

Journal of Law & Commerce

Vol. 35, No. 1 (2016) • ISSN: 2164-7984 (online)
DOI 10.5195/jlc.2016.116 • <http://jlc.law.pitt.edu>

ARTICLES

HARDLY ROOM FOR HARDSHIP—A FUNCTIONAL REVIEW OF ARTICLE 79 OF THE CISG

David Kuster & Camilla Baasch Andersen



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program, and is cosponsored by the University of Pittsburgh Press.

ARTICLES

HARDLY ROOM FOR HARDSHIP—A FUNCTIONAL REVIEW OF ARTICLE 79 OF THE CISG

*David Kuster** & *Camilla Baasch Andersen***

INTRODUCTION[†]

Over a decade ago, Francesco Mazzotta penned a penetrating article on the issue of determination of interest rate under Article 78 of the Convention on Contracts for the International Sale of Goods (CISG),¹ which pierced academic discussions at the time, and won a much deserved Schmitthoff research award. It was appropriately entitled: “CISG Article 78: Endless disagreement among commentators, much less among the courts.”² After finding a similar phenomenon of “much ado about nothing,” in relation to the application of Article 79 and the issue of hardship, the authors were inspired to undertake a similar debunking of a similar myth, in Mazzotta’s vein. We hope it may inspire others to pursue pragmatic and empirical research issues.

* David Kuster is a student at the University of Melbourne studying the Juris Doctor and previously completed a Bachelor of Philosophy with honours at the University of Western Australia.

** Dr. Camilla Baasch Andersen is Professor of International Commercial Law at University of Western Australia, and has worked as a CISG specialist for two decades at universities across several continents. For a full bio see: <http://www.web.uwa.edu.au/people/camilla.andersen>.

[†] The *Journal of Law and Commerce* adheres to The Bluebook Uniform System of Citation, but citations to foreign authority in this Article instead follow a system of citation employed by the author that is used in other jurisdictions in discussion of the subject matter addressed. With respect to foreign language sources for which the *Journal of Law and Commerce* was not provided an English translation, the editors have relied on the author for the veracity of statements drawn from such sources.

¹ U.N. Convention on Contracts for the International Sale of Goods [CISG], *opened for signature* Apr. 10, 1980, S. TREATY DOC. NO. 98-9 (1983); Annex I, U.N. DOC.A/Conf. 97/18 (1980).

² Francesco G. Mazzotta, *CISG Article 78: Endless Disagreement Among Commentators, Much Less Among the Courts*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE SALE OF GOODS (CISG)* 123–61 (Pace Int’l L. Rev. ed., 2004).

The question of whether Article 79(1) CISG can form a basis for exemption from liability in cases where hardship occurs is one that has divided CISG scholars.³ There is no mention of the term “hardship” within Article 79(1), and the linguistic problem of categorizing hardship as an “impediment” rather than a “difficulty” has fueled the debate. However, as Schwenger points out, unforeseeable changes in circumstances that alter the economic equilibrium of a contract (i.e., situations of hardship) are one of the major problems parties to a contract face in international commercial law⁴—and so this is an area that needs clarification.

From Schlechtriem to Honnold to *The Practitioners Guide to the CISG*, innumerable academics have extended their analysis of the provision and expressed their various views on whether or not liability for failure to fulfill an obligation can or should be exempted under Article 79 CISG in cases of hardship. A few years ago, the CISG Advisory Council (“CISG AC”) sought to offer clarity on this topic through its AC Opinion No. 7 of October 2007, stating that:

A change of circumstance that could not reasonably be expected to have been taken into account, rendering performance excessively onerous, may qualify as an “impediment” under article 79(1). . . . Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under article 79.⁵

This seems to allow this inclusion of hardship considerations in the ambit of Art 79(1). However, the discussion and debate surrounding the provision has not subsided as a result of this opinion. As Professor Flechtner eloquently

³ This Article applies the definition of “hardship” as found in Article 6.2.2 of the UNIDROIT principles: “There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of the party’s performance has increased or because the value of the performance a party receives has diminished.” INT’L INST. FOR THE UNIFICATION OF PRIVATE L. [UNIDROIT], *Principles of International Commercial Contracts*, art. 6.2.2, <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/403-chapter-6-performance-section-2-hardship/1058-article-6-2-2-definition-of-hardship>.

⁴ Ingeborg Schwenger, *Force Majeure and Hardship in International Sales Contracts*, 39 VICT. U. WELLINGTON L. REV. 709, 709 (2009).

⁵ CISG-AC Opinion No. 7, ¶ 3.1, 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.

states, Article 79(1) is “difficult to understand, challenging to distinguish, and daunting to apply.”⁶

This Article argues that while the varying scholarly and theoretical contributions to the issue over the years have been very informative (and an interesting study for the comparative lawyer), they are ultimately not important now that there is a sufficiently large body of case law on the issue to illustrate a functional uniformity. It is not the scholars who shape the future of the CISG, but the judges and arbitrators who apply it. And they have spoken.

This Article thus demonstrates that Courts and arbitral tribunals have set the threshold for exemption for hardship very high due to the risks inherent in international commercial trade, and that there are no currently recorded decisions exempting a party from liability due to hardship using Article 79(1) of the CISG. With a practical threshold so high as to make application of Article 79(1) closely align with impossibility, the functional outcome of the application is that hardship is in fact *not* covered by Article 79 CISG.

Due to this high threshold, parties entering into a contract governed by the CISG, who wish to be protected from hardship, would be well advised to draft a clause in the contract ensuring this. The CISG will not grant it for them, regardless of what the CISG AC and other scholars assure us.

A. *The Academic Debate*

Article 79(1) of the CISG provides:

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 consequence.

It is evident that there is no mention of “hardship” or economic difficulty in this provision. The use of the word “impediment” leaves significant room

⁶ Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on “Hardship” Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court*, 3 BELGRADE L. REV. 84, 85 (2010).

for interpretation.⁷ Thus, legal commentators have been attempting to interpret this “vague and imprecise”⁸ wording in order to determine whether it incorporates situations of hardship or economic duress.

Most scholars support a broader interpretation of Article 79(1), in line with the CISG AC Opinion No.7, including “changes in circumstances” within the meaning of “impediment” and thus including situations where the economic circumstances have made performance excessively onerous.⁹ Scholars such as Professor Bonell rely on the wording of the article to reach a conclusion, surmising that the use of the words “impediment” and “could not reasonably be expected . . . to have avoided or overcome it or its consequences,” show that changes in circumstances short of impossibility can be unreasonable to enforce and thus hardship is included within the wording.¹⁰

On the other hand, some legal commentators point towards the nature of risk inherent within international commercial sales¹¹ and argue that nothing short of “impossibility” satisfies the wording of Article 79(1), thus excluding hardship from the scope.¹² Others have even advocated that there be a duty to renegotiate the contract in extreme events where an unreasonable increase in costs of performance has occurred, based on the concept of good faith found in Article 7(1) of the Convention.¹³ This is arguably an extreme position, especially for those of us trained in a *pacta sunt servanda* point of view.

⁷ See, e.g., Rolf Kofod, *Hardship in International Sales, CISG and the UNIDROIT Principles* (2011) (thesis, University of Copenhagen-Faculty of Law), <http://www.cisg.law.pace.edu/cisg/biblio/kofod.html>.

⁸ Joern Rimke, *Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)* 197, 218 (PACE INT'L L. REV. eds., 1999–2000).

⁹ See, e.g., Joseph Lookofsky, *Not Running Wild with the CISG*, 29 J.L. & COM. 141, 157–58 (2009); Rimke, *supra* note 8, at 214; Schwenger, *supra* note 4, at 711.

¹⁰ Michael J. Bonell, *Force Majeure e Hardship Nel Diritto Uniforme Della Vendita Internazionale*, in *DIRITTOD DEL COMMERCIO INTERNAZIONALE* 570 (1990) (It.).

¹¹ Elena C. Zaccaria, *The Effects of Changed Circumstances in International Commercial Trade*, 9 INT'L TRADE & BUS. L. REV. 135, 136 (2004).

¹² See Flechtner, *supra* note 6, at 92–93; Sarah H. Jenkins, *Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles—A Comparative Assessment*, 72 TUL. L. REV. 2015, 2024 (1998).

¹³ Hans Stoll & Georg Gruber, *Article 79*, in *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 600, 618 (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998).

Another argument again is the *travaux préparatoires* argument, which is popular amongst those arguing for the exclusion of hardship from the scope of Article 79(1)—they point out that at the Vienna Conference, the question of whether economic difficulty should give rise to an exemption of liability was discussed at length and ultimately rejected.¹⁴ This is a very valid point. The Norwegian delegation proposed that paragraph 3 of Article 65 of the 1978 UNCITRAL Draft Convention ought to state that, “. . . nevertheless, the party who fails to perform is permanently exempted to the extent that, after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold him liable.”¹⁵ This proposed Article would govern situations of hardship, as it deals with the changing of circumstances that would make it excessively arduous for a party to perform. However, this proposal was ultimately rejected and the wording of Article 79(1) was settled upon.¹⁶ So, when weighing the intention of the drafters, hardship should be excluded.

Moreover, in the UNCITRAL outline of coded issues for all CISG Articles,¹⁷ it is interesting to note that there is not a specific code for issues of economic impediment or hardship. There is a code for “Types of impediments” (79B2) and one for “General elements for excusing” (79B1), but nothing specifically on the issue of economic duress in a contract.¹⁸

The 2012 UNCITRAL case law digest on Article 79 also clearly dismisses the notion of any case law permitting hardship as an exemption of liability, reflecting the same position as the previous Digest published in 2008.¹⁹

That is not to say that the CISG should not be subject to a dynamic interpretation.²⁰ We need not necessarily be religiously bound by *travaux* if

¹⁴ Schwenger, *supra* note 4, at 712.

¹⁵ U.N. CISG, 27th mtg. at 381, U.N. DOC. A/CONF.97/C.1/L.191/Rev.1 (Mar. 28, 1980).

¹⁶ *Ibid.* at 382.

¹⁷ UNCITRAL Outline of the CISG [The UNCITRAL Thesaurus], U.N. DOC. A/CN.9/SER.C/GUIDE/1 (Sept. 12, 1995).

¹⁸ *Ibid.*

¹⁹ Sale of Goods, 2012 UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, ch. V, § IV at 390; Sale of Goods, 2008 UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, ch. V, § IV at 254.

²⁰ See generally Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998).

courts and tribunals are moving away from an expressed intention of the drafters, in a unified manner. As times change, instruments like the CISG, which are unlikely to be re-drafted, need to retain some dynamic elasticity. However, there has been no indication that courts or tribunals are departing from the original intention in the outcomes of cases reported. In the very few cases where hardship is applied, it is done so under otherwise applicable rules of law.²¹

Those CISG scholars who seek a comparative law solution point to the nature of the CISG, which seeks a compromise between civil and common law, as the reason for this confusion and, as such, indicate that there is little chance of clarity coming from within the text of the Convention, as any express clause including or excluding hardship might be seen as leaning too far towards either civil or common law. As such, there is still no agreement amongst scholars concerning hardship and Article 79(1).

However, an examination of the CISG cases involving claims of hardship show that there is a functional uniformity present and that certainty for contracting parties may be gleaned from the court's approach to Article 79(1), rendering the academic debate just that: academic. This is largely due to the almost unattainable threshold the courts set for a hardship exemption due to the inherent risk of international commercial trade.

In order to understand the increased threshold present for international commercial trade, this article will first examine the domestic thresholds for jurisdictions, which contain hardship exemptions.

B. Defining Functional Uniformity—A Standard of Applied Uniformity

Uniform laws such as the CISG operate with their own unique methodologies and—in some cases—pathologies. The distinction between the semblance of uniformity and actual applied uniformity has long been appreciated.²²

In that vein, the inability of Article 79(1) to be uniformly interpreted at a scholarly level may well be a symptom of a problem of uniform application.

²¹ See discussion of *Scafo International v. Lorraine Tubes S.A.S.*, *infra*.

²² Camilla Baasch Andersen, *A New Challenge for Commercial Practitioners: Making the Most of Shared Laws and Their 'Jurisconsultorium'*, 38 U.N.S.W. L.J. 911, 922–23 (2015) [hereinafter Andersen, *A New Challenge for Commercial Practitioners*]. See also Camilla Baasch Andersen, *Defining Uniformity in Law*, 12 UNIF. L. REV. 5, 29 (2007) [hereinafter Andersen, *Defining Uniformity*].

In fact, that could easily be expected. But in this particular case, an outcome based—or functional—methodology will reveal a different story.

This Article operates with the concept of “functional uniformity” as an expression of a unique standard of applied uniformity. In some cases, the application of a rule may not be uniform in process or appearance, but in taking a strictly functional approach based on outcome, we can operate with a functional standard of uniformity: Courts and Tribunals may be operating with very different parameters in applying a rule, but they can achieve outcomes which are so similar as to be uniform in function.²³

C. *Some Key Domestic Thresholds for Hardship Exemptions*

Many civil law countries, such as Germany,²⁴ Netherlands,²⁵ Italy,²⁶ Greece,²⁷ Portugal,²⁸ Austria²⁹ and the Scandinavian countries,³⁰ incorporate notions of hardship or similar exemption doctrines in their domestic laws and/or civil codes. In contrast, common law is notoriously unsophisticated in its development of similar concepts of hardship. In his 1996 analysis of the Italian *onerosità* and common law “hardship,” Perillo states that “. . . the common law has no developed doctrine of dissolving or adapting a contract because of hardship.”³¹

However, even though the threshold that individual jurisdictions have in place for hardship exemptions are on average lower than those set for international commercial trade, even domestic courts applying their own hardship rules are hesitant to grant an exemption of liability due to economic

²³ Camilla Baasch Andersen, *Applied Uniformity of a Uniform Commercial Law: Ensuring Functional Harmonisation of Uniform Texts Through a Global Jurisconsultorium of the CISG*, in THEORY AND PRACTICE OF HARMONISATION 30, 32 (Mads Andenas & Camilla Baasch Andersen eds., 2012).

²⁴ Bürgerliches Gesetzbuch [BGB] [CIVIL CODE], § 313 (Ger.).

²⁵ Art. 6:258, para. 1 BW. (Neth.).

²⁶ Codice civile [C.c.] art. 1467 (It.).

²⁷ ASTIKOS KODIKAS [A.K.] [CIVIL CODE] 388 (Greece).

²⁸ CC art. 437 (Port.).

²⁹ ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] §§ 936; 1052; 1170a (Austria).

³⁰ See Ole Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379, 397 (2005).

³¹ Joseph M. Perillo, *Hardship and its Impact on Contractual Obligations: A Comparative Analysis*, CENTRO DI STUDI E RICERCHE DI DIRITTO COMPARATO E STRANIERO, SAGGI, CONFERENZE E SEMINARI (Apr. 1996), <http://www.cisg.law.pace.edu/cisg/biblio/perillo4.html>.

circumstances making performance excessively burdensome. There are examples of Italian cases setting quite low thresholds, but these are few and far between.³²

One example of this is found in United States law, which accepts the principle of “commercial impracticability”³³ through which a party may be exempted if, as a result of unexpected supervening events, such as a steep increase in prices, performance becomes severely more burdensome.³⁴ However, the American court in *In re Westinghouse Electric Corp. Uranium Contracts Litigation*³⁵ noted that, “promisors seeking to establish impracticability by reason of increased expense have not generally found a sympathetic ear in court.”³⁶ In *Maple Farms*,³⁷ one of the leading cases on commercial impracticability, the supplier experienced a sudden 23% increase in the price of raw milk in a short period of time due to supervening events including inflation, unanticipated crop failures and government reforms. As such, the supplier asked to be relieved of the contract due to commercial impracticability (hardship). However, the court refused to exempt the supplier from performing the contract, stipulating that the price increase could not be deemed as unexpected. In the American cases in which courts have found commercial impracticability, price changes were “especially severe and unreasonable,”³⁸ and there are no cases where something less than a 100% cost increase has been held to make a seller’s performance impracticable.³⁹

A similarly high threshold is found in the UK, where *The Tsakiroglou*, a 1962 case, is yet to be overturned on the doctrine of frustration.⁴⁰ In this

³² One example is given by Perillo, *supra* note 31, at 12, who states that “an arbitral decision has held that a 14% devaluation of the English pound sterling was a sufficient ground for the adaptation of a contract. . . .” under domestic Italian law.

³³ RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

³⁴ CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 431 (2009).

³⁵ *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440 (E.D. Va. 1981).

³⁶ *Ibid.* at 453 (citing *Maple Farms, Inc. v. City Sch. Dist. of City of Elmira*, 352 N.Y.S.2d 784 (N.Y. Sup. Ct. 1974); *Gulf Oil Corp. v. Fed. Power Com.*, 563 F.2d 588 (3d Cir. 1977), *cert denied*, 434 U.S. 1062 (1978); *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966)).

³⁷ *Maple Farms*, 352 N.Y.S.2d at 786.

³⁸ *Gulf Oil*, 563 F.2d at 600.

³⁹ *Publicker Indus. Inc. v. Union Carbide Corp.*, 17 UCC Rep. Serv. 989, 992–93 (E.D. Pa. Jan. 17, 1975).

⁴⁰ *Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH* [1962] AC 93 (Eng.).

case, a carrier was found to be obligated to transport goods from Sudan to Hamburg despite the unexpected closure of the Suez Canal, which made the journey economically unviable.

Indeed, this seems to be the norm for most reviewed domestic principles of hardship. In 2009, Christoph Brunner conducted an exhaustive comparative analysis of a significant number of domestic principles of hardship and stipulated that, as a rule of thumb, there seems to be a 100% minimum threshold present.⁴¹ This is a significant threshold and one that is hard to attain, especially as the courts take the price volatility of a product into consideration. However, as demonstrated with the United States examples above, there are some domestic cases where parties have been exempt from liability, or the court has amended the contract, due to hardship.

Another example of this is found in Germany, where economic hardship is recognized by the principle of “Wegfall der Geschäftsgrundlage,”⁴² which was codified in 2002 through paragraph 313 of the *Bürgerliches Gesetzbuch*. The German principle allows a judge to adapt the contract in cases of hardship and the threshold for this is lower than in other jurisdictions, which has seen parties successfully argue on the grounds of hardship.⁴³

Overall, however, it must be said that the threshold for hardship in domestic jurisdictions is significantly high, making it difficult for parties to be exempted from liability on the grounds of hardship.

When examining cases in international commercial law, it is evident that the threshold is even substantially higher, thus making a hardship exemption almost impossible and therefore providing certainty and functional uniformity.

D. International Threshold for Hardship

The inherent risks and price fluctuations that are part and parcel of international commercial trade means that courts are unwilling to grant exemption of liability due to hardship. The fact that “in an international

⁴¹ BRUNNER, *supra* note 34, at 431.

⁴² *Ibid.* at 405.

⁴³ *Ibid.* at 405–07; Andreas Heldrich, *Vertragsanpassung bei Störung der Geschäftsgrundlage—Eine Skizze der Auspruchslosung des Paragraph 313 BGB*, in *FESTSCHRIFT FÜR ANDREAS HELDRICH ZUM 70 GEBURTSTAG* 183, 189 (Stephan Lorenz et al. eds., 2005).

market, one may expect the potentially aggrieved party to insist on incorporating terms for possible adjustment in the contract or otherwise assuming the risk for higher fluctuations than usually occur on domestic markets,”⁴⁴ means that unforeseen price fluctuations are almost impossible and thus, so too is exemption from liability due to hardship. As one legal commentator noted, “the risk of hardship is virtually inevitable in the field of international trade, as the economic and political context is subject to continual flux and rapid change.”⁴⁵

An examination of the approach of international arbitrators gives an insight into this, as arbitrators are extremely hesitant to intervene in cases of hardship in international commerce. In general, arbitrators feel that such changes in circumstances are not unforeseeable or should not exempt liability as the parties assume a certain amount of risk if they fail to include a hardship clause. For example, in International Chamber of Commerce (“ICC”) Award No. 1512, the arbitrator commented that as a rule, one should be very reluctant to exempt a party from liability in situations of hardship and stated that, “caution is especially called for in international transactions where it is generally much less likely that the parties have been unaware of the risk of a remote contingency or unable to formulate it precisely.”⁴⁶ Similarly, in ICC Award No. 8873, the arbitrator held that adaptation of the contract, or exemption of liability cannot be enforced unless specifically included in the contract between the parties.⁴⁷

The tribunals will generally feel that, in international commerce, the price is subject to constant change and the parties accept that risk. As such, in ICC Award No. 8486, in which a Dutch manufacturer and a Turkish buyer contracted for the sale of a manufacturing plant, severe exchange rate fluctuations meant that there was a dramatic drop in the price of the relevant product on the Turkish market, and thus the buyer argued that he be exempted of liability due to hardship. The tribunal stated that, “in international commerce one must rather assume in principle that the parties take the risk

⁴⁴ MARTIN DAVIES & DAVID V. SNYDER, INTERNATIONAL TRANSACTIONS IN GOODS: GLOBAL SALES IN COMPARATIVE CONTEXT 334 (2014).

⁴⁵ Zaccaria, *supra* note 11, at 136.

⁴⁶ ICC Award No. 1512 of 1971, SIGVARD JARVIN & YVES DERAINS, COLLECTION OF ICC ARBITRAL AWARDS 3 (1990); *see also* Zaccaria, *supra* note 11, at 159–60.

⁴⁷ ICC Award No. 8873 of 1997, 10 BULLETIN DE LA COUR INTERNATIONALE D’ARBITRAGE DE LA CCI 81 (1999); *see also* Zaccaria, *supra* note 11, at 160.

of performing and carrying out the contract upon themselves, unless a different allocation of risk is expressly provided for in the contract.”⁴⁸ The fact is, international trade inevitably bears risks.

For example, Ecuador suffered a steep devaluation of its currency in 1999, which saw the exchange rate fall to 25,000 Sucres for one U.S. Dollar in early 2000, with a devaluation of 67%.⁴⁹ As such, any international contracts entered into before 1999, without a hardship clause and denominated in Sucres, were suddenly worth 67% less.⁵⁰ Even though this distorts the equilibrium of the contract, such are the risks that one bears regularly when dealing in international commerce and should be taken into account. Large currency and price fluctuations are not unforeseeable and as international commercial trade has professional participants, it is expected that the parties will protect themselves against such situations through a hardship clause in the contract or a forward contract. Thus parties are arguably not going to be exempted of liability due to hardship in the international commercial sale of goods.

E. Functional Uniformity of Article 79(1)

Although there is debate between scholars about whether Article 79(1) encompasses situations of hardship, the fact remains that there is functional uniformity on the matter, with the courts consistently refusing to exempt parties from liability due to hardship under Article 79(1), as the threshold that the courts hold for international commercial contracts is such that the fluctuations of price have never been deemed drastic enough.

Although some courts and tribunals have been willing to accept that hardship exists within the wording of Article 79(1), up until now there has not been a single reported court or arbitral decision that has exempted a party from liability under a CISG sales contract due to hardship.⁵¹ As such, there is functional uniformity. Thus far, there have only been sixteen reported cases in which a party has sought an exemption from a CISG sales contract due to

⁴⁸ ICC Award No. 8486 of 1996, 1999 Y.B. Comm. Arb. 162 (ICC Int’l Ct. Arb.).

⁴⁹ PAUL BECKERMAN & ANDRES SOLIMANO, CRISIS AND DOLLARIZATION IN ECUADOR: STABILITY, GROWTH, AND SOCIAL EQUITY 7 (2002).

⁵⁰ *Ibid.*

⁵¹ DAVIES & SNYDER, *supra* note 44, at 334.

hardship under Article 79, compared to the sixty-one cases that have been heard pursuant to Article 79.⁵² This may serve as an indication that parties are already aware that they are very unlikely to be exempted from liability under Article 79(1) when arguing hardship.

The court's stance on hardship under Article 79(1) was demonstrated in the 2006 *Sunflower seed case*, in which the seller sought to be exempted from liability under Article 79(1), arguing that a steep reduction in production, availability of the product and increased transportation cost had made delivery of the product excessively onerous and costly.⁵³ However, the court stated its view that the CISG does not release a party from liability based upon a change of the economic background on which the parties relied, and dismissed the claim quickly.⁵⁴ Similarly, in the *Canned oranges case*, a Chinese arbitral tribunal dismissed a seller's claim for losses to be divided due to unforeseen factors transpiring after the contract was concluded, such as the weather, the sudden increase in price of oranges, the operation of the market economy, the cost of the can material and sugar increasing substantially and the foreign exchange rate fluctuating wildly, all causing a drastic change in the overall economic situation.⁵⁵ The court again refused to sustain the request and dismissed the claim for hardship under Article 79(1).⁵⁶

This is similar to the decision reached in *Societe AG v. SARL Behr France*,⁵⁷ in which the buyer sought to rely on Article 79 due to the collapse of the automotive market, and in particular, of industrial vehicles, making the ultimate customer change its buying conditions and impose a price that was less than half the price of the goods supplied by the seller.⁵⁸ Again the court demonstrated the functional uniformity present in all the CISG cases concerning hardship and dismissed the claim, stating that "it was up to the defendant, a professional experienced in international market practice, to lay

⁵² CISG-AC Opinion No. 7, *supra* note 5.

⁵³ Efetio Lamias, Greece, 2006 (*Sunflower seed case*) (docket No. 63/2006), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/060001gr.html>.

⁵⁴ *Ibid.*

⁵⁵ China International Economic and Trade Arbitration Commission (CIETAC), China, May 2006 (*Canned oranges case*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060500c1.html>.

⁵⁶ *Ibid.*

⁵⁷ Cour d'appel Colmar, France, 12 June 2001 (*Societe AG v. SARL Behr France*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010612f1.html>.

⁵⁸ *Ibid.*

down guarantees of performance of obligations to the plaintiff or to stipulate arrangements for revising those obligations, as it failed to do so, it has to bear the risk associated with noncompliance.”⁵⁹

As international commercial trade is filled with professional market participants, the courts are not sympathetic to price fluctuations and economic changes, as they are arguably part of the risks of the world of international commercial sales. Although the courts are reluctant to address whether theoretically and in principle a claim for a hardship exemption under Article 79(1) could be sustained, they provide certainty through uniform decisions that all dismiss the possibility of a party being exempt from liability due to hardship. Even when price fluctuations have far exceeded Brunner’s 100% “domestic threshold” as outlined above, and are arguably so drastic that they could be reasonably seen as unforeseeable, the courts are still unwilling to exempt a party from liability due to hardship.

For instance in the *Iron molybdenum case*, the price of the product had increased by 300% and the court still dismissed the claim, arguing also that the product was prone to significant price fluctuations as a speculative commodity.⁶⁰ Given that this was a German case, a jurisdiction which *does* allow hardship exemptions through “Wegfall der geschäftsgrundlage,” it provides a good example of a higher international threshold.

Despite what some may say, it seems that all courts have held the line consistently when it comes to hardship and Article 79(1), consistently refusing to exempt parties from liability even when the economic circumstances change significantly and perhaps even unforeseeably.⁶¹ In some of the cases where courts have addressed the issue of hardship, they

⁵⁹ Claude Witz, UNCITRAL Case Abstract, *Société AG v. SARL Behr France*, INT’L INST. FOR COM. L., English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010612f1.html>.

⁶⁰ Oberlandesgericht Hamburg, Germany, 28 February 1997 (*Iron molybdenum case*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970228g1.html>.

⁶¹ See, e.g., Tribunale Civile di Monza, Italy, 14 January 1993 (*Nuova Fucinati v. Fondmetal International*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/930114i3.html>; Oberlandesgericht Brandenburg, Germany, 18 November 2008 (*Beer case*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>; Rechtbank van Koophandel Ieper, Belgium, 18 February 2002 (*L. v SA C.*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020218b1.html>; ICC Arbitration Case No. 6281, 26 August 1989 (*Steel bars case*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/896281i1.html>; CIETAC, China, 2 May 1996 (“*FeMo*” *alloy case*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960502c1.html>.

have stated that situations of hardship could be potentially seen as an “impediment” under Article 79(1).⁶² This is irrelevant, however, as in practice they refuse to exempt a party from liability due to hardship under Article 79(1). Thus this functional uniformity provides parties with clarity and certainty concerning hardship and Article 79(1), and should advise them to ensure their contract covers such scenarios.

Some commentators point towards the 2009 *Scafom case*,⁶³ to indicate that the courts have in fact exempted a party from liability due to hardship, as the court adapted the contract and ordered the parties to renegotiate due to a 70% price increase of the product (steel tubes).⁶⁴ However, the court of appeals in the *Scafom case* did not arrive at its ruling using Article 79(1) of the CISG, rather it agreed with the previous instance that hardship was *not* governed by Article 79(1) CISG.⁶⁵ It went on to use Article 7(2) to fill in what it determined to be a gap, meaning that it decided the issue using otherwise applicable law.⁶⁶ By turning to Article 7(2), the court thus unequivocally places the issue of hardship outside the scope of the CISG and Article 79(1). It is an odd application of legal reasoning that then decides to look for a solution elsewhere, after deciding that the applicable law does not support the claim. The second instance had applied the general principle of good faith as understood by French law, which allows the court to adapt the contract and order the parties to renegotiate contractual terms.⁶⁷ The third instance makes the same mistake of thinking that the omission of hardship is a gap, but uses the UNIDROIT Principles of International Commercial Contracts to fill the gap instead.

Both solutions are symptomatic of a “homeward trend,” as the judge failed to understand the true international character of the CISG and sought

⁶² Hof van Cassatie, Belgium, 19 June 2009 (*Scafom case*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

⁶³ *Ibid.*

⁶⁴ See, for example, Professor Sieg Eiselen’s commentary to the case online, where he alludes that the case follows the CISG-AC Opinion 7 guidelines. Siegfried Eiselen, UNCITRAL Editorial Remarks, *Scafom case*, INT’L INST. COM. L., English translation available on the Internet at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/090619b1.html>.

⁶⁵ Hof van Cassatie, Belgium, 19 June 2009 (*Scafom case*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

⁶⁶ *Ibid.*

⁶⁷ Kelda Groves, *The Doctrine of Good Faith in Four Legal Systems*, 15 CONSTRUCTION L.J. 265, 271 (1999).

to embellish the applicable law with a domestic principle of hardship. As Professor Flechtner states, the decision of the judge in the *Scafom case* “distorts the meaning of the CISG, violates the mandate to interpret the Convention with regard for its international character and threatens the political legitimacy of the treaty.”⁶⁸ Clearly the judge misinterpreted Article 79(1) by classifying the omission of hardship as a gap, when, as Schwenger stated, “. . . there is no gap in the CISG regarding the debtor’s invocation of economic impossibility and the adaption of the contract to changed circumstances. If one were to hold otherwise, unification of the law of sales would be undermined. . . .”⁶⁹ The identification of this alleged gap is a point of much criticism performing a “rather perverse tour de force”⁷⁰ to arrive at a decision to support the use of the civil law remedy of contractual adjustment by the court. Nevertheless, in regard to the objective of this article, ultimately the court in *Scafom* did not exempt the party due to hardship using Article 79(1), but—despite obvious inclinations in favor of hardship evidenced by their “tour de force”—even they cannot extend Article 79(1) to include hardship. And so, the case falls within the consistent lines of the functional application of Article 79(1) applied in this Article.

When there is vagueness within an international instrument such as the CISG, it is not uncommon to see instances of “homeward trend,”⁷¹ where judges are tempted to use different approaches in order to interpret Article 79(1) such as in *Nuova Fucinati v. Fondmettal International*,⁷² where the judge equated Article 79(1) of the CISG to Article 1467 of the Italian Civil Code,⁷³ which only provides release and excuse from a duty made “impossible” by a supervening impediment.

However despite alarming evidence of homeward trend, and differences in approach to the question, the bottom line is uniform application. The courts remain clearly unified in terms of outcome when applying Article 79(1) of the CISG in situations of hardship, as there has not been a single decision

⁶⁸ Flechtner, *supra* note 6, at 83.

⁶⁹ Schwenger, *supra* note 4, at 713.

⁷⁰ Flechtner, *supra* note 6, at 87.

⁷¹ For more on the homeward trend application of shared laws, see Andersen, *Defining Uniformity*, *supra* note 22, and more recently, Anderson, *A New Challenge for Commercial Practitioners*, *supra* note 22.

⁷² Tribunale Civile di Monza, Italy, 14 January 1993, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/930114i3.html>.

⁷³ Codice civile [C.c.] art. 1467 (It.).

where the courts have exempted a party to a CISG contract from liability due to hardship under Article 79(1). They have continually denied hardship under the CISG, *or* set an artificially high threshold that is effectively unattainable, thus virtually ruling out hardship as an exemption in international commercial trade under the CISG.

The Empirical Data

The below table illustrates this. Amongst the reported Article 79 cases which deal with hardship, set out below, none have found that Article 79 can extend to encompass the concept; either because the threshold is too high *or* because economic difficulty/hardship is considered irrelevant to Article 79.

| Country/Case | Date of decision | Hardship | Art 79 Exemption? |
|---------------------|-----------------------------------|---|---------------------------------------|
| Belgium | 18 February 2002 | Altered economic circumstances | No |
| | 25 January 2005 | Non-performance of contract; loss of rights | No |
| | 19 June 2009 | Lack of price variation clause; unforeseen circumstances exceptionally detrimental for seller | No (but invent gap to apply UNIDROIT) |
| Greece | 2006 (no specific date available) | Anticipatory breach of contract | No |

| Country/Case | Date of decision | Hardship | Art 79 Exemption? |
|--------------|------------------|--|-------------------|
| China | 2 May 1996 | Loss of goods pursuant to repeated breaches of contract for delivery of goods (claiming indemnity) | No |
| | May 2006 | Breach of contract through non-delivery of goods | No |
| Germany | 28 February 1997 | Delay in delivery constituting fundamental breach of contract | No |
| | 18 November 2008 | Avoidance of contracts | No |
| France | 12 June 2001 | Breach of sales contract (“collaboration agreement”) | No |
| Latvia | 16 August 2006 | Non-performance of contractual obligation caused by <i>force majeure</i> , resulting in termination of contract by other party | No |
| | 5 May 2010 | Non-performance of contractual obligation | No |

| Country/Case | Date of decision | Hardship | Art 79 Exemption? |
|---------------------------------------|-------------------------|---|--------------------------|
| Colombia | 21 February 2012 | Although holding that contracts are subject to the assumption that conditions do not change, no hardship is found to apply under Art 79 CIG | No |
| Spain | 25 May 2012 | Breach of contract through fundamental defect of goods (re food regulations) | No |
| ICC Arbitration Case No. 6281 of 1989 | 26 August 1989 | Refusal to deliver goods due to increase in market price; breach of contract | No |
| Italy | 14 January 1993 | Failure to deliver goods, claim of avoidance on the ground of hardship due to increase in price | No |

Based on the above data, the authors maintain that there is functional uniformity of Article 79 when it comes to hardship. The cases above may apply very different reasoning in not applying Article 79 to cases involving hardship; but the end result is the same. Whether from a refusal to extend Article 79 to hardship, or from applying an impossibly high threshold, it is clear that the case law has spoken: Article 79 does not apply to hardship.

CONCLUSION

As mentioned, there have been numerous articles written by scholars surrounding the issue of whether Article 79(1) includes situations of hardship.⁷⁴ The CISG Advisory Council's 2007 No. 7 Opinion failed to bring closure to the debate, as scholars and commentators continue to disagree on whether in principle an economic change in situation after the conclusion of the contract may qualify as an "impediment" as per Article 79(1).

However, such debate is superfluous, as an examination of all the cases concerning the exemption of a party from liability due to hardship under Article 79(1) gives a clear picture of functional uniformity in application. Although the courts do not expressly or uniformly pronounce on whether Article 79(1) should govern situations of hardship, the ones that might entertain the notion set thresholds for such an exemption which are effectively unattainable. Thus, in practice, this means parties can be certain that they will not be exempt from liability due to hardship under the CISG. Even in cases where the economic and financial circumstances have changed so significantly that it can well be argued that it could constitute an unforeseen impediment, the courts have nonetheless refused to exempt parties from liability under Article 79 and depart from *contractus qui habent tractum succesivum et dependiam de futuro rebus sic stantibus inteliguntur*, abandon the general principle of *pacta sunt servanda*,⁷⁵ or (wrongly) apply otherwise applicable law/legal principles to the issue.

As such, the functional uniformity present in the court and arbitral rulings means that there should be no confusion when it comes to hardship and the CISG, as the courts have made their stance clear. In negotiating a commercial contract under the CISG, parties who wish for there to be a hardship exemption are thus uniformly advised to include such a clause in the contract. Article 6 ensures that any clear contract clause implemented in to a contract will take precedence over Article 79 in the question of exemption from liability. So if parties want hardship to apply, they had best

⁷⁴ See Flechtner, *supra* note 6; Catherine Kessedjian, *Competing Approaches to Force Majeure and Hardship*, 25 INT'L REV. L. & ECON. 415 (2005); Kofod, *supra* note 7; Peter Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for the Non-Performance: The Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, 2 NORDIC J. COM. L. 1, 53 (2011); Schwenzer, *supra* note 4, at 709; Zaccaria, *supra* note 11, at 135.

⁷⁵ Kessedjian, *supra* note 74, at 427.

make sure the contract mandates it. Indeed, neither the CISG nor relying on gap-filling will yield a predictable outcome.