States.[23] However, it creates doctrinal problems in countries such as France and Germany where the existence of the subject matter at the time of the conclusion of the contract is regarded as a condition of validity.[24] This is not governed by the CISG[25] but by the applicable law of the contract.[26] Therefore, it is suggested that if the applicable law of contract is one that regards the existence of the subject matter of the contract as a condition of validity, the CISG should not apply and

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ject of the contract may have already perished at the time of the conclusion of the contract. However, the seller would not be exempted from liability if he reasonably could have been expected to take the destruction of the goods into account at the time of the conclusion of the contract.

Secretariat Commentary, supra. Kritzer finally refers to Professor Schlechtriem, who concludes that initial impossibility is undoubtedly a matter within the purview of the CISG. *See* KRITZER, *supra.*

[23] *See, e.g.*, U.C.C. § 2-613 (1977).

[24] *See, e.g.*, § 306 BÜRGERLICHES GESETZBUCH [hereinafter BGB]; SCHWEIZERISCHES OBLIGATIONENRECHT [hereinafter OR] art. 20 II; G.H. TREITEL, FRUSTRATION AND FORCE MAJEURE 1-2 (1994). The explanation of the difference between civil and common law systems lies in the fact that in civil law systems "enforced performance is assumed to be the primary remedy" and is obviously "inappropriate when the performance in question is, or has become, impossible." TREITEL, *supra* at 2. The same rule was followed under Roman law. *See* DIG. 18.1.8 (Pomp.) ("*Nec emptio nec uenditio sine re quae ueneat potest intellegi.*"); *see also* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 194, 240-48, 686-95, 719, 809, 898 (Clarendon Press 1996) (1990). Nevertheless, this approach is not unanimously accepted by all civil law systems. *See, e.g.*, GREEK CIVIL CODE arts. 335-48, 380-82. For the matter of initial impossibility under Greek law, see APOSTOLOS GEORGIADIS, CONTRACT LAW – GENERAL PART 228, 260 (1999).

[25] This Convention governs only the formation of the contract of sale and the right and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

CISG, *supra* note 1, art. 4.

[26] *See* KRITZER, *supra* note 22, at 44(*l*). *See also* Tallon, *supra* note 11, § 2.4.3, at 577-78; Wanki Lee, *Exemptions of Contract Liability Under the 1980 United Nations Convention*, 8 DICK. J. INT'L L. 375, 386-87 (1990). However, different laws provide different solutions in relation to the problem of initial impossibility. Therefore, there is a risk of different interpretations, and thus non-uniformity in the application of the CISG.

the judge or arbitrator should make reference to the applicable law.[27]

On the other hand, if the applicable law of contract of sale does not regard the existence of the subject matter of the contract as a condition of validity, then the judge or arbitrator should refer to CISG Article 79. In any case, the judge or arbitrator should, before referring to the applicable law or to CISG Article 79, attempt to interpret the parties' contractual intention and determine whether the parties wish their contract to be avoided if its subject matter does not exist at the time of its conclusion, thus following the unanimously accepted principle of *pacta sunt servanda*, a general principle governing the CISG (see also CISG Article 7(2) which requires interpretation of the CISG in accordance with its general principles before anything else). For example, that would be the case if the party whose performance is affected by the non-existence of the subject matter has provided an express or implied undertaking or warranty in the contract as to the existence of the subject matter.[28]

2. *Unforeseeability*

The second pre-condition, unforeseeability, describes in a very flexible manner the criterion of foreseeability. This rule has been adopted by most domestic systems and is consistent with the basic idea that if the event, an event being an impediment within the meaning of CISG Article 79, was foreseeable, the defaulting party should, in the absence of any contrary contractual provision(s), be considered as having assumed the risk of its realization.[29] Foreseability must be appreciated at the time of the conclusion of the contract; it is a question of whether the promisor ought to have reasonably foreseen a realistic possi-

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[27] *See* GERMAN NATIONAL REPORTS, XIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 127-28 (Peter Schlechtriem ed., 1987).

[28] *See, e.g.*, Couturier v. Hastie, 10 Eng. Rep. 1065 (H.L. 1856); McRae v. Commonwealth Disposals Commission (1951) 84 CLR 377 (where the subject matter of a contract of sale did not exist at the time of the conclusion of the contract, the court based its decision on the construction of the contractual terms).

[29] *See* Tallon, *supra* note 11, §2.6.3, at 580. The concept of foreseeability is not universally accepted as a valid criterion. American scholars have expressed the view that in interpreting U.C.C. § 2-615 the concept of foreseeability may be too slippery to serve as a valid predictor in circumstances that would warrant excuse. *See* CLAYTON P. GILLETTE & STEVEN D. WALTZ, SALES LAW: DOMESTIC & INTERNATIONAL 244-45 (1999).

bility that an impediment to performance would occur. Accordingly, the judge or arbitrator should neither refer to an excessively concerned "pessimist who foresees all sorts of disasters" nor to a "resolute optimist who never anticipates the least misfortune."[30] However, it is important to understand that in the assessment of the foreseeability factor other circumstances should also be considered, such as the duration of the contract (the longer the duration, the less likely the contracting parties will be able to foresee possible impediments), the fact that the price of the goods sold tends to fluctuate in the international market,[31] or the fact that early signs of the impediment were already obvious at the time of the conclusion of the contract.[32]

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[30] Stoll, *supra* note 8, para. 23, at 611. *See also* Tallon, *supra* note 11, §2.6.3, at 580-81; ICC 7197/1992, *supra* note 18; ICC Arbitration Case No. 6281/1989, *reprinted in* SIGVARD JARVIN, ET AL., COLLECTION OF ICC ARBITRAL AWARDS 1986-1990 249 (1990) (analysis of precondition of non-foreseeability).

[31] In ICC Arbitration Case No. 6281/1989 the seller agreed to sell 80,000 tons of steel to the buyer on August 20, 1987 and gave the buyer the option of buying an additional 80,000 tons at the same price, provided that he exercise the option before December 15, 1987. The buyer exercised the option on November 26, 1987, but the seller refused to deliver the additional quantity of steel for the original price. The buyer covered at a loss, since the price of steel had increased. Subsequently, the buyer sued for damages. The seller argued that he was discharged from any liability since the increase in the price of steel was an unavoidable fact. Although the CISG did not apply, the arbitrators analyzed its relevant provisions and rejected the seller's argument. They justified their decision by stating that the seller should have predicted the increase in the price of steel since such increases often take place in the international steel market. Furthermore, the price of steel had already started increasing at the time of conclusion of the contract, and the seller could have protected himself by inserting a price adjustment or renegotiation clause in the contract of sale. *See* ICC Arbitration Case No. 6281/1989, *supra* note 30.

[32] In ICC Arbitration Case No. 7197/1992, the contract of sale between the parties provided that the price should be paid through opening a letter of credit by a Bulgarian bank by a specific date. The letter of credit was not opened on time, and the seller claimed damages for delay in the payment of the price as provided for in CISG Article 61(1)(b). The buyer argued that since the Bulgarian government resolved to freeze the payment of foreign debts, he was discharged from his liability arising from his delay to open a letter of credit. The arbitrators, however, found that the buyer could not be discharged from such liability in accordance with CISG Article 79(1) since the resolution of the Bulgarian government had already been in force at the time of the conclusion of the contract. Accordingly, the buyer was able to predict that there would be an impediment in the payment of the price. *See* ICC Arbitration Case No.7197/1992, *supra* note 18.

3. *Unavoidability*

Even an unforeseeable impediment exempts the non-performing party only if he can prove that he could neither avoid the impediment, nor by taking reasonable steps, overcome its consequences. Avoidance should take place in the most effective manner from an economic point of view, that is, with conclusion of an insurance contract (if this is the norm and it is available), with the insertion of special clauses in the contract of sale, or with the adaptation of the price in order to reflect assumption of the risks by the seller or the buyer.[33] Again, reference should be made to the reasonable person, and a case-by-case analysis will be necessary. For example, "in an earthquake zone the effects of earthquakes can be overcome by special construction techniques, though it would be different in the case of a quake of much greater force than usual."[34]

Furthermore, a difficult situation arises in cases where it is hard to distinguish between "absolute impossibility" and "economic impossibility" ("rendering performance extremely onerous"), where, a case-by-case analysis shall be necessary.[35] This situation is exemplified in the Suez Canal Cases. In these cases, English courts did not find frustration of contract, although the cost of sea transport had more than doubled (ships had to travel around Africa) as the Suez Canal was closed in 1956 due to hostilities between Israel and Egypt.[36]

4. *Notice*

CISG Article 79(4) requires the party who fails to perform to give notice (not necessarily in writing) of the impediment and its effect on his ability to perform, to the other party, regardless of whether the impediment is of a permanent or temporary na-

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[33] *See* KORNILAKIS, *supra* note 7, at 60 ("[T]ypes of self-insurance of the contracting party . . . [are] taken into consideration during the economic analysis of the law."). *See also* PETER BEHRENS, DIE ÖKONOMISCHEN GRUNDLAGEN DES RECHTS 158-59 (1986).

[34] PECL, *supra* note 2, at 381.

[35] *See* Tallon, *supra* note 11, § 2.6.4 at 581-82.

[36] *See, e.g.*, Tsakiroglou & Co. Ltd. v. Noblee & Thorl GmbH, A.C. 93 (H.L. 1962). For more on the Suez canal cases see, Berman, *supra* note 14, at 1439; Rapsomanikis, *supra* note 14, at 582.

ture.[37] If notice is not received by the other party within a reasonable time after the party who fails to perform knows or should have known of the impediment, the non-performing party shall be liable for damages resulting from such non-receipt.[38] These damages, however, will only cover the promisee's reliance interest.[39] It is apparent that CISG Article 79(4) puts the risk of loss of the notice or the risk of delay in the receipt of the notice on the sender, thus constituting an exception to the rule provided for by CISG Article 27.

5. *Causation*

The unforeseeable and unavoidable impediment should be the only cause for the promisor's non-performance, a fact that has to be proven by the non-performing party.[40] Accordingly, the seller will not be exempt from his liability for damages for non-delivery if he first declares that he will not deliver the goods, and subsequently the goods, while still on the seller's premises, are destroyed by a fortuitous event (e.g. fire).[41] Nevertheless, some are of the opinion that if the loss of the goods were to take place even if the promisor had performed his obligation, then the breaching behavior of the latter should not be taken into account and the non-performing party shall be discharged from his liability for non-performance.[42]

C. *Liability for Third Persons*

Under CISG Article 79(2) the promisor is liable for the conduct of a third person engaged to perform all or part of the contract on the promisor's behalf. Furthermore, the same paragraph poses stricter conditions for the exemption of the promisor who must prove that the conditions of the first para-

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[37] *See* BERNARD AUDIT, LA VENTE INTERNATIONALE DE MARCHANDISES 176 (1990).

[38] *See* MARTIN KAROLLUS, UN-KAUFRECHT 216 (1991).

[39] Since the expectation interest will not be covered, the promisee can only be placed in the position in which he would have been had the notice reached him on time. *See* Stoll, *supra* note 8, para. 59, at 624.

[40] *See* ICC Arbitration Case No. 7197/1992, *supra* note 18 (where the arbitrators found in favor of the seller since the buyer did not prove that his bank's delay in opening a letter of credit for the payment of the price was attributable to the Bulgarian government's resolution to freeze payment of foreign debts).

[41] *See* Tallon, *supra* note 11, § 2.6.6, at 583.

[42] *See* ENDERLEIN & MASKOW, *supra* note 19, § 3.4, at 322.

graph of CISG Article 79 are fulfilled not only in relation to himself, but also in relation to the third person.[43]

With regard to the meaning of "third person," the history of CISG Article 79 suggests that it only covers persons who are acting independently and are neither within the promisor's organizational sphere nor under his responsibility.[44] Although such definition appears quite simple, it is doubtful whether it includes the suppliers of the seller. It is suggested that the seller's suppliers should not be considered third persons for the purposes of CISG Article 79(2), since such persons simply create the preconditions or assist in the preparation for the performance of the promisor's obligation without, however, performing all or part of the actual contract (as CISG Article 79(2) requires). This opinion is supported by recent judgments and arbitral awards.[45]

D. *Temporary Impediments*

CISG Article 79(3) provides that the exemption provided by CISG Article 79 only has an effect for the period during which the impediment exists. Accordingly, temporary impediments exempt performance of the obligation temporarily and only if the creditor of the obligation has been notified in accordance with CISG Article 79(4). Nevertheless, as long as the temporary impediment exists, the obligor is still liable for non-performance (CISG Article 79(5)). Therefore, if, for example, there is a delay

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[43] If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

a) he is exempt under the preceding paragraph; and

b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

CISG, *supra* note 1, art. 79(2).

[44] *See* Stoll, *supra* note 8, para. 35, at 615; Hans Stoll, *Inhalt und Grenzen der Schadensersatzpflicht sowie Befreiung von der Haftung im UN-Kaufrecht im Vergleich zu EKG und BGB, in* PETER SCHLECHTRIEM, EINHEITLICHE KAUFRECHT UND NATIONALES OBLIGATIONENRECHT (Peter Schlechtriem ed., 1987).

[45] *See* BGHZ 141, 129, *supra* note 20 (holding that where the seller's supplier is involved, subparagraph (1) and not subparagraph (2) of CISG Article 79 is applicable); *see also* JURISTEN ZEITUNG, *supra* note 20, at 791-94. Furthermore, the Hamburg Arbitral Tribunal has distinguished the seller's liability to his suppliers from his liability to third persons who have been engaged to perform the whole or part of the contact. *See* Schiedsgericht der Handelskammer Hamburg, 42 INTERNATIONALES WIRTSCHAFTRECHT 766 (1996).

in the delivery of the goods and such delay constitutes a fundamental breach, the buyer will be able to declare the contract avoided pursuant to CISG Articles 49(1) and 25.[46]

E. *Problematic Situations*[47]

1. *Specific Performance*

The creditor of the obligation in question may still require specific performance of the obligation under CISG Article 79(5) (along with all other rights other than the right to damages).[48] This solution, however, does not appear satisfactory in situations where performance has been rendered impossible, for example, where the subject matter of the performance no longer exists (the goods have perished) or the performance would be excessively onerous or expensive (for example, there is a necessity for an expensive salvage operation since the goods lie at the bottom of the sea). Therefore, it is suggested that in such extreme situations a teleological interpretation should be adopted and a "limit of sacrifice"[49] should be admitted beyond which the promisor of the obligation could not reasonably be expected to perform his obligation. Such a solution would be rational, especially in a situation where the performance of the promisor has subsequently become illegal. An example of such a situation is where the seller cannot provide the agreed quality of a chemical substance, which is the subject matter of the sale contract, since a ban has been imposed on its use and a penalty is threatened for any related trading.[50] Arguably, in the latter situation the buyer could, in accordance with CISG Article 79(5), require delivery of the agreed quantity of the chemical substance from the seller. However, under a teleological interpretation of CISG Articles 46(1) and 28, the buyer should not be able to require the seller to deliver the goods, since in performing such act, he

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[46] *See* Jelena Vilas, *Provisions Common to the Seller and Buyer, in* INTERNATIONAL SALE OF GOODS DUBROVNIK LECTURES (1985) 239, 255 (Petar Šarèeviæ & Paul Volken eds., 1986); KRITZER, *supra* note 22, Supp. 6 (June 1993), at 632.

[47] *See* Flambouras, *supra* note 7, at 699 (providing a detailed analysis of the problematic areas relating to CISG Article 79).

[48] The CISG provides that a remedy for breach of contract is specific performance (*in natura*). *See* Stathopoulos, *supra* note 7, at 1088; *see also* Pouliadis, *supra* note 7, at 32.

[49] *See* Stoll, *supra* note 8, paras. 55, 57, at 622; Pouliadis, *supra* note 7, at 25.

[50] *See* HONNOLD, *supra* note 17, § 435.5, at 493-95.

would break the ban thus bearing the risk of paying a penalty or losing his trading license. This interpretation is supported by the fact that a similar solution is given under English law, where it is accepted that in the absence of any express terms regulating the rights of the parties, the contract would be treated as frustrated, if, as a result of a ban, the performance is rendered impossible or tender of performance would involve violation of the local law.[51] Of course it should be mentioned that where the contract does not specify an "origin of goods" and a ban is local, then the seller will not be absolved from his obligation to procure the goods from "other possibly more expensive" available sources.

2. *Defective Goods*

The second problem relates to the question of whether the seller may under CISG Article 79 avoid his liability for delivering defective goods. One opinion stresses that the seller may not avoid such liability, even if the conditions included in CISG Article 79 are fulfilled.[52] The basic supporting argument for this opinion is that the seller will normally not be able to inform the buyer of the existence of the impediment, as required by CISG Article 79(4), especially in a situation where the defect is not obvious.[53] The opposite opinion stresses that the seller may, under CISG Article 79, avoid liability for delivering defective goods. The basic argument supporting this opinion is that, since the CISG provides the same remedies for breach committed by the seller and the buyer, it is logical that the CISG would provide for the same conditions under which the contracting party will be exempted from liability for non-performance.[54] The language of CISG Article 79 could be construed to favor such an interpretation, as CISG Article 79(1) contains the phrase "any of his obligations" without providing for any further exceptions or distinctions between buyer and seller. Moreover, in a discussion of Article 65(1) of the 1978 Draft CISG the Secretariat Commentary provides an example of a situation where a non-

[51] *See* Basil Eckersley, *International Sale of Goods – Licences and Export Prohibitions*, LLOYD'S MAR. & COM. L.Q. 265, 268, n.15 (1975).

[52] *See* HONNOLD, *supra* note 17, § 435.5, at 493-95.

[53] *See* Jenkins *supra* note 14, at 2020; HONNOLD, *supra* note 17, § 435.5, at 493-95.

[54] *See* Nicholas, *supra* note 11, at 232-45; Stoll, *supra* note 8, para. 12, at 606.

performing seller could avoid liability. The example illustrates that a seller who fails to supply plastic packaging for goods, as required under the contract would not be liable for damages if the seller provides a commercially reasonable substitute for the plastic packaging.[55] Such obligation, however, is classified as necessary for the goods to conform with the contract in accordance with Article 33 of the 1978 Draft CISG.[56]

3. *Clausula Rebus Sic Stantibus and Related Theories: Economic Impossibility, Change of Circumstances, Alteration of the Contractual Foundation, Impracticability*

CISG Article 79 only governs impossibility of performance, and it is debatable whether a disturbance which does not fully exclude performance, but makes it considerably more difficult or onerous (e.g. change of circumstances, hardship, economic impossibility, commercial impracticability, etc.) can be considered an impediment, thus calling for the application of CISG Article 79.[57] In these situations, the impossibility theory cannot apply since we do not refer to a contractual obligation that cannot be performed in its entirety, but rather to situations where the promisor's performance, though not impossible, has become excessively onerous (hardship-economic responsibility),[58] so different that the economic basis on which the contract was made has disappeared due to subsequent change in circumstances (in Germany: *Wegfall der Geschäftsgrundlage*)[59] or impracticable by the occurrence of a contingency the nonoccurrence of which

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[55] *See Secretariat Commentary, supra* note 22, at 56 (example 65D), *reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALE 404, 446 (1989).

[56] *See* BGHZ 141, 129, *supra* note 20, at 794-97; JURISTEN ZEITUNG, *supra* note 20, at 791-94.

[57] *See* Tallon, *supra* note 11, § 3.1, at 592.

[58] *See, e.g.*, Codice Civile [hereinafter C.c.] art. 1467 (It.) (providing that the party owing performance may request cancellation of the contract in the event that performance has become excessively onerous).

[59] *See* GERHARD DANNEMAN, AN INTRODUCTION TO GERMAN CIVIL AND COMMERCIAL LAW 31 (1993).

was a basic assumption on which the contract was made (in the United States: *Commercial Impracticability*).[60]

Since the majority opinion considers that the mentioned events are not within the scope of CISG Article 79, it is apparent that the CISG does not adopt the *clausula rebus sic stantibus* doctrine[61] under which the validity of a contract depends upon the continuance of the surrounding circumstances at the time of its formation.[62] Therefore, events such as a sudden increase in the price of raw materials or a dramatic devaluation of currency, will not allow the seller to avoid his liability for non-delivery of the goods or to require renegotiation of the terms of the contract of sale. Nevertheless, in many business circles such strict interpretation of the *pacta sunt servanda* rule is considered too severe, especially in contracts of duration such as cooperation agreements, long lasting construction or project finance contracts, distribution and supply of goods agreements, estate development agreements, etc., where unforeseen events may result in a fundamental change of the equilibrium of the contract, thus rendering performance of the contractual obligation excessively onerous. An example of this situation is where there has been a fundamental increase in the costs of the performance or a fundamental decrease in the value of the performance that is to be received by the disadvantaged party.[63]

Experienced businessmen are normally aware of the possibility that these risks may occur. Since they anticipate the con-

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[60] *See* GILLETTE & WALTZ, *supra* note 29, at 222; Thomas Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under UCC Section 2-615*, 54 N.C. L. REV. 545, 553 (1975).

[61] *See* Tallon, *supra* note 11, § 3.1, at 592; JAN H. DALHUISEN, DALHUISEN ON INTERNATIONAL COMMERCIAL, FINANCIAL AND TRADE LAW 184-85 (2000). However, other commentators appear reluctant to reject the idea that changed circumstances may be considered impediments for the purposes of CISG Article 79. *See, e.g.*, ENDERLEIN & MASKOW, *supra* note 19, § 6.3, at 324-25.

[62] *See* AUDIT, *supra* note 37, § 182, at 175. The effect of this doctrine "is in certain cases to discharge contractual obligations because circumstances have changed since the conclusion of the contract [in such a degree,] so as to destroy a basic assumption [that] the parties had made when they entered the contract." TREITEL, *supra* note 24, at 1; *see also* ZIMMERMANN, *supra* note 24, at 579-80; ZWEIGERT & KÖTZ, *supra* note 13, at 518; Alexei G. Doudko, *Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Developments in Russia*, 5 UNIF. L. REV. 483, 492 (2000-3).

[63] *See* Ole Lando, *Eight Principles of European Contract Law*, *in* MAKING COMMERCIAL LAW - ESSAYS IN HONOUR OF ROY GOODE 119 (Ross Cranston ed., 1997).

tinuance of circumstances existing at the time of the contract formation, they normally insert in their contract documents *force majeure*, hardship clauses, or special risks clauses, thus "attempting to anticipate and deal with the situation where unforeseen circumstances fundamentally change the contractual equilibrium such that an excessive, normally economic, burden is thrust upon one of the parties."[64]

Nevertheless, the contracting parties are frequently not sufficiently sophisticated, or are too careless of their own interests and either neglect to insert such clauses or draft the inserted clauses in an unsatisfactory manner, in that the clauses do not cover specific events or situations.[65] It is at this point that a problem is created; there exist no specific provisions in the CISG that allow renegotiation or adaptation of the contract in the cases of economic impossibility, impracticability or hardship. As a result, commentators have suggested that in relation to these matters there is a gap in the CISG.[66] Thus recourse to the gap-filling methodology found in CISG Article 7(2) becomes necessary.[67]

In this situation, the first methodological step would be to establish whether the aforesaid issue is to be settled in conformity with the general principles on which the CISG is based. It could be argued that the general principle which requires excuse in the case of total impossibility (as incorporated in CISG Article 79) could be of assistance if it is extended by analogy to cover cases of economic impossibility, hardship, or change of circumstances or commercial impracticability. Nevertheless, such a broad interpretation would violate the letter and *ratio* of CISG Article 79, which only provides the non-performing party with a defense against an action for damages and does not re-

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[64] Karl Heinz Böckstiegel, *Hardship, Force Majeure and Special Risks Clauses in International Contracts, in* 3 ADAPTATION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE 159 (Norbert Horn ed., 1985).

[65] *See* PECL, *supra* note 2, at 323.

[66] *See generally* Tallon, *supra* note 11, § 3.1.2, at 593-94.

[67] Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CISG, *supra* note 1, art. 7(2).

late to renegotiation or, alternatively, judicial adaptation of the contract.

Another possibility would be to totally avoid CISG Article 79 and any general principle that it may incorporate and to accept that the aforesaid issues are included in the general principle of good faith as is spelled out in CISG Article 7.[68] Such interpretation would, however, result in: (1) imposing on the parties obligations deriving from the good faith principle,[69] and (2) increasing the risk of different interpretations by national courts thus jeopardizing the aim of the CISG -- to promote uniformity in its application.[70]

Since the aforesaid matter cannot be resolved in conformity with the general principles of the CISG, the next step dictates recourse to the relevant provisions of the law applicable by virtue of the rules of private international law of the forum (if the case is being dealt with by a national court) or by the conflict rules that the arbitrators will use. The provisions of the applicable law may determine the validity of the contract depending on the continuation of circumstances present at the time of contract formation, otherwise on the renegotiation and, if the parties fail to reach agreement, on judicial adaptation of the contract. However, due to the disparity among different domestic provisions and theories, resorting to national laws would be undesirable as it would result in different solutions and thus non-uniformity in the application of the CISG.[71]

Taking into consideration all of these problems, it is possible to propose that the aforesaid issues should be resolved by applying the relevant rules of other international instruments

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[68] *See id.* art. 7(1) ("In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.").

[69] Such result, however, would be unacceptable since good faith should only be used as a criterion for the interpretation of the CISG's explicit provisions rather than as means of bypassing them. *See* Tallon, *supra* note 11, § 3.1.2, at 594; ENDERLEIN & MASKOW, *supra* note 19, § 6.3, at 325.

[70] *See* Tallon, *supra* note 11, § 3.1.2, at 594; Hugh Collins, *Good Faith in European Contract Law*, 14 OXFORD J. LEGAL STUD. 229, 253 (1994).

[71] *See* ZWEIGERT & KÖTZ, *supra* note 13, at 516. *See also* Trib. Civile de Monza, 14 Jan. 1993, R.G. 4267/88, Giur. It. 1994, I, *translated at* http://cisgw3.law.pac.edu/cases/930114i3.html *and* 15 J.L. & COM. 153, 158 (1995) (holding that the CISG did not apply to the contract and thus that Italian law would apply).

in the field of commercial law (e.g. UNIDROIT Principles, PECL).[72] Although this opinion definitely carries credit, it seems there are serious arguments against its adoption (*see* discussion *infra* Part V(C)).

4. *Penalties and Liquidated Damages Clauses*

Contracting parties often insert penalty or liquidated damages clauses in the contract of sale. The question that arises here is whether the obligor is discharged from his liability to pay the amount imposed by the penalty or liquidated damages clause if the conditions of CISG Article 79 are fulfilled.

One opinion argues that these matters are not within the scope of the CISG, thus they are governed by other applicable law.[73] However, even if we refer to other applicable law, the answer to this question depends to a great extent on the terms of the contract, since such terms incorporate the express or implied intention of the parties.[74] Accordingly, it is suggested that if a contract of sale incorporates a wide penalty clause and this clause does not further provide for the circumstances under which the contracting party under breach will be discharged from his liability to pay the amount (absolute penalty clause), the judge would probably decide that no discharge may take place where the penalty clause is applicable, even if the conditions of CISG Article 79 have been satisfied. This solution from a methodological point of view appears to be the most appropriate, since the contractual intention of the parties (which did not provide for exceptions to the absolute payment obligation imposed by the penalty clause) supersedes CISG Article 79 (CISG Article 6). However, in this situation it is possible that the amount of the penalty will be reduced or eliminated by reason of the application of mandatory rules.[75]

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[72] *See* Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law*, 69 TUL. L. REV. 1149, 1181 (1995).

[73] *See Impracticability and Impossibilty*, *supra* note 11, § 5.03, at 5-19, 5-20; ICC Arbitration Case No. 7585/1994, J. DR. INT'L 1015 (1995) (where the arbitrators held that the validity of a penalty clause would be governed by the general principles of the CISG, *see* CISG, *supra* note 1, art. 7(2), and not by the otherwise applicable law).

[74] *See* Stoll, *supra* note 8, para. 15, at 607.

[75] *See, e.g.*, GREEK CIVIL CODE art. 409 (court may reduce the penalty amount if it is excessive). *See also* Flambouras, *supra* note 7, at 705 (analyzing situations where a court may reduce the penalty amount).

With regard to liquidated damages clauses, the solution appears to be different and it depends on whether such clauses are classified as "compensation." If we accept that they are compensatory, then the obligor of a monetary obligation deriving from a liquidated damages clause will owe a monetary obligation. Therefore he may be discharged provided the conditions of CISG Article 79 have been fulfilled.[76]

5. *Relation to the Obligation to Pay Interest*

It is accepted that interest is owed even if the delay in the payment of price (or any other monetary obligation in general) is due to a *force majeure* event, since payment of interest is one of the rights that are referred to in CISG Article 79(5). One point of view is that interest is not considered compensation, therefore the obligation to pay interest continues even if the debtor of the monetary obligation is discharged from his liability to pay compensation for breach of contract.[77] The opposing view stresses that the obligation to pay interest may be classified as compensation. Therefore, the debtor of the obligation will not have to pay interest when the impediment ceases to exist.

The former opinion appears preferable since (a) the CISG clearly distinguishes between interest payment obligation and damages, and (b) the obligation to pay interest commences where payment has been delayed even if the creditor of the payment obligation has not suffered any damage from such delay and the debtor is not liable.[78]

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[76] *See, e.g.*, ICC Arbitration Case No. 7585/1994, *supra* note 73, where the arbitrators found that a clause which provided for payment of a compensation fee even in the case of *force majeure* events was not valid, since it would be contrary to the general principle of CISG Article 79, which requires discharge of the obligor of an obligation in the case of *force majeure* events. It is quite possible that under many domestic systems such a clause would also be contrary to good faith and thus invalid, or the national court will deny recognition or enforcement of a judgement granting compensation under such clause on the ground that such recognition or enforcement is contrary to public order.

[77] *See generally* Dionysios Flambouras, *To próblêma tês epidíkasês kai t tôy ypôlôgismôú tôn tókôn otê Súmbasê Tês Viénnês Gia Tis Diethneís Pôléseis Kinêtón Pragmátôn* [*The Problem of the Granting and Calculation of Interest Under the Vienna Convention for the International Sale of Goods*], Critical Review of Legal Theory and Practice 195 (2000).

[78] *See id.*

III. *Force Majeure* and Hardship Clauses

CISG Article 79 applies unless the contracting parties have otherwise provided pursuant to CISG Article 6. This will normally be the case and CISG Article 79 will wholly or partially be excluded, since the contracting parties in international trade are normally very experienced and aware of the risks involved. Therefore, they are likely to include special clauses in their contract, use pre-drafted contracts or use general terms specific to a particular trade.[79]

Such contractual arrangements may appear as *force majeure* or hardship clauses. In the former case, the clause generally covers future situations where events occur which are beyond the control of the parties and render execution of the contract impossible, either temporarily or permanently, and may or may not provide for the discharge of the debtor of the obligation in question where these events occur (e.g. *force majeure* events, embargoes, export/import limitations, etc.). A *force majeure* clause may impose more or less lenient conditions or may provide for the obligor's liability in *force majeure* sitations.[80] On the other hand, a hardship clause attempts to anticipate and deal with the situation where unforeseen circumstances fundamentally change the contractual equilibrium such that an excessive, normally economic, burden is thrust upon one of the parties. Such a clause is likely to set some parameters for renegotiation of the contract in its entirety (or some contractual terms) and its objectives, should the circumstances change (e.g. if a dramatic devaluation of the currency occurs).[81]

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[79] Examples of pre-drafted contracts are: United Nations Commission for Europe, No. 188 "General Conditions for the Supply of Plant and Machinery for Export," U.N. Doc. ME/188/ibis 53 (1953), *in* 1 SOURCES OF INTERNATIONAL UNIFORM LAW 90 (K. Zweigert & J. Kropholler eds., 1971); No. 100 The Grain and Feed Trade Association Contract for Shipment of Feedingstuffs in Bulk, *available at* http://www.lurisint.org/pub/02/en/doc/63.htm.

[80] *See* PECL, *supra* note 2, at 378 (discussing the requirements for invoking a *force majeure* clause). *See also* ICC Arbitration Case No. 7585/1994, *supra* note 73 (where a penalty clause provided for the buyer's liability even if he had repudiated the contract due to *force majeure* events). However, in ICC 7585/1994 the arbitrators did not consider the penalty clause valid.

[81] *See* Böckstiegel, *supra* note 64, at 159-60, for a definition of *force majeure* and hardship. Special risks clauses anticipate the occurrence of specified events that would otherwise fall under a hardship or a *force majeure* clause. In enumerating these events a special risks clause attempts to allocate the risk of the occurrence of such events among the parties in a predetermined manner. *See* JAMES J.

Force majeure clauses are normally used in short term contracts of sale where the contracting parties' obligations are limited to the delivery of the goods and the payment of the price. In these situations, the number of discharging events is normally limited and restrictively enumerated in the *force majeure* clauses. On the other hand, in contracts performed over a long period of time (e.g. distribution, agency, agreements consisting of successive contracts of sale, supply contracts) the absolute application of the *pacta sunt servanda* rule appears quite harsh since during the existence of the contractual relationship unpredictable and otherwise unavoidable factors could render the performance of the contractual obligations excessively onerous or unfair. Consequently, in such situations the insertion of a hardship clause is often viewed as necessary.[82]

IV. ARTICLE 80 OF THE CISG

The UNCITRAL Draft Convention did not contain a specific provision corresponding to CISG Article 80, since such situations could be covered with the application of the principles of good faith and *venire contra factum proprium*. However, during the preparatory work it was decided that such provision should be included to avoid the risk of the non-uniform application of the CISG by reason of Article 7(2).[83] CISG Article 80 provides that "a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission." Accordingly, the seller may not plead the rights of CISG Articles 45-52 and 71-73 and the buyer the rights of CISG Articles 61-65 and 71-73.[84]

WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 3-10 (4th ed. 1995). *See also* Marcel Fontaine, *Les clauses de force majeure dans les contrats internationaux*, 5 DR. PRAT. COM. INT'L 469, 497-98 (1979); Berman, *supra* note 14, at 1428-429; Wouter Den Haerynck, *Drafting Hardship Clauses in International Contracts, in* STRUCTURING INTERNATIONAL CONTRACTS 231, 235 (Dennis Campbell ed., Kluwer Law International 1996); Dietrich Maskow, *Hardship and* Force Majeure, 40 AM. J. COMP. L. 657, 658-63 (1992); Clive M. Schmitthoff, *Hardship and Intervener Clauses*, 1980 J. BUS. L. 82, 85; DALHUISEN, *supra* note 61, at 186.

[82] *See* Bruno Oppetit, *L'adaption des contrats internationaux aux changements de circonstances: la clause de hardship*, J. DR. INT'L 794 (1975).

[83] *See* Tallon, *Breach Caused by Other Party, in* COMMENTARY ON THE INTERNATIONAL SALES LAW § 1.1, at 596 (C.M. Bianca & M.J. Bonnell eds., 1987).

[84] *See id.* § 2.5, at 598.

V. PRINCIPLES OF EUROPEAN CONTRACT LAW AND CISG PROVISIONS: A COMPARISON

A. *Excuse Due to an Impediment*

A rule similar to CISG Article 79 is provided for by PECL Article 8:108, since the conditions laid down in the first paragraph for the operation of the article are analogous to the conditions traditionally required for *force majeure*: (a) event outside the debtor's sphere of control ("impediment beyond its control"); (b) which could not have been taken into account ("it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract") and (c) of insurmountable nature ("or to have avoided or overcome the impediment or its consequences").

Every impediment which fulfils the conditions set by PECL Article 8:108(1) relieves the non-performing party from any liability, in contrast with CISG Article 79, which only provides the non-performing party with a defense against an action for damages. Accordingly, if the non-performing party is excused under PECL Article 8:108(1), he will have a defense against an action for specific performance (PECL Articles 9:101 and 9:102), damages (including liquidated damages), or termination of the contract.[85]

Finally, PECL Article 8:108(3), similar to CISG Article 79, provides for the non-performing party's duty to ensure that notice of the impediment and of its effect on that party's ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. It is, therefore, apparent that PECL Article 8:108(3) (similar to CISG Article 79) puts risk of non-receipt or delay of receipt of the notice (non-communication or delay in communication) on the sender. If notice is not received by the creditor of the obligation, the non-performing party will be liable for damages resulting from such non-receipt. These damages shall, however, in contrast to the CISG's provision under which only reliance interest is covered, cover any loss, i.e., reliance and expectation interest.

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[85] Under the CISG, if the nonperforming event, for example, delay, amounts to a fundamental breach, the creditor of the obligation shall still have the option to avoid the contract. *See* CISG, *supra* note 1, art. 49.

B. *Hardship Under the Principles of European Contract Law*

In situations where the CISG applies, a major issue emerges due to the fact that it is debatable whether or not a disturbance which does not fully exclude performance, but makes it considerably more difficult or onerous (e.g. change of circumstances, hardship, economic impossibility), can be considered an impediment, thus calling for the application of CISG Article 79 (*clausula rebus sic stantibus* theory). Furthermore, potential problems related to the application of the general principles, including that of good faith, and the domestic applicable law in accordance with CISG Article 7(2), have been noted. Taking these problems into consideration, one could propose that the aforesaid issues should be resolved by applying the relevant rules of other uniform international projects in the field of commercial law. Although, there is extensive academic discussion for the possibility of applying the UNIDROIT Principles,[86] the same matter has not been addressed in relation to the PECL, where Article 6:111 provides for the change of circumstances.

Before dealing with the possibility of applying PECL Article 6:111 it is important to present some basic introductory points concerning said article. First, PECL Article 6:111(1) confirms that *pacta sunt servanda* is the rule: "A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished."[87] Then PECL Article 6:111(2) provides the exception: "If . . . performance of the contract becomes excessively onerous because of change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or ending it" (renegotiation stage) "provided that: (a) the change of the circumstances occurred after the time of conclusion of the contract,"[88] "(b) the possibility of a change of circumstances was not

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[86] *See* Garro, *supra* note 72, at 1182; Jennifer M. Bund, Force Majeure *Clauses: Drafting Advice for the CISG Practitioner*, 17 J.L. & COM. 381, 389-92 (1998).

[87] PECL, *supra* note 2, art. 6:111(1).

[88] *Id.* art. 6:111(2)(a). Accordingly, "[i]f unknown to either party circumstances which make the contract excessively onerous for one of them already existed at that date, the rules on mistake will apply." *Id.* at 325. Since the PECL provides for cases of mistake, there is no need for recourse to the domestic applica-

one which could reasonably have been taken into account at the time of conclusion of the contract"[89] and "(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear."[90] Nevertheless, if the parties fail to reach an agreement within a reasonable period during the renegotiation stage then PECL Article 6:111(3) provides the court with the discretion either "(a) to end the contract at a date and on terms to be determined by the court; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances."[91] Finally in either case, (a) or (b), "the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing."[92]

C. *The CISG and the Gap-Filling Application of the Principles of European Contract Law (with parallel reference to the UNIDROIT Principles of International Commercial Contracts)*

Regarding the possibility of application of the provisions of PECL Article 6:111 (and similarly UNIDROIT Principles Article 6.2.2)[93] as a means of specifying the meaning of the CISG's general principles (Article 7(2)) it is suggested that this solution

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ble law. Therefore, problems similar to those encountered under CISG Article 4, which refers to the domestic applicable law for similar matters, do not exist.

[89] *Id.* art. 6:111(2)(b). "This condition is parallel to that applicable to impossibility of performance and should be interpreted in the same way. Hardship cannot be invoked if the matter would have been foreseen and taken into account by a reasonable man in the same situation [that is,] by a person who is neither unduly optimistic or pessimistic, nor careless of his own interests." *Id.* at 325.

[90] *Id.* art. 6:111(2)(c). This is a self-evident rule since the rules adopted by the PECL are not mandatory. Accordingly, a party cannot make use of this section if it has expressly contractually undertaken to take the risk of a specific change, for example, the seller undertakes to pay even if there is an excessive increase in the price of a raw material, or if the contract is of a speculative nature, for example, in a sale on the futures market. *See id.* at 326.

[91] *Id.* art. 6:111(3).

[92] *Id.*

[93] Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

UNIDROIT Principles, *supra* note 6, art. 6.2.1.

> There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's per-

should not be adopted for the following reasons. First, the drafters of the PECL aimed to make a major contribution to the formation of a European *ius commune,* i.e., *lex mercatoria*, the scope of which is limited to the States of the European Union.[94] In contrast, the CISG may be applied universally. Thus, it is highly unlikely that a non-European Union judge or arbitrator will refer to the PECL in order to interpret the meaning of the CISG's general principles when applying CISG Article 7(2).[95] Second, even if CISG Article 7(2) is applied by a European Union judge or arbitrator, it is hard to imagine that the latter would refer to PECL Article 6:111 (or to UNIDROIT Principles Article 6.2.2) to justify renegotiation or adaptation of the contract, since CISG Article 7(2) only requires settlement with reference to the general principles on which the CISG is based. Neither the legislative history nor the language of the CISG indicates the existence of any general principle allowing renegotiation or judicial adaptation in the case of changed circumstances or economic impossibility.[96] Only if a general

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formance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of events was not assumed by the disadvantaged party.

UNIDROIT Principles, *supra* note 6, art. 6.2.2.

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the ground on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium.

UNIDROIT Principles, *supra* note 6, art. 6.2.3.

[94] *See* KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA 198 (1999).

[95] *See* CISG, *supra* note 1, art. 7(2).

[96] *See* Trib. Civile de Monza, *supra* note 71. In this case the plaintiff, an Italian seller who failed to deliver the goods to the defendant, a Swedish buyer, claimed avoidance of the sales contract on the ground of hardship since the price of the goods had increased after conclusion of the contract and before delivery by

principle exists within the CISG's system (e.g. full compensation), may the PECL provisions be used in order to specify one of the possible meanings of that principle (e.g. the mode of calculation of the rate of interest). Third, the PECL (and the UNIDROIT Principles) deal with the law of contract in general, rather than the law of sales; therefore, provisions dealing with hardship are necessary especially in the light of the existence of long term agreements. Finally, such solution (the application of the PECL and the UNIDROIT Principles) would appear to disrespect the intentions of the contracting parties, which could have provided in their contracts for renegotiation or adaptation in the cases of hardship, economic impossibility, etc.

Based on the foregoing analysis it is thus clear that PECL Article 6:111 (or UNIDROIT Principles Articles 6.2.1-3) may only apply if the contracting parties agree on its incorporation into the contract of sale. In this situation, in accordance with CISG Article 6, PECL Article 6:111 will apply as a special provision of a contractually incorporated a set of terms, as discussed below.

D. *Methodological Model – Interpretation of the Terms of the Contract*

Where the CISG applies, some commentators[97] suggest that in the event of subsequent material change in circum-

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almost 30%. Although the CISG did not apply, the court made it clear that the seller could not rely on hardship as a ground for avoidance, since the CISG did not contemplate such remedy in Article 79 or elsewhere.

Furthermore, the efforts of the Norwegian delegate to include a provision on hardship in the CISG did not succeed. *See Text of Proposed Amendments; Action by the First Committee; Consideration by the First Committee of the Draft Convention on Contracts for the International Sale of Goods,* Official Records 83, at 133-36, U.N. Document A/CONF.97/C.1/L.191/Rev.1 (1981), *reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 655, 705-08 (1989).

Finally, in the ICC award of 4 May 1998, the arbitral "[t]ribunal pointed out that the theory of changed circumstances does not form part of the widely recognized and accepted legal principles . . . ." Doudko, *supra* note 62, at 508. *See also* ICC Arbitration Case No. 8331/1996, J. DR. INT'L 1041, 1044 (1995); Vol. 10, No.2 ICC BULL. 65-68 (1998); ICC Arbitration Case No. 8873/1997, UNIF. L. REV. 1999, 1010 (where the arbitral tribunal did not apply the UNIDROIT Principles and noted that the Principles' rules on practice do not correspond to international trade practice).

[97] *See* Stoll, *supra* note 8, para. 40, at 618; ENDERLEIN & MASKOW, *supra* note 19, § 6.3, at 324.

stances or economic impossibility there must be a "limit of sacrifice" beyond which, in view of the severe economic disadvantages involved, the promisor can no longer be expected to perform the contract. Even so, these commentators admit that there is "not much sense [in defining] that limit in more detail given the manifold nature of the conflicts which may arise" and suggest that a strict test should be applied.[98] As Professor Stoll points out, the correct approach is to take a reasonable interpretation of the actual contract under CISG Article 6, in order to clarify whether the parties may have derogated from or varied the effect of CISG Article 79.[99]

It is proposed that the following methodological model be followed. The judge or arbitrator must first interpret the contractual terms in accordance with CISG Article 8, and decide whether the contracting parties have implicitly or expressly provided for the possibility of renegotiation or judicial-arbitral adaptation of the contract in the event of a change of circumstances or economic impossibility. This will be the case under the following circumstances:

(a) The parties have included a hardship clause in their contract allowing renegotiation or adaptation of the contract (*see* Part II *supra*);

(b) The contracting parties have implied or expressly excluded the application of the whole of the CISG or of CISG Article 79 and the law which is applicable in accordance with the rules of private international law of the forum (or in accordance with the conflict rules that the arbitrators apply) provides for the possibility of renegotiation or adaptation of the contract.[100]

(c) The contracting parties, especially in contracts subject to arbitration, have provided for the sole application of the PECL or UNIDROIT Principles.[101] More specifically, there are

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[98] *See* Stoll, *supra* note 8, para. 40, at 618.

[99] *See id.*

[100] This situation also includes cases where the parties have included terms of the trade in their contracts, thus impliedly excluding the provision of CISG Article 79 by reason of CISG Articles 6 and 9. The latter of these terms also has a customary, and thus binding, effect.

[101] There are many examples where the arbitrators applied the UNIDROIT Principles as *lex causae*, thus respecting the contracting parties' intention not to apply a national system of law. *See, e.g.*, ICC Arbitration Case No. 8331/1996, *supra* note 96 (application of UNIDROIT Principles); ICC Arbitration Case No. 1795/1997, 2 UNIF. L. REV. 602 (1997-3) (where the arbitrators decided "in con-

many reported cases where the arbitrators based their decisions on the application of the UNIDROIT Principles as an autonomous supranational legal system and not on the application of other legal systems.[102] Furthermore, the parties quite often provide for the application of the UNIDROIT Principles, but as a supplement to the applicable law of the contract. In this case, the set of conflict rules that the arbitrators will use to find the *lex causae* of the contract may indicate that the law of a State that has ratified the CISG is applicable. Accordingly, the UNIDROIT Principles (or the PECL) will supersede or exclude the CISG's rules on discharge in accordance with CISG Article 6 and will supplement the CISG's rules on hardship.

(d) The contracting parties (in contracts subject to arbitration) have authorized the arbitrators to act *ex aequo et bono* or as *amiables compositeurs*, or to base their decisions on rules of law that do not belong to any particular domestic law (negative choice-of-law, e.g. where the parties agree in their contract for the application of the general principles of law, the *lex mercatoria* rules, the rules of natural justice, the principles of equity or the trade usages and generally accepted principles of international trade).[103] The basic argument against the applica-

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formity with the UNIDROIT Principles tempered by recourse to equity"); ICC Arbitration Case No. 116/1997, 4 UNIF. L. REV. 172 (1999-1) (where the parties requested the arbitral tribunal to base its decision on "Russian law supplemented, if necessary, by the UNIDROIT Principles").

[102] *See* ICC Arbitration Case No. 8261/1996, 4 UNIF. L. REV. 170 (1999-1); ICC Arbitration Case No. 7110/1999, Vol. 10, No.2 ICC BULL. 39, 46 (Fall 1999); ICC Arbitration Case No. 8874/1996, Vol. 10, No.2 ICC BULL. 82 (Fall 1999). For more on this matter, see M.J. Bonell, *The UNIDROIT Principles and Transactional Law*, 5 UNIF. L. REV. 199 (2000).

[103] UNCITRAL Model Law on International Commercial Arbitration, art. 28(1), 18th Sess., U.N. GAOR, 40th Sess., Supp. No. 17, Annex I, U.N. Document A/40/17 (1985), *reprinted in* 24 I.L.M. 1302 provides that "[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to substance of the dispute." Rules of law are specifically domestic and include rules of a supranational character. However, it is unlikely that a domestic court would apply rules of a supranational character, since the domestic conflict of law rules normally indicate the application of the domestic laws of a particular legal system. The language of Articles 3 (3) and 4 (1) of the EC Convention on the Law Applicable to Contractual Obligations supports this position. The EC Convention refers to the "law of a contracting state" and the "law of the country with which the contract has its closest connection." EC Convention on the Law Applicable to Contractual Obligations 80/934/EEC, 1980 O.J. (L 266), http://www.jus.uio.no/lm/ec.applicable.law.contracts.1980/doc.html (Nov. 10, 2001).

tion of the PECL or the UNIDROIT Principles[104] in this situation is that these are not the only set of uniform rules that represent the general principles of law, the *lex mercatoria* etc. It is, in the writer's personal opinion, more preferable and methodologically sound to accept that the PECL, along with the UNIDROIT Principles, the CISG and the INCOTERMS 2000 are some of the available sources for the specification of general concepts such as those mentioned above.[105] Accordingly, should any of the aforesaid situations arise and there is reference to general principles of law, *lex mercatoria*, principles of justice, etc., the arbitrators will have the chance to apply the rules of the UNIDROIT Principles or the PECL concerning change of circumstances, as far as these rules can be considered to reflect generally accepted principles and rules and always through the provisions of a domestic legal system (or the rules of an international convention that has been ratified by the State) that will allow for their application (e.g. CISG Article 6).[106]

VI. CONCLUSION

Taking into consideration the problems relating to the renegotiation or adaptation in the cases of radical change of circumstances where the CISG applies, it is suggested that the contracting parties should make clear their intentions, that is, whether they will provide for the possibility of renegotiation where the price of goods has been altered by inserting a hardship clause or for the possibility of mutual discharge from liability in the cases of economic impossibility or hardship by inserting a *force majeure* clause. Such provision will be desirable especially in situations where (a) there is a long term contract (e.g. distribution agreement consisting of a number of successive sale agreements between the same parties), (b) the price of goods sold tends to fluctuate in the international mar-

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[104] In ICC 8873/1997 the arbitral tribunal rejected the application of the doctrine of hardship, pointing out that the UNIDROIT Principles' rules on hardship did not correspond to international trade practice. *See* ICC Arbitration Case No. 8873/1997, *supra* note 96.

[105] *See* Philippe Kahn, *Les principes Unidroit comme droit applicable aux contrats internationaux, in* CONTRATTI COMMERCIALI INTERNAZIONALI E PRINCIPI UNIDROIT 39, 41, 45 (M.J. Bonell & F. Bonelli eds., 1997).

[106] *See* ICC Arbitration Case No. 7535/1996, 2 UNIF. L. REV. 598 (1997-3).

ket,[107] or (c) where, especially in contracts subjected to arbitration, the parties subject their contract to legal sources or principles of supranational character.

[107] See ICC Arbitration Case No. 6281/1989, *supra* note 30 (where it was held that since the parties had not inserted in their contract of sale a price adjustment clause, no renegotiation of the price should take place even if the factual circumstances appeared to be totally different); Trib. Civile de Monza, *supra* note 71 (rejecting a request for dissolution "based on supervening excessive onerousness" and nonperformance).