

THE EFFECT OF CHANGING CIRCUMSTANCES IN INTERNATIONAL
COMMERCIAL CONTRACTS: THE SCAFORM CASE

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1 INTRODUCTION

The present article discusses a breaching party's exemption from liability under the United Nation Convention on Contracts for the International Sale of Goods (hereinafter "CISG") due to changed circumstances. Under the CISG a party is responsible for all events in its control and a party's liability is independent of its negligence. However, a party shall not be liable for a failure to perform the contract if the failure was due to an impediment beyond its control. It is important to discuss what can be regarded as an "impediment beyond control", as the Article concentrates on the Scaform case (Belgian Court of Cassation, 19 June 2009). The Belgian Court of Cassation, indeed, concluded that a party's possibility for an exemption in situations where a performance has become more expensive than expected and the equilibrium of the contract has been altered due to changed circumstances and a performance in the new situation would be something totally different than at the time of the conclusion of the contract.

2 ARTICLE 79(1) CISG

Taking into consideration that the ultimate goal of the Convention is the uniform application of the rules, under the CISG a party is responsible for all events in its control and a party's liability is independent of its negligence. A party shall not be liable however, for a failure to perform the contract if the failure was due to an impediment beyond its control. It is central to analyse what can be regarded as an 'impediment beyond control', as the present article concentrates on a party's possibility for an exemption in situations where a performance has become more expensive than expected and the equilibrium of the contract has been fundamentally altered due to changed circumstances and a performance in the new situation would be something totally different than what was anticipated at the time of the conclusion of the contract.¹

As mentioned above, the purpose of the present paper is to discuss whether economic difficulties, in particular hardship, in performing a contract may constitute an impediment under Art. 79 CISG. The provision that is the equivalent of a *force majeure* clause in the CISG is Art. 79. It is placed in a section entitled 'exemptions' and it is bilateral, i.e. it applies equally to the buyer or the seller.

Different legal concepts exist in all legal systems dealing with the problem of changed circumstances and excusing a party from performance of its obligations when a contract has become unexpectedly onerous or impossible to perform. Some systems only accept a narrow range of excuses, while others are more generous.² It seems clear that the intention when drawing up Art. 79 CISG was to avoid any mention of existing concepts in the various national legal systems, such as *force majeure*, *imprévision*,

¹ Lindström, N., "Changed circumstances and hardship in international sale of goods", *Nordic Journal of Commercial Law*, at p. 23 (January, 2006).

² Kritzer, A.H., "International Contract Manual - Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods" (1991) *Kluwer Law International*.

Unmöglichkeit, Wegfall der Geschäftsgrundlage, frustration or impracticability.³ The draftsmen's purpose was to express a single, independent rule that could be shared by the various nations taking part in the Convention. This explains the use of elastic words like 'impediment' or 'exemptions'. The draftsmen wanted the Convention to stand by itself and be interpreted to the furthest extent possible under general principles of international law, with due regard to its international character and the necessity to promote uniformity in its application. Thus, any consideration of a domestic system is to be left as a last recourse for interpretation if all other methods fail to provide an answer to the question at stake.⁴

In accordance with Art. 79 CISG, if the non-performing party proves (1) that the failure was due to an impediment beyond its control (impediment), (2) that it 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 materialised, the party could not reasonably have avoided or overcome it or its consequences (unavoidability), then provided written notice is given to the other party, the non-performing party is exempt from liability in damages.⁵

At this point, it is appropriate to dedicate a brief note to the concept of 'unforeseeable event'. It is not easy to ascertain whether the change in circumstances could not have been reasonably foreseen. It is no easier a task to distinguish between the risk of loss that every contracting party should be deemed to have assumed and the extraordinary disastrous economic disadvantages amounting to a 'limit of sacrifice' (because there is indeed such a limit), beyond which the obligor should not be expected to perform the contract as written. But if there is such a 'truly hard hardship problem' i.e., a deal unexpectedly turned into a 'nightmare' for one party and a 'steal' for the other, well, this is it.⁶

³ Flambouras D. P., *Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108*, available at: <<http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html#N1>>; See also Kritzer, A.H., "International Contract Manual - Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods" (1994) *Detailed Analysis* 623; See also Jenkins, S.H., "Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles - A Comparative Assessment", (1998) 72 *Tulane Law Review* 2015-2030, also available at: <<http://www.cisg.law.pace.edu/cisg/biblio/jenkins.html>>.

⁴ These ideas were embodied in Art. 7 of the Convention, which reads: "(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. (2) 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."

⁵ Flambouras, D. P., *Comparative Remarks*, *supra* fn 1.

⁶ Garro, A., *Editorial Remarks: Comparison between provisions of the CISG regarding exemption of liability for damages (Art. 79) and the counterpart provisions of the UNIDROIT Principles (Art. 7.1.7)*, available at: <<http://cisgw3.law.pace.edu/cisg/principles/uni79.html#giv>>.

Although all three elements listed in Art. 79 CISG must be established for the court, the central problem of proof and interpretation in this case is exactly how high a standard the Art. 79 incorporates. The ordinary meaning of ‘impediment’ is not evident from the context of Art. 79, but the drafting history does reveal some interpretive insights. For example, the drafters of the predecessor of the CISG, i.e. the Convention relating to a Uniform Law on the International Sale of Goods, (hereinafter “ULIS”), also faced the dilemma in determining which obligations would be excused from non-performance.⁷ At the 1964 Hague Conference for the drafting of ULIS, the delegations disagreed over the terms ‘circumstances’ or ‘obstacles’ as the triggering events for excuse. The majority, wanting to avoid an overly narrow restriction on excuse, drafted the provision allowing non-performance in ‘circumstances’ that the non-performing party was not bound to take into account at the time of contract formation.⁸

When UNCITRAL revisited this issue at the Vienna drafting conferences for the Convention, the provision was changed to replace ‘circumstances’ with ‘impediment’. Thus, under the Convention, excuse should apply only to ‘impediments’ that prevent performance, not to the more wide-ranging ‘circumstances’ that might make performance merely difficult or unprofitable.⁹ In addition, this change also highlights the fact that the nature of the ‘impediment’ is to be determined from an objective, or a reasonable person’s perspective, rather than from the point of view of the non-performing party.¹⁰ In this regard, the language of Art. 79(1) which requires that the non-performing party ‘could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract’ suggests that the purpose of the provision is to give effect to reasonable expectations; not necessarily the (unreasonable) subjective expectations of the non-performing party.¹¹ Professor Nicholas explains that in order to give effect to ‘reasonable expectations,’ the court ‘must necessarily take account of the terms of the contract, the whole context in which it was made, and the current trade practices in the areas concerned.’¹²

⁷ The antecedents to the CISG are the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Convention relating to a Uniform Law on the International Sale of Goods (ULIS) done at The Hague on 1 July 1964.

⁸ Honnold, J. O., *Uniform Law For International Sales Under The 1980 United Nations Convention*, 65 (2d ed. 1991).

⁹ Tallon, D., *Article 79 Commentary*, in *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, 1987, at p. 581 (ed) Bianca, C. M. & M.J. Bonell, M. J.; Kritzer, A. H., *Guide To Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods*, 1989, at p. 37.

¹⁰ Tallon, D., *Article 79 Commentary*, *supra* fn 9, at p. 579 (‘By adopting the word “impediment”, the Vienna Conference aimed at emphasising the objective nature of the hindrance rather than its personal aspect [...] What is actually at issue [...] is the external character of the impediment with regard to the activity of the defaulting party [...]).’)

¹¹ Weitzmann, T., “Validity and excuse in the U.N. Sales Convention” (1997)16 *J.L. & COM.* 265.

¹² Nicholas, B., *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*, 1984, at pp. 5-9 (ed. Galston, N. M. & Smit, H).

Although Art. 79's 'impediment' connotes a barrier that prevents performance, it is not immediately evident exactly how insurmountable the standard should be in practice. Clearly, Art. 79 represents a retreat from the more lenient grounds for excuse in the ULIS. Professor Honnold describes this retreat as a response "to concerns that the reference to 'circumstances' [in ULIS] could be a basis for excuse merely because performance became more difficult or unprofitable."¹³ Nevertheless, there is evidence that the barrier intended by the use of the term 'impediment' is not limited to physical or legal bars to performance.¹⁴ For example, 'economic dislocations' can at times prevent performance as effectively as more traditional barriers to performance. In fact, as Professor Honnold notes, sometimes 'extreme price and (especially) currency dislocations may be sufficiently widespread to lead to laws or administrative regulations that require contract readjustment.'¹⁵

If 'the supply of material needed for performance of a contract unexpectedly becomes so reduced in quantity and inflated in price that only a minority of producers that need this material can continue in production,' Honnold writes, 'this situation clearly constitutes an "impediment."¹⁶ On the other hand, if the goods needed were not of a 'limited kind', and other goods were available to replace them, then performance would not be excused.¹⁷ The difference between these cases lies not in a single factor, like price or availability, but in the interplay of many factors at once: reasonable foreseeability, the party's control of the barrier,¹⁸ and even the practices of international trade.

Within the scope of application of the Convention, hardship situations are therefore to be examined under the *force majeure* exemption of Art. 79. This, however, does not mean that the legal consequences of Art. 79 CISG should inflexibly be applied to such situations. In cases where the equilibrium of the contract is fundamentally altered, making performance excessively onerous for the obligor, courts should have the power to apply the legal consequences of Art. 6.2.3(4) UPICC instead of simply excusing the obligor according to Art. 79(5) CISG. Thus, in case of hardship, the disadvantaged party is entitled to request renegotiations even though this request does not itself entitle the disadvantaged party to withhold performance (Art. 6.2.3(1) UPICC). In case of failure to reach agreement within a reasonable time, either party may resort to the court. If the court finds hardship it may, if reasonable, either adapt

¹³ Honnold, J.O., *Uniform Law For International Sales Under The 1980 United Nations Convention* (2d ed) 1991, at par. 432.2. Professor Honnold also notes that the drafters of the Convention were also responding to the claim that 'exemption under ULIS should be narrowed since it was not confined to cases 'where performance was radically changed' but might apply when performance had become unexpectedly onerous or based on an unforeseen rise in prices.'

¹⁴ Tallon, D., *Article 79 Commentary*, *supra* fn 9, at p. 583.

¹⁵ Honnold, J.O., *Uniform Law*, *supra* fn 13, at par. 432.2.

¹⁶ *Ibid.*

¹⁷ Tallon, D., *Article 79 Commentary*, *supra* fn 9, at p. 582

¹⁸ F. Enderlein & D. Maskow, *International Sales Law*, 1992, at p. 322.

the contract with a view of restoring its equilibrium or terminate the contract at a date and on term to be fixed by the court. The court's power to adapt the contracts appears to be appropriate, as it is, from the perspective of the obligee in comparison to the obligor's excuse or the contract's termination, a less interfering legal consequence. This flexible approach is based on Art. 7(1) CISG, i.e. the principle of good faith, which may be used to adapt the contract.¹⁹

The case law on the CISG dealing with hardship does not generally exclude an exemption of the obligor on the grounds of changed circumstances.

In the *Scaform International* case (which will be analysed below), the Belgian Supreme Court came to the conclusion that 'changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision of the Convention.' After having analysed the *Scaform International* case, as the term impediment is not defined in Art. 79 CISG, an interesting question is whether the hardship provisions in Arts. 6.2.1, 6.2.2 and 6.2.3 UPICC, along with Art. 6:111 (Change of Circumstances) PECL can be invoked to expand the meaning of impediment found in the CISG to include cases of economic or commercial hardship.²⁰

¹⁹ Brunner, C., *Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration*, at p. 218 (Kluwer Law International, The Hague, 2009).

²⁰ Cfr. Ziegel, J., *Comparative Editorial Remarks on article 79 CISG and its UNIDROIT Principles counterparts*, available at: <<http://www.cisg.law.pace.edu/cisg/principles/uni79.html>>, where the author discusses the same question in terms of Art. 79 CISG and the comparable provisions in the UNIDROIT Principles of International Commercial Contracts.

3 **BELGIAN 19 JUNE 2009 COURT OF CASSATION, SCAFORM
INTERNATIONAL BV V. LORRAINE TUBES S.A.S**

In the *Scaform International* case, the Belgian Court of Cassation (Supreme Court of Belgium) overturned the earlier decision of the Tongeren Commercial Court²¹ in dealing with economic hardship. In this case, the parties had concluded an agreement for the sale of steel tubes. After the conclusion of the contract and before delivery, the price of steel unexpectedly rose by about 70 percent.

The seller tried to renegotiate a higher contract price, but the buyer refused and insisted on delivery of the goods at the price agreed upon. The decision of the Tongeren Commercial Court (Court of First Instance) was overturned by the Antwerpen Court of Appeal. The latter court decided that the issue regarding economic hardship was not dealt with by the CISG and applied French domestic law in allowing the seller's counterclaim for an amount based on a higher price. The Supreme Court rejected the application of the French domestic law, holding that there was a gap in the CISG to be filled by general principles of international trade.

Issuing this decision, the Belgian Court of Cassation ruled that circumstances which were not reasonably foreseeable at the time of the conclusion of an agreement and which increase the burden of the agreement disproportionately can, in certain circumstances, be considered an 'impediment' within the meaning of Art. 79 CISG.

The exact words used by the Court of Cassation are the following:

1. Under Article 79(1) [CISG], 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.

²¹ The Tongeren Commercial Court (Belgium, 25 January 2005 *Rechtbank van Koophandel - Scaform International BV & Orion Metal BVBA v. Exma CPI SA*) is the District Court. In the proceedings on the merits, the District Court held that price fluctuations are foreseeable and were part of the business risk assumed by the vendor, all the more so in this case because the vendor had failed to include a price adjustment clause in the sales contract. The court also held that circumstances which do not make a contract impossible to perform, but merely render its performance more onerous, cannot be considered an impediment in the sense of Art. 79. The vendor appealed. The Tongeren Commercial Court's decision was appealed before the Antwerpen Court of Appeal. The judgment of the latter's court was radically different. It implicitly held that the issue at stake was not governed by the CISG and that the question should be governed by the national law applicable to the contract. By virtue of Art. 4 of the Rome Convention on the Law Applicable to Contractual Obligations, French law applied in this case. French law, particularly the principle of good faith in Art. 1135 of the French Civil Code, was found to give parties in such circumstances the right to renegotiate the contract. The Antwerpen Court of Appeal's judgment was appealed before the Court of Cassation. In the judgment, dated 19 June 2009, the Supreme Court held that Art. 79 can, in some circumstances, govern hardship.

Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision of the treaty.

2. Article 7(1) states that 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.

Article 7(2) states that 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.

Thus, to fill the gaps in a uniform manner adhesion should be sought with the general principles which govern the law of international trade.

Under these principles, as incorporated inter alia in the Unidroit Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance [...] is also entitled to claim the renegotiation of the contract. (cfr. Belgian Court of Cassation, 19 June 2009)

The present decision has an extraordinary importance because it seems to corroborate Professor Honnold's opinion when he states that '[sometimes] [e]xtreme price and (especially) currency dislocations may be sufficiently widespread to lead to laws or administrative regulations that require contract readjustment' and also support the argument that hardship situations (in case of a performance becoming excessively onerous) can be examined under Art. 79 CISG giving to the parties and to the courts the option to apply the legal consequences of Art. 6.2.3 UPICC.

Indeed, the Belgian Court of Cassation stated that the Convention does not prevent the application of the theory of *imprévision* (hardship) or an obligation of re-negotiation of the previously determined price. The Court of Cassation also believed that the seller has not committed a breach by refusing to deliver, without a reasonable adaptation of the price, in light of the economic hardship that he faced. The seller also gave the buyer the opportunity to re-negotiate and the fact that the seller refused to deliver further was only due to the fault of the buyer, and thus was a breach of good faith under which the contract must be performed. In this direction, taking the concrete market situation into account, that offer of the seller was not unreasonable and it provided a sound basis for re-negotiation. The Court of Cassation affirmed that under international principles, as incorporated *inter alia* in the UPICC that constitutes a tool for interpreting CISG (and also Art. 79 CISG), the party who invokes changed circumstances that fundamentally disturb the contractual balance, as in the present case, is also entitled to claim the re-negotiation of the contract, applying Art. 6.2.3 UPICC.

4 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

First, it has to be underscored that the UPICC represent an attempt to unify international trade law. The doctrine felt that international conventions or model laws are often fragmentary in character and that model clauses and contracts, formulated by the interested business circles, are frequently drafted in a one-sided manner presupposing a more general regulatory system within which to operate. The aim of UPICC was to specifically elaborate a general regulatory system that could apply universally and restate the general principles of contract law, thus reflecting all the major legal systems of the world.²²

In this paper, the relationship between Art. 79 CISG and the provisions on situations of changed circumstances of the UPICC is of fundamental interest. In order to develop this issue, the relevant provisions of the UPICC have to be introduced.

The UPICC Principles contain two separate provisions, one on hardship included in Chapter 6 on Performance; and one on *force majeure* included in Chapter 7 on Non-Performance. Contrary to the CISG, the UPICC does use the expression '*force majeure*' in the title of Art. 7.1.7. The commentary specifies that this provision deals with common law concepts of frustration and impossibility of performance, but it is not identical to any of these doctrines. It adds that the term '*force majeure*' was chosen because it is 'widely known in international trade practice.' Art. 7.1.7 of the UPICC appears similar to Art. 79 CISG even though, in UPICC, the function of *force majeure* as an exemption has been enlarged in comparison with the CISG.²³

In Art. 79 CISG, the effect of the exemption is reduced to claims for damages only. The UPICC uses a different approach than the CISG. They adhere to the principle that the excuse is general, but in paragraph (4), they make important exceptions in determining certain claims that are not affected by *force majeure*. These include the right to terminate the contract, withhold delivery, or request interest on money due. The case of *force majeure*, performance, as well as damages and penalties, cannot be claimed.²⁴

When the UPICC Principles were adopted in 1994, it was the first time in the development of international commercial legal norms that a principle of hardship was recognised independently of contractual provisions. Before that, no arbitrator (obviously in a published award) had ever overridden the principle *pacta sunt*

²² Rimke, J., "*Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts*", *Pace International Law Review* (Kluwer, The Hague, 2001) at par. 233.

²³ Rimke, J., *supra* fn 22, at par. 233.

²⁴ Rimke, J., *supra* fn 22, at par. 234.

servanda in deciding that the contract should be adapted to a change of circumstances. Judges only applied a hardship principle if the *lex contractus* allowed them to do so.

The principle of hardship is reflected in the UPICC section s. 6.2. This section applies to hardship in situations where the balance between the two sides of the contract has become out of proportion because of severe changes in the market after the conclusion of the contract that fundamentally have altered the equilibrium of the contract.²⁵ The existence of hardship gives the disadvantaged party a right to request that the parties renegotiate the contract. Upon failure to reach an agreement, the disadvantaged party can request the court or arbitral tribunal to either terminate or adapt the contract. The section on hardship starts off, in Art. 6.2.1, by stressing that *pacta sunt servanda* is an underlying principle of the UPICC. This entails that performance must be rendered even though a change in the market has caused the contract to become more burdensome for one party.

Article 6.2.2 UPICC defines what is to be understood as hardship. It reads: '[T]here is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of performance a party receives has diminished [...]'. According to this provision, a change in the market after the conclusion of the contract only amounts to hardship if the equilibrium of the contract has been fundamentally altered. The requirement of a fundamental alteration of the contract entails that normal economic risks is not to be regarded as hardship, but only developments in the market that lie far beyond the normal economic development.

According to Art. 6.2.2 UPICC, the application of hardship is further conditioned that the event occurs after the conclusion of the contract, that the event could not reasonably be taken into account, that the event is outside the disadvantaged party's control, and that the risk of the event is not assumed by the disadvantaged party.

Articles 6.2.2 and 6.2.3 UPICC can serve as instruments for the interpretation and gap filling of Art. 79 CISG in light of the following reasons. First, according to Art. 7(1) CISG,²⁶ courts should, to the largest possible extent, refrain from resorting to the different domestic laws and try to find a solution within the Convention itself, not only in the case of ambiguities or obscurities in the text, but also in the case of gaps. Art. 7(1) also states that 'regard is to be had to its international character' (and the UPICC is certainly one of international codification which can help to interpret the CISG in order to regard CISG's international character). Art. 7(2) also provides a potentially powerful tool which courts and arbitrators can use to plug 'gaps' in the literal CISG text. By locating a relevant CISG "general principle" for the resolution of a matter "governed but not settled" by the Convention text, decision-makers can remain within the four corners of the treaty in situations where they otherwise would

²⁶ For an exhaustive overview of Art. 7 CISG, see Bonell, M.J., in Bianca-Bonell, *Commentary on the International Sales Law*, 1987 (ed. Giuffrè Milan) at pp. 65-94.

²⁶ For an exhaustive overview of Art. 7 CISG, see Bonell, M.J., in Bianca-Bonell, *Commentary on the International Sales Law*, 1987 (ed. Giuffrè Milan) at pp. 65-94.

need to revert to other (usually domestic) rules of law.²⁷ Accordingly, UPICC can be interpreted as a means of gap-filling the CISG.

Having stated that the UPICC is an important key to fill the eventual gap in the CISG, it also needs to be noted that change of economic circumstances may only, in very exceptional cases and under very narrow conditions, qualify as a hardship situation provided by Arts. 6.2.2 and 6.2.3 UPICC. Thus, the meaning of the concept of 'impediment' in Art. 79 will not be twisted.

Lastly, keeping in mind that Arts. 6.2.2 and 6.2.3 UPICC and Art. 79 CISG have analogous scopes and taking into account that the *force majeure* excuse (as reflected in Art. 79 CISG) not only applies to cases of physical or factual impossibility, but also to cases of economic impossibility, it must reasonably be said that Arts. 6.2.2 and 6.2.3 UPICC can be invoked to expand the meaning of impediment found in the CISG to include cases of economic or commercial hardship. The UPICC provide guidelines for an interpretation based upon the uniform law's international character. The judge or arbitrator is offered a rule that is likely to be more suitable to an international commercial contract than a domestic rule of contract law. Supplementing an international instrument with the UPICC has the additional advantage of enhancing consistency and fairness in the adjudication of international commercial disputes.²⁸

5 PRINCIPLES OF EUROPEAN CONTRACT LAW

The Principles of European Contract Law (hereinafter "PECL") have been drawn up by an independent body of experts from each Member State of the European Union under a project supported by the European Commission and many other organisations. They are stated in the form of articles, with a detailed commentary explaining the purpose and operation of each article. In the comments there are illustrations, ultra short cases that show how the rules are to operate in practice. Each article also has comparative notes surveying the national laws and other international provisions on the topic. PECL cover the core rules of contract, formation, authority of agents, validity, interpretation, contents, performance, non-performance (breach) and remedies. In order to show that PECL's hardship provisions can be invoked to expand the meaning of impediment found in the CISG to include cases of economic or commercial hardship, it is noteworthy to briefly consider the background of the PECL. Thus, the European Union has promoted a European régime of academic lawyers whose platform is Europe and whose writings and debates are concerned with the future European law.

²⁷ Art. 7(2) states that "[q]uestions 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".

²⁸ Rimke, J., *supra* fn 22 at par. 236.

This new European regime resembles that of the American. In the United States, writings on contract law, as on other subjects, deal with the problems and issues frequently found in common law jurisdictions. There are considerable differences between these various contract law systems. These differences, however, do not prevent a debate that can be based on common concepts and a common legal method. Such a common language and a common legal method are also slowly emerging in Europe. The American and the new European regimes inspire each other. Together with lawyers from other countries, they are in the process of becoming a world community of academic lawyers. These considerations have guided the Commission on European Contract Law since 1982. Part 1 of the PECL dealing with performance, non-performance and remedies was published in 1995.²⁹

In some respects, the PECL may be compared with the American Restatement of the Law of Contract, which was published in its second edition in 1981. Like the Restatements, the articles drafted are supplied with comments and notes.

The Restatements consist of non-binding rules, 'soft law'. They purport to restate the Common Law of the United States. The PECL are also 'soft law', but their main purpose is to serve as a first draft of a part of a European Civil Code. Furthermore, a common law does not exist in the European Union. The Principles have therefore been established by a more radical process. No single legal system has been the basis. The Commission has paid attention to all the systems of the Member States, but not every one of them has had influence on every issue dealt with. The rules of the legal systems outside of the Communities have also been considered, as have the American Restatement on the Law of Contracts and the existing conventions, such as the CISG.

That being stated, it seems reasonable to affirm that PECL, along with the UPICC, represent the latest developments in the field of contract law and combine civil law and common law, as well as international contract practices. Thus, the PECL provisions on hardship can be seen as a source in interpreting the CISG.

There is a trend beyond the UPICC to the effect that excessive hardship is a ground for relief. The Commission on European Contract Law has formulated a rule that is basically the same as UPICC's, and considered a hardship rule to be necessary and inserted it in one article, i.e. Art. 6:111 PECL, under the heading 'Change of Circumstances'. As discussed previously, Art. 8:108 PECL contains a rule similar to Art. 79 CISG and Art. 7.1.7 UPICC. In addition, Art. 6:111 PECL contains a provision on hardship that is not dealt with under the CISG. In contrast to the single paragraph found in Art. 79(1) CISG, that only includes impediments that must be amount to actual impossibility, the PECL deal with the issue of change of circumstances in a quite thorough way, providing not only a basic statement of principle (Art 6:111(1)) and the operational parameters of the concept (Art. 6:111(2)),

²⁹ *Principles of European Contract Law, Part 1. Performance, Non-performance and Remedies*, 1995, (ed. Lando & Beale Dordrecht).

but also the mechanism for the adaptation or termination of the contract by the court (Art. 6:111(3)).

It is found that the majority of countries in the European Community have introduced some mechanism into their respective laws intended to correct any injustice that results from an imbalance in the contract caused by supervening events that the parties could not reasonably have foreseen when they made the contract. In practice, contracting parties adopt the same idea; supplementing the general rules of law with a variety of clauses, such as 'hardship' clauses. The PECL adopt such a mechanism, taking a broad and flexible approach, as befits the pursuit of contractual justice that runs through them: they prevent the cost caused by some unforeseen event from falling wholly on one of the parties. The same idea may be expressed in different terms: the risk of a change of circumstances that was unforeseen may not have been allocated by the original contract and the parties or, if they cannot agree, the court must now decide how the cost should be borne. The mechanism reflects the modern trend towards giving the court some power to moderate the rigors of freedom and sanctity of contract.

6 CONCLUSION

After having weighed the fundamental principle of *pacta sunt servanda* against the doctrine *rebus sic stantibus*, the present paper has shown that it is apparent that the flexible terms of Art. 79 CISG will always leave considerable room for judicial appraisal and different views can be argued. The view taken by the author is that hardship is governed by the CISG and that a gap allowing for the application of national laws cannot be found in light of Art. 7(1) CISG's provision. Nonetheless, Art. 79 CISG can also be interpreted using tools such as UPICC and PECL according to Art. 7(1) CISG.

It should be remembered that there are several arguments in favour of the view that the CISG governs hardship using the aforementioned gap-filling technique and one includes a possibility to adapt the contract, as well as the view that the CISG does not govern hardship at all and the question should be solved with the help of national law. All these views have gained wide support. As far as the latter view is concerned, since the situation is unsettled, there is a risk that courts find a gap concerning hardship in the CISG and apply national law instead of the CISG. The temptation is even bigger as many national laws contain rules on the effect of hardship on the trade of goods. Even if courts do not find a gap in the CISG, they have a natural tendency to interpret Art. 79 CISG in the light of their national law. It has been stated that "article 79 is a chameleon-like example of superficial harmony" and that it is possible to interpret article 79 so that it suits the interpreters' background the best.³⁰ One of the problems seems to be that there is no actual case law concerning the question that would set

³⁰ Rimke, J. *supra* fn 22, at. par. 234.

aside the national solutions.³¹ Krüger emphasizes that Art. 79 CISG must be read as an independent rule free from national contract laws. In particular where national laws have created doctrines such as “*imprévision*”, “*Wegfall der Geschäftsgrundlage*” and “*bristende forutsetninger*”.

Moreover, in countries where different rules exist side by side for situations of impossibility and situations of changed circumstances, it might be natural to interpret Art. 79 as only concerning impossibility. In that case the question of changed circumstances would be solved in accordance with the general principle of “good faith”. However, an application of national laws would result in inconsistency. This is the reason why, according to the author, Art. 79 CISG should be interpreted using the UPICC and the PECL in order to guarantee more uniformity.

Differing arguments concerning the relationship between hardship and Art. 79 CISG are based on the fact that the term ‘impediment’ that is used in the CISG has not been defined in the Convention or elsewhere. What then constitutes an impediment under Art. 79? It is clear that something that makes the performance objectively impossible can constitute an impediment. A party cannot be asked to perform what is impossible (*ad impossibilia nemo tenetur*). Hence, the fact that the sold item is destroyed constitutes an impediment in the sale of specific goods. Also, events such as war, acts of terrorism and export or import bans, as well as natural catastrophes can constitute impediments within the meaning of Art. 79. These are but a few examples, for it is impossible and also inexpedient to make an exhaustive list of events that can constitute an impediment. The evaluation must be done *in casu*. It is also important to note that no event can constitute an impediment only due to its nature, but the event in question must also in fact prevent the contracted performance. For example, a war does not constitute an impediment if the agreed performance is still completely possible.³²

The question of whether an event that does not make the performance of a contract impossible can also constitute an impediment under Art. 79(1) is more interesting. Therefore, the paper has analysed the provisions of the UPICC and PECL in order to verify whether the hardship provisions of the UPICC and PECL can be invoked to expand the meaning of impediment found in the CISG to include cases of economic or commercial hardship. In light of Art. 7(1) CISG and taking into consideration that the impediment beyond control excuse (as reflected in Art. 79 CISG) not only applies to cases of physical or factual impossibility, but also to cases of economic impossibility, it is reasonable to affirm that Arts. 6.2.2 and 6.2.3 UPICC, along with Art. 6:111 PECL, can be invoked to expand the meaning of impediment found in the CISG to include cases of economic or commercial hardship.

³¹ Krüger, Kai, *Financial force majeure*, Rättsvetenskapliga studier till minnet av Tore Almén, Justus Förlag (Krüger 1999), at p. 245.

³² Lindström, N., *Changed Circumstances and hardship in international sale of goods*, *supra* fn 1.

In this direction, it is noteworthy to underline that unforeseen supervening changes of economic circumstances can considerably change the equilibrium of the contract under which the parties had calculated their risks, costs and benefits. As pointed out throughout the paper, an obligor may not invoke the hardship exemption if the performance of the contract becomes more burdensome or less desirable than anticipated, unless the performance of the contract becomes excessively onerous. In other words, any event which makes performance more burdensome, without meeting the stringent hardship standard threshold test, falls within the typical sphere of risk and control of the obligor. It should be noted however, that the promisor should not be held to his promise when circumstances have changed so fundamentally that a hardship event has occurred to him. In other words, the promisor should not be held to his promise if the situation existing at the conclusion of the contract has changed so completely that the parties, acting as reasonable persons, would not have made the contract, or would have made it differently, had they known what was going to happen. Applying the aforementioned considerations to Art. 79 CISG and following Christopher Brunner's theory,³³ the present paper sustains that it would be unsatisfactory to treat cases of physical impossibility differently than cases of economic impossibility of unaffordability. Indeed, any factual impossibility also has economic consequences and can be converted into money and a factual impediment may only excuse the obligor if it cannot reasonably be overcome, i.e. at additional cost. Therefore, a case of economic unaffordability may also result from a factual impediment that could be overcome, but only at an additional cost that is unreasonably excessive in comparison with the obligee's interest in receiving the goods. If an obligor is excused in a situation where a factual impediment can only be overcome at excessive cost, it cannot be justified why the solution should be different where the performance becomes excessively burdensome as a result of a change of market conditions.

The paper also analysed the *Scaform International BV v. Lorraine Tubes S.A.S* case, where the Belgian Court of Cassation, using Art. 6.2.3 UPICC as a tool for interpreting Art. 79 CISG, held that circumstances that were not reasonably foreseeable at the time of the conclusion of an agreement and which increase the burden of the agreement disproportionately can, in certain circumstances, be considered an 'impediment' within the meaning of Art. 79 CISG. In conclusion, taking a literal approach to the term 'impediment', it has to be said that 'impediment' is something that constitutes an obstacle for a person or thing; something that makes their movement, development, or progress more difficult (excessively onerous); not adhering to a strict interpretation of impossibility.

Thus, change of economic circumstances makes things more difficult, sometimes unreasonably and excessively so, for an obligor. Hence, according to a literal point of

³³ Brunner, C., *supra* fn 19.

view of the term 'impediment', it may excuse the obligor from performing or continuing to perform under the contract.

However, in light of the fact that more or less all questions concerning hardship and Art. 79 CISG are unsettled and as the views differ greatly, the interpretation of Art. 79 in a practical case is far from certain. Hence, it is highly recommendable that the contracting parties agree on the procedure if faced with hardship and do not leave questions of hardship to be settled under Art. 79. The contracting parties can in their sales contract agree on a suitable manner of proceedings in case of hardship, or by reference to the UNIDROIT Principles or the PECL transfer the question of hardship to one of these principles containing clear and functional provisions on the matter.³⁴

³⁴ Lindström, N., *supra* fn 1, at p. 25.