HARDSHIP UNDER THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)

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1 INTRODUCTION

The question of the availability of a hardship defense under the CISG has recently turned into a highly contentious issue. Traditionally, in the absence of a contractual

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1 Under the UNIDROIT Principles of International Commercial Contracts hardship arises “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 the performance a party receives has diminished”. See UNIDROIT International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (2010) Art. 6.2.2. In those domestic legal systems that
hardship clause\(^2\), the vast majority of courts have denied the possibility of relying on hardship as an excuse for failure to perform. Those courts have held – expressly or impliedly – that Art. 79 CISG\(^3\) only allows for exemptions in cases involving force majeure,\(^4\) i.e. unforeseeable and unavoidable occurrences which render performance materially or legally impossible, instead of more onerous or difficult.\(^5\) Decisions recognizing that hardship may fall within the scope of Art. 79 CISG have been

\(^2\) Art. 6 CISG allows the parties to ‘exclude the application of this Convention or… [to] derogate from or vary the effect of any of its provisions’.

\(^3\) Article 79(1) CISG lays down the basic principle in the following terms: ‘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’.

\(^4\) See, e.g., Nuova Fucinati S.p.A. v. Fondmetall International A.B. [1993], available at: <http://cisgw3.law.pace.edu/cases/930114i3.html> (stating that ‘the excessive onerousness doctrine does not fit within the structure of the Convention when invoked either as a defense or as a reason to avoid… the contract’); Vital Berry Marketing NV v. Dira-Frost NV [1995], available at: <http://cisgw3.law.pace.edu/cases/950502b1.html> (holding that a significant drop in the market price cannot qualify as an impediment under Art. 79 CISG since it is not constitutive of force majeure); Appellate Court Hamburg [1997], available at: <http://cisgw3.law.pace.edu/cases/970228g1.html> (holding that the contractual force majeure clause had the same effect as Art. 79 CISG); Appellate Court Hamburg [1997], available at: <http://cisgw3.law.pace.edu/cases/970704g1.html> (noting that a ground for exemption within the meaning of Art. 79 did not exist since the owed class of goods was not exhausted, i.e. there was no impossibility to perform); Arbitration Case 11/96 [1998], available at: <http://cisgw3.law.pace.edu/cases/980212bu.html> (denying the buyer’s hardship defense on the grounds that there was no ‘objective impossibility [for the buyer] to accept the delivered goods and [that] the described facts do not represent force majeure’); Arbitration proceeding [2012], available at: <http://cisgw3.law.pace.edu/cases/120123u5.html> (observing that Art. 79 CISG has the character of a force majeure clause).

\(^5\) A typical definition of force majeure requires that the occurrence relied upon be (i) unpredictable, (ii) uncontrollable and (iii) unavoidable or impossible to overcome. See, e.g., UNIDROIT Principles (2010), Art. 7.1.7. The concept of force majeure is generally considered to apply only to situations where performance becomes physically or legally impossible. See Joseph M. Perillo, Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts, Contratación internacional. Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit, Universidad Nacional Autonoma de Mexico – Universidad Panamericana 111 (1998), available at: http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html, at 112.
exceptional\textsuperscript{6}, and virtually no court has actually exempted a party from liability on this basis\textsuperscript{7}.

In spite of the position adopted by the overwhelming majority of courts, legal writers have frequently expressed support for the possibility of raising a hardship defense under the CISG. Recently, some of the most influential commentators have even observed that the availability of such a defense constitutes “the now prevailing opinion”. \textsuperscript{8} Significantly, the CISG Advisory Council (‘AC’), in its Opinion No. 7 on the ‘Exemption of Liability for Damages Under Article 79 of the CISG’, took the view that hardship may qualify as an “impediment” in the sense of Article 79(1) CISG and that it may therefore exempt a party from liability for non-performance under that provision\textsuperscript{9}.

The relationship between hardship and the CISG has been rendered even more complex by the Belgian Supreme Court’s decision in \textit{Scafom International BV v. Lorraine Tubes S.A.S.} of 19 June 2009\textsuperscript{10}. In this case, the Court upheld a hardship defense raised in connection with a contract governed by the CISG. Rather than basing its decision on the idea that hardship is covered by the concept of impediment used in Art. 79, it considered that the absence of a provision specifically dealing with situations of hardship constituted a gap in the CISG and that, in accordance with Article 7(2) CISG, such a gap had to be filled by having recourse to the general principles on which the CISG is based\textsuperscript{11}. The Court found that those principles were notably enshrined in the

\textsuperscript{6} See, e.g., Hamburg Arbitration proceeding \textsuperscript{[1996]}, available at: <http://cisgw3.law.pace.edu/cases/960321g1.html> (observing that the financial difficulties of the manufacturer were not ‘a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness’); Société Romay AG v. SARL Behr France \textsuperscript{[2001]}, available at: <http://cisgw3.law.pace.edu/cases/010612f1.html> (rejecting the seller’s hardship defense on the grounds that the events relied upon were neither exceptional, nor unforeseeable, thus implying that hardship defenses may be successful where these two characteristics are present).

\textsuperscript{7} See CISG Advisory Council Opinion No. 7, available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> (“To this date, there are no reported decisions whereby a court exempted a party from liability on the ground of hardship”).

\textsuperscript{8} Schlechtriem, P. and Schwenzer, I., \textit{Commentary on the UN Convention on the International Sale of Goods (CISG)} 2010, Oxford University Press, Oxford, at p. 1076. See also Schwenzer I., “Force Majeure and Hardship in International Sales Contracts” (2008) 39 \textit{Victoria University of Wellington Law Review} 713 (stating, rather controversially, that ‘[t]oday, however, it is more or less unanimously accepted in court and arbitral decisions, as well as in scholarly writing, that Article 79 does indeed cover issues relating to hardship’).

\textsuperscript{9} See supra fn 7, Article 3.1: ‘A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous (“hardship”), may qualify as an “impediment” under Article 79(1). The language of Article 79 does not expressly equate the term “impediment” with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79’.

\textsuperscript{10} Scafom International BV v. Lorraine Tubes S.A.S. \textsuperscript{[2009]} Available at: <http://cisgw3.law.pace.edu/cases/090619b1.html>

\textsuperscript{11} Ibid. at § 2
UNIDROIT Principles of International Commercial Contracts\textsuperscript{12}, which expressly recognize hardship as an excuse for non-performance\textsuperscript{13}.

It is important to note that, in the same matter, the Court of Appeal of Antwerp had adopted a slightly different approach\textsuperscript{14}. Similarly to the Supreme Court, it found that the absence of a hardship provision constituted a gap in the CISG. However, unlike the Highest Court, it held that this gap had to be filled by the applicable domestic law, and not by the general principles on which the CISG is based.

It follows that there are, currently, four possible approaches to the question of the availability of a hardship exception under the CISG: (1) exclusion of hardship from the scope of the CISG (the “traditional” view); (2) inclusion of hardship within the scope of Art. 79 CISG and, more specifically, the concept of impediment (AC Opinion No. 7); (iii) recourse to general principles to fill a gap in the Convention (Belgian Supreme Court in Scafom); and (iv) application of domestic law to fill that gap (Antwerp Court of Appeal in Scafom).

The purpose of this article is to examine the merits of these competing approaches to the relationship between hardship and the CISG and to determine the correct interpretation of Article 79. Section I examines the rationales underlying the four possible solutions to this question, all of which are – as has been seen – supported either by case law or in scholarly writing. Section II articulates the author’s view of the correct approach, which consists of the “traditional” interpretation of Article 79 CISG as excluding the possibility of raising claims alleging hardship. Section III offers some explanations as to why the approach advocated by the AC and the view taken by the Belgian Supreme Court are problematic.

This article is only concerned with the availability of a hardship defense under the CISG, absent a contractual hardship provision. It does not examine the more general question of whether a hardship exception is per se desirable or not. Such an exception, which is recognized under the laws of a number of countries\textsuperscript{15}, may constitute a useful tool to protect parties from a fundamental change of circumstances which radically alters the contractual equilibrium. This article, however, does not deal with this question. It simply argues that Art. 79 CISG, correctly interpreted, excludes the possibility of raising hardship as an excuse for failure to perform.

\footnotesize
\textsuperscript{12} Ibid.
\textsuperscript{13} UNIDROIT Principles Art. 6.2.
\textsuperscript{14} The Court of Appeal’s decision is not available in the CISG database. All references to this decision are based on the information contained in the judgment of the Supreme Court.
2 POSSIBLE SOLUTIONS

This Section examines the four possible approaches (or solutions) to the question of the availability of a hardship defense under the CISG. Solutions No. 1 to 3 allow for such a defense to be raised, while solution No. 4 excludes this possibility. The purpose of this Section is to explain the reasoning behind each of these approaches; it does not assess the appropriateness of the various solutions examined – this evaluation will be undertaken in Sections II and III.

2.1 SOLUTION NO.1: THE ABSENCE OF A SPECIFIC HARDSHIP PROVISION CONSTITUTES A GAP WHICH MUST BE FILLED BY THE APPLICABLE DOMESTIC LAW

Solution No. 1 is based on the assumption that the absence of an express hardship provision constitutes a gap in the CISG. Under the CISG, a gap exists if a particular issue falls within the material scope of the CISG without being expressly addressed.\(^\text{16}\)

A gap in this sense is sometimes referred to as an internal gap,\(^\text{17}\) as opposed to an external gap which is an issue that is outside the material scope of the CISG. Examples of external gaps notably include contract validity,\(^\text{18}\) the effect of the contract on ownership of the goods,\(^\text{19}\) and the liability of the seller for injuries caused by the goods.\(^\text{20}\)

Where an internal gap exists, Article 7(2) requires that it be filled ‘in conformity with the general principles on which it [the CISG] is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law’. Article 7(2) therefore provides for two distinct gap-filling mechanisms, preference being accorded to recourse to general principles, rather than domestic law. Such preference is intended to promote the uniform application of the CISG, an objective expressly set forth in Art. 7(1).\(^\text{21}\)

As has already been stated, solution No. 1 is based on the idea that the lack of a specific hardship provision constitutes a gap in the CISG. Under this view, hardship falls within the material scope of the CISG but is not addressed therein. This approach further assumes that Art. 79 does not implicitly exclude hardship defenses but leaves the issue unanswered. As regards the question of how this gap should be filled, solution No. 1

\(^{16}\) Art. 7(2) CISG defines gaps as ‘[q]uestions concerning matters governed by this Convention which are not expressly settled in it’.

\(^{17}\) Schlechtriem & Schwenzer, supra fn 8, at 134.

\(^{18}\) CISG Art. 4(a).

\(^{19}\) CISG Art. 4(b).

\(^{20}\) CISG Art. 5.

\(^{21}\) Art. 7(1) CISG provides: ‘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’.

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considers that recourse to the general principles on which the CISG is based is either impossible or unhelpful and that, as a consequence, recourse must be had to the applicable domestic law.

So far, solution No. 1 has received little support from either courts or scholars. An interesting example of a decision following this approach, however, is provided by the aforementioned ruling of the Court of Appeal of Antwerp in Scafom. Although the Supreme Court disapproved of the Court of Appeal’s reasoning (without, however, annulling its decision), the latter Court’s ruling is nevertheless illustrative.

This case involved a claim of hardship raised by a French seller of steel tubes against a Dutch buyer on the grounds of a 70% increase of the price of steel between conclusion of the contract and scheduled delivery. The Court of Appeal held that the issue of hardship was not settled in the CISG (i.e. that there was a gap) and that the issue had to be solved on the basis of the applicable domestic law, namely French law. There is no indication in the Supreme Court’s decision as to why the Court of Appeal did not attempt to fill the perceived gap in reliance on the general principles on which the CISG is based – it presumably considered that no such principles could usefully be resorted to.

One interesting point of this decision is that French law does not actually recognize a hardship defense since the relevant doctrine, the so-called théorie de l’imprévision, is only applied by administrative and not by civil courts. This explains why the Court of Appeal did not – rightly or wrongly – base its decision on the théorie de l’imprévision, but on the more general good faith principle contained in French law.

### 2.2 SOLUTION NO.2: THE ABSENCE OF A SPECIFIC HARDSHIP PROVISION CONSTITUTES A GAP WHICH MUST BE FILLED BY THE GENERAL PRINCIPLES UNDERLYING THE CISG

Similarly to solution No. 1, solution No. 2 also assumes the existence of a gap as regards the availability of an exception based on hardship. It differs from solution No. 1 with regard to how this perceived gap should be filled. In that respect, solution No. 2 is faithful to the preference that Art. 7(2) accords to recourse to the general principles on

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22 See *supra* fn 10 ("The Appellate Court judgment could, on the basis of these findings… decide that [Buyer] must renegotiate the contractual conditions")


24 See Schwenzer I., *supra* fn 8, at 710 (noting that ‘neither general civil law nor commercial law has been favourable to the concept of hardship’).

25 See *supra* fn 10, (observing that the Appellate Court decided that ‘French law should be applied, which does not know the theory of imprévision, but nevertheless allows renegotiation as an application of good faith’).
which the CISG is based since it postulates that the availability of a hardship defense must be determined on the basis of such general principles.26

The best – and so far only – example for this approach is the Belgian Supreme Court’s decision in Scafom, referred to above. The Supreme Court held that the availability of a hardship defense had to be evaluated not on the basis of domestic law, but in reliance on general principles. The Court found that those principles were “incorporated inter alia in the Unidroit Principles of International Commercial Contracts” 27 which expressly recognize hardship as an excuse for failure to perform.28 Although the Supreme Court concluded that hardship could successfully be raised as a defense in the case at stake, the approach it advocates does not inevitably lead to this conclusion. The final outcome will in fact depend on the court’s view of what the general principles on which the CISG is based consist of.29

2.3 SOLUTION NO. 3: HARDSHIP MAY CONSTITUTE AN IMPEDIMENT IN THE SENSE OF ART. 79 CISG

Solution No. 3, inasmuch as it is based on the idea that hardship may fall within the scope of Art. 79, implicitly rejects the proposition that there is a gap in the CISG as regards the issue of hardship. It relies on the interpretive argument according to which an impediment in the sense of Art. 79 does not necessarily require that performance has become impossible. A situation in which performance becomes significantly more onerous or burdensome (e.g. as a result of a sudden and drastic price increase or currency fluctuations having similar characteristics) may arguably qualify as an impediment.

Solution No. 3 is the position adopted by the CISG Advisory Council in its aforementioned Opinion. The AC contends that “a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79” because ‘[t]he language of Article 79 does not expressly equate the term “impediment” with an event that makes performance absolutely impossible’ 30. This statement of principle stands somewhat in contradiction to the AC’s comments highlighting that both the CISG’s legislative and its drafting history strongly suggest that hardship was not intended to be included within the scope of Art. 79.31 The AC’s Opinion also rests on

26 For a scholarly article which apparently takes this view, see Lee W., “Exemptions of Contract Liability Under the 1980 United Nations Convention” (1990) 8 Dickinson Journal of International Law 375, at p. 394 (‘Thus, the problem of frustration should be solved outside of Article 79… General principles on which the Convention are (sic!) based will apply in this situation’)
27 See supra fn 10.
28 UNIDROIT Principles Art. 6.2.
29 This point will be analysed in more detail supra at II.3(b)(i).
30 See supra fn 7, Art. 3(1).
31 Ibid, at § 28 (‘there is ample support for the proposition that… the notion of “impediment” under Article 79 points to an insurmountable obstacle that is unrelated to the more flexible notions of hardship,

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the observation that the concept of “impediment” is ambiguous and that the legislative and drafting histories are not entirely conclusive of the matter.\textsuperscript{32}

Interestingly, the Belgian Supreme Court’s opinion in \textit{Scafom}, discussed above as an illustration for solution No. 2, also provides support for the position adopted by the AC. In fact, in what can be considered an \textit{obiter dictum}, the Court observed that ‘‘[c]hanged 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… form an impediment in the sense of [Art. 79 CISG].’’\textsuperscript{33} It is unclear why the Supreme Court preferred to base its decision on the existence of a gap to be filled by the relevant provision of the UNIDROIT Principles, rather than on this broad reading of the concept of impediment. Also, it appears that the Court’s decision (solution No. 2) is in fact incompatible with the principle enunciated in its \textit{obiter dictum} (solution No. 3) since the two approaches are based on contrasting assumptions (existence versus absence of a gap).

\section{2.4 SOLUTION NO. 4: HARDSHIP IS EXCLUDED UNDER THE CISG}

Similarly to solution No. 3, solution No. 4 is also based on the idea that the CISG exhaustively regulates available exemptions. However, it differs from solution No. 3 as far as the reach of Art. 79 is concerned. While solution No. 3 considers that situations of hardship may be covered by Art. 79, solution No. 4 views such situations as being outside the scope of this provision. Solution No. 4 views Art. 79 as the equivalent of domestic rules of \textit{force majeure}, a notion that requires impossibility of performance (e.g. destruction of the goods to be delivered; enactment of economic sanctions rendering exports or imports unlawful etc.)

As has already been mentioned, support for solution No. 4 is ample. Most courts that have faced exceptions alleging hardship in relation to contracts governed by the CISG have found those claims to be unavailable on the grounds that the CISG only recognizes

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{32} \textit{Ibid.} Comments § 27.
\item \textsuperscript{33} \textit{See supra} fn 10.
\end{itemize}
\end{footnotesize}
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*force majeure* exemptions\(^{34}\). The same view has been taken by a significant number of writers, both prior to\(^{35}\) and in the aftermath\(^{36}\) of the *Scafom* ruling.

### 3 THE CORRECT SOLUTION: HARDSHIP IS EXCLUDED UNDER THE CISG (SOLUTION NO. 4)

This Section presents the author’s view of the correct approach to the relationship between hardship and the CISG, namely the approach whereby hardship is implicitly excluded by Art. 79. Since the problem lies in the determination of the “true” meaning of Art. 79 CISG, this Section is essentially an interpretive exercise. In light of the legal nature of the CISG, the relevant rules of interpretation are those laid down in the Vienna Convention on the Law of Treaties (‘VCLT’), which can be considered to represent customary international law on this matter\(^{37}\).

The relevant rules of the VCLT are Articles 31 and 32. Under Article 31, which constitutes the general rule of treaty interpretation, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 32 VCLT provides for recourse to ‘supplementary means of interpretation’ (such as the *travaux préparatoires* and the circumstances of the conclusion of the treaty) in the event that

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\(^{34}\) See *supra* fn 4.


\(^{36}\) See, e.g., Zeller B., “Article 79 Revisited” (2010) 14 *Vindobona Journal* 151, at p. 153 (‘the theory of *imprévision* or hardship has no application as the CISG in Art. 79 or anywhere else does not allow the parties or the judge to modify the contract’); Veneziano, A., “UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court” (2010) 15 Uniform Law Review 137, at p. 143 (‘Article 79 CISG is formally entitled “exemption from non-performance” and clearly governs the classical *force majeure* situations’).

the general rule of interpretation ‘[l]eaves the meaning ambiguous or obscure’ or ‘[l]eads to a result which is manifestly absurd or unreasonable’.

The rules of the VCLT are not the only ones that are relevant for the purposes of determining the meaning of Art. 79 CISG. In fact, the CISG itself contains rules of interpretation in Art. 7. According to Art. 7(1), as has already been explained, ‘regard is to be had to… the need to promote uniformity in its [the CISG’s] application’. Article 7(1) reflects the basic objective pursued by the CISG, namely the achievement of uniformity not only in the text, but also in the application of the CISG. The interpretive approach followed in Art. 7(1) can therefore be considered to be largely identical with the rule contained in Art. 31 VCLT according to which a treaty has to be interpreted in light of its ‘object and purpose’ (the purpose of the CISG being the achievement of actual uniformity). There is hence no need for separate analysis under Art. 7(1) CISG.

3.1 INTERPRETATION OF ART. 79(1) CISG IN ACCORDANCE WITH ART. 31 VCLT

3.1.1 THE ORDINARY MEANING OF ART. 79(1) CISG

It is submitted that the ordinary meaning of Art. 79(1) CISG restricts the scope of the exemption contained therein to situations where a party’s non-performance is the result of actual impossibility to perform. As shall be seen, this meaning derives unambiguously from the various definitional elements of Art. 79(1).

In this respect, it should also be noted that the UNIDROIT Principles – which the Belgian Supreme Court relied upon to “introduce” hardship into the sphere of the CISG – ironically provide strong support for such an interpretation. The UNIDROIT Principles contain separate provisions dealing with force majeure and hardship respectively. Remarkably, the Principles’ force majeure rule is, as a matter of substance, identical with CISG Art. 79(1). The only differences are of a non-substantial linguistic nature such as the use of the expression “non-performance” instead of “failure to perform” and the use of the gender-neutral possessive pronoun its instead of his.

The fact that one and the same rule is referred to as a force majeure norm under the Principles and as a broader exemption rule under the CISG suggests that Art. 79 may in fact be nothing else (or more) than a traditional force majeure rule. At the very least, the wording of Art. 7.1.7(1) of the Principles indicates that such was the understanding.

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38 Art. 7.1.7 of the UNIDROIT Principles deals with force majeure, while Art. 6.2 addresses hardship.
39 Art. 7.1.7(1) of the UNIDROIT Principles provides: ‘Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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’.
of the drafters of this provision. Indeed, had the latter taken the view that Art. 79 CISG
was not a force majeure provision, then they would most probably have departed from
its wording for the purposes of drafting the Principles’ force majeure.

3.1.1.1 MEANING OF “IMPEDIMENT”

The Oxford Dictionary defines an impediment as a “hindrance or obstruction in doing
something”.40 Both the term hindrance and the expression obstruction suggest the
presence of an obstacle that affects the ability of someone to do something, i.e. the very
possibility for that person to do something. An analysis of the meaning of the verb “to
impede” leads to the same conclusion. In the example provided by the Oxford
Dictionary: “the sap causes swelling which can impede breathing”,41 to impede is used
in the sense of to make impossible, i.e. a swelling which can impede breathing is a
swelling which can make breathing impossible.

3.1.1.2 MEANING OF “FAILURE WAS DUE TO”

One of the requirements for an exemption under Art. 79 is that the failure to perform be
“due to” an impediment. In other words, the impediment must have caused the failure
to perform of the party relying on it. Failing any contrary indication, the proposition:
‘A (impediment) causes B (failure to perform)” must be understood as meaning that A
is the sole cause for B, i.e. “the impediment must be the exclusive cause for the non-
performance’.42

This requirement of an exclusive causal nexus between impediment and non-
performance is clearly not met in situations involving hardship. In such situations,
where, by definition, performance is still possible, the non-performance is ultimately
caused by a decision of the party concerned not to perform. Where, for example, the
market price of a particular commodity has risen sharply and unexpectedly between the
conclusion of the contract and the contractual delivery date, the seller – who is in
possession of the goods – is still able to perform. His failure to perform does not stem
from a lack of ability, but from a lack of willingness, to perform. In hardship scenarios,
a party’s failure to perform is thus never due to the alleged impediment, but rather to a
conscious choice not to perform.

40 Available at: <http://www.oxforddictionaries.com/definition/english/impediment>
41 Available at: <http://www.oxforddictionaries.com/definition/english/impede>
3.1.1.3 MEANING OF ‘COULD NOT REASONABLY BE EXPECTED TO… HAVE AVOIDED OR OVERCOME IT [THE IMPEDIMENT], OR ITS CONSEQUENCES’

Art. 79 CISG further requires that the party relying on an impediment “could not reasonably be expected to… have avoided or overcome it, or its consequences.” This particular wording clearly suggests that Art. 79 CISG only contemplates situations where the event relied upon has rendered performance impossible. In fact, as regards situations of hardship, the use of the verbs avoid and overcome is not appropriate. In those situations, there is simply no need to avoid or overcome the event (or its consequences) because the party relying on the alleged impediment is still able to perform.

In fact, this particular requirement only makes sense in relation to situations where performance has become impossible. Where, for example, the seller fails to deliver because of a failure of a supplier to deliver components needed to manufacture the goods (physical impossibility), the question of whether such a situation could have been either avoided or overcome is a sensible one. In such a scenario, it is appropriate to determine whether the seller was able to overcome the alleged impediment, for example by ordering the components from a third party. It is also relevant to ask whether the seller could have avoided the event, for example by choosing a more reliable supplier.

3.1.2 THE MEANING OF ART. 79 CISG IN ITS CONTEXT

Under the general rule of interpretation set forth in Art. 31 VCLT, the term “concept” refers to (a) the text of the treaty, including its preamble and annexes, (b) “[a]ny agreement relating to the treaty which was made between all the parties in connexion (sic) with the conclusion of the treaty” and (c) “[a]ny instrument which was made by one or more parties in connexion (sic) with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty”. For present purposes, the relevant context is the text of the CISG.

3.1.2.1 MEANING OF ART. 79 CISG IN ITS BROADER TEXTUAL CONTEXT

Art. 79 CISG is contained in Part III, Chapter 5, Section IV entitled ‘Exemptions’. It is not the only provision of that Section. Section IV also includes Art. 80 which lays down the rule according to which ‘(a) party may not rely on the failure of the other party

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43 On the meaning of contextual interpretation under the VCLT, see Gardiner, R., supra fn 37, at pp. 177-89.

44 It is generally recognized that titles and headings are relevant elements of a treaty’s context. See Gardiner, R., supra fn 37, at pp. 180-182.
to perform, to the extent that such a failure was caused by the first party’s act or omission’. Section IV therefore comprises two separate provisions dealing with exemptions.

The conclusion that can be drawn from this context is that there is no gap in the CISG as regards the availability of a hardship defense. In fact, the title of Section IV (‘Exemptions’) indicates that this Section covers exemptions in general, i.e. all categories of exemptions, and not only a certain type, or certain types, of exemption. It is significant that Section IV is not entitled Force majeure since such a heading would suggest that the availability of other types of exemptions is not addressed in the CISG.

Also, it is reasonable to assume that Section IV exhaustively regulates the question of available exemptions. First of all, the wording of Section IV does not suggest that the rules contained in Articles 79 and 80 are merely indicative or illustrative, rather than exhaustive. If Articles 79 and 80 constituted only two of several possible grounds for exemption, one would have expected Section IV to contain a corresponding “chapeau” stating, for example, that “a party’s failure to perform will be excused, *inter alia*, if…”. (emphasis added)

Secondly, an interpretation of Section IV to the effect that Articles 79 and 80 are merely illustrative would be contrary to the basic requirement of legal certainty. The recognition of the availability of other exemptions would raise difficult questions (e.g. what other defenses may be raised?) without offering any answers or guidance. Outcomes in individual cases would vary from one court to another. By the same token, the Convention’s basic objective of uniform interpretation would be compromised.

Thirdly, a presumption of exhaustive regulation is not peculiar to “exemptions”; it can be considered to characterize most, if not all, topics covered in the Convention. As regards contract avoidance by the buyer, for example, the relevant rules are set forth in Articles 49(1)(a) and 49(1)(b). It would be unreasonable (i.e. detrimental to legal certainty and uniformity) to argue that these provisions are not exhaustive and that the buyer may invoke other circumstances in order to declare the contract avoided. To this author’s knowledge, neither courts nor scholars have in fact adopted, or advocated, such an approach.

### 3.1.2.2 Meaning of Art. 79 in the Context of the Absence of a Specific Hardship Remedy

As has already been explained, Art. 79 CISG provides for an exemption from liability in the event that a party’s non-performance is due to an impediment in the sense of this

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45 As Professor Lookofsky explains, if one piece of legislation (here, the CISG) occupies the entire field, then the application of domestic laws (here, laws providing for a hardship exception) is “preempted”. See Lookofsky, J., “Impediments and Hardship in International Sales” (2005) 25, *International Review of Law and Economics* 434, at p. 442.

46 See infra at II.A.3(b)(ii).
provision. In other words, the remedy offered by Art. 79 to the party relying on an impediment consists of not being liable, i.e. not having to pay damages, for breaches due to the impediment. Other rights such as, for example, the (other party’s) right to avoid the contract, remain unaffected. Under Art. 79 exemptions from liability have effect ‘for the period during which the impediment exists’. Remedies that are typically available in cases of hardship significantly differ from the remedy provided for in Art. 79 CISG. Under the UNIDROIT Principles, for example, the primary remedy is the right of the disadvantaged party to request the renegotiation of the contract. The Principles specify that the exercise of this right does not entitle the party concerned from withholding performance, i.e. it must perform, or continue to perform, its obligations. Where renegotiations do not lead to an agreement between the parties, either party (generally the disadvantaged party) may bring the case before a court which, if it finds hardship, may either terminate the contract or modify its terms (adaptation). Those remedies (i.e. renegotiation, adaptation, termination), or at least some of them, can also be found in most domestic laws that recognize the principle of hardship, as well as in relevant model clauses. Under German law, for example, a situation of hardship entitles the party concerned to request adaptation of the contract. Where ‘adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke [i.e. avoid] the contract’. Unlike the UNIDROIT Principles, German law does not provide for a duty to renegotiate. Under Italian law, the hardship rule contained in the Civil Code only applies to long-term contracts defined as ‘contratti a esecuzione continuata o periodica, ovvero a esecuzione differita’. Under the relevant provision of the Code, the only available remedy consists of the right to request the (judicial) resolution, i.e. termination, of the contract. Under the ICC model hardship clause, available remedies include

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47 CISG Art. 79(5) provides: ‘Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention’.

48 CISG Art. 79(3).

49 UNIDROIT Principles Art. 6.2.3(1).

50 UNIDROIT Principles Art. 6.2.3(2).

51 UNIDROIT Principles Art. 6.2.3(3).

52 UNIDROIT Principles Art. 6.2.3(4).

53 German Civil Code (BGB) Section 313(1).

54 Ibid. Section 313(3).

55 Italian Civil Code Art. 1467.

56 Ibid.
renegotiation and, absent an agreement on modified contract terms, termination of the contract.\(^{57}\)

The differences between the remedies available under Article 79 CISG and those available under various hardship rules highlight that these two sets of norms are of an entirely different nature. Art. 79 addresses situations involving impossibility to perform and, as a consequence, it is merely concerned with exempting the non-performing party from its liability. Hardship rules, on the other hand, deal with cases where performance is still possible; their purpose is to restore the initial contractual equilibrium. Hardship norms frequently aim to “save” contracts affected by the occurrence of certain unforeseen events; in situations falling under Art. 79 CISG, contracts can no longer be “saved”, given that performance is no longer possible. In light of these fundamental differences between hardship remedies and the remedy laid down in Art. 79 CISG, it must be concluded that situations involving hardship cannot adequately be dealt with within the framework of Art. 79.

### 3.1.3 THE MEANING OF ART. 79 IN LIGHT OF ITS OBJECT AND PURPOSE

#### 3.1.3.1 OBJECT AND PURPOSE OF THE CISG: UNIFORMITY

It is hardly necessary to recall that one of the fundamental objectives of the CISG is to achieve legal uniformity, understood as referring not only to textual uniformity but also to actual uniformity, i.e. uniform application by the courts. This objective is not only implicit in the nature of the CISG as a uniform law instrument, but also expressly stated in Art. 7(1).\(^ {58}\) Ever since the entry into force of the CISG, significant efforts have been deployed to ensure the uniform application of the CISG.\(^ {59}\)

### 3.2 INABILITY OF SOLUTIONS NO. 1 TO 3 TO ENSURE UNIFORMITY

#### 3.2.1.1 INABILITY OF SOLUTIONS NO. 1 AND 2 TO ENSURE UNIFORMITY

Solutions No. 1 and 2, as has been explained, are based on the assumption that there exists a gap in the CISG as regards the availability of a hardship exception. Under

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\(^{58}\) See supra fn 21.

\(^{59}\) It is generally considered that, in order to promote the internationally uniform application of the CISG, courts and arbitral tribunals should take into account decisions rendered by foreign courts and tribunals. In order to facilitate access to foreign case law, UNCITRAL has set up a free online database called CLOUT (Case Law on UNCITRAL Texts) available at: <http://www.uncitral.org/uncitral/en/case_law.html>. For an illuminating discussion of this issue, see Ferrari F, “CISG Case Law: A New Challenge for Interpreters?” (1997) 17<em>Journal of Law and Commerce</em> 245.
solution No. 1 this gap is to be filled by the applicable domestic law, while solution No. 2 advocates the application of the general principles on which the CISG is based. As will be shown, both approaches have a detrimental impact on the achievement of uniformity.

Evidently, solution No. 1 is the worst in terms of uniformity. Under this approach, the availability of a hardship defense will depend on whether such a defense is recognized under the applicable domestic law. While hardship is recognized in a large number of jurisdictions, it is far from being a universally accepted principle. Even amongst those jurisdictions that recognize hardship, as has already been explained, relevant definitions of hardship, as well as the legal consequences flowing from situations of hardship, may be dissimilar.

Solution No. 2 appears to have a “milder” impact on uniformity. In fact, it may be tempting to assume that recourse to general principles will always lead to the same outcome, namely – as held by the Belgian Supreme Court – recognition of a hardship defense. However, it cannot be excluded that other courts following this particular approach will have a different understanding of what the principles underlying the CISG consist of. Those courts may therefore decide that the general principles on which the CISG is based (and notably the principle *pacta sunt servanda*) militate against the application of a hardship rule.

### 3.2.1.1.2 Inability of solution No. 3 to ensure uniformity

Solution No. 3, which considers situations of hardship to fall within the scope of Art. 79 CISG is not, at first sight, less capable of ensuring uniformity than the opposite view according to which hardship is implicitly excluded from the CISG. In fact, solution No. 3 consists of a single rule (availability of a hardship exemption) which is subject neither to exceptions nor judicial discretion. In practical terms, however, this view is not entirely accurate.

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60 See *supra* fn 7, Comments at § 35 (“The alternative of resolving the hardship problem within the four corners of the CISG is more palatable than the other, because leaving the question to the conflict of law rules of the forum leads to a great diversity of potentially applicable legal doctrines”)

61 As has already been explained, hardship is recognized in Germany and Italy. It is also an accepted principle under the laws of the Netherlands, Greece, Portugal, Austria, and the Scandinavian countries. See Schwenzer I., *supra* fn 8, at p. 711. For an analysis of the extent to which hardship is recognized in Latin American countries, see Muñoz, E., “Impossibility, Hardship and Exemption under Ibero-American Contract Law” (2010) 14 *Vindobona Journal* 175, at p. 184-9.

62 See *supra* fn 23.

63 See *supra* at II.A.2(b).

64 See Maskow D., *supra* fn 15, at p. 658 (observing that “(t)he problem of hardship and adaptation of a contract to changed circumstances […] is by far less elaborated, established and acknowledged than the principle of “pacta servanda sunt”).
To begin with, it needs to be borne in mind that the vast majority of courts have traditionally equated the Art. 79 exemption with a force majeure provision,\(^\text{65}\) i.e. a provision applying to situations involving impossibility. Solution No. 3 therefore constitutes an attempt at breaking with a well-established judicial practice. As such, recognition of solution No. 3 would inevitably encounter reluctance on the part of a number of courts to alter their existing approaches. This would result in non-uniform application of Art. 79.

In addition, as has already been mentioned, the hardship rule itself is the subject of varying approaches with regard to both the circumstances that trigger its application (what constitutes hardship?) and the legal consequences flowing from hardship. Some courts may consider it appropriate to apply a particular version of the hardship rule which differs from the one followed by other courts. For instance, some courts may consider judicial contract adaptation as contemplated in the UNIDROIT Principles and the German BGB as an inappropriate remedy, while others may grant such a remedy. Courts may also require varying degrees of contractual imbalance in order to uphold claims or defenses based on hardship.

### 3.2.1.2 Ability of Solution No. 4 to Ensure Uniformity

Unlike solutions No. 1 to 3, solution No. 4 ensures uniformity or, at least, a high degree thereof. First of all, solution No. 4 avoids the uncertainty inherent in solutions No. 1 and 2 as regards the fundamental question of the availability of a hardship defense. Moreover, solution No. 4 also escapes the problem of possibly varying interpretations of the scope of application and legal effect of the hardship rule. Lastly, inasmuch as solution No. 4 reflects the currently predominating judicial orientation, it also eludes the lack of uniformity that may result from the possible reluctance of some courts to accept the novel proposition that Art. 79 CISG covers situations involving mere hardship.

### 3.3 Interpretation of Art. 79 CISG in Accordance with Art. 32 VCLT

Art. 32 VCLT provides for recourse to “supplementary means of interpretation” including “the preparatory work of the treaty and the circumstances of its conclusion”. These supplementary means may be relied upon either to confirm the meaning which derives from an interpretation in accordance with Art. 31 VCLT or to determine the meaning, if an interpretation under the rule of Art. 31 VCLT ‘[l]eaves the meaning ambiguous or obscure’ or ‘[l]eads to a result which is manifestly absurd or unreasonable’.

In the present case, the interpretation of Art. 79 CISG in accordance with the rule laid down in Art. 31 VCLT clearly establishes that (1) Art. 79 relates to cases in which

\(^{65}\) See Schwenzer, supra fn 8.
performance has been rendered physically or legally impossible and that (2) the CISG does not contain any gap as regards the availability of a hardship exception since it exhaustively regulates the issue of available remedies in Articles 79 and 80. For present purposes, recourse to the supplementary means contemplated in Art. 32 VCLT therefore serves as a tool to confirm the meaning established in accordance with Art. 31 VCLT.

3.3.1 GENERAL LEGISLATIVE INTENT

A proper understanding of the motivation of the drafters of Art. 79 CISG requires a closer examination of its “predecessor” provision, namely Art. 74 of the Uniform Law on the International Sale of Goods (‘ULIS’). Article 74(1) ULIS, which is the predecessor of Art. 79(1) CISG, exempts a party from liability for non-performance where such non-performance is due to ‘circumstances which… he was not bound to take into account or to avoid or to overcome’.

Among the members of the UNCITRAL Working Group – the initial drafters of the CISG – ‘the central objection was that under paragraph 1 [of Art. 74 ULIS] a party could be too readily excused from performing his contract’. In particular, the members of the Working Group expressed concern over the fact that the exemption of Art. 74(1) ULIS ‘might extend to situations in which performance had become unexpectedly onerous.’ Several representatives therefore considered it vital to ‘narrow the grounds for exoneration and to make them more objective.’ Those representatives were of the view that ‘exoneration should only be available on the occurrence of an objective obstacle or impediment.’

This basic objective is reflected in the final wording of Art. 79 CISG, which employs the term impediment instead of the broader concept of “circumstances” and which adopts a more objective requirement pertaining to the characteristics of such impediment. For present purposes, it is important to observe that the recognition of an

66 For an analysis of this provision, see Nicholas, B., “Force Majeure and Frustration” (1979) 27 American Journal of Comparative Law 231.
67 Article 74(1) ULIS provides in full: ‘Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended’.
69 Ibid.
70 Ibid.
71 Ibid.
72 Art. 74(1) ULIS refers to circumstances which ‘he [the non-performing party] was not bound to take into account’, while Art. 79(1) CISG refers to an impediment which ‘he could not reasonably be expected to have taken… into account’.
exemption based on hardship would appear to run counter the drafters’ intent to establish a narrowly defined exemption.

3.3.2 REJECTION BY UNCTARL OF A PROPOSAL TO INCLUDE A HARDSHIP PROVISION

During its review of the draft Convention elaborated by the Working Group, UNCTARL’s Committee of the Whole considered a proposal to add a provision on hardship following the norm that was going to become Art. 79 CISG. This proposal defined hardship as an event which “results in excessive difficulties or threatens either party with considerable damage” and afforded the party affected ‘a right to claim an adequate amendment of the contract or its termination’73. This proposal, which can be assumed to have been based on the typical considerations of fairness which generally underpin the doctrine of hardship, was rejected by the Committee.74

The interpretive implications of this rejection are clear. The express rejection of a hardship exception can only be construed as meaning that such an exemption is not available under the CISG, unless one considers that this rejection was based on the assumption that hardship is already covered by Art. 79. In light of the meaning of Art. 79 under the interpretive rule contained in Art. 31 VCLT, as well as the general legislative intent of the drafters of the CISG examined in the preceding section, it is difficult to find any support for such a view. The conclusion that the rejection of a separate hardship provision must be understood as a general rejection of hardship is therefore compelling.

3.3.3 REJECTION OF A PROPOSAL TO TAKE INTO ACCOUNT A RADICAL CHANGE OF CIRCUMSTANCES

During the diplomatic Conference held in Vienna between March 10 and April 11, 1980, the Norwegian representative suggested an amendment to the text of Art. 65(3), the predecessor of Art. 79(3) CISG. Under that provision, which has remained largely unaltered, “[t]he exemption provided by this article has effect only for the period during which the impediment exists.” The Norwegian delegation argued that the rule of Art. 65(3) according to which the exemption ceases with the impediment was undesirable ‘because, in the case of a long-term impediment, circumstances could change radically and make it totally unrealistic to impose performance at that later stage.’75

Therefore, the Norwegian delegation proposed two amendments to Art. 65(3). First, it suggested expressly restricting the scope of the rule contained in this provision to situations in which the impediment was merely temporary.76 In conjunction with this

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73 Honnold, supra fn 68, at p. 350.
74 Ibid.
75 Ibid. at p. 602.
76 Ibid.
suggested amendment, the Norwegian delegation also proposed the inclusion of a new sentence in order to address the problem of a radical change of circumstances.\textsuperscript{77} Under this proposal, such a radical change of circumstances – similarly to the impediment of Art. 65(1) – exempted the party concerned from liability for failure to perform.

While the Norwegian proposal received support from several delegations,\textsuperscript{78} an at least equally significant number of representatives were opposed to its adoption. The Swedish delegate, for example, pointed out that ‘(s)uch a provision had been omitted from the draft Convention for the very good reason that it was impossible to cover all eventualities’\textsuperscript{79}. Significantly, the French delegate objected on the grounds that ‘such a provision had been omitted from the draft Convention for the very good reason that it was impossible to cover all eventualities’\textsuperscript{79}. The Argentine delegate observed that exemption from liability was not the appropriate remedy in the event of a radical change of circumstances,\textsuperscript{81} while the Japanese delegate doubted the wisdom of adopting the proposal ‘in light of the many difficult problems involved.’\textsuperscript{82} The Norwegian proposal was eventually rejected.\textsuperscript{83}

In essence, the Norwegian proposal constituted an attempt at introducing the hardship rule in the particular context of long-term impediments. The concerns expressed by some of the delegates – especially the French representative – indicate that the rejection of this proposal is based on a general hostility, or at least skepticism, vis-à-vis the hardship principle. Viewed in conjunction with the rejection of the proposal to add a separate hardship provision, the delegates’ decision not to adopt the Norwegian proposal suggests that the drafters of the CISG did not intend to allow any exceptions based on hardship.

3.4 CONCLUSION

Art. 79 CISG must be interpreted as excluding the possibility of relying on hardship as an exemption from liability for non-performance. This derives not only from an interpretation of the ordinary meaning of Art. 79 in its context and in light of its object and purpose (as mandated by Art. 31 VCLT), but also from the recourse to

\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid. The record shows that the proposal was notably supported by the English, Dutch, Italian, and Australian delegations.
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid, at p. 603.
\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid.
supplementary means of interpretation and, more particularly, the CISG’s legislative and drafting history (in conformity with Art. 32 VCLT).

4 SOME OBSERVATIONS ON TWO UNDESIRABLE SOLUTIONS

4.1 SOME OBSERVATIONS ON THE SOLUTION ADVOCATED BY THE CISG-AC

In its Opinion No. 7, the Advisory Council acknowledges that support for the view that hardship may be raised as a defense under Art. 79 CISG is limited. As regards judicial precedents, the AC acknowledges that ‘[t]here are not many cases dealing with situations of hardship in which courts have found it fair to provide relief’, noting that ‘[t]o this date, there are no reported decisions whereby a court exempted a party from liability on the ground of hardship’\textsuperscript{84}. The AC further recognizes that the CISG’s legislative history provides ‘ample support for the proposition that […] the notion of “impediment” under Article 79 […] is unrelated to the more flexible notions of hardship, frustration, or the like’\textsuperscript{85}. The AC also concedes that the CISG’s drafting history supports a similar interpretation\textsuperscript{86}.

In support of its analysis, the AC emphasizes the vagueness of the concept of impediment which, in the AC’s opinion, is not necessarily restricted to occurrences rendering performance physically or legally impossible\textsuperscript{87}. The AC further relies on a few doctrinal writings of authors that have expressed similar views.\textsuperscript{88} Overall, it appears that the AC’s opinion is largely based on the idea that, although most of the “evidence” points to a hardship defense being unavailable under the CISG, the lack of absolute certainty as to this conclusion leaves room for other interpretations.

One important aspect of the AC’s Opinion is the way in which it purports to “solve” the problem of the absence of specific hardship remedies in Art. 79 CISG. Since it considers hardship to fall within the scope of the concept of impediment, the AC is forced to affirm that the remedy provided for in this provision applies to situations involving hardship. Thus, in the words of the AC, ‘a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79’\textsuperscript{89}.

\textsuperscript{84} See supra fn 7, Comments at § 32.
\textsuperscript{85} Ibid, at § 28.
\textsuperscript{86} Ibid, at § 29.
\textsuperscript{87} Ibid, at § 27.
\textsuperscript{88} Ibid, at § 26.
\textsuperscript{89} See Article 3(1) of the Opinion which provides in full: ‘A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous (“hardship”), may qualify as an "impediment" under Article 79(1). The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79’.
The AC also maintains that, in addition to exempting a party from liability, a ‘court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based.’\(^90\) Specifically, the AC deduces a duty to renegotiate the terms of the contract from the principle of good faith governing the interpretation of the CISG under Art. 7(1)\(^91\). The AC further argues that the possibility for a court or arbitral tribunal to “adapt” the contract could be derived from Art. 79(5) CISG according to which “[n]othing in [Article 79] prevents either party from exercising any right other than to claim damages under this Convention”\(^92\).

The remedial guidelines established by the AC call for three comments. Firstly, as far as exemption from liability is concerned, it must be noted that such a remedy is not generally provided for by hardship rules or clauses and that it is, to a significant extent, incompatible with the traditional hardship remedies, i.e. renegotiation, adaptation, and contract termination/avoidance\(^93\).

Secondly, the way in which the AC reads the two traditional hardship remedies into the text of Art. 79 is not persuasive. It is, in fact, questionable how a specific duty to renegotiate can be derived from the general and broad principle according to which, in the interpretation of the CISG, ‘regard is to be had to […] the observance of good faith in international trade’. It is submitted that such an “interpretation” exceeds the interpretive boundaries of Art. 79.

Similarly, it is difficult to comprehend how Art. 79(5) can provide a textual basis for judicial contract adaptation or termination. Art. 79(5) clarifies that the exemption of liability of the non-performing party deprives neither party of other rights that they may possess “under this Convention”. For instance, the seller’s exemption from liability for failure to deliver does not deprive the buyer of the right that he may have to avoid the contract\(^94\), such a right being expressly provided for under the CISG\(^95\). However, since a party’s right to have the contract adapted or terminated in the event of hardship is not provided for anywhere in the CISG, it cannot therefore constitute a ‘right […] under this Convention’.

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\(^90\) See supra fn 7, Art. 3(2), emphasis added.


\(^92\) *Ibid.*

\(^93\) However, to the extent that a court or arbitral tribunal which adapts or terminates a contract on the grounds of hardship can be considered implicitly to exempt the party invoking hardship from any liability for failure to perform, such a remedy is not necessarily excluded under typical hardship rules.


\(^95\) CISG Article 49(1).
Thirdly, the remedial framework set forth in the AC’s Opinion is characterized by some degree of internal incoherence. In fact, the AC’s interpretation of Art. 79 places a remedy attached to failure to perform (exemption) on equal footing with remedies aimed at facilitating or ensuring continued performance (renegotiation, judicial contract adaptation), without clarifying the respective fields of application of each of these remedies. It would be sensible, however, to confine the sphere of application of exemption from liability to those situations in which the parties failed to agree on new contract terms and the court or arbitral tribunal decided to terminate the contract. In those situations where the parties agree on contractual amendments or where a court or arbitral tribunal adapts the terms of the contract, the party invoking hardship actually performs the contract – it is thus not necessary to provide for an exemption from liability for failure to perform.

Ultimately, the AC’s conclusion that hardship falls within the scope of Art. 79 CISG appears to be based on considerations of justice and fairness. It stems, in other words, from a general and principled approval of the hardship rule. As such, the AC seems to have substituted its own perceptions of what the CISG’s rules on exemptions should be for what they actually are. It is submitted that, from a purely legal perspective, such an approach is incorrect.

4.2 SOME OBSERVATIONS ON THE DECISION OF THE BELGIAN SUPREME COURT IN SCAFOM

It has already been explained that the Court’s holding that there is a gap in the CISG as regards the availability of a hardship defense is inaccurate. Two other aspects of the Court’s reasoning are also problematic. To begin with, the Court’s assimilation of the concept of “general principles on which it [the CISG] is based” with the broader notion of “general principles which govern the law of international trade” ⁹⁶ is highly questionable. In fact, the former concept is much narrower than the latter as it only includes those general principles which can be derived from specific provisions of the CISG⁹⁷.

In addition, the Court’s unqualified statement according to which the UNIDROIT Principles constitute such ‘general principles which govern the law of international trade’⁹⁸, is similarly questionable⁹⁹. Indeed, not all rules contained in the Principles can be considered as such general principles. The Governing Council of UNIDROIT itself

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⁹⁶ See supra fn 10 (‘Thus, to fill the gaps in a uniform manner, adhesion should be sought to the general principles which govern the law of international trade’.)
⁹⁷ See Schlechtriem, and Schwenzer supra fn 8, at pp. 135-9.
⁹⁸ See supra fn 10.
⁹⁹ See Veneziano A., supra fn 36, at p. 144 (observing that ‘it would seem at the very least questionable that in the context of an unforeseen change of circumstances, a mere reference to the "general principles governing the law of international commerce" and to the UNIDROIT Principles as their "restatement" be a sufficient justification for the application of the latter hardship provisions’.)
observed in this respect that, while ‘[f]or the most part the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems… they also embody what are perceived to be the best solutions, even if still not yet generally adopted’\textsuperscript{100}. Whether the Principles’ hardship rule constitutes a general principle or rather a not yet generally adopted best solution is debatable.\textsuperscript{101}

5 CONCLUSION

Although some writers would have it differently, it is difficult to deny that, under all interpretive approaches, Article 79 must be read to exclude the possibility of raising defenses based on hardship in cases governed by the CISG. As has been explained, this conclusion clearly derives not only from a literal interpretation of this provision, but also from an interpretation based on its context and object and purpose. It also, perhaps even more clearly, emerges from an interpretation of Art. 79 in light of the travaux préparatoires and the circumstances of its conclusion.

Alternative interpretations, whether the one suggested by the CISG AC or the ones followed by the Belgian Supreme Court and the Antwerp Court of Appeal respectively, have so far been rather isolated. In particular, there is no reported post-Scafom case in which a court or arbitral tribunal found that the absence of a specific hardship provision in the CISG constituted a gap in the sense of Art. 7(2). Similarly, Opinion No. 7 of the CISG AC seems to have had little impact on judicial rulings.

This article has only addressed the availability of a hardship defense under the CISG. It has not, as has been stated at the beginning, explored the question of whether, as a general matter, hardship is a sound legal concept – this may very well be the case. What this article has intended to show is that the introduction of hardship within the scope of the CISG by means of an excessively “liberal” interpretation of Art. 79 CISG is, for the reasons discussed in this article, undesirable. If one considers that the exclusion of hardship from the sphere of the CISG is unfortunate, then this problem is more usefully addressed at the level of the parties (through inclusion of contractual hardship clauses) than by means of a judicial or arbitral distortion of Art. 79.


\footnote{\textsuperscript{101} See Kessedjian, \textit{supra} fn 35, at p. 420 (‘[T]he UNIDROIT Principles accepted a hardship principle when, at the time, it was unknown in a number of systems, at least in civil and commercial matters and not accepted as a principle of international commercial law.’).}