The Availability of a Hardship Defense under the UN Convention on Contracts for the International Sale of Goods (CISG)

by Lovro Klepac

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Supervisor: dr. sc. Markus Petsche

Central European University

1051 Budapest, Nador utca 9

Hungary

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Abstract

Earthquakes, floods, fires, extremely bad weather conditions, market crashes and changed economic circumstances might render the party's performance impossible, excessively onerous, or difficult. UN Convention on Contracts for the International Sale of Goods (CISG) provides an exemption from liability for damages to the disadvantaged party whose performance is impeded by an unforeseeable, unavoidable event. The problem which has been hotly debated among scholars and courts is, whether CISG allows an exemption from liability due to changed circumstances which fall short of complete impossibility of performance, and if it does, what are the requirements, particularly threshold in case of economic hardship, for the excuse of disadvantaged party in such situation. Thesis presents an overview of approaches to the question adopted by domestic courts, arbitral tribunals, and legal doctrine, and provides reasons for which a situation of changed circumstances or hardship may be qualified as an impediment under Convention's exemption provisions and dealt with by the remedies provided in Article 79 CISG, without the need to resort to external sources.

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Introduction

Earthquakes of great magnitude, civil wars, fires, floods, extremely bad weather conditions, market crashes or extreme change of other economic circumstances can often create insurmountable problems for the parties to an international sales contract.[1] Those events can make the promised performance of a contractual obligation extremely expensive, difficult, or even impossible for the promisor. Just like many domestic legal systems, United Nations Convention on Contracts for the International Sale of Goods 1980 (hereinafter: CISG) provides an exemption from liability for damages to the party who breaches the contract due to an unforeseeable impediment beyond its control which occurs between the conclusion of contract and its performance. Still, it is not entirely clear in arbitral and judicial practice and scholarly writings, whether the exemptions system adopted by the Convention can provide a relief both for parties whose performance has become not only impossible, but merely excessively or more onerous and difficult, or is any obstacle falling short of strict impossibility excluded from the Convention's scope of application.

Article 79 CISG does not contain separate, exhaustive remedial provisions for a hardship situation, such as those of UNIDROIT Principles 2010, PECL 1999 or DCFR 2008, whose texts contain separate provisions dealing with impossibility and those resolving the situation of hardship, which has led some commentators to find that hardship is excluded from the Convention's scope. Considering the issues that have arisen during the years of application of Article 79 CISG, it was sometimes described as possibly the least successful provision of the uniform sales law.[2] This is especially so because of the very broad and vague standards used in the provision, which must nevertheless be interpreted and defined autonomously, without any

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[1] Fritz Enderlein and Dietrich Maskow, *International Sales Law* (Oceana Publications 1992), p. 322.
[2] Harry M Flechtner, 'The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court Uniform Sales Law' (2011) 2011 Annals of the Faculty of Law in Belgrade - International Edition 84, p. 85.

recourse to domestic law. A relatively controversial question which has arisen with respect to application of Article 79 CISG is, whether it covers the situations of changed economic circumstances, i.e. whether a party may invoke a hardship defense under Article 79 CISG and be released from liability for damages. Different approaches to resolving this issue have been adopted by national courts, arbitral tribunals and legal scholarship,[3] and even among the authorities which view hardship as a matter governed by the CISG, there are different opinions regarding the legal basis on which the hardship solution lies, what are its consequences and remedies available to the disadvantaged party, and how to interpret or supplement broad standards employed by Article 79 CISG. It should be noted that this paper is not concerned with the problem of changed circumstances in cases when the parties include a hardship clause in their agreement, but only with situations when parties do not expressly provide for a mechanism which would restore the lost contractual balance.

Currently there are four different approaches to this issue adopted by case law and legal doctrine.[4] The so-called "traditional view"[5] considers that a situation of changed circumstances is not a matter governed by the Convention and that the disadvantaged party has no right to claim exemption from liability for damages in case of an impediment which does not render performance completely impossible. Completely opposite, the approach advocated by CISG Advisory Council qualifies hardship as an impediment under Article 79 CISG which excuses the non-performing party from liability for damages. Some scholars have referred to a possibility to qualify hardship as an external gap in the CISG. Finally, some courts have found that hardship is governed by Article 79 CISG, but that it contains a gap which must be filled by general principles underlying the Convention, and sometimes identified those principles as contained in UNIDROIT Principles.

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[3] Markus Petsche, 'Hardship under the UN Convention on the International Sale of Goods (CISG)' (2015) 19 Vindobona Law Journal 147, pp. 147-148.
[4] ibid., p. 150.
[5] ibid., pp. 147-148.

The thesis provides an overview and comments to various approaches advocated by scholars,[6] adopted by courts and tribunals to resolve the issue of hardship and its inclusion or exclusion from the Convention and opts for an approach which, in my opinion, is in line with Convention's scope and purpose. The purpose of this thesis is to demonstrate that the situation of changed circumstances qualifies as an impediment under Article 79 CISG, and that the disadvantaged party is entitled to relief provided by the Convention not only in case of *force majeure,* but also in case of changed (economic) circumstances. The Convention completely and exhaustively addresses the change of circumstances which occurs after the conclusion of contract and it prevents and preempts any application of domestic hardship or other similar doctrines. The issue of hardship is dealt with by the provision of Article 79 CISG, there is no gap, and no need to resolve the question by looking outside the Convention's text. Most importantly, the fact that there is no adaptation of contract available under Article 79 CISG does not necessarily mean there is a gap in the CISG or that hardship is excluded from its scope of application.[7]

The research for this thesis has been conducted by examination of other uniform law instruments and attempts of harmonizing international contract law, and their provisions on exemption from liability for damages, such as UNIDROIT Principles of International Commercial Contracts 2010, Principles of European Contract Law 1999 and Draft Common Frame of Reference 2009, but also the relevant legislation of domestic legal systems, such as Italian, German, French, English and the rules of US contract law, which are all familiar with changed circumstances as a basis for parties' exemption from liability for damages and different remedies in such circumstances. Thesis also analyzes domestic court decisions and arbitral awards on CISG governed sales contracts which dealt with the possibility of a disadvantaged party to invoke a defense under Article 79 CISG in a hardship situation. This includes most

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[6] ibid.
[7] Flechtner (n 2)., p. 93.

recent decisions on this hotly debated problem, notably the decision of Belgian Supreme Court in *Scafom International v. Lorraine Tubes S.A.* from 2009 and French Supreme Court in *Dupire Invicta Industrie v. Gabo* in 2015. Finally, the literature analyzed during the research includes the drafting history of the Convention prepared by professor Honnold, relevant journal articles, comments on judicial and arbitral decisions and most important commentaries to the CISG, dating from 1999 until the editions from 2016.

In the first chapter, thesis provides a short comparison of the legal doctrines of *force majeure* (or impossibility) and hardship as a sub-category of *force majeure*, legal basis for exemptions from liability for damages and different international and domestic approaches in dealing with changed circumstances and remedies available to the disadvantaged party. Furthermore, this chapter presents the legislative and drafting history of Article 79 CISG and their (decreasing) role in Convention's interpretation. Second part of the thesis provides an overview of different approaches to hardship adopted by courts and arbitral tribunals, scholars and legal professionals and some comments to the mentioned solutions. Finally, the third part deals with the possibility of hardship being qualified as an impediment under Article 79 CISG and provides reasons for interpretation which does not seek remedies of contract adaptation outside the Convention, but exempts the party in hardship from liability, in accordance with Convention's set of remedies.

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CHAPTER I: FORCE MAJEURE, HARDSHIP, AND HISTORY OF ARTICLE 79 CISG

It was stated by one author that "A contract is not only a momentary picture of the reality as it is according to that very contract, but it also initiates and covers processes which develop in the future."[8] Those processes can naturally include events such as crashes of economies,

[8] Dietrich Maskow, 'Hardship and Force Majeure' (1992) 40 American Journal of Comparative Law 657, p. 657.

extreme market or currency fluctuations, extraordinary weather conditions and natural disasters etc., which can often make the promisor's performance a heavy burden. Depending on the nature and severity of those events, they can either make party's performance completely impossible or they can result in party's performance being excessively onerous or difficult. This distinction between impossibility of performance and hardship plays a role in determining the legal consequences of events which struck the disadvantaged party and is further examined in this chapter. Furthermore, this chapter provides a short overview of the legislative and drafting history of Article 79 CISG and their role in the interpretation of Convention's exemption provisions.

1.1. Hardship and Force Majeure

Force majeure is a concept which is recognized as a general principle of law.[9] Unlike the notion of hardship or change of circumstances, the concept of *force majeure* is common to many national legal systems and uniform law instruments, such as Article 79 CISG, Article 7.1.7. UNIDROIT Principles 2010, Article 8:108 PECL 1999 and DCFR 2008. *Force majeure* exemption is generally applicable to all different types of non-performance, that is partial or complete non-performance, non-conformity of goods, or obligation of restitution which is a consequence of contract termination for both parties.[10] The exemption can be applied and invoked by the non-performing party due to non-performance of any of its contractual obligations,[11] because of the impediment which can already exist at the time of the conclusion

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[9] Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Austin: Wolters Kluwer Law & Business; Alphen Aan Den Rijn: Kluwer Law International; Frederick, MD: Sold and distributed in North, Central and South America by Aspen Publishers, c2009), p. 75.

[10] ibid., p. 76.

[11] It has been stated by several scholars that the prevailing view under the CISG is that the exemption provisions of Article 79 CISG can also be applied to situations of delivery of defective goods, which means partial non-performance of the party's obligation to deliver the goods. The same is argued for the secondary obligations of the parties whose non-performance only influences the claim of the disadvantaged, non-performing party, such as the duty of notification provided by Article 79 CISG or the duty to mitigate damages. *See* Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International*

of contract or which can subsequently arise after the contract has been entered into.[12] Requirements (under general contract principles in common for most systems and uniform law instruments) for the disadvantaged party to be exempted from liability by virtue of *force majeure* principle are that the promisor has not assumed the risk of non-performance and that it could not reasonably have taken the obstacle which renders performance excessively difficult or impossible into account at the time of the conclusion of contract; that the obstacle or impediment was outside or beyond control of the disadvantaged party; that there is a causal link between the impediment and non-performance; and finally, that the impediment and its consequences could not have been avoided or overcome.[13] The first requirement that is mentioned, that the impediment or obstacle be outside the sphere of risk assumed by the non-performing party, is not expressly mentioned in the CISG or other uniform law instruments, but it has been argued that it is a preliminary and primary condition which can be derived from the other elements of the *force majeure* clauses of CISG, UNIDROIT Principles 2010, PECL 1999 and DCFR 2008.[14] An example of this implied requirement may be demonstrated by the hypothetical scenario in which the seller agrees to supply the buyer with perishable goods which are generally available on the market and whose source of supply is not limited or unique. In that scenario, the non-performing seller, whose failure to perform was due to the failure of his supplier to deliver the goods for resale to the buyer, will not be able to invoke the *force majeure* as a defense to be exempted from liability for damages. As long as those goods are still available in the market, the seller can enter into a reasonable substitute transaction and still perform his obligation. On the other hand, in a situation where the seller promises to supply the buyer with a product which is of a unique nature, such as wine of top quality which could not be easily

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Arbitration (Austin: Wolters Kluwer Law & Business; Alphen Aan den Rijn: Kluwer Law International Frederick, MD: Sold and distributed in North, Central and South America by Aspen Publishers, c2009), p. 111.

[12] Brunner (n 9)., p. 111.

[13] ibid.

[14] ibid., p. 112.

replaced by another market substitute, and then fails to perform due to extremely bad, unexpected weather conditions which destroy the harvest, it is more likely that it would be able to rely on *force majeure* excuse. The second argument which has been mentioned as justifying the application of the requirement that the risk not be assumed by the defaulting party is the fact that UNIDROIT Principles 2010 and PECL 1999 expressly provide for this requirement in their hardship provisions, and since hardship is a form or a category of *force majeure*, these rules must also apply to all *force majeure* defenses.[15]

Unlike *force majeure,* which is the issue of responsibility for non-performance, "the result of the change in the conditions for performance is a problem of the binding force of contract."[16] Hardship is a supervening change of circumstances which makes performance of contract excessively onerous or difficult for non-performing party, which is beyond control of that party, could not have been taken into account at the time of the conclusion of contract and whose consequences could not have been avoided.[17] Events such as economic catastrophes, wars, political tensions, extremely bad weather conditions or extreme change of circumstances which the parties have not reasonably taken into account when concluding the contract are usually referred to as hardship situations which change the balance or equilibrium of the parties' relationship.[18] The fundamental issue which arises when dealing with such situations is the one of allocation of risk, namely which party has assumed it, or which party should have to bear the risk of changed circumstances or distorted contractual equilibrium. Here two general principles of law are to be weighed, the principle of *pacta sunt servanda* and the equally important principle of *good faith.*[19] Uniform law instruments other than CISG expressly provide for the

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[15] ibid.
[16] Attila Harmathy, 'Hardship' (2016) 2 Eppur si Muove: Age of Uniform Law, Essays in Honour of Michael Joachim Bonell to Celebrate his 70th Birthday, p. 1036.
[17] Rapporteur: Professor Alejandro M. Garro, 'CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG' (2007), *supra* note 3.1.
[18] Brunner (n 9)., p. 391.
[19] ibid.

respect of the principle of sanctity of contracts in their hardship rules, but enable the parties to renegotiate the contract due to changed circumstances and, ultimately, to the court to adapt or terminate the contract on a certain date because of such drastic change of conditions under which the contract was concluded.[20]

In common law, the term hardship designates a factual scenario and not a legal doctrine, which is the case in civilian systems.[21] In different legal systems hardship is referred to as *eccessiva onerosita soppravenuta*,[22] *Wegfall der Geschäftsgrundlage*,[23] theory of *imprevision*[24] or *rebus sic stantibus*.[25] In France, the change of circumstances is known under the *imprevision* theory, which was applicable only in administrative contracts until the amendments to the French Code Civil in 2016, which expressly made the doctrine applicable to sales contracts. Although it was not available in contracts other than administrative, even before the mentioned amendment to the French Code Civil the doctrine was applied as an emanation of the principle of good faith required by each contracting party, i.e. the parties were expected to renegotiate the contract in case of subsequent (extreme) change of circumstances.[26] There is a trend even in legal systems which are famous for the strict adherence to the principle of *pacta sunt servanda* (e.g. France), of accepting to provide a relief for the party who did not assume the risk of changed circumstances which made its performance excessively onerous or difficult and

[20] Article 6.2.1. UNIDROIT Principles 2010 provides that the promisor is obligated to fulfill its obligation despite the fact that performance has become more onerous, subject to a hardship exception provided by the rules of Article 6.2.2. UNIDROIT Principles 2010.
[21] Flechtner (n 2)..
[22] § 1467 Codice Civile (*eccesiva onerosita soppravenuta*). § 1467 Codice Civile provides that if the performance of one of the parties has become excessively onerous due to occurrence of extraordinary and unexpected events, this disadvantaged party may terminate the contract, with effects of termination provided in § 1458 Codice Civile, namely *restitutio in integrum.* It is noted that *l'eccesiva onerosita soppravenuta* is not recognizable in situations of a mere alteration of contract price of promised goods, but such change of circumstances (price) must be significant and cause distortion of contractual balance. *See* Giorgio Cian, *Codice Civile e Leggi Collegate* (Seconda Edizione, Wolters Kluwer 2016), § 1467.
[23] § 313 German Civil Code.
[24] Virginie Colaiuta, "Hardship" according to New French Civil Code' (2016) 27 Construction Europe 19. The author explains that the concept of *imprevision* was introduced to French private contract law with a purpose of protecting the weaker contracting party.
[25] Order no. 2016-131 of 10 February2016; Article 1195 (French) Code Civil, available at: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721
[26] Colaiuta (n 24).

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in that way are adapting their national legislation to the requirements of trade usages, which are always changing. For the same reason, the courts should interpret the exemption provisions of CISG in accordance with the development of usages in international trade.

The United States have also moved away from the strict rules of common law by adopting the doctrine of commercial impracticability.[27] However, the sole price increase would not be a sufficient impediment or change of circumstances which would allow the party to invoke a hardship defense and escape liability for non-performance of contract.[28]

A significant number of continental legal systems is well familiar with the hardship theory and provide the non-performing party with an exemption from liability for damages when its non-performance is due to subsequent supervening changed circumstances.[29] Hardship theory is accepted in Germany, Italy, France, Netherlands, Spain, Austria, Poland, Slovenia, Croatia, Greece, Portugal, Estonia,[30] with different remedies and consequences for the parties' future relationship, since the remedy of contract adaptation is clearly rejected in the common law theory.[31]

English law, on the other hand, does not approach the situation of changed circumstances by adopting a mechanism of appropriation of risk between the parties, but it differentiates between doctrines of impossibility and frustration of purpose.[32] It does not allow any relief for changed circumstances and the doctrine of frustration of purpose is not usually extended to hardship situations, as those understood in civilian systems and US law (commercial

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[27] Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (Oxford University Press 2012), p. 669.
[28] ibid.
[29] Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (2008) 39 Victoria University of Wellington Law Review 709, p. 711.
[30] Christian von Bar and Eric Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Outline Edition, European Law Publishers 2010), pp. 707-710.
[31] Flechtner (n 2)., p. 98.
[32] Brunner (n 9)., p. 408. The author also notes that the *Iran-United States Claims Tribunal* expressly recognized changed circumstances as a general principle of law.

impracticability).[33] It allows the contract to be discharged only when the subject-matter of contract has become impossible, illegal or the purpose has been ruined.[34] The first known case to deal with the issue of impossibility was *Taylor v. Caldwell,* where the plaintiffs agreed with the defendant to use its concert hall for their concerts on certain dates. Since the music hall was destroyed in a fire before the contract was performed, they sued the defendant for damages for non-performance, but the court held defendant was excused because the destruction of the hall "was not within the contemplation of the parties."[35] English law does not provide an exemption to the disadvantaged party in cases falling short of impossibility, but as an exception to this rule it uses the doctrine of frustration of contract.[36]

The UNIDROIT Principles of International Commercial Contracts 2010 (hereinafter: UNIDROIT Principles 2010),[37] Principles of European Contract Law 1999 (hereinafter: PECL 1999)[38] and the Draft Common Frame of Reference 2008 (hereinafter: DCFR 2008) all expressly provide for consequences and remedies in case of changed (economic) circumstances, including the duty to renegotiate the contract and ultimately the right of the parties to apply to the court which has the power to either terminate it on a specified date or adapt it. UNIDROIT Principles 2010 contain both provisions on impossibility of performance (*force majeure*)[39] and hardship[40] as impediments which render the party's performance of contract impossible or

[33] ibid.; Larry A DiMatteo, 'Contractual Excuse Under the Cisg: Impediment, Hardship, and the Excuse Doctrines' (2015) 27 Pace International Law Review 258, p. 277.
[34] Joseph M Perillo, 'Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts' (1997) 5 Tulane Journal of International and Comparative Law 5, p. 8.
[35] Joseph M Perillo, 'Hardship and Its Impact on Contractual Obligations: A Comparative Analysis'. The author notes further that the implied term theory is not used by English courts any more.
[36] Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29)., p. 711. The doctrine of frustration of purpose was introduced by the decision in Krell v. Henry and further expanded to different situations of supervening changed circumstances which could not have been foreseen or contemplated by the parties.
[37] Articles 6.2.1.-6.2.3. UNIDROIT Principles 2010.

[39] Article 7.1.7. UNIDROIT Principles 2010 (*force majeure*) provides that 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 contract or to have avoided or overcome it or its consequences.
[40] Hardship is often understood in legal doctrine as a subcategory of *force majeure*, which is also in line with the proposition that change of circumstances qualifies as an impediment under Article 79 CISG, because those two

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excessively onerous. "Hardship alone never forgives non-performance."[41] Article 6.2.1. UNIDROIT Principles 2010 reflects the maxim of *pacta sunt servanda* and provides that "the party for which the performance of contract has become more onerous is still bound to perform its contractual obligation".[42] This means that the change of circumstances must be of a fundamental importance, i.e. it must essentially change the equilibrium of the contractual obligations and lead to an extreme burden for the party in order to be considered as hardship.[43] Hardship is defined as occurrence of events which fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished. Those events must occur or become known to the disadvantaged party after the conclusion of contract, they must be such that the party could not have reasonably taken them into account, beyond control of the disadvantaged party and the risk of those events must not have been assumed by the party requesting relief.[44] Therefore, there are two possible scenarios in which hardship defense may be invoked by the disadvantaged party, provided that all other conditions required by Article 6.2.2. are fulfilled. The first situation is when the cost of the party's performance of contract increases for reasons such as the increase in price of raw materials, or any other change of circumstances (not in the sphere of the party's risk or fault) which renders performance excessively onerous and burdensome.[45] The second scenario in which the hardship provisions may be applied is when the value of contractual performance is decreased for one party as a result of currency fluctuations or other events which must be objectively ascertainable.[46] According to the provisions of Article 6.2.3. UNIDROIT Principles 2010, the effect of hardship is that the

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are not completely separate legal concepts. These two concepts involve very similar factual scenarios, with same requirements of unforeseeability, unavoidability and the impediment being beyond control of the party (which also implies that the party has not assumed the risk of such impediment). *See* Brunner (n 9).

[41] Perillo (n 34)., p. 21.

[42] Article 6.2.1. UNIDROIT Principles 2010.

[43] ibid.

[44] Article 6.2.2. UNIDROIT Principles 2010., *supra* note, p. 213.

[45] ibid., p. 214.

[46] ibid.

disadvantaged party has right to request renegotiation of the contract terms. There is no ground to request renegotiation when the contract itself contains a price adaptation clause, even though this might become possible in case the cost of performance increases drastically or the adaptation clause does not contemplate changed circumstances which are qualified as hardship.[47] Furthermore, the request for contract renegotiation does not entitle the disadvantaged party to withhold performance in itself, but withholding performance may be allowed only in exceptional circumstances.[48] In case such renegotiations do not result in the parties' agreement within reasonable period of time, each of the parties is entitled to resort to the competent court, which has the power to either "terminate the contract at a date and on terms to be fixed, or adapt the contract with a view to restoring its equilibrium".[49] If the court adapts the contract terms, it can sometimes mean that it would have to change the agreed contract price, but such price adaptation may not always reflect the full loss suffered by the disadvantaged party due to changed circumstances, since the court would also have to consider the risk one of the parties has taken and the benefit for the party requesting performance of contract.[50]

Article 6:111 PECL 1999 (*Change of Circumstances*) contains provisions on hardship which largely resemble the hardship provisions of UNIDROIT Principles 2010. Article 6:111(1) PECL 1999 reflects the principle of *pacta sunt servanda*, by providing that "party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished"[51] and hence, excludes the possibility of forgiveness for non-performance. "If, however, performance of the contract becomes excessively onerous because of a 346 change of

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[47] Article 6.2.3. UNIDROIT Principles 2010, *supra* note 1, p. 219.
[48] ibid., *supra* note 4, p. 220.
[49] Article 6.2.3. (3) UNIDROIT Principles 2010.
[50] Article 6.2.3. UNIDROIT Principles 2010, *supra* note 7, p. 221.
[51] Article 6:111(1) PECL 1999.

circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it."[52] The change of circumstances must occur after the conclusion of contract, it must be such that the party could not have taken it into account at the time of conclusion of contract, and the risk of change of circumstances must not be such that the party affected should be required to bear it.[53] The effect of hardship or changed circumstances is the parties' duty to renegotiate the contract and if such renegotiation provides no result, each of the parties is entitled to resort to the court, which may either adapt or terminate the contract.[54]

Since many European states have adopted at least a variation of a principle or provision which rectifies the situation when the performance of contract for one party becomes excessively onerous as a result of unforeseeable supervening events, the drafters of the DCFR 2008 also found it necessary to adopt a similar approach which enables the parties to adapt or terminate the contract when the change of circumstances is so extreme that it would not be just for the party to still be bound to perform under the agreed terms.[55] Same as the provisions of both UNIDROIT Principles 2010 and PECL 1999, Article III.-1:110(1) DCFR 2008 firstly stresses the importance of principle of *pacta sunt servanda* by prescribing that an "obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished".[56] The text of the relevant provision of DCFR 2008 continues by providing for exceptional circumstances which would result in the performance being unjustly expected from the disadvantaged party. Article III.-1:110(3) enables the court to adapt or terminate the contract in the case of such extreme change of circumstances. However, the party's good faith attempt to renegotiate contract terms is listed as one of the requirements for the application to the court

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[52] Article 6:111(2) PECL 1999.
[53] ibid.
[54] Article 6:111(3) PECL 1999.
[55] von Bar and Clive (n 30)., p. 737
[56] Article III.-1:110 DCFR 2008.

which can only then adapt or terminate the contract, provided that all other conditions have been met.[57] The approach to hardship followed by UNIDROIT Principles 2010, PECL 1999 and DCFR 2008 is the one which distributes the economic risk of changed circumstances between the promisor and the promisee.[58] Therefore, although hardship encompasses situations which involve a less severe impediment, that is, situations falling short of impossibility, the fact that it is a sub-category of *force majeure* and that it can have the same remedy and consequences as a classic *force majeure* impediment amounting to total impossibility of performance strongly indicate that it should not be excluded under the CISG, which will be discussed in 3.4.

1.2. History of Article 79 CISG and its Interpretive Role

Article 79 CISG is a successor of Article 74 Convention Relating to a Uniform Law on the International Sale of Goods 1964 (hereinafter: ULIS), the instrument on uniform sales law replaced by the CISG in 1980. Article 74 ULIS provided:

> "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."[59]

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[57] Article III.-1:110 DCFR 2008 provides, in principle, for the same requirements for hardship as PECL 1999 and UNIDROIT Principles 2010, namely that the change of circumstances occurred after the conclusion of contract, that the debtor could have been reasonably expected to take into account such change of circumstances, that the debtor (disadvantaged party) did not assume the risk of changed circumstances of that scale and that it attempted to renegotiate the contract terms in good faith.

[58] *See* Brunner (n 9)., p. 392. Author differentiates three possible approaches to hardship by contract law. The first one is to expect the promisor to perform notwithstanding the changed circumstances, which is especially the case in situations where the courts find that performance has not become onerous or difficult enough to grant renegotiation or exemption from liability. The second approach is to allow the promisor to be exempted from liability for damages and terminate the contract. This approach might be considered appropriate in case when the applicable law does not expressly provide for consequences or available remedies to disadvantaged parties, which is the case with e.g. Article 79 CISG. Third approach to resolve the conflict of *good faith* and *pacta sunt servanda* is the one employed by UNIDROIT Principles 2010, PECL 1999 and DCFR 2008 – to distribute the risk of hardship between the contracting parties.

[59] Article 74 ULIS.

Article 79 CISG contains several modifications to the mentioned former ULIS rule on exemption from liability for non-performance. First, the term circumstances in Article 74 ULIS was replaced by the term impediment in Article 79 CISG. This does not mean that this replacement intended to remove the possibility of the disadvantaged party to be exempted from liability even in case of economic difficulties.[60] It has been stated that Article 79 CISG had been drafted as a response to the critics of former Article 74 ULIS, and in fact, it was stated by the UNCITRAL Working Group which adopted the text of CISG, that the goal of Article 79 CISG and the replacement of term "circumstances" with "impediment" was to define the requirements for the application of Article 79 CISG more narrowly.[61] Solely this background is not enough to interpret Article 79 CISG in a way to exclude the situation of changed (economic) circumstances and prevent the disadvantaged party from relying on them to benefit from the exemption from liability for damages, which will be discussed in detail in 2.1.2.[62]

The drafting history of Article 79 CISG has also been pointed out to, as an argument in favor of excluding hardship from the Convention's scope of application, which will be further discussed in 2.1.2. Without going into further details on the effect of drafting history to this provision, it should be mentioned that the legislative history and the preparatory work of the treaty provisions are used as a second-step means of interpretation of treaties, in accordance with Article 32 Vienna Convention on the Law of Treaties (hereinafter: VCLT). Article 32 VCLT provides:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31 VCLT, when the interpretation according to Article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or

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[60] John O Honnold, *Uniform Law for International Sales* (Third edition, Kluwer Law International 1999), pp. 484-485.
[61] Rapporteur: Professor Alejandro M. Garro (n 17).
[62] ibid.

(b) Leads to a result which is manifestly absurd or unreasonable."

Therefore, if it is assumed that the meaning of Article 79 CISG with respect to availability of hardship defense is left ambiguous or obscure after its literal interpretation, recourse may be had to the legislative and drafting history of CISG. However, the interpretation of the provisions of Convention according to Article 32 VCLT has less and less power nowadays, when the CISG has been in force for a long time.[63] Parts of the Convention's preparatory work, which sometimes indicate what was considered to be a possible result of certain provision, do not mean that the Convention's interpretation should be set in stone and never changed, especially in times when it has to adapt to changes in international trade and be dynamically interpreted.

CHAPTER II: POSSIBLE SOLUTIONS FOR HARDSHIP IN CISG

Arbitral and judicial practice, as well as legal doctrine have introduced different ways and solutions to deal with the issue of whether a situation of changed (economic) circumstances falls within the scope of application of Article 79 CISG. The approaches adopted by different authorities varied from the implicit exclusion of hardship from the Convention as a consequence of its interpretation under Articles 31 and 32 VCLT, to the approach advocated by CISG Advisory Council and most recent case law, which sees hardship as a matter which is expressly dealt with by Article 79 CISG and which may be, under certain conditions, considered an impediment beyond control of the disadvantaged party.

This chapter will demonstrate various approaches which were until now adopted in resolving the issue of hardship under Article 79 CISG, and some of the arguments used to

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[63] Ingeborg Schwenzer, 'Interpretation and Gap-Filling under the CISG' in Ingeborg Schwenzer, Yesim M Atamer and Petra Butler (eds), *Current issues in CISG and arbitration*, vol 15 (Eleven International Publishing 2014), p. 113. The author argues that the historic interpretation is constantly losing its power as the CISG is longer in force and provides an example of contradictions between Article 14 and 55 CISG about the existence of contract with open price terms. The change of policies in those legal systems which opted for certain solutions and expressed intentions about certain provisions are less relevant today if they also adapted those views in their domestic systems and generally abandoned such approaches to certain legal issues.

defend those views will be analyzed. First, the "traditional view" which implicitly excludes hardship from the Convention's scope will be examined. Second, it will provide an overview of the two approaches employed by the Belgian courts in *Scafom International v. Lorraine Tubes S.A.* where the court of first instance held that there is an internal which must be filled by applicable domestic law, and the Supreme Court found that, although hardship may qualify as an impediment under Article 79 CISG, there is an internal gap regarding the available remedies, and decided to fill this gap by using UNIDROIT Principles 2010.[64] Furthermore, this chapter examines whether, in case hardship is not in the Convention's scope, domestic law preempts provisions of CISG and whether a domestic court would in that case have to apply a national hardship doctrine, or the Convention's exemption provisions fully and exhaustively address the issue and therefore preempt the application of national law. Finally, the last part of this chapter will address the preferable view, that hardship qualifies as an impediment under Article 79 CISG. It will also analyze the conditions and consequences of a hardship situation, and demonstrate that there is no need to look outside the Convention, or finding gaps in CISG to seek for remedies available to the disadvantaged party, but that the matter should be resolved within the "four corners" [65] of the Convention.

2.1. Implicit Exclusion of Hardship from the Scope of Application of the CISG

According to the "traditional view,"[66] hardship is implicitly excluded from the scope of application of Article 79 CISG.[67] Scholars who consider the exclusion of hardship from the provisions of CISG as a correct solution found that this approach is a result of the correct

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[64] *Scafom International v Lorraine Tubes SA* [2009] Hof van Cassatie C.07.0289.N, CISG-online 1963.
[65] Bruno Zeller, 'Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods' <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html#ack>. The author explains the mandate to interpret the Convention by not interpreting specific provisions in isolation, without taking into account the general principles on which it is based and which connect its rules. This means interpreting the Convention, autonomously, without using preconceptions from domestic doctrines and rules.
[66] Petsche (n 3)., p. 150.
[67] ibid., p. 155.

interpretation of the CISG, according to Articles 31 and 32 of Vienna Convention on the Law of Treaties (hereinafter: VCLT).[68] Article 31 VCLT provides that a "treaty shall be interpreted in good faith and 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".[69] Article 32 VCLT provides for a supplementary method of treaty interpretation, i.e. recourse to preparatory work of the treaty and the circumstances of its conclusion. According to this view, when the rule of Article 31 VCLT is applied to the text of Article 79 CISG and its ordinary meaning, as well as the meaning in its context and in the light of its object and purpose is examined, there is no place for hardship to be subsumed under the provisions of Article 79 CISG.[70]

2.1.1. Ordinary Meaning, Object, and Purpose of Article 79 CISG

First, it has been argued that the term impediment, which is not defined by the CISG, relates to the situation of making performance of contract impossible,[71] and not merely difficult or excessively onerous for the disadvantaged party. To the contrary, it has been stated by professor Schlechtriem that the text of Article 79 CISG is not exactly the text of impossibility, but can include other impediments which would make the performance of contract extremely burdensome and lead to unfair results which the parties could not have foreseen.[72] In line with his opinion, the term impediment, apart from being used as a synonym only to describe total impossibility,[73] also includes notions which mean obstacles or events which render the accomplishment of certain results merely more difficult.[74] This can be seen from the example used by the Oxford Dictionary, which employs the term impediment in the following phrase:

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[68] ibid.
[69] Vienna Convention on the Law of Treaties 1969, Article 31.
[70] ibid.
[71] Petsche (n 3)., p. 157.
[72] Ingeborg Schwenzer and Peter Schlechtriem (eds), 'Art 79', *Commentary on the UN–Convention on the International Sale of Goods (CISG)* (2nd Edition, Oxford University Press 2005).; DiMatteo (n 33)., p. 280.
[73] Petsche (n 3)., p. 157.
[74] Available at: https://en.oxforddictionaries.com/definition/impediment.

"a serious impediment to scientific progress".[75] The ability to grade or scale the term impediment also shows that it can mean more than a totally insurmountable impossibility, but also a difficulty or other type of obstruction, although, "the borderline between impracticability and reasonably insurmountable impediment is, of course, uncertain."[76] Finally, Article 79 CISG "does not expressly equate the term 'impediment' with an event that makes performance absolutely impossible".[77] Therefore, although the term impediment is unique[78] in hardship provisions of uniform law instruments, its use does not constitute sufficient evidence that hardship is excluded from the scope of application of Article 79 CISG.

Second, as another reason for the conclusion that hardship is excluded from CISG, it has been argued that the wording of the part of Article 79 CISG, which provides that "the disadvantaged party must not have been reasonably expected to avoid or overcome its consequences," is not appropriate for hardship situations.[79] This argument is backed up by wording other uniform law instruments, such as UNIDROIT Principles 2010, PECL 1999 and DCFR 2008, which do not use the language of Article 79 CISG in their hardship provisions.

It is also recognized in scholarship that the impediment which causes non-performance is deemed unavoidable where the existence of the company would be endangered if the contract was performed and because of this danger, it would not be reasonable to expect from the promisor to perform the contractual obligation.[80] "Avoidability within the sense of Article 79 CISG means the possible avoidance of specific impairments which are caused by specific impediments."[81] Therefore, the text of Article 79 CISG, which provides that an impediment

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[75] Available at: https://en.oxforddictionaries.com/definition/impediment.
[76] Joern Rimke, 'Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts' Pace Review of the Convention on Contracts for the International Sale of Goods 197, p. 222.
[77] Rapporteur: Professor Alejandro M. Garro (n 13), *para.* 1.
[78] Other uniform law instruments, soft laws, or model laws, such as UNIDROIT Principles, PECL or DCFR do not use the term impediment but change of circumstances for a situation of hardship.
[79] Petsche (n 3)., p. 158.
[80] Ingeborg Schwenzer and Peter Schlechtriem (n 73)., p. 818.
[81] ibid.

must be unavoidable as a requirement for an excuse for non-performance, is not restricted exclusively to situations of *force majeure* or impossibility, but also to hardship situations where it would not be reasonable to expect the non-performing party to fulfill its contractual promise. Even scholars who strongly disagree with contract adaptation as a remedy under CISG, acknowledge that Article 79 CISG is usually read as including impediments which result in performance being more difficult, rather than literally impossible.[82]

If Article 79 CISG is interpreted in in its broader textual context, it is argued that it governs the available exemptions from liability for non-performance exhaustively together with Article 80 CISG, and that there are no other exemptions available under the Convention, which would also mean that there is no space for the application of hardship defense.[83] At the same time, although the CISG does not clearly define its position on the question whether hardship is governed by Article 79 CISG, and therefore exhaustively covered by the Convention's exemption provisions' scope, the fact that Convention exhaustively covers all exemptions from liability from non-performance does not necessarily mean that the hardship exemption cannot be applied under Article 79 CISG, either as an internal gap filled by the general principles underlying the CISG or as being encompassed by the definition of term impediment. This can be withdrawn from the Part III of the Convention, which governs the rights and obligations of the parties to a sales contract as non-exhaustive, but there are issues in the context of such transactions regarding which the Convention's provisions are silent.[84] If drafters of the Convention intended to exhaustively regulate all matters that could come up in a specific sales transaction, there would be no need for a gap-filling mechanism and the classification of internal and external gaps in the CISG.[85]

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[82] Flechtner (n 2).
[83] Petsche (n 3)., 159.
[84] Ingeborg Schwenzer and Peter Schlechtriem (eds), 'Art 7', *Commentary on the UN–Convention on the International Sale of Goods (CISG)* (2nd Edition, Oxford University Press 2005), p. 103.
[85] ibid.

Finally, it has been argued that the meaning of Article 79 CISG in the light of its object and purpose, and considering the absence of a specific hardship remedy, mandates excluding hardship from the scope of Article 79 exemptions.[86] Article 7(1) CISG provides: "in the interpretation of this Convention, regard is to be had to its international character and the need to promote uniformity in its application."[87] In line with the mentioned provision, it has been argued that excluding hardship situations from the scope of application of Article 79 CISG represents a solution which is most favorable for achieving the goal of uniform interpretation of the Convention,[88] because it cannot possibly lead to different results. To the contrary, this solution does not ensure a higher level of uniformity in the application of CISG than the opposite solution, which adopts the view that the term impediment in Article 79 CISG covers hardship situations. That is because, in both of these scenarios, the court or arbitral tribunal faced with the situation of extremely changed circumstances would follow a very similar line of reasoning – either it would conclude that the change of circumstances cannot influence the exemption from liability or have any other consequences for the parties' relationship, or it would decide that hardship is covered by the term impediment in Article 79 CISG and decide on the consequences of such situation based on the provisions of the said article, including Convention's general principles of mitigation, good faith etc.[89] The abovementioned argument favoring exclusion of a hardship defense from the Convention is even less convincing when remembering the view that a certain issue is considered as not governed by the CISG only if there is no general principle underlying the CISG to which the decision-maker could rely in resolving it.[90]

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[86] Petsche (n 3)., p. 147.
[87] Article 7(1) CISG.
[88] Petsche (n 3)., p. 163.
[89] About the available remedies for the disadvantaged party facing a situation of hardship, see *supra* 2.4.2. and 3.6.
[90] Ingeborg Schwenzer and Peter Schlechtriem (n 85)., p. 103.

Additionally, legal doctrine is not familiar with only one type of remedy or consequences of a situation of changed circumstances, but there are at least three possible solutions in which a legislative text may govern the consequences and remedies designed for a hardship situation, namely it can require performance of contract despite the change of circumstances, it can distribute the risk of hardship between the parties in the way to allow the court to adapt or terminate the contract if certain requirements are met, or it can provide an exemption from liability for damages and possibility to terminate the contract.[91] Therefore, since there are various possible approaches for an instrument to deal with availability of hardship under its scope, the fact that the CISG does not expressly provide for a remedy "specific" to a hardship situation does not mean that this notion is excluded from its scope, because the Convention has its set of remedies included in Article 79 which are applicable to a hardship situation equally as to a scenario of *force majeure.*

2.1.2. Interpretation of Article 79 CISG according to Preparatory Work and other Circumstances

In line with Article 32 VCLT, it has been argued that the general legislative intent of the CISG's drafters, rejection of the UNCITRAL Working Group to include a hardship provision in the text of CISG and the rejection of the Norwegian proposal to consider a radical change of circumstances as a reason for exemption from liability, mean that Article 79 CISG cannot be interpreted as including hardship.[92]

First, according to the Convention's legislative history, there is a lot of support for the argument that Article 79 CISG contains strict rules about the exemption from liability and does not easily excuse the non-performing party.[93] However, this legislative background does not

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[91] Brunner (n 5), p. 392.
[92] Petsche (n 3)., pp. 163-166.
[93] Rapporteur: Professor Alejandro M. Garro (n 13), *para.* 27. John Honnold, *Documentary History of the Uniform Law for International Sales* (Deventer : Kluwer Law and Taxation Publishers, c1989), p. 185. The author compares Article 74 ULIS, which provided an exemption for the party who can prove non-performance was due to circumstances which, according to the parties' intentions which existed at the time when contract was concluded, it should not have taken into account, avoid, or overcome. Several experts have supported the proposal to draft

necessarily mean that the correct approach is to conclude that hardship is excluded from the scope of application of Article 79 CISG,[94] which is further demonstrated by the interpretation of the rejection of the Norwegian proposal to take into account changed circumstances as an excuse for non-performance. During the Diplomatic Conference when the issue of a temporary impediment arose, the Norwegian delegation proposed to supplement Article 79(3) CISG by providing that a temporary impediment may turn into a permanent one if the circumstances have changed so much that it would not be reasonable any more to expect the promisor to perform.[95]

Another point which has been often raised in contradiction to the approach which favors the disadvantaged party and a hardship defense concerns the drafting history of Article 79 CISG. During the preparation of the text of CISG, there were a few isolated discussions and proposals as to the text of Article 79 CISG which have created an opinion within the legal doctrine, that the drafters' intent was to exclude hardship from the Convention's scope of application.[96]Comments of the UNCITRAL Working Group's members and discussions about certain proposals made by some delegates, and also the replacement of the term "circumstances" from Article 74 ULIS with the term "impediment" have lead some commentators to conclude that there was a consensus among the delegates against the hardship theory being available under Article 79 CISG.[97] On the other hand, some other commentators argue that the rejection of the Norwegian proposal to take into account the situation of changed circumstances with respect to Article 79(3) CISG infers that Article 79 CISG covers the situations of true hardship.[98] It must be pointed out that the recollection of discussions between

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Article 79 CISG in a way to reduce the possibility of easy exemptions and make the requirements for exemption more objective. Some have mentioned that the important problem in Article 79 CISG is connected to the allocation of risk and proposed for Article 79 CISG to expressly refer to that risk. Others have not accepted this proposal because it seemed difficult to refer precisely to risk allocation in the provision of the instrument.

[94] Rapporteur: Professor Alejandro M. Garro (n 17).

[95] ibid.

[96] ibid.

[97] ibid.

[98] ibid.

the members of the UNCITRAL Working Group also differs and that there is no sufficient evidence in the reports as to what exact approach to hardship in Article 79 CISG did the drafters actually want to adopt, and furthermore, that the issue of economic hardship was never really discussed in itself, i.e. the delegates have never discussed whether Article 79 CISG would exempt the party from liability in case of radically changed (economic) circumstances which would make the performance of contract unreasonable.[99] Therefore, the drafting history of CISG does not provide sufficient information for a certain conclusion about the intent of the drafters to include or exclude hardship from its provisions.

When interpreting Article 79 CISG in accordance with Articles 31 and 32 VCLT, i.e. according to the ordinary meaning of the terms employed in the Convention's provisions, its object and purpose, and supplementary means of interpretation, such as legislative history and other circumstances of the CISG's drafting, there is no sufficient evidence that the issue of hardship is excluded from the Convention's material scope of application.[100] In fact, this conclusion is confirmed by a number of cases in which the courts and tribunals have implicitly or expressly held that hardship is a matter governed by CISG which, in this respect, preempts the application of domestic law. Finally, even authors who find that the new wording of Article 79 CISG narrowed down the scope of Article 74 ULIS, have stated that Article 79 leaves enough room for "economic dislocations"[101] to constitute an impediment and allow the disadvantaged party to escape liability in a situation of hardship.[102] The legislative and drafting history are such that they do not mandate any of the two possible interpretations and leave enough space for judicial and arbitral practice to form the approach towards a change of circumstances and its availability as a claim under Article 79 CISG.[103] Not only are legislative and drafting history

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[99] ibid.
[100] Honnold (n 61)., pp. 483-484.
[101] ibid., p. 484.
[102] ibid.
[103] Stefan Kröll, Loukas A Mistelis and Pilar Perales Viscasillas (eds), 'Art. 79', *UN Convention on Contracts for the International Sale of Goods Commentary* (CH Beck, Hart Publishing 2011), p. 1088.

inconclusive as to the exact scope of Article 79 CISG, but their role in the interpretation of CISG is also decreasing the longer the CISG is in force.[104] The best example of this trend is the evolution of the Convention's fundamental principle of good faith. It was never the drafters' intention to extend its scope to the parties' conduct, formation, and performance of contract, but today it is well settled in the doctrine and case law that the principle of good faith (defined autonomously and detached from domestic law) plays an important role as a substantive rule of the Convention, manifested in a number of its provisions.[105]

2.1.3. Court and Arbitral Decisions Excluding Hardship from the Convention's Scope

In *Nuova Fucinatti S.p.A. v. Fondmetall International A.B.*[106] the buyer, whose place of business was in Sweden, and the seller, whose place of business was in Italy, concluded a sales contract for the delivery of 1000 tons of iron chrome. Market price of the goods rose for 30% in the period after the contract was concluded and before the delivery to the buyer, and on that ground, the seller claimed avoidance of contract on the basis of hardship (or in Italian law *eccessiva onerosita soppravenuta*, at that time contained in Article 1467 Codice Civile). Although the court had failed to apply the CISG on the basis of Article 1(1)(b) and the parties' choice of Italian law (which consequently includes CISG as applicable law because it is the law of the contracting state), it held that, even if the CISG was applicable, it would preempt Italian provisions on hardship, but it would not allow the party to invoke a hardship defense, because:

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[104] Ingeborg Schwenzer (n 64)., p. 113.
[105] Stefan Kröll, Loukas A Mistelis and Pilar Perales Viscasillas (eds), 'Art. 7', *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary* (Beck and Hart Publishing 2011), p. 123.
[106] *Nuova Fucinati v Fondmetall International* [1993] Tribunale Civile di Monza R.G. 4267/88, CISG-online 102 was the first decision on the CISG rendered by Italian courts (1993). The decision has been criticized, not only on the basis of rejection of hardship defense, but also because of the clearly erroneous application of the law chosen by the parties. The court did not give effect to the parties' choice of Italian law as governing law in the sense that it did not apply the CISG according to the rule of Article 1(1)(b) CISG. The court should have applied CISG instead of Italian domestic contract law, because party autonomy is the primary and most important connecting factor in private international law, and Article 1(1)(b) CISG provides that the CISG is applicable when the parties have their places of business in different states and the rules of private international law lead to the application of the law of a contracting state. The court held that this rule does not apply in case when the parties choose the applicable law. *See* Franco Ferrari, 'Uniform Law of International Sales: Issues of Applicability and Private International Law' 1995 Journal of Law and Commerce 159.

> "Under the Convention the remedy of dissolution is associated with breach, whereas 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 (rectius: dissolve) the contract."[107]

In *Vital Berry Marketing NV v. Dira-Frost NV,* buyer and seller concluded a contract for the delivery of frozen raspberries. When the buyer failed to open a letter of credit as requested, the seller refused to ship the goods. The buyer then tried to renegotiate the contract, alleging a very sharp drop in the market price of raspberries, but the seller did not accept the reduced price. The court ruled in favor of the seller, stating that this significant change of market price of frozen raspberries does not constitute an impediment in the sense of Article 79 CISG.[108] In *Iron Molybdenum case,*[109] buyer and seller entered a sales contract for delivery of iron molybdenum from China. Since the goods were not delivered on time, the buyer entered into a substitute transaction and purchased them from another supplier at a price which was 300% higher than the original contract price agreed with the seller.[110] The court held the seller could be exempted from liability for damages because it is in the sphere of risk of seller to bear the costs of market price increase of goods bought in a substitute transaction when the contract is highly speculative. Although this decision has been often pointed out to as an example of the court excluding change of circumstances from the scope of exemption provisions, it can also be understood as excluding it only in cases of such highly speculative contracts. Otherwise, if the court wanted to categorically deny any effect of hardship under the Convention's scope, it would not mention the level of speculativity, but it would only conclude that the change of circumstances does not fall within the scope of Article 79 CISG. The conclusion withdrawn from the court's rejection of the claim for exemption from liability for damages can also be that the threshold for invoking a hardship defense in highly speculative contracts is very high,

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[107] *Nuova Fucinati v. Fondmetall International* (n 107).
[108] *Vital Berry Marketing NV v Dira-Frost NV* Rechtbank van Koophandel, Hasselt AR 1849/94, CISG-online 371.
[109] *Iron Molybdenum Case* Oberlandesgericht Hamburg (Hanseatisches Oberlandesgericht) 1 U 167/95, CISG-online 261.
[110] ibid.

because when entering such a contract, the disadvantaged party has assumed a high risk of loss and the market volatility cannot serve as an excuse to escape liability. This, on the other hand, does not mean that the party can never be exempted from liability in case of excessive onerousness, but the nature of contract, the exact amount of price increase or decrease and other factors discussed in 2.4.1. must be examined in each individual case, not to enable easy exemptions under Article 79 CISG.

In the decision of the Appellate Court of Colmar[111] the court held that the party was liable for damages for taking delivery of only 8.495 crankcases instead of taking delivery of 20.000 as agreed by the contract. The court also stated that the party could have been exempted from liability if the impediment (which consisted of the significant modification of the terms of purchase of its client) was unforeseeable. Since the requirement that impediment be unforeseeable was not met, the court rejected the exemption claim. The court's reasoning prevails more towards the approach that hardship is not excluded under the convention, but simply that the requirements in that specific case were not met.

Although there have been decisions which either expressly stated that hardship does not fall within Convention's material scope of application (*Nuova Fucinatti S.p.A. v. Fondmetall International A.B.*) or denied hardship defense based on the reasoning that the requirements for invoking hardship were not met (*Iron Molybdenum Case, Appellate Court of Colmar, Frozen Raspberries Case*), this case law has left enough room for the Convention's exemption provisions to intervene when it would not be reasonable to expect the party to perform due to changed circumstances.[112] Therefore, according to now-existing case-law, hardship should not be considered as an issue which is excluded from the Convention's scope of application.

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[111] *Société Romay AG v SARL Behr France* [2001] Cour d'appel de Colmar CISG-online 694.
[112] Stefan Kröll, Loukas A Mistelis and Pilar Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)* (Beck and Hart Publishing 2011), p. 1088.

2.2. Hardship as an Internal Gap in the CISG

While it might seem that Article 4 CISG, which provides that the Convention governs only the formation of contract of sale and the rights and obligations of the seller and buyer arising from such a contract and excludes contract validity and the effect of the contract on property in the goods sold, expressly circumvents only certain issues regarding the contract of sale and that all other issues are expressly excluded from the Convention's scope of application, the phrase rights and obligations of the seller and buyer used in the provision of Article 4 CISG is not precisely defined or exhaustive.[113] It is recognized within scholarship, judicial and arbitral practice that the CISG contains gaps and in order to fill the gaps within the Convention, it must be precisely determined what constitutes an internal gap, i.e. what is a matter which is governed but not expressly settled by CISG.[114] On the other hand, the Convention also contains gaps which are referred to as external, and which are filled differently – by the application of domestic law, because they cannot be resolved by general principles on which the CISG is based. Therefore, in order to answer whether a hardship situation constitutes a gap in the CISG, it must first be determined whether it would constitute an internal or external gap and how it would have to be filled. Furthermore, in case hardship is considered as an internal gap within the CISG, the decision-maker must further identify the general principles which are suitable for filling such a gap within "the four corners of the Convention."[115]

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[113] Peter Schlechtriem and Ingeborg Schwenzer (eds), 'Art. 7', *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Second edition, Oxford University Press 2005)., p. 103.

[114] Stefan Kröll, Loukas A Mistelis and Pilar Perales Viscasillas (n 105).

[115] Joseph Lookofsky, 'Walking the Article 7(2) Tightrope between CISG and Domestic Law' [2005] Journal of Law and Commerce 87, p. 101.

2.2.1. Filling the Hardship Gap by General Principles of CISG

Before further elaborating on whether a situation of hardship constitutes an internal gap, it must be first described how to identify internal gaps and provide some examples of such gaps in other parts of the CISG. Article 7(2) CISG provides:

"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."[116]

The usual definition, in accordance with the text of Article 7(2), of an internal gap is "a matter governed but not expressly settled by the CISG."[117] Therefore, an internal gap is a gap *praeter legem,* as opposed to issues which are not even dealt with by the CISG and which cannot even be considered as gaps within the meaning of Article 7(2) CISG. Those issues are for example, the validity of contract of sale, the effect of contract on the property over the goods sold and the liability of the seller for death and personal injuries caused by sold goods.[118] Considering the two-step gap-filling mechanism provided by Article 7(2) CISG, it is clear how important is the first step in this mechanism, i.e. filling the gaps in the CISG by application of general principles on which the CISG is based.[119] When the court or arbitral tribunal is faced with an issue which it considers to be a gap within the meaning of Article 7(2), it should, therefore, first try to resolve this gap within the text of Convention, by applying the general principles on which the CISG is based, and only in the absence of such principles can the decision-maker resort to rules of private international in order to determine the applicable law and resolve the issue according to the rules of applicable domestic law. Naturally, the success of filling the gap

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[116] Article 7(2) CISG.
[117] Nina Tepeš, 'Gap-Filling Mechanism in United Nations Convention on Contracts for International Sale of Goods and Unification of Law on International Sale of Goods' (2012) 62 Zbornik Pravnog Fakulteta u Zagrebu 669, p. 682.
[118] Articles 4 and 5 CISG.
[119] Tepeš (n 117).

in the first step depends on whether it would be necessary to approach the gap as external, and fill it by national applicable by virtue of private international law rules.[120]

The problem which arises when the decision-maker must determine the general principle of the CISG according to which it should resolve the issue for which it holds to be an internal gap is, how to identify those general principles.[121] That is especially so because the CISG does not contain a list of general principles on which it is based. The only exception to this can be seen in Article 80 CISG, which is considered by scholarship as an emanation of the principle of good faith, as one of the general principles on which the CISG is based.[122] Legal scholarship plays a very important role in identifying the general principles of the Convention, which are in the same way confirmed by numerous court decisions and arbitral awards. Some of them are, for example, the principle of party autonomy, good faith (but not derived from Article 7(1) CISG),[123] freedom of form, estoppel or prohibition of *venire contra factum proprium*, a general duty of mitigation, duty to cooperate, principle of full compensation, the principle of *favor contractus*, restitution of unjust enrichments etc.[124] External principles can be indirectly and carefully taken into account because those principles can only serve to support a certain solution advocated by the decision-maker when deciding a case, and are not considered as principles on which the CISG is based, as required by Article 7(2) when providing a method for the first step of a gap-filling mechanism.[125]

This solution, which proposes that the absence of specific rules regarding hardship constitutes an internal gap which is to be filled by resorting to general principles on which the CISG is based, has been rarely advocated in legal scholarship. So far, it has been stated that

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[120] Ingeborg Schwenzer (ed), 'Art 7', *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (Third edition, Oxford University Press 2010)., p. 134.
[121] ibid.
[122] ibid.
[123] Camilla Andersen and Ulrich Schroeter (eds), 'General Principles of the CISG -- Generally Impenetrable?', *Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of His Eightieth Birthday* (Wildy, Simmonds & Hill Publishing 2008), p. 28.
[124] Schlechtriem and Schwenzer, 'Art. 7' (n 114)., pp. 105-106.
[125] ibid.

only one court decision has adopted the mentioned approach.[126] In *Scafom International v. Lorraine Tubes SA*, the parties concluded an agreement for the sale of steel tubes. After the contract was concluded, and before the goods were delivered to the buyer, the market price of steel suddenly rose about 70%.[127] This meant the deal was a windfall for the buyer, and a significant loss for the seller, which is why the seller tried to renegotiate the contract terms, but the buyer nevertheless insisted on delivery of steel tubes according to the agreed conditions.[128] In its reasoning, the Belgian Supreme Court stated:

> "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."[129]

It is not entirely correct to say that the Belgian Supreme Court adopted the approach according to which hardship constitutes an internal gap in the CISG. In my view, the Court held that a hardship situation (or changed economic circumstances which render performance excessively onerous for one party) falls within the scope of definition of the term impediment under Article 79 CISG. What constitutes an internal gap in this situation is the choice of available remedies for the disadvantaged party, which is exactly the reason the Supreme Court resorted to "general principles of international trade"[130] and decided that the disadvantaged seller has the right to request contract renegotiation in order to adapt it to changed market price of steel. This remedy of renegotiation or contract adaptation can be seen as arising from the principle of good faith, as one of the general principles underlying the CISG.[131] This approach, which adopted the theory that economic hardship falls within the scope of Article 79 CISG and

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[126] *Scafom International v. Lorraine Tubes S.A.* (n 65).; Petsche (n 3)., p. 153.
[127] *Scafom International v. Lorraine Tubes S.A.* (n 65).
[128] ibid.
[129] ibid.
[130] *See* Flechtner (n 2).
[131] Anna Veneziano, 'UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court' (2010) 15 Uniform Law Review 137, p. 144.; Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29).p. 721.

is encompassed by the term "impediment", but the gap exists in the remedies which CISG offers to the parties, has been criticized by scholars, mostly because the notion of contract adaptation is unknown and "striking" to someone coming from a common law legal system and relies exclusively to domestic remedies available in some civil systems.[132] This is also because, the fact that the exemption provisions of Article 79 CISG do not allow the court or tribunal to adapt the contract terms does not constitute a gap in the Convention.[133] Of course, this does not mean that hardship is completely excluded from the CISG, but only that renegotiation is not provided for as a remedy for the disadvantaged party.[134]

Furthermore, the Supreme Court's decision is criticized because of the way the Court decided to fill the (arguably) existing gap in the Convention. In its decision, the Court cited Article 7(2) CISG and stated that, to fill gaps in the CISG resort must be made to the general principles "which govern the law of international trade".[135] The Court then briefly explained how those general principles are found in UNIDROIT Principles of International Commercial Contracts 2004, which (same as the 2010 version) expressly regulate available remedies in the event of hardship. By resorting to UNIDROIT Principles 2004, as general principles of international trade, the Court concluded that the disadvantaged party has the right to renegotiate the contract, and in the absence of a successful renegotiation, any party may apply to the court to request the contract adaptation or termination.[136] This part of the Court's reasoning has led to discussions about whether general principles of international trade represent the principles on which the CISG is based, and most importantly, whether a decision-maker can use UNIDROIT Principles to supplement the CISG.

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[132] Flechtner (n 2)., p. 91.
[133] ibid.
[134] ibid.
[135] *Scafom International v. Lorraine Tubes S.A.* (n 65).
[136] ibid.

2.2.2. Identifying General Principles on which CISG is based

Assuming that the approach adopted by the Belgian Appellate and Supreme Court in *Scafom International v. Lorraine Tubes* is correct, i.e. that hardship is encompassed by the term "impediment" employed by Article 79 CISG and that there is an internal gap in the Convention with respect to the remedies available to the disadvantaged party, the court or tribunal must then decide how to resolve this issue according to Article 7(2) CISG. The first step is to identify general principles on which CISG is based, in order to fill the internal gap. Only if the first step proves unsuccessful, the court may resort to the second, i.e. it can fill the gap by applying the domestic law applicable by virtue of private international law (2.2.4.). Since there is no official, exhaustive list of general principles underlying the Convention, legal scholarship and case law play a significant role in determining which are exactly the principles that can be used to supplement the gaps in provisions of the Convention. Some commentators have even divided general principles of the Convention into three categories, namely principles derived from Parts I, II or III of the Convention.[137] All of them can be categorized as internal principles, i.e. principles which can be derived directly from the express provisions of the Convention. On the other hand, it is at least questionable whether external principles can be used to fill gaps or supplement the CISG. External principles are those which are not "anchored" in the Convention's text, but arise from various uniform law (and soft law) instruments such as UNIDROIT Principles, PECL or DCFR.[138] The prevailing view in scholarship is that, those instruments cannot directly be used to supplement the CISG, but can be used as a supportive means in advocating a certain approach or gap-filling mechanism employed by the court or arbitral tribunal.[139] UNIDROIT Principles, as well as PECL, are often regarded as "Restatement" which includes provisions and principles which are common to both the CISG

[137] Schwenzer, 'Art 7' (n 120)., p. 137.
[138] ibid., p. 139.
[139] ibid.; Veneziano (n 131)., p. 141.

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and other sources of international commercial law.[140] UNIDROIT Principles are a body of soft law which contains not only the general principles on which the CISG is based, but the general principles of international commercial contracts, which encompass far more than only sales transactions.[141] Therefore, it would not be entirely correct to state that UNIDROIT Principles contain general principles on which CISG is based. Of course, there are some general principles which are common to both instruments. In those cases, specific provisions of UNIDROIT Principles which are emanations of such principles can be used to supplement the CISG. Yet, many principles embodied in UNIDROIT Principles are not underlying principles of CISG, but are the general principles of international trade. We must not forget that Article 7(2) CISG expressly requires the decision maker who is faced with a gap in the Convention to fill it by resorting to general principles on which the CISG is based, and not the general principles of international trade, because that would be contrary to the express rule of the CISG. On the other hand, there is also many general principles of international trade evidenced by UNIDROIT Principles that are also the general principles of the Convention, and for gaps in CISG which must be filled by those principles, recourse can be had to UNIDROIT Principles. The rule of Article 7(2) CISG clearly requires the decision maker to fill the Convention's gaps by resorting to its general principles, and not principles of international trade or commercial law. Those principles can be external, i.e. they can be found outside the Convention's text, but they must be common to both the CISG and the external instrument, such as UNIDROIT Principles, used to identify those principles and derive a specific rule out of it.[142] Therefore, the general principles on which the CISG is based are to be derived mainly from the CISG itself and its specific provisions. It cannot be simply said that UNIDROIT Principles contain general

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[140] John Felemegas, 'An International Approach to the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law' (2007) Cambridge University Press, p. 31.
[141] Flechtner (n 2)., p. 95.
[142] ibid.

principles on which the CISG is based, and that therefore, they must be used to supplement the Convention.[143]

It is also sometimes argued, especially for UNIDROIT Principles as an external source of some principles on which CISG is based, that they seem to advocate or favor the approaches of Civil law systems in many controversial issues which are not expressly dealt with by the text of CISG.[144] This can be very clearly demonstrated on the approach adopted by the Belgian Supreme Court in *Scafom International v. Lorraine Tubes SA.* Belgian Supreme Court held that the situation of hardship falls within the scope of definition of the term impediment used by Article 79 CISG, but what is the most interesting part of the decision is, how the Court identified the gap in the CISG, and for some authors, the most striking part of its decision, is that the Court concluded that there is a gap with respect to remedies available to the disadvantaged party, which must be filled by applying the hardship provisions of UNIDROIT Principles. Hardship provisions of UNIDROIT Principles contain a solution which is characteristic to civilian systems, but completely unknown to someone from common law, i.e. they require the parties to renegotiate the contract terms and their failing of such renegotiation results in a each party's entitlement to apply to the court to adapt or terminate the contract. First of all, it is clear that the Belgian Supreme Court found that a situation which it qualified as hardship falls within the scope of application of Article 79 CISG and is encompassed by the term impediment employed by that provision. Second, the Court concluded that, with respect to the remedies available to the disadvantaged party, there exists a gap in the CISG. Since Article 79(1) CISG only provides that a party is not liable for its failure to perform due to an impediment beyond its control and that he could not reasonably be expected to have taken into account at the time of the conclusion of contract or to have avoided or overcome its consequences, this has lead the Belgian Supreme Court to conclude that there is a gap in the Convention. However, according to its decision, this

[143] ibid., p. 96.
[144] ibid., p. 97.

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gap does not exist regarding the issue of whether hardship is governed by the Convention, but there is one regarding the remedies provided to the disadvantaged party because Article 79 CISG provides only for exemption from damages and not for adaptation of the terms of contract.

Some authors argue how this approach adopted by the Belgian Supreme Court actually favors civil law remedies since the notion of contract adaptation is completely unknown to a common lawyer.[145] Since the CISG is a result of a need to promote uniformity in international sales law, they find such gap-filling mechanism which favors civil law approaches inappropriate in applying the Convention.[146] Finally, it is questionable whether the hardship provisions of UNIDROIT Principles can be even considered as an emanation of the general principles on which CISG is based,[147] since UNIDROIT Principles are considered to encompass the general principles of international trade or international commercial contract law, and not only the principles of CISG. A significant number of scholars shares the opinion that the UNIDROIT Principles should not be used of their own force to supplement the gaps found in the CISG.[148] That is especially so because UNIDROIT Principles are envisaged as an instrument which provides general rules that govern international contracts. Preamble of UNIDROIT Principles 2010 provides that they set forth general rules for international commercial contracts and it is further explained that the term "international commercial contracts" should be given the broadest possible meaning.[149] Despite the fact that some principles which can be found in both UNIDROIT Principles and CISG are the same, it cannot be said that those two uniform law instruments share original and essential similarities or the common purpose.[150] Therefore, in line with the suggestions of doctrine and case law on Article

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[145] Flechtner (n 2), p. 98.
[146] ibid.
[147] Veneziano (n 131)., p. 143.
[148] John Y Gotanda, 'Using the Unidroit Principles to Fill Gaps in the CISG' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2007), p. 3.
[149] Preamble of UNIDROIT Principles 2010, *supra* note 2.
[150] Tepeš (n 117)., p. 688.

7 CISG, general principles on which the Convention is based should primarily be found in the CISG itself.

2.2.3. Why UNIDROIT Principles Should not be used to Supplement Article 79 CISG

UNIDROIT Principles 2010 are a soft-law instrument which represents a body of rules and principles of contract law which are a commonality of various domestic legal systems or are a set of best rules of contract law which conform with the needs and goals of international commercial contracts.[151] They are used as the proper law governing the contract (in case of the parties' express choice), when the parties agree to submit their relationship to *lex mercatoria* or general principles of (commercial) law,[152] as a means of interpretation and/or supplementing the applicable law and uniform law instruments and finally, as a model law for the legislators.[153] Now, even if it is assumed that there may exist an internal gap in the Convention with respect to availability of a hardship defense, the question which arises is, whether the general principles underlying the Convention to fill this gap can be found in external sources, such as UNIDROIT Principles.

"The autonomous interpretation of the Convention is defined by some scholars through a negative definition – no external concepts to interpret the CISG."[154] Despite the prevailing view in legal scholarship, that UNIDROIT Principles and other external sources cannot be directly used to supplement the CISG,[155] there are some views which identify the UNIDROIT Principles as general principles on which the Convention is based,[156] which is a widely criticized practice, once again confirmed by some of the comments on decision of the Belgian

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[151] UNIDROIT Principles 2010, Preamble, *supra* note 4.
[152] ICC Case No. 7110, 1995. The arbitral tribunal held that the reference to the rules of natural justice means choosing UNIDROIT Principles 1994 as the law applicable to the contract. Parties to the contract wanted to avoid the application of any possible domestic law and submit their contract to the widely-accepted principles of law, which the tribunal held were embodied in the UNIDROIT Principles 1994.
[153] Preamble of the UNIDROIT Principles 2010.
[154] Stefan Kröll, Loukas A Mistelis and Pilar Perales Viscasillas (n 106)., p. 138.
[155] Tepeš (n 117)., p. 688.
[156] Stefan Kröll, Loukas A Mistelis and Pilar Perales Viscasillas (n 106)., p. 138.

Supreme Court in *Scafom International v. Lorraine Tubes SA.* In line with this criticism, there are several reasons why UNIDROIT Principles (or other external sources) should not be used as means to supplement or fill gaps in the CISG, especially where the courts and tribunals should not fall into the trap of finding or inventing a gap in the Convention where it actually does not exist, to apply the rule of UNIDROIT Principles as a general principle supposedly in accordance with Article 7(2) CISG.

First, UNIDROIT Principles cannot be considered to contain general principles on which the CISG is based because they have been first adopted 14 years after the Convention had been enacted.[157] They are a *soft law* instrument, drafted by a different institution,[158] and the CISG has been used as an example and guide for much of the provisions of UNIDROIT Principles which are very similar to those contained in the CISG. However, this similarity of the provisions is merely a logical consequence of CISG being used as a model for the adoption of UNIDROIT Principles, and should not be used as a negation of the obvious differences between those two instruments' scopes of application.[159]

Second, the instruments' scopes of application are significantly different. While CISG deals exclusively with international contracts of sale of goods,[160] UNIDROIT Principles have a much wider scope because they have been designed to cover a set of general commercial contracts' principles which offer the parties a possibility to use some or all of them in their commercial transactions.[161] For this reason, UNIDROIT Principles are not suitable to use in

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[157] Ingeborg Schwenzer (n 64)., p. 117.
[158] UNIDROIT Principles were drafted by UNIDROIT (International Institute for Unification of Private Law), an institution which is separated from the United Nations, unlike UNCITRAL (whose Working Group No. 6 drafted the CISG) which is short for United Nations Commission for International Trade Law. Except for this formal difference, it has been noted that UNIDROIT Principles were much more influenced by the civil law systems, while CISG was intended to be a compromise between civil law and common law approach, more suitable for international trade. *See* Ingeborg Schwenzer, 'Interpretation and gap-filling under the CISG', in: Current issues in CISG and arbitration (Eleven Hart Publishing 2013), p. 117.
[159] Tepeš (n 117)., p. 688.
[160] Article 1(1) CISG.
[161] Tepeš (n 117)., p. 688.

application of Article 7(2) CISG as general principles underlying the CISG.[162] They can be used as the means to support an argument in favor of a solution advocated by the general principle found in the CISG, but in itself are not considered a source of direct supplementation or interpretation of the Convention's text.[163]

Third, as it has been pointed out by several scholars,[164] there is an important difference between general principles on which CISG is based, and general principles of international trade law or commercial law. Article 7(2) CISG provides that internal gaps in the Convention are to be filled in by the general principles on which the CISG is based. UNIDROIT Principles are not general principles underlying the CISG. They are general principles of international commercial contracts or trade law, they apply in a much broader way, covering the scope of many contracts and not only sale of goods. Providing that UNIDROIT Principles can be used as means to interpret or supplement uniform law instruments unnecessarily opens the door to the possibility that this instruments starts becoming perceived as principles on which the Convention is based.[165]

In *Scafom International v. Lorraine Tubes S.A.*, the Belgian Supreme Court held that the CISG mandated the judicial adaptation of contract.[166] In its reasoning, the Court stated:

> "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,

[162] Ingeborg Schwenzer (ed), 'Art 7', *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (Fourth edition, Oxford University Press 2016), pp. 137-138.
[163] ibid. However, the issue is controversial and there are views of scholars which favor using the UNIDROIT Principles and other sources of *lex mercatoria*, such as the Principles of European Contract Law as means of intepreting and supplementing the CISG in case there are no general principles underlying the Convention which can fill the gaps in accordance with the rule of Article 7(2) CISG. The recognition of UNIDROIT Principles by UNCITRAL has also been mentioned as the reason for increasing the legitimacy of using this instrument to supplement and interpret the CISG. Report of the United Nations Commission on International Trade Law is available at: http://www.uncitral.org/uncitral/en/commission/sessions/40th.html
[164] Flechtner (n 2).; Tepeš (n 117).
[165] Tepeš (n 117)., p. 692.
[166] Professor Flechtner finds this part of the reasoning of the Belgian Supreme Court inappropriate because the remedy of judicial contract adaptation is exclusively characteristic to a civilian system. Common law is not familiar with judicial modification or termination of contract as a remedy for a hardship situation. CISG being a compromise and the mixed system of rules common to both legal traditions was not, in his opinion, designed to include such a remedy characteristic only for civil law.

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> the party who invokes changed circumstances that fundamentally disturb the contractual balance, as mentioned in paragraph 1, is also entitled to claim the renegotiation of the contract."[167]

Instead of trying to fill the supposed gap with the general principles on which CISG is based, Belgian Supreme Court directly resorted to general principles of law of international trade, which is hardly the same as the principles underlying the Convention. Principles underlying the Convention are found in the Convention's text, while on the other hand, general principles of law of international trade are contained in some other, external sources which govern a much wider area of commercial law.[168]

Finally, argument in favor of using UNIDROT Principles to supplement the CISG, that the issue of secondary application of UNIDROIT Principles must be left to resolve by the courts and tribunals, actually admits that there is no valid legal argument in favor of directly applying UNIDROIT Principles to supplement the Convention as provided by Article 7(2) CISG.[169] Additionally, it is the opinion of some scholars that the provisions of UNIDROIT Principles favor the civilian approach of resolving certain issues of international commercial law.[170] Without discussing it, it is certainly clear that is the approach taken by the UNIDROIT Principles' hardship provisions, which enable the use of contract adaptation or termination as a hardship remedy, which is unknown to common law.[171] On the other hand, we must consider the fact that the CISG was adopted as a compromise and system of solutions acceptable to lawyers from all legal traditions,[172] and that it expressly provides an obligation to interpret it with regard to its international character. Interpreting or filling the gap in the Convention without regard to its international character, or using a remedy exclusive to only one legal

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[167] *Scafom International v. Lorraine Tubes S.A.* (n 65).
[168] Flechtner (n 2)., p. 95.
[169] Tepeš (n 117)., p. 691.
[170] Flechtner (n 2)., p. 98.
[171] ibid.
[172] Schwenzer, 'Art 7' (n 120)., p. 123.; Bruno Zeller, *Damages under the Convention on Contracts for the International Sale of Goods* (Oceana Publications Inc 2005), p. 175.

tradition might mean imposing it on the states which never agreed to it, which is the same as the so-called "homeward trend."[173]

Therefore, UNIDROIT Principles (as well as other uniform law instruments such as Principles of European Contract Law or Draft Common Frame of Reference) should not be directly used to supplement the CISG, but can only be used as "additional argument for a solution advocated when filling internal gaps."[174] Using UNIDROIT Principles directly as general principles of CISG without finding an exact principle to fill the internal gap in the Convention itself unnecessarily broadens the Convention's scope and ignores the fact that those two instruments have different creators and goals, different scopes of application and legal force.[175]

2.2.4. Hardship as a Gap which Must be filled by Applicable Domestic Law

Article 7(2) CISG provides for a two-step mechanism of filling gaps or resolving matters which are governed by the Convention but not expressly settled in its text. The first, abovementioned, step is to supplement the provisions of the Convention by the general principles on which it is based. In the absence of such principles, these gaps must be settled according to the law applicable by virtue of rules of private international law.[176] Along this line, if we assume that that hardship is an internal gap which must be somehow filled, and there are no general principles underlying the Convention to fill this gap, it must be filled by the

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[173] Flechtner (n 2)., p. 98. For the definition of "homeward trend" *see* Franco Ferrari, 'Homeward Trend and Lex Forism Despite Uniform Sales Law' (2009) 1/2009 15. The author has defined homeward trend as national courts and judges (or arbitrators) being inclined to interpret the legal standards and provisions of CISG in accordance with the domestic concepts of the legal system in which they were trained, instead of giving an autonomous interpretation of the Convention's provisions, in accordance with its international character and the need for its uniform application, as provided by Article 7(1) CISG. Furthermore, the author provides an illustrative example of a homeward trend, when the court is faced with a question of Convention's applicability to the contract, that is with the issue whether a contract is a sale of goods for the purpose of Convention's material scope of application. To resolve the question whether a contract is a sale, the court must not resort to its domestic definition of sale of goods, but must resolve it autonomously within the CISG (and existing case law applying the Convention).
[174] Schlechtriem and Schwenzer, 'Art. 7' (n 114)., p. 139.
[175] Tepeš (n 117)., p. 688.
[176] Article 7(2) CISG.

application of the rules of the law applicable by virtue of private international law. This solution was adopted by the Court of Appeal of Antwerp in *Scafom International v. Lorraine Tubes SA,* which was ultimately reversed by the Belgian Supreme Court.

This solution, adopted by the Court of Appeal of Antwerp can be criticized because it is arguably the solution which provides the lowest level of uniformity in the application of CISG, uniformity being one of the goals which must be achieved in its interpretation.[177] Assuming that this approach to hardship under Article 79 CISG is the one to follow, the scenario would be the following: if the court is faced with a situation of change of circumstances, it would directly apply the law of the state according to the applicable rules of private international law. Since the CISG applies when the parties' places of business are in different states, the applicable law can be very different. Different legal systems have adopted radically different approaches to issue of change of circumstances, and therefore the parties would never know, at the time of the conclusion of contract, whether they would be exempted from liability for non-performance caused by severe change of circumstances, what is the threshold required under each individual national law, what are the exact requirements which must be fulfilled to exempt the party from liability etc. This situation, in which the disadvantaged party never knows which rules will apply in a contract governed by CISG, would possibly undermine the Convention in achieving one of its main goals.

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2.3. Hardship as an External Gap in the CISG

Unlike matters which are considered to be governed but not expressly settled by the Convention's text (internal gaps), external gaps in the CISG are not filled by the mechanism provided by Article 7(2) CISG.[178] An external gap is sometimes described as a matter which is

[177] Article 7(1) CISG.
[178] Christian Monberg, 'The UNIDROIT Principles: The Ugly Duckling of Gap-Filling Instruments under the CISG', p. 1030.

not even governed nor settled by the Convention, and such gap should be filled by rules applicable according to provisions of private international law.[179] The line between internal and external gaps is not always clear and there are various opinions about the position of certain borderline problems, whether they constitute Convention's internal or external gaps and the method which should be used to fill them. Without further discussing these areas, an approach should be mentioned which places the issue of hardship or changed circumstances in the sphere of an external gap in the CISG. The mentioned approach is closely connected to the discussion of preemption and concurrence between CISG and national law as different sets of rules. Simply described, preemption means that if one area of law is exhaustively regulated by a legal instrument (such as CISG), there is no room for any other law to govern the same area.[180]

If hardship is considered to be an external gap in the CISG, this means that domestic hardship doctrines can concurrently apply to the disadvantaged party in a CISG governed contract, and provide for a contract adaptation, termination or other domestic remedy. Therefore, if hardship is considered to be an external gap, it means that the Convention does not completely or exhaustively regulate exemptions from liability for non-performance and that the national court or tribunal would actually have to, when dealing with such a situation, examine whether the conditions for exemption are fulfilled under both Convention and the national hardship doctrines.[181]

Under the assumption that there might be real life court or arbitrator who decides that national rules on hardship, or more generally, exemption from liability for damages can apply concurrently with Convention's Article 79, such resolution of this issue seems less certain and uniform than excluding hardship from Convention' scope or qualifying it as impediment under

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[179] ibid., p. 992.
[180] Joseph Lookofsky, 'Impediments and Hardship in International Sales: A Commentary on Catherine Kessedjian's "Competing Approaches to Force Majeure and Hardship"' (2005) 2005 International Review of Law and Economics 434, p. 441.
[181] ibid., p. 442.

Article 79 because then, in each individual case, it will actually depend on national law, whether a disadvantaged party may request renegotiation, adaptation or termination of contract, or it can benefit from the exemption from liability, or is it expected to simply perform the contract. Furthermore, the required conditions for exemptions and the threshold would significantly vary, depending on domestic doctrines and domestic case law.

2.4. Hardship as Impediment under Article 79 CISG

"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."[182] It is also accepted by the CISG Advisory Council that a change of (economic) circumstances because of which the performance of contract becomes too expensive for the disadvantaged party can be defined as impediment under Article 79(1) CISG.[183] CISG Advisory Council, as well as professor Schlechtriem, opined that the language of Article 79(1) CISG is not exactly the language of impossibility and therefore, hardship situations which make performance excessively onerous entitle the disadvantaged party to invoke the exemption from liability as provided by Article 79 CISG.[184] Even though it was argued by some scholars that Article 79(1) CISG employs the language of impossibility or *force majeure* which is seen as an "unforeseeable, insurmountable and irresistible"[185] obstacle to contract performance[186], no evidence exists in Article 79 CISG that hardship was supposed to be excluded or included within its scope of application.[187]

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[182] Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (2008) 39 Victoria University of Wellington Law Review 709, p. 713.
[183] Rapporteur: Professor Alejandro M. Garro (n 17)., *supra* 3.1.
[184] ibid.
[185] Barry Nicholas, 'International Sales: The United Nations Convention on Contracts for the International Sale of Goods' in Nina M Galston and Hans Smit (eds) (Matthew Bender 1984), p. 5-4.
[186] ibid.
[187] Rapporteur: Professor Alejandro M. Garro (n 17)., *supra* 3.1.

It has been noted that almost no court has exempted a party from liability as provided by rules of Article 79 CISG based on hardship or change of economic circumstances, based on the report by the CISG Advisory Council from 2007.[188] This situation has changed by the decision of the Belgian Supreme Court in *Scafom International v. Lorraine Tubes SA*, where the court expressly held that hardship may constitute an impediment for the purposes of Article 79 CISG, which may exempt the non-performing party from liability for damages.[189] Since there is a relatively small number of court decisions and arbitral awards which at least mention or take an approach to hardship defense being (un)available under Article 79 CISG,[190] if it is to be accepted that the party may invoke change of circumstances in its Article 79 defense, the views on what situations may constitute a valid hardship situation for the purposes of Article 79 and what are the consequences for the parties' relationship, i.e. which remedies are available to the disadvantaged party still vary, but generally the doctrine takes the position that changes of circumstances may qualify as impediments.[191] It is, naturally, not certain which is the exact threshold of such changed economic circumstances which would justify an exemption from liability, but this will be shown from real CISG cases decided by more courts or tribunals. Until this moment, there are few decisions where the courts were faced with hardship in CISG contracts, and their decisions have greatly varied, so it cannot be stated that there is an approximate threshold established by case law.

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2.4.1. Conditions for Hardship under Article 79 CISG

Article 79 CISG provides:

> "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably

[188] Petsche (n 3)., p. 149.
[189] *Scafom International v. Lorraine Tubes S.A.* (n 65).
[190] *Steel Ropes Case* [1998] Bulgarian Chamber of Commerce and Industry 11/1996 CISG-online 436.; *Nuova Fucinati v. Fondmetall International* (n 107).; *Société Romay AG v. SARL Behr France* (n 112).
[191] Enderlein and Maskow (n 1), p. 324.

be expected to have taken the impediment into account at the time of conclusion of the contract or to have avoided or overcome its consequences."

First, the disadvantaged party who wants to invoke a hardship defense under Article 79 CISG must prove that the situation of changed economic circumstances is a hardship situation, which is severe enough to relieve the party of its duty to perform the obligation. Commentators have often mentioned a "limit of sacrifice"[192] beyond which the disadvantaged party should not be any more expected to perform the contract.[193] Therefore, the principle of *pacta sunt servanda* must not be disregarded by accepting that the mere fact that performance of contract has become impractical or more expensive for the disadvantaged party is enough to exempt it from liability for damages under Article 79 CISG.[194] The party's hardship defense can only be accepted if the performance of contract has become excessively onerous or beyond the "limit of sacrifice", which is why the promisor should not be any more expected to perform its obligation.[195]

When determining whether a situation actually constitutes a hardship in the meaning of impediment in Article 79 CISG, it is sometimes suggested to start from the type of parties' relationship, i.e. their sales contract.[196] If the contract is highly speculative, it has been noted that the presumption should be in favor of the promisee, that is that the obligor has assumed the risk of changed circumstances, especially price fluctuation which may result in the transaction becoming a loss.[197] For example, in the German *Iron Molybdenum Case,* the appellate court of Hamburg held that the seller should not be exempt from liability for damages even though the market price of iron molybdenum had risen by 300%.[198] While 300% was a very high threshold, the court held that it did not lead to a "sacrificial" sale price for the seller, as the whole

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[192] Peter Schlechtriem and Ingeborg Schwenzer (eds), 'Art. 79', *Commentary on the UN Convention on Contracts on the International Sale of Goods (CISG)* (Second edition, Oxford University Press 2005), p. 824.
[193] ibid.
[194] Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29)., p. 714.
[195] ibid.; Schlechtriem and Schwenzer, 'Art. 79' (n 192).
[196] Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29)., p. 715.
[197] ibid; *Steel Ropes Case* (n 190).; *Scafom International BV & Orion Metal BVBA v Exma* [2005] Commercial Court Tongeren A.R. A/04/01960 CISG-online 1106.
[198] *Iron Molybdenum Case* (n 110).

transaction was highly speculative.[199] Furthermore, when determining whether a situation of changed circumstances may amount to hardship for the purposes of Article 79 CISG, other circumstances of each individual case must be taken into account. For example, what may be relevant is the expected profit margin in a particular type of contract in a certain trade or industry, or whether the parties have concluded a short or long-term agreement. Based on the analysis of different domestic solutions with respect to the required threshold for a hardship defense, it has been suggested that for example, a price increase of raw materials of 100% should suffice to allow a party to be exempted from liability.[200] However, the judicial and arbitral practice in the CISG's application have shown that courts and tribunals were sometimes unwilling to exempt the party from liability even in extreme cases of price fluctuations.[201] One author had advised a threshold of 150-200 per cent applicable for an international market, since the 100 per cent threshold was suggested based on the research conducted among domestic markets, where price fluctuations that occur are usually smaller.[202]

In *"FeMo" Alloy Case,*[203] one of the parties tried to invoke a hardship defense on the basis of a market price increase of 30%, which was not accepted by the tribunal as a threshold which would be relevant to consider the change of circumstances as an impediment.

On the other hand, in *Scafom International BV v. Lorraine Tubes S.A.,* Belgian Supreme Court held that the unforeseeable rise in the price of steel after the time of conclusion of contract had made performance of contract detrimental to the seller and that the buyer had to renegotiate the contract terms.[204] Therefore, despite the particularly small number of decisions in which courts have expressly mentioned a certain precise threshold for changed circumstances in form of price

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[199] ibid.
[200] Brunner (n 9).; Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29), p. 715.
[201] *Nuova Fucinati v. Fondmetall International* (n 107).; *Steel Bars Case* [1989] Court of Arbitration of the International Chamber of Commerce 6281/1989 CISG-online 8; Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29)., p. 716.
[202] ibid.
[203] *'FeMo' Alloy Case* [1996] CIETAC Arbitration CISG/1996/21 CISG-online 1067.
[204] *Scafom International v. Lorraine Tubes S.A.* (n 65).

fluctuations or increase of the price of raw materials to be qualified as hardship, it would be hard to state a precise criterion required for the disadvantaged party to be exempt from liability without assessing all other circumstances of the case, such as the type of contract and level of speculation, duration of the parties relationship and the requirements provided by Article 79 CISG. Still, the decision of Belgian Supreme Court departs from the thresholds suggested by legal doctrine for national and international markets, because the court excused the party from liability for damages although the market price had increased only about 70% (which was approximately 450.000 EUR), while the abovementioned case law and scholarly writings did not even consider a 100% price fluctuations serious enough to enable the disadvantaged party to escape liability under Article 79 CISG. This was especially so because international markets are considered more speculative than domestic ones, and consequently, a higher threshold ought to be expected to grant an exemption from liability.[205] However, until there are more decisions where the courts actually exempt a party from liability and apply an exact threshold (having due regard to all other circumstances of the individual case), the mentioned few decisions which are not consistent and suggestions of legal doctrine are the only reference of what might be expected as a reasonable threshold to exempt a party in hardship from liability for damages.

Another important issue is the timing of changed economic circumstances. In *force majeure* situations, the prevailing view is that the impediment does not have to appear after the conclusion of contract, but the party can be exempt from liability even if it existed at the time of conclusion of contract.[206] On the other hand, as far as hardship situations are concerned, it has been argued that changed circumstances must appear after the contract was concluded.[207] Although this problem was rarely discussed in case law and scholarly writings, in a hypothetical situation where there is a large imbalance between the parties' respective performances at the

[205] Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29), p. 717.
[206] ibid.
[207] ibid.

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time of conclusion of contract, the disadvantaged party would probably use other remedies provided by national law, such as remedies for mistake.[208] However, if the sales contract is governed by CISG, problems may arise because the Convention does not contain any provisions on contract validity, which would lead to the application of otherwise applicable domestic contract law and therefore unpredictable results.[209] Therefore, without going into further details on the timing of changed circumstances, for the sake of uniformity in application of the Convention, it is suggested to give hardship the broadest possible sense in this respect, to include situations of changed economic circumstances after the conclusion of contract but also a large disparity of contract performances value which exists when the contract is concluded.[210] Hardship situation can exempt the disadvantaged party from liability for damages only if: (1) changed circumstances are out of control of the disadvantaged party, (2) if the party could not be reasonably expected to have taken the impediment into account at the time of conclusion of contract, or (3) to have avoided or overcome its consequences.[211] The mentioned requirements of Article 79(1) CISG must be fulfilled cumulatively, i.e. even if the party proves that the impediment was unforeseeable, it may not invoke a hardship defense if the other party proves that it could have avoided the situation or overcome its consequences.[212] When the court is deciding whether the disadvantaged party could or was expected to have avoided or overcome the consequences of hardship, it must also take into account the threshold suggested by CISG case law and legal doctrine for hardship situations.[213] In a hypothetical situation where the seller assumes the obligation to deliver certain amount of goods to the buyer and cannot perform his obligation due to an increase in the cost of performance, e.g. because of the increase of import

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[208] ibid., p. 718.
[209] ibid.
[210] ibid.
[211] Article 79(1) CISG.
[212] '2012 UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods: Digest of Article 79 Case Law' <http://cisgw3.law.pace.edu/cisg/text/digest-2012-79.html#ov>.
[213] Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29)., p. 719.

duties to his country, the seller has to be expected to try to obtain the goods from another source or still obtain the goods despite a higher cost of transfer, until this increase in costs reaches the relevant threshold or the so-called "limit of sacrifice"[214] after which it would not be reasonable to expect his performance. Whether this limit has been exceeded in a particular situation must be evaluated by the court or tribunal differently in each individual case, taking into account all relevant circumstances.[215] Even though the threshold of for example, a price increase of a 100% has been mentioned as insufficient to justify a hardship defense[216], in certain situations the courts have granted such a defense to a disadvantaged party even when the increase in the cost of performance was below such number, e.g. 70%.[217] This only confirms the above mentioned opinion that it is challenging to estimate and fix a required threshold for a hardship defense to be available under Article 79(1) CISG, without closely examining all circumstances of the contract, e.g. the level of speculation associated with it, the duration of the expected contract performance, the type of goods involved in the transaction and the market circumstances etc. It should be noted that price fluctuations which are in such lower range of 70% or 100% are more likely to be associated with a usual risk which the party engaged in a certain type of trade usually assumes and therefore they will most probably be considered foreseeable.[218] On the other hand, it is suggested that in speculative transactions, even a price fluctuation which would amount to 300% would not be sufficient to excuse the disadvantaged party from non-performance and liability for damages under Article 79 CISG, obviously because of the uncertain nature of transaction.[219]

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[214] Ingeborg Schwenzer (ed), 'Art 79', *Schlechtriem & Schwenzer Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG)* (Fourth edition, Oxford University Press 2016), p. 1142.
[215] ibid, p. 1143.
[216] ibid.
[217] *Scafom International v. Lorraine Tubes S.A.* (n 65).
[218] ibid.;*Scafom International BV & Orion Metal BVBA v. Exma* (n 197).; *Société Romay AG v. SARL Behr France* (n 112).; *Steel Ropes Case* (n 190).
[219] *Iron Molybdenum Case* (n 110).; *Steel Bars Case* (n 201).; *Nuova Fucinati v. Fondmetall International* (n 107).

2.4.2. Consequences of Hardship

As opposed to the hardship provisions of UNIDROIT Principles 2010, PECL 1999 and DCFR 2008, Article 79 CISG does not provide a detailed remedial scheme available to the disadvantaged party who finds itself in a hardship situation.[220] Except for providing that a contracting party is not liable for a failure to perform any of his obligations due to a *force majeure* or hardship situation in Article 79(1), Article 79(5) CISG expressly states that the parties are only prevented from claiming damages under the provisions of exemption from liability.[221] Therefore, even though the disadvantaged party may not be liable for the damage caused by non-performance, the promisee (and the promisor) is still entitled to any other remedy available under other provisions of the Convention. The exemption from liability also includes liquidated damages and penalties agreed by the contract.[222] Some of the most controversial issues with regard to the consequences of a hardship situation are the influence of changed circumstances on the party's right to avoidance of contract, the issue whether the CISG contains a duty to renegotiate the contract, and finally, whether the parties are entitled to apply to the court to adapt the contract.

Article 79(5) CISG provides that the rules of Article 79 do not prevent either party "from exercising any other remedies available under the Convention, except for claiming damages."[223] This means that, in case of successfully invoked changed circumstances by the promisor, the promisee is still left with his right to avoid the contract, provided that the promisor's non-performance amounted to a fundamental breach of contract.[224] A breach of contract governed by the Convention is fundamental if "it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract".[225] Therefore,

[220] Article 79(1) CISG.
[221] Article 79(5) CISG.
[222] Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29)., p. 720.
[223] Article 79(5) CISG.
[224] Article 49(1)(a) CISG.
[225] Article 25 CISG.

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the party who expected performance is entitled to avoid the contract if the conditions for avoidance are fulfilled, without the need to first renegotiate the contract, and only then use the avoidance as a remedy of last resort, which will be discussed in 3.4.

CHAPTER III: A DESIRABLE SOLUTION: HARDSHIP QUALIFIES AS IMPEDIMENT UNDER ARTICLE 79 CISG

In my view, a disadvantaged party to whom performance of contract has become excessively difficult or onerous due to a change of circumstances must be, under required conditions of a certain threshold appropriate for an international commercial transaction, unforeseeability and unavoidability of impediment, allowed to benefit from the Convention's exemption provisions and excused from liability for damages. This "prevailing view"[226] in legal doctrine has been partially confirmed by the decision of Belgian Supreme Court in *Scafom International v. Lorraine Tubes S.A.* The court decided that hardship was indeed expressly covered by Article 79 CISG, but in the second part of its reasoning it found a gap with respect to available remedies for hardship, and filled by UNIDROIT Principles 2010,[227] which is hardly justifiable considering the mandate of Article 7(1) CISG to interpret the Convention with respect to its international character, uniformity and the need to avoid direct application of UNIDROIT Principles and other uniform law instruments as "general principles on which CISG is based"[228] to fill the Convention's internal gaps. Following the analysis of the abovementioned decision

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[226] Schwenzer, 'Art 79' (n 214)., p. 1141.
[227] *Scafom International v. Lorraine Tubes S.A.* (n 65).
[228] Article 7(2) CISG.

3.1. Alternative Result in *Scafom International v. Lorraine Tubes SA*

In *Scafom International v. Lorraine Tubes SA*, the buyer and seller entered a number of sale contracts for the delivery of steel tubes. After the contract was concluded, the price of steel unexpectedly rose for 70%, and the seller tried to renegotiate the contract to obtain a higher price, but the buyer nevertheless insisted on the delivery of the agreed amount of steel tubes, obviously because the change of price put him in a very favorable position.[229] Commercial court of Tongeren, which has rendered the decision in the first instance, rejected seller's request for contract adaptation with a reasoning that the situation of hardship is excluded from the scope of application of CISG.[230] On appeal, the court in Antwerp reversed the decision of the first instance court and decided that the issue of hardship is an internal gap in the Convention, which cannot be decided in accordance with its general principles, and therefore must be resolved according to the rules of applicable national law.[231] The applicable national law was French law, and according to Article 1134 of the Code Civil, the parties have a duty to renegotiate the contract in case of unforeseeable changed circumstances. Therefore, on appeal, the court awarded damages to the seller because the buyer breached the contract by refusing to renegotiate in good faith.[232]

The buyer then appealed to the Belgian Supreme Court, which decided the case in line with the decision of the court of second instance, but on different legal grounds. Belgian Supreme Court expressly stated that unforeseen changed circumstances may amount to an impediment used by Article 79 CISG.[233] However, what is often discussed as controversial in the decision of the Supreme Court, and is further analyzed in 2.2.3., is that the court then found

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[229] *Scafom International v. Lorraine Tubes S.A.* (n 65).
[230] Julie Dewez and others, 'The Duty to Renegotiate an International Sales Contract under CISG in Case of Hardship and the Use of UNIDROIT Principles' 19 101, p. 120.
[231] ibid.
[232] ibid., p. 121.
[233] *Scafom International v. Lorraine Tubes S.A.* (n 65).

a gap in the sense that the CISG does not provide any remedies for the disadvantaged party in a hardship situation, and consequently concluded that this supposed gap must be filled by the application of UNIDROIT Principles as "general principles of international trade."[234]
Although the decision of the Belgian Supreme Court has been justifiably criticized for finding or "hallucinating"[235] a gap in the provisions of CISG where it could not resort to a similar domestic rule, it is a decision which has confirmed the prevailing view in modern scholarship dealing with CISG, that Article 79 CISG should be interpreted as including a hardship situation within the scope of definition of the term impediment.[236] Contrary to the court's reasoning, there are valid arguments that there is no need to look outside the CISG to resolve the issue of available remedies for a hardship situation,[237] which will be discussed in 3.6.

The final decision of Belgian Supreme Court rejected the buyer's appeal from the decision of the Appellate court. The buyer appealed because of the finding of the court of appeal that the duty of good faith (contained in Article 1135 French Code Civil) mandated renegotiation of contract and that the buyer's rejection to renegotiate in good faith constituted a breach of contract. The Supreme court reached the same conclusion on a different legal basis, i.e. it employed the first step in the two-step gap-filling mechanism, and filled this gap with what it considered to be general principles on which CISG is based (it used UNIDROIT Principles), while the court of appeal based its decision on the basis of French domestic law because it held that there is no general principle to fill this gap, but that it had to resort to domestic law.

First, the seller in this case informed the buyer that it would not be able to deliver the goods at the agreed price because of the market price rise of 70%. The buyer refused to renegotiate the contract and initiated proceedings in which it claimed damages for non-

[234] ibid.
[235] Flechtner (n 2)., p. 98.
[236] Rapporteur: Professor Alejandro M. Garro (n 17)., *supra* note 3.1.
[237] Schwenzer, Hachem and Kee (n 27)., p. 673.

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performance. The seller filed a counterclaim based on the amount for a higher price of steel tubes, which both court of appeal and Supreme Court upheld by ordering buyer to pay 450.000 EUR because it breached its duty to renegotiate the contract and adjust the price after its unexpected change. Without finding a gap in the Convention and using French domestic law or external principles as general principles underlying CISG, Supreme Court (and lower courts) could have reached this result by the regular remedy mechanism provided by the Convention.[238] If the buyer accepted the seller's offer to renegotiate the contract, the contract would be adapted to changed circumstances. Since the buyer refused to do so, seller refused to deliver the goods and buyer filed a claim seeking damages for non-performance. Seller relied on the change of circumstances which made performance excessively onerous and the court found that such situation is encompassed by the term impediment under Article 79 CISG. Therefore, it then filed a counterclaim seeking the payment of additional 450.000 EUR, which would have been a higher purchase price after its rise.[239] In this situation the buyer will most probably have to claim that it rightfully avoided the contract because the seller's offer to deliver the goods for a different purchase price amounted to a fundamental breach of contract.[240] If the court finds that the buyer had a duty, based on the principle of good faith, to agree on the different purchase price which was offered after the change of circumstances, it will grant the seller the amount sought in its counterclaim.[241]

Second, Article 79(5) CISG provides that the parties have the right to exercise all remedies available under the Convention in case of *force majeure* and hardship situations, except for claiming damages for non-performance which was caused by the impediment. Therefore, in a situation where the buyer requests delivery, subsequently rejects renegotiation

[238] Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29), pp. 723-725.
[239] Seller could have also sought damages for wrongful termination of contract. This will be the scenario depending on what is the prior move of the buyer, whether it is specific performance or damages. *See* ibid., p. 724.
[240] ibid.
[241] ibid.

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and claims damages, the seller will not be liable for damages arising out of that non-performance if the court finds that it was due to a hardship situation which qualifies as an impediment.

3.2. Dupiré Invicta Industrie v. Gabo[242]

Buyer and seller concluded an agreement which provided that buyer would become an exclusive distributor of seller's products in Poland and Slovakia. When the price of raw materials necessary to produce stoves suddenly increased, the seller refused to deliver the goods on the basis of a hardship situation, which has led the buyer to sue for damages due to its non-performance. Among other issues, both Court of Appeal and Supreme Court had to decide whether such increase of price of raw materials constitutes a hardship situation which exempts the party from liability, and whether such exemption is included within the provisions of Article 79 CISG. Court of Appeal held that there was no hardship which would excuse the seller from performance, because, if the parties have not provided otherwise in their agreement, the seller is the one who assumed the risk of price increase or performance becoming more onerous. Decision of the appellate court has then been challenged before the Supreme Court, which held that the seller did not prove the increase in its costs of contractual performance or the existence of a situation of changed circumstances which would significantly alter the contractual balance and allow an exemption to the disadvantaged party.

Therefore, after the decision of *Scafom International v. Lorraine Tubes S.A.*, another decision of a national supreme court on a situation of hardship shows that the courts do not tend to deem hardship as completely excluded as an impediment under Article 79 CISG, but the exact applicable threshold (considered in connection with all other conditions) is still very

[242] The most recent reported decision of a domestic court applying Article 79 CISG concerning the issue whether a party should be exempt from liability for damages in a hardship situation was decided by French Cour de Cassation in February 2015.

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uncertain. After the Court of Appeal and seller invoked hardship provisions of UNIDROIT Principles, the Supreme Court did not refer to those provisions, but merely addressed the problem that the disadvantaged party failed to prove there was an alteration of the contractual equilibrium and therefore could not excused under Article 79 CISG. This does not necessarily mean that the French Supreme Court holds hardship to be excluded from the Convention, but since it did not refer to the application of UNIDROIT Principles invoked by the seller and the Court of Appeal, it is not completely certain whether it rejected the claim because such change of circumstances was foreseeable or because the respondent did not discharge its burden of proof. What can be certainly concluded from the official translation of the decision to English is that, in any case, the court did not find that there was a change of circumstances which was severe enough to allow for an exemption from liability.

3.3. Promotion of Good Faith in International Trade

The principle of good faith is recognized as one of the general principles governing the law of international commerce, a principle of interpretation of CISG embodied in Article 7(1) CISG,[243] but also as a concept and principle contained in various provisions of the CISG,[244] as one of the general principles underlying the Convention and applicable to parties' conduct.[245]

[243] Article 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. "

[244] *Dulces Luisi v Seoul International* [1998] Mexican Commission for the Protection of Foreign Trade M/115/97 CISG-online 504. In this case the tribunal held that one of the parties had breached its duty to conduct in good faith towards the other party in a CISG governed transaction. The tribunal also pointed out that the duty of good faith must be interpreted and defined autonomously, i.e. that definition of good faith with reliance on a particular domestic legal system represents a homeward trend, contrary to Article 7 CISG. For "two packages" of good faith, *see* Bruno Zeller, 'Good Faith - The Scarlet Pimpernel of the CISG' <http://www.cisg.law.pace.edu/cisg/biblio/zeller2.html>.
Prof. Schwenzer notes that proposition of good faith as a standard directly applicable to parties' conduct is still a controversial issue. The wording of Article 7(1) CISG and the drafting history of the Convention do not encourage the argument that good faith is a standard which directly applies to parties' contractual relationship (this view has been mostly argued by German authors), but the author admits it certainly influences communication between the parties relevant for application of Article 8 CISG and it can be used to specify parties' rights and obligations. *See* Schlechtriem and Schwenzer, 'Art. 7' (n 114)., p. 128.

[245] Joseph Lookofsky, *Understanding the CISG* (Fourth edition, Kluwer Law International 2012), p. 34.

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The parties' duty of good faith and fair dealing can play an important role in resolving the situation of hardship under the CISG governed contract. I am not suggesting that good faith should be used to fill an internal gap in the Convention by virtue of Article 7(2) CISG, because such a gap should not be found in the Convention, but the duty of good faith and its breach can prevent the promisee to avoid the contract if the court finds that the promisor was caught in a situation of hardship and the promisee refused to renegotiate in good faith, but claims that the offer to perform under different contract terms constitutes a fundamental breach of contract, which purportedly entitles it to avoidance.[246] The promisee can try to request avoidance of contract claiming that the promisor's offer to perform under the changed or adapted contract terms constitutes a fundamental breach of contract. However, if the court finds that the promisor was indeed in a situation in which the performance would be excessively onerous and consequently where the promisee would be expected to accept different terms, promisor's claim for avoidance should be rejected,[247] which actually means achieving a result which would ultimately be very similar to the one of UNIDROIT Principles 2010, or any other instrument or domestic law which expressly provides for a duty to renegotiate the contract and for the court to adapt it or terminate it.

Article 7(1) CISG mandates the promotion of observance of good faith in sales transactions, which is achieved, *inter alia*, by using the Convention's remedial scheme to deal with a hardship situations in different forms, including market fluctuations which are so severe that they should exempt the disadvantaged party from liability under Article 79 CISG. The judicial recognition and denial of the promisee's right to avoid the contract based on different terms due to hardship impliedly recognizes the parties' duty of good faith, and depending on

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[246] Ingeborg Schwenzer and Pascal Hachem, 'The CISG - Successes and Pitfalls' (2009) 57 American Journal of Comparative Law 457, p. 475.
[247] Ingeborg Schwenzer (ed), 'Art 79', *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd Edition, Oxford University Press 2010), p. 1085; Schwenzer and Hachem (n 246)., p. 475.

circumstances, the duty to try to renegotiate in good faith. If the parties' renegotiations fail, the non-performing party will be liable only for those damages which were not caused by extreme change of circumstances.

Finally, although it was sometimes argued that allowing the parties to invoke a hardship defense on the basis of Article 79 CISG represents a departure from the paramount principle of *pacta sunt servanda*,[248] but it must not be forgotten that the principle of good faith, producing a duty to renegotiate the contract and the possibility to invoke change circumstances as an excuse for non-performance, is just as an important general principle of which the Convention lies.

Therefore, allowing the parties to rely on a hardship defense in case of changed circumstances under Article 79 CISG is exactly what promotes observance of good faith in international trade and follows the order of Article 7(1) CISG to promote it in Convention's interpretation. In connection with this question, it has to be analyzed whether it is likely that the domestic court or tribunal would conclude that the general principle of good faith encompasses an obligation to renegotiate the contract, i.e. whether the parties' duty to cooperate other duties under that principle extend to contract renegotiation. Again, if the court does not find there is such a duty, the option for the disadvantaged party to keep the contract alive does not exist. It still may be exempted from liability on the basis of Article 79 CISG.

3.4. International Character and Uniformity in Interpretation of CISG

Other than demanding observance of good faith and its promotion, Article 7(1) expressly commands courts and tribunals to interpret the Convention in accordance with its international character and the need to promote uniformity. The wording "regard is to be had" employed by Article 7(1) CISG should be understood not merely as a recommendation to the decision-makers, but as a strict and explicit order to interpret the Convention in accordance with its

[248] Markus Petsche, 'Hardship under the UN Convention on the International Sale of Goods (CISG)' (2015) 19 Vindobona Law Journal 147,

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international character in a manner which ensures uniformity in its application.[249] This primarily means that any term and standard employed by the Convention must be interpreted autonomously, without any regard to domestic concepts connected to such terms.[250] The Convention was adopted by many states which have very different conceptions of contract, liability for damages and other issues within its scope, and therefore it was negotiated to include legal notions which are common and acceptable to different legal systems.[251] Interpretation of Convention's provisions by relying on the domestic preconceptions and doctrines, the so-called "homeward trend"[252] should, therefore, be avoided in any case, in order to ensure autonomous interpretation.[253] In a certain way, as it was mentioned by professor Flechtner, finding a gap in CISG concerning the available remedies for a change of circumstances, and filling this gap by UNIDROIT Principles as supposedly general principles on which CISG is based, represents a homeward trend "at its corrosive worst."[254] Since I am not competent to say whether UNIDROIT Principles favor more civilian solutions over common law concepts, and in that sense whether their use represents a homeward trend as it was argued by professor Flechtner, in my view the reason why finding a gap in Convention's remedies to resolve the issue of hardship is contrary to the mandate to have regard to international character in interpretation of the Convention is that this approach adopts the rules of an external instrument which is not binding for the CISG contracting states and imposes upon the parties rules that the Convention's

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[249] Schwenzer, 'Art 7' (n 120)., p. 123.
[250] *Frozen Pork Case* [2005] Bundesgerichtshof VIII ZR 67/04 CISG-online 999.; Peter Schlechtriem and Ingeborg H Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford ; New York : Oxford University Press, 2010)., p. 123.
[251] ibid.
[252] Flechtner (n 2)., p. 99. Homeward trend does not mean only interpreting the Convention according to domestic concepts and doctrines, but also using such notions characteristic for a certain legal tradition. A very good example may be found exactly in different hardship rules in civil and common law countries. Common law jurisdictions are not familiar with remedies such as contract adaptation or termination by the court in case of a hardship situation, while they are common in civilian systems. Professor Flechtner pointed out that, using Article 7(2) CISG in this case, and imposing a renegotiation or contract adaptation remedy on the parties under the Convention's exemption provisions would mean forcing the contracting states of the Convention to apply a rule to which their delegations have never agreed during the diplomatic conferences and which is completely unknown and "striking" to their legal systems, despite the CISG being considered as a compromise between both traditions.
[253] Stefan Kröll, Loukas A Mistelis and Pilar Perales Viscasillas (n 106)., pp. 111, 117.
[254] Flechtner (n 2)., p. 99.

creators and contracting states which have adopted it never consented to include in the instrument. UNIDROIT Principles contain an approach to hardship which is fundamentally different that the style of Article 79 provisions and by saying that those provisions are a general principle of the Convention, the approach adopted by the contracting states is completely altered. CISG is an instrument which represents a consensus between experts and officials from different legal traditions. One of those traditions, namely common law, is not familiar with remedies of contract adaptation and the court's interference of such magnitude to alter the contractual terms. Therefore, CISG, to adopt solutions which are acceptable to all systems, did not include contract adaptation as a remedy under Article 79, but it chose another approach, and that is the one of including hardship in its scope but exempting the disadvantaged party from liability, instead of apportioning the risk of changed circumstances between the parties. It might not be common for other uniform law instruments, which do not even have a binding force, to provide such a remedy for a hardship scenario, which has sometimes been used as an argument why hardship should be considered as excluded from the Convention,[255] but this does not mean that apportioning consequences of hardship is the only approach adopted in international commercial law, but also the approach adopted by CISG, which excludes liability of the party in hardship. This is not only approach of CISG, but as it has been demonstrated by the provisions of Italian contract law, also an approach to which some domestic systems have resorted.[256] Moreover, Article 79(5) CISG expressly enables parties to exercise any other remedy available under the Convention, except for claiming damages, in case of changed circumstances, which leaves termination, or avoidance still available for them.

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[255] Petsche (n 3)., p. 168.
[256] § 1467 Codice Civile allows the disadvantaged party, if all requirements for hardship are met, to terminate the contract. *See* Giorgio Cian, *Codice Civile e Leggi Collegate* (Seconda Edizione, Wolters Kluwer 2016), § 1467.

It has been suggested by some scholars that excluding hardship from the CISG[257] is an approach to this issue which provides the highest level of uniformity, and therefore a desirable result.[258] According to this view, because a number or a "vast majority of courts"[259] have accepted only a defense of impossibility of performance under Article 79 CISG, applying this provision to situations of hardship would mean a departure from the existing judicial practice.[260] To the contrary, it must be noted that, even if there was any such departure from the existing judicial practice,[261] that would not mean breaking or applying the Convention contrary to the mandate of Article 7(1). This is because "uniformity does not mean that the Convention should be frozen in time and independent of evolving circumstances."[262] The usages of particular trades and industries are changing over years and using uniformity as a reason not to adapt the interpretation of the Convention's provisions to these changes contradicts the recognized[263] importance of adapting the Convention to evolution of international trade.[264]

Therefore, interpretation of Article 79 CISG provides both an approach to hardship which is in line with developments of international trade and the mandate of Article 7(1) CISG, to interpret the Convention in a manner which gives regard to its international character and promotes uniformity in its application.

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[257] When referring to exclusion of hardship under the Convention, it is to be understood as the Convention preempts any other domestic law in this area, but does not provide a solution for hardship, i.e. impediments falling short of impossibility cannot excuse the disadvantaged party from liability for damages.

[258] Markus Petsche, 'Hardship under the UN Convention on the International Sale of Goods (CISG)' (2015) 19 Vindobona Law Journal 147, p.

[259] ibid., p. 163.

[260] ibid.

[261] There is not a large number of court and arbitral decisions which dealt with situations of changed circumstances under CISG, and among the reported decisions published in the relevant databases on CISG case law, even the courts which have rejected parties' defenses on the basis of a hardship which rendered their performance excessively difficult or onerous, there is a number of them in which courts expressly recognized hardship as a part of Article 79 CISG, but simply rejected the party's claim because the other requirements, such as foreseeability or unavoidability were not met.

[262] Stefan Kröll, Loukas A Mistelis and Pilar Perales Viscasillas (n 106)., p. 116. Original quotation from: Jernej Sekolec, 'Digest of Case Law on the UN Sales Convention: The Combined Wisdom of Judges and Arbitrators Promoting Uniform Interpretation of the Convention' in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention : Papers of the Pittsburgh Conference* (2004), p. 2.

[264] Stefan Kröll, Loukas A Mistelis and Pilar Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)* (Beck and Hart Publishing 2011)., p. 116.

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3.5. Differentiating *Force Majeure,* Economic Impossibility and Hardship

"The days of the old Roman notion of "impossibility" are gone."[265] In modern sales contracts governed by the Convention, most of the supervening events will not render performance of contract impossible, but only more or less burdensome or onerous for the disadvantaged party.[266] Other than this reason, it is sometimes challenging for the court or tribunal to draw a clear line between impossibility of performance and such severe change of circumstances which render performance excessively onerous to decide that a party may not be excused from liability for damages under Article 79 CISG just because the impediment falls short of total impossibility. In fact, in modern commercial transactions situations of real impossibility of performance are becoming pretty rare, and the scenario which usually comes into play instead of such total impossibility is excessive onerousness, "unaffordability,"[267] or economic impossibility.[268] In other words, the suggestion is to apply remedies for hardship up to a certain threshold or percentage of cost increase, after which the court or tribunal should apply the remedies designed for *force majeure.*[269]

Although there are suggestions to apply different remedies for these concepts, this does not resolve the problem of determining which situation exactly deserves to be qualified as hardship, i.e. where is the line above which the performance of contract becomes considered as economically impossible, and stops being excessively onerous. The second problem with the proposed solution of different remedies being applied to those situations is that, as discussed in 2.2.4., UNIDROIT Principles and other uniform (soft law) instruments should not be directly used to supplement the CISG and unnecessarily broaden its scope.

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[265] Schwenzer (n 31), p. 725.
[266] ibid., p. 725.
[267] Brunner (n 5), p. 213.
[268] Ingeborg Schwenzer (n 247)., p. 1076.
[269] Brunner (n 5), pp. 220-222.

What is especially difficult to determine is not the difference between impossibility and hardship, but the difference between so-called unaffordability or economic impossibility and regular hardship. It must be borne in mind that percentage of cost increase or decrease, or change of market price is not the only factor which must be considered when drawing such distinction. Therefore, there cannot be a fixed percentage determined which the court would consider as a benchmark to decide whether a situation deserves to be qualified as hardship or unaffordability (economic impossibility) and consequently apply different remedies according to this proposal.

On the other hand, if we consider that hardship, along with any other type of *force majeure* (such as impossibility) falls within the scope of Article 79 CISG and has to be treated the same way, i.e. with same remedies applicable as impossibility (which is acceptable to both civilian and common lawyers), there is no need to draw such distinctions, and saves the application of Article 79 CISG from very different practices of domestic courts. Of course, there has to be a threshold which is to be determined by judicial and arbitral practice, which must be considered as a requirement for allowing the party to invoke a hardship situation, along with all other conditions of Article 79 CISG.

The reason why it is difficult to draw a clear line between changed economic circumstances which could exempt the party from liability and those which would only trigger the obligation to renegotiate is that, when we speak of economic impossibility, we cannot speak of a duty which *de facto* cannot be performed. It can be performed, but at a price or cost which is not reasonable for the party. Since this is a subjective criterion the threshold of what is or is not reasonable for each party will vary, depending on all circumstances of the case, and naturally, the jurisdiction in which the case is being decided. This is not because the courts would necessarily always try to get help from their domestic doctrines, but also because they simply have a wide discretion in determining what is the appropriate benchmark, and little case

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law to rely upon for a proper autonomous interpretation. Therefore, in some circumstances the court may decide that a threshold of 300% does not constitute either hardship or economic impossibility (assuming that this qualifies as traditional *force majeure*), and in other it might find a price increase of 70% enough to exempt the non-performing party from liability for damages. In addition, we cannot forget that the Convention does not provide any rule whatsoever for contract adaptation or termination, which is known only to civilian systems, and in my view, saying that hardship falls within the scope of Article 79 CISG and qualifies as an impediment, but that a different remedy must be applied is not in line with express provisions of CISG which clearly provide for a remedy if an impediment obstructs performance – and that remedy is exemption from liability for damages (if all requirements are met). In the end, the line between (economic) impossibility and hardship can always be drawn, more or less successfully, but in my view, this difference between impossibility and hardship should not justify introducing a set of remedies to the Convention's text which the drafters of the Convention never agreed upon, by virtue of external principles or sources of soft law, such as UPICC, PECL or DCFR whose provisions would directly replace the relief provided by Article 79 CISG. After all, hardship is a subcategory of *force majeure,* and an approach which provides the same relief for both impediments is not unknown to international commercial or domestic law.[270]

3.6. Convention's Remedies as an Appropriate Mechanism for Hardship

It is accepted by the part of legal doctrine that Convention's system of remedies is sufficient to provide a relief to the disadvantaged party who is faced not only with impossibility

[270] A good illustration of this rule can be found in § 1467 (Italian) Codice Civile which provides that the disadvantaged party, in case the performance of contract has become excessively onerous after the conclusion of contract due to an extraordinary unpredictable event, has the right to terminate the contract. The other party may keep the contract in force by offering to modify the terms to changed circumstances. The same rules are adopted by Articles 478-480 Brazilian Civil Code and Article 1198 Argentinian Civil Code. *See* ibid., p. 402.

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of performance, but also with changed circumstances.[271] This conclusion is in line with solutions provided for hardship situations according to general principles of law, which know of three different approaches to a situation of changed circumstances.[272] The first is to expect the disadvantaged party to perform in any situation which falls short of impossibility, the second is to appropriate the risks of hardship between the parties and introduce a remedy of contract adaptation and finally, third solution is to exempt the party from liability, and/or to enable it to terminate the contract when the performance becomes excessively onerous.[273] In line with mandate of Article 7 CISG, to interpret convention with regard to its international character and uniformity, Article 79 CISG could be best interpreted in a way which is acceptable to parties and courts from both systems. This means to interpret Article 79 CISG as exhaustively governing the hardship situation and providing a remedy available to the parties, which is exemption from liability.

For example, buyer and seller conclude a contract for the delivery goods which are usually obtained by the seller at a market price for a specifically determined, fixed contract price.[274] After the contract is concluded, and before the delivery of goods to the seller, the market price of goods rises for 200%, which makes the transaction for the buyer a complete loss and additionally negatively impacts its financial stability and the possibility to meet its obligations towards other clients who might be buying the same goods from the seller. Now in

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[271] Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29).; Flechtner (n 2).
[272] Brunner (n 5), p. 392.
[273] ibid.
[274] This factor may play a role in situations of hardship, because the changed circumstances differently influence the parties' positions, depending also on their suppliers and price for which the re-seller obtains the goods. For example, if the goods are also produced by the seller, the rise of market price might favor its position and be a motivation for an efficient breach of contract, i.e. to repudiate the contract with the buyer and decide to deliver the goods to a third party, which would constitute a fundamental breach under Article 25 CISG. In a hypothetical scenario where the seller agrees to supply the buyer with 20.000 bottles of wine of extraordinary quality, and the market price of wine rises for 100% due to an extremely bad harvest which resulted in very low quantities available in the market, it will not be in a hardship situation which would entitle it to non-performance and exemption from liability. The seller will not itself in a situation of changed circumstances which would excuse it from non-performance because its fulfillment of contractual promise did not become excessively onerous or difficult, it just lost the opportunity to profit from an efficient breach of contract and the rise of market price.

this situation, one option for the seller is to offer the delivery of goods at a price which is to be adapted to the changed circumstances. Since there is a general duty of good faith applicable to the parties conduct in contract performance, the buyer might be expected to accept the delivery of goods under different contract terms, especially considering the fact that there might be other buyers in very similar positions who all expect their goods to be delivered from the seller, which the seller actually is not in a position to do unless they renegotiate the contract and in that way cooperate to make performance reasonably possible. If the buyer does not accept different terms, seller will simply not deliver the goods (repudiate the contract). The buyer would most likely sue for damages for non-performance (under the provisions of fundamental breach of contract) or ask for specific performance.[275] In either of these scenarios, if the court finds that seller was indeed caught by the excusable hardship situation, it would exempt it from liability. In this case, the seller would be exempt from liability, which would have the same effects as a judicial termination of contract on a specified date after renegotiations have failed. In line with that, if the seller still wants to keep the contract alive, it can file a counterclaim or request the payment of price under different (offered) terms. The outcome of this claim would, on the other hand, depend on whether the court finds that the refusal of buyer to accept the different contract terms constitutes a fundamental breach of contract,[276] which is, admittedly, less likely, but depends on all circumstances, especially severity of hardship.

Additionally, since it is arguable whether the duty of good faith as a general principle governing the parties' conduct and performance of contract comprises a specific duty to renegotiate the contract in case of changed circumstances, the parties' duty to mitigate damages under Article 77 CISG has been mentioned as supporting the claim that CISG contains a sufficient remedial mechanism to deal with hardship within the Convention itself.[277] The duty

[275] Schwenzer (n 31), p. 724.
[276] ibid.
[277] ibid.

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to mitigate damages is also recognized as one of the general principles underlying the CISG, but the failure to act in conformity with this in principle does not in itself cause sanctions to the breaching party.[278] Article 77 CISG orders the non-breaching party to mitigate any damages by undertaking measures which are reasonable in given circumstances, or otherwise it loses the right to claim damages in the amount they could have been avoided by such measures. The party does not have to undertake measures which are not reasonable in the given circumstances or are considered extraordinary, but it cannot passively wait for the contract to be broken and claim damages which it could have avoided.[279] Therefore, if the situation which renders the party's performance excessively onerous is reasonably considered to be a cause of damages, the promisee can be expected, under Article 77, to undertake reasonable measures to reduce and avoid those damages, which may very well include its duty to accept just and reasonably changed terms of agreement with the promisor, in accordance with the changed (economic) situation. Without going into any further discussion about limitations on damages in the Convention, a claim for damages arising out of a breach of contract governed by CISG is intended to put the non-breaching party in the same pecuniary position it would have been in had the contract been properly performed.[280] In other words, by accepting the principle of full compensation as a limitation for damages, CISG protects expectation interest of the non-breaching party, which usually includes also reliance interest.[281] The principle of full compensation, arising out of the text of Article 74 CISG, is further limited by the parties' duty to mitigate damages which is embodies in the mentioned Article 77 CISG. The measures which must be made by the non-breaching party to avoid damages which could be prevented are

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[278] 'The 1980 United Nations Convention on Contracts for the International Sale of Goods - Article 77 Mitigation: No Recovery for Avoidable Loss', *International Encyclopaedia of Laws - Contracts* (Kluwer Law International 2000) 1, p. 157.
[279] Stefan Kröll, Loukas A Mistelis and Pilar Perales Viscasillas, 'Art. 77', *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary* (CH Beck, Hart Publishing 2011), p. 1037.
[280] Article 74 CISG.
[281] Djakhongir Saidov, 'Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods' (2001), *supra* fn. 17.

subject to the standard of reasonableness. The measure of mitigation of loss has been usually described as reasonable if, considering all circumstances, the measure could have been justifiably expected from the party who is acting in good faith.[282] In this situation, a problem which would appear before the court or tribunal deciding whether a hardship situation should exempt the party from liability (or grant relief for damages in a counterclaim if it wants to keep the contract alive), is whether the duty to mitigate damages arising out of Article 77 CISG, specified as an expected measure to prevent unnecessary damages by the party's good faith conduct, can be expected from the non-breaching party under the particular circumstances. This does not mean there is a duty to renegotiate the contract under the CISG, but the non-breaching party (promisee) might be required to accept an offer to perform under different contract terms in a situation of hardship which strikes the other party, as a reasonable good faith measure to avoid unnecessary damages. Such duty to act in good faith upon the initiative of the disadvantaged party who wants to keep the contract alive is different from introducing a duty to renegotiate the contract before applying to the court or tribunal to either adapt it to changed circumstances or terminate it on a specified date, first, because it provides a solution which is in line with text of Article 79 CISG and avoids unnecessary use of external sources for which it is questionable whether they can and should be used to supplement the CISG and second, because it still leaves enough room for the parties to reach an acceptable solution by offering and accepting different contract terms in good faith.

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[282] ibid., *supra* fn. 239.

Conclusion

The parties in modern international sales contracts governed by the Convention are sometimes faced with significantly different impediments than those which frequently occurred 1980s, when the Convention was adopted. Those different types of impediments to performance do not always render it completely impossible for the promisor the perform its obligation, but impose excessive burden on the promisor who should not be expected to fulfill the obligation simply because the supervening event fall short of complete impossibility. Furthermore, the supervening events which interfere with parties' performances are sometimes very hardly defined, or precisely determined as constituting *force majeure* or hardship and consequently, it is often impossible to clearly determine whether such an event renders performance completely impossible or excessively onerous.[283] For these reasons, many authors find that exemption provisions of CISG allow such changed circumstances to be qualified as impediments under Article 79 CISG, in order to provide a relief to the disadvantaged party who is faced with an unpredictable, unforeseeable and unavoidable situation of excessive onerousness and should not be reasonably expected to perform the contract.[284]

Article 79 CISG, which provides conditions for the exemption from liability for damages, is a rare example of an instrument which uses the term impediment for a situation which, under certain conditions, may excuse the party from non-performance. This term must be interpreted autonomously, in accordance with the order of Article 7 CISG, without any concepts borrowed from domestic law or doctrines. Some authors have interpreted Article 79 CISG as implicitly excluding hardship from the Convention's scope of application (although preempting the application of national law in this regard and preventing the parallelism of sets of rules).[285] Other authors and courts have considered hardship to be covered by the term impediment but

[283] Schwenzer, 'Force Majeure and Hardship in International Sales Contracts Wider Perspectives' (n 29), p. 725.
[284] Enderlein and Maskow (n 1), p. 324.
[285] Petsche (n 3).

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found a gap with respect to available remedies and held UNIDROIT Principles to constitute general principles of the CISG which are to be used to fill this gap,[286] or in absence of those principles, by the applicable rules of domestic law.[287] On the other hand, some scholars partly agree with the Belgian Supreme Court in that hardship is included in the Convention's exemption provisions, but the gap-filling mechanism employed by the Court was considered unnecessary. This paper has attempted to provide an overview of those different approaches and explain the reasons why a situation of changed economic circumstances should be considered as an excuse for the party whose performance has become more onerous.

General principles of law and some domestic legal systems accept the exemption the party in hardship from liability for damages, and this is an approach which might be taken towards hardship notwithstanding different trends in soft law instruments such as UNIDROIT Principles. Second, it is in line with the system of remedies which are expressly provided by the Convention, to use them to resolve a situation which falls under the scope of Article 79 CISG, instead of using external sources to resolve problems which are dealt with by the Convention's rule. This view is also backed up by the provision of Article 7(1) CISG, which orders the courts and tribunals to interpret the Convention with regard to its international character, promote uniformity in its application and good faith in international trade. However, it remains to be seen from real CISG cases decided by courts and tribunals what exact threshold should be applied to a hardship situation to qualify as an impediment under Article 79 CISG, because it should not provide an easy excuse for the breaching party, but also should not impose a duty to perform when that would be unreasonable. Until the decision in *Scafom International v. Lorraine Tubes S.A.*, scholars have mostly suggested thresholds of more than 100% or even 200% of market rises or falls, and some courts have refused to excuse the parties even with unexpected fluctuations of prices of 300%. On the other hand, the court in *Scafom International*

[286] *Scafom International v. Lorraine Tubes S.A.* (n 65).
[287] *Scafom International BV & Orion Metal BVBA v. Exma* (n 197).

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v. Lorraine Tubes S.A. has held a price increase of 70% to be sufficient for an exemption. Although the exact threshold is yet to be crystallized through court decisions, dealing with a hardship situation entirely by the Convention's provisions provides a highest level of legal certainty for the parties and achieves uniformity in the Convention's application, especially because it is acceptable both to common lawyers and practitioners from civilian systems.

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