



**THE HARDSHIP GAP IN THE CONTRACTS  
OF INTERNATIONAL SALES OF GOODS**

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## 1. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) is an agreement between different participating States, that establishes uniform rules for international contracts for sale of goods. The main goal from the drafters was to create security between the contracting parties, promoting development in international trade<sup>1</sup>.

As of 26 September 2014, UNCITRAL reports that 83 States have adopted the CISG<sup>2</sup>. Despite of its success, like any other regulation, it leaves gaps for different interpretations in some articles. This paper will discuss the CISG provision about hardship in contracts governed by this Convention.

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<sup>1</sup> Ingebord Schwenzer ET AL. INTERNATIONAL SALES LAW: A GUIDE TO THE CISG 5 (Norm Page 2d ed., Hart Publishing 2012) (2007)

<sup>2</sup> Albert H. Kritzer, *CISG: Table of Contracting States* (Oct 2, 2014), <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>

## 2- The idea of Hardship in Domestic Contracts

The main idea of hardship in contracts is brought by an unforeseeable circumstance that impedes the fulfillment of legal obligation, and exempts a person or institution from full or partial performance to avoid a disproportionate burden.

The concept of hardship is accepted in most of the juridical systems. It is hard to come with a precise definition, once its acceptability, requirement, and exemptions are differently understood among States, with different historical developments.

Despite the different set of rules brought by local legislators in every jurisdiction, (as example: doctrine of *imprévision*, *cas fortuit*, *force majeure*, etc), they have in common the will to assure that any party gets financially harmed, as long as they had acted in good faith in the moment the contract was celebrated.

Note that although a large number of legal systems understand that an unforeseeable situation can occur, causing a change in the landscape of a contract, the requirements for

application are extended in a manner that doesn't turn easy to a party to invoke it, causing chain.

Examples of doctrines are provided bellow:

a) Articles 1147 and 1148 CC of France express termination of contracts is possible only in cases of *force majeure*.

b) English law has started from a position of extreme strictness, but after strong cases like Taylor v Caldwell<sup>3</sup>, was understood that frustration could be invoked, as long as an event "radically different" would happen. The restriction is severe and cases based in economic fluctuations are not strong.

c) German law thus offers codified powers to the judge to adapt or terminate the contract which has become excessively difficult for parties to perform or which has become pointless for one party<sup>4</sup>.

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<sup>3</sup> Taylor (plaintiff) and Cadwell (defendant), entered in a contract agreeing that the plaintiff would rent a concert hall for a music performance. However, the hall was destroyed by fire. Once there was fault of neither party, and the scope of the contract was lost, the Court released liability of the plaintiff.

<sup>4</sup> Velimir Živković, HARDSHIP IN FRENCH, ENGLISH AND GERMAN LAW (2012), available at: [http://www.academia.edu/3152183/Hardship\\_in\\_French\\_English\\_and\\_German\\_Law](http://www.academia.edu/3152183/Hardship_in_French_English_and_German_Law)

### 3- Hardship in Contracts governed by the CISG

As per showed in the last paragraph, we come to a conclusion that contracting with different States could cause insecurity for both parties. There was a need of a uniform international regulation that would give us the right of fair play. However, to achieve this goal it would be necessary not to refer to any specific domestic legal root.

That being said, we can say this is the main role of CISG, to promote uniformity and security, and for that, it is considered for some interpreters the best developed regulation for international trade<sup>5</sup>.

CISG trustworthy comes from the principle of *Pacta Sunt Servanda*, “agreements must be kept”, presented by the autonomy of will, the freedom to contract and a juridical security, and based on the trust of the legal system. It emphasis that the clauses in the private contracts “make law” between the parties.

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<sup>5</sup> Ingebord Schwenzer ET AL. INTERNATIONAL SALES LAW: A GUIDE TO THE CISG 6 (Norm Page 2d ed., Hart Publishing 2012) (2007)

But despite its success, CISG does not constitute an exhaustive body of rules<sup>6</sup>, we still struggle to apply some dispositions. This paper will discuss only the terms of the hardship, expressed by its article 79 of the Convention, which reads in his first part:

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

We note the concern from the drafters regarding economic problems between the contracting parties, the importance of the warranty of an aimed goal, and their will to not exclude it from the regulation.

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<sup>6</sup> Franco Ferrari & Marco Torsello. INTERNATIONAL SALES LAW – CISG IN A NUTSHELL 18 (West Nutshell ed., West Academic Publishing) (June 2, 2014)

But this article also brings the Principle of *Rebus Sic Standibus*, trying to reach a contractual balance, equality between parties and contemplating the possibility of an alteration of an agreement when the circumstances that existed while its formation has become different in the moment of its execution, due to an unforeseeable circumstance, harming one party financially.

#### **4 – Overview of Hardship Requirements in the CISG**

This topic will discuss the requirements listed in article 79 of the CISG. Will be noticed that the elasticity in the meaning of words used will give elasticity of its interpretation.

##### **4.1 - Good Faith**

Article 7(1) of CISG states that:

*“In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith*

*in international trade” and is a principle for interpreting provisions and a general requirement.”*

It is known that article 79 of the CISG does not express in his wording this principle, but the author of this paper understand it is, because morality holds hands with hardship. In this interpretation good faith could not have been left aside of this topic.

Although good faith is a complex and extended subject, it is easy to affirm that we cannot corroborate hardship without considering the maliciousness of the contracting parties. The proof of good faith might be the difference in being excused of a performance or not.

The words we have that approach this Principle are: fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behavior, a common ethical sense, a spirit of solidarity, community standards of fairness<sup>7</sup>. The party who invokes hardship must be able to show these meanings, when alleging that an event happened and the performance become burdensome.

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<sup>7</sup> H. K. Lücke., GOOD FAITH AND CONTRACTUAL PERFORMANCE 160 (P. Finn (d.), The Law Book Company Limited) (1987)

It is valid to remember once again, that based on the principle of *Pacta Sunt Servanda*, contracts should not be modified without a strong reason, otherwise it would bring back the insecurity making agreements with different contract States. Keep in mind that contracts are elaborated according to the will and interest of both parties, and wanting to be excused of liability just because the contract is not convenient anymore means evidence of lack of good faith.

#### **4.2 -The Failure Due to an Impediment Beyond Control**

One of the conditions stated by article 79(1) was a failure of performance due to an impediment beyond the party's control. Although the wording is clear, it doesn't tell us how to apply them, in the sense of giving us a cross-line where the impediment could be controlled or not.

The commenters have seen this disposition as something really dramatic due to the broad idea of how could a party create a detour to the impediment.

Another question that might arise is regarding the condition of timing. When was the specific moment that the impediment arose, and also when it had become evident to the party.

It is important to highlight that most of the juridical systems use the term “circumstance”, other than “impediment”(beyond control) , as listed in the article 79. This wording is more flexible and allows a wider possibility of concepts. Some commenters read “impediment” as “impossibility”, narrowing a lot the idea of hardship, to the point that they believe that severe market price increase of the good does not constitutes a reason for the party to be excused of liability, others are more flexible and assume a simple loss of margin profit in a sales contract is already a reason to be heard in court.<sup>8</sup>

Another point to be mentioned is that the choice of the word “impediment” wider the possibility of chances to invoke hardship. This provision expresses that cases of *force majeure* are not the only one acceptable, but so are those where the performance is still possible.

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<sup>8</sup> These point of views will be better discussed along this paper and more details will be given.

### 4.3 – Unforeseen Impediment

Article 79 (1) also states as a requirement to the parties that they “could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract”.

In the case of *force majeure* might be easier to determine the impediment could not have been expected, and the party in question can proclaim that nothing could had been done about it. However, in the majority of the cases what we have is a matter opened to opinion, where one party to the contract believes<sup>9</sup> that an impediment could not be expected and made impractical to move forward with the contractual obligations<sup>10</sup>.

Nevertheless this “unforeseeability” can mean something really extendable, we can narrow it if we do a cross-examination about the likelihood of the circumstance change.

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<sup>9</sup> Underlined by the author.,

<sup>10</sup> Kat Kadian-Baumeyer, *Changed Circumstances in Contracts: Possibility, Practicality & Effects*, Chapter 13, Lesson 2 (2015), available at

Another point to be said is about the time of the conclusion of the contract. Accordingly to most interpreters it can be irrelevant in cases of *Force Majeure*. In other cases of hardship, however, it is argued that the changed circumstances must have occurred after the conclusion of the contract<sup>11</sup>.

#### **4.4 – Impossibility to Avoid or Overcome**

Article 79(1) continues saying the impediment couldn't have been avoided or overcome. To say it could not be avoided, means that the party should have done everything to prevent the impediment. But, once aware of it, need to act in all the ways possible to avoid its consequences.

Like the term foreseeability, the idea of how the party could have overcome a situation is extended and subjected to personal approaches.

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<sup>11</sup> Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts* (2008), available at: <http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf>

## 5 – How to Interpret Article 79 of the CISG

The purpose of interpreting the law is to get the closest possible to the thoughts of the legislator, therefore is not difficult the subject written in the statutory be constant controversial nor their interpreters feel confused about the wording used.

Among the methods to understand the norm we have the analyse of the wording, which is composed by language and grammar. Moreover, we also assay its scope<sup>12</sup>.

The idea we have left from article 79 of CISG is that the legislators were concerned in protecting one of the parties in case of difficult times, nevertheless not leaving clear the restrictions of its requirements.

We end up being left with a variety of questions arrised by the wording of article 79 of the CISG. How to reach an agreement in the wording left in this article? When should be

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<sup>12</sup> It is vast the study of interpretation of norms. This paper, especially in this paragraph, will not go through all of them, and the examples given were used to introduce the subject.

considered reasonable? Impediment beyond control needs to be impossible or just burdensome for a party? At what point an unforeseen circumstance or profit loss encumber the purpose of entering the contract? At what point was the equilibrium of the contract changed? When to say it is unforeseen even after having calculated a risk? Should the ruler alter the terms of the contract or avoid it? These will be discussed in this topic of this paper.

### **5.1 – Purpose of the Contract**

First and foremost, let's start by commenting the importance of mentioning (or not) the purpose of the contract<sup>13</sup>.

In the coronation case, that set forth the doctrine of frustration, named *Krell v. Henry*, we had explicit the will of CS Henry in renting the flat of Paul Krell to watch the coronation procession of Edward VII, however, the king felt ill and the event did not take place at the date supposed to

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<sup>13</sup> Note that showing the purpose of the contract is not necessarily an advantage for the parties. When signing a contract, any or both of the parties might not want to know what the purpose is, depending on the convenience.

happen, resting assured that the aim of the contract ended defeated to Mr. Krell. The court understood that the contract should be voided in the ground of frustration of purpose<sup>1415</sup>.

In this particular case was too evident the objective of both parties and when it got frustrated. But not always the goal of the contracting parties are expressed in their agreements, and it is at this point, about what the parties aimed, that will increase the chances to know what both parties may expect, or at least hope, about their chances in a case based on hardship. Knowing what the parties wanted since the beginning, a decision maker can give a ruling based on strong facts, not only on the wording of article 79.

## **5.2 – Elasticity of Vocabulary**

Whereas the flexibility in the language used is very vast, different approaches are found in case law. We will present now three similar cases and discuss after the reasoning of each court regarding their approach to art 79 CISG:

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<sup>14</sup> Krell brought suit against Henry to recover the remaining balance, and Henry countersued to recover his deposit and put reasoning.

<sup>15</sup> Krell v Henry. 2 KB 740 (England 1903). Also available at: [https://en.wikipedia.org/wiki/Krell\\_v\\_Henry](https://en.wikipedia.org/wiki/Krell_v_Henry)

First case (hereinafter: Case A)<sup>16</sup>: Scafom International, buyer, and Lorraine Tubes, seller, had concluded an agreement for the sale of steel tubes. After the conclusion of the contract and before delivery, the price of steel unexpectedly rose by about 70%. The seller tried to renegotiate a higher contract price, but the buyer refused flat-out and insisted on delivery of the goods at the price agreed upon. The judges on appeal found that these unforeseen increases in the price gave rise to a serious imbalance, considered economic duress an “impediment” and exempt the obligor from liability to pay damages.

In the second case (hereinafter: Case B)<sup>17</sup>, an Italian seller Nuova Fucinati, S.p.A. failed to deliver ferrochrome to the Swedish buyer, Fondmetall International, claimed avoidance of the contract on the ground supervening excessive onerousness caused by market change price, since the price of the goods after the conclusion of the contract and before its delivery had increased 30%. The court ruled that if article 79 from CISG was to be applied, it would only provide release from a duty made impossible by a supervening impediment.

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<sup>16</sup> Scafom International BV v. Lorraine Tubes S.A.S. Court of Cassation, Supreme Court (Belgium 19 June 2009), available at: <http://cisgw3.law.pace.edu/cases/090619b1.html>

<sup>17</sup> Nuova Fucinati v. Fondmetall International. District Court Monza (Italy 14 January 1993), available at: <http://cisgw3.law.pace.edu/cases/930114i3.html>

Third Case (herein after: Case C)<sup>18</sup>, an English buyer, plaintiff, and a German seller, defendant, entered into a contract for the supply of iron-molybdenum. The goods were never delivered to the buyer, as the seller did not itself receive delivery of the goods from its own Chinese supplier. After expiry of an additional period of time for delivery, the buyer concluded a substitute transaction with a third party and sued the seller for the difference between the price paid and the price under the contract. The seller sought to be excused from liability under article 79 of the CISG because the market price for the contract item had risen by 300%. The court held that it was incumbent upon the seller to bear the risk of increasing market prices, and that only if goods of an equal or similar quality were no longer available on the market would the seller be exempted from liability.

### **5.2.1 – Meaning of impediment**

Coming back to our analyses, “impediment” is the first ambivalent word we will discuss

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<sup>18</sup> Iron molybdenum case. Appellate Court Hamburg (Germany 28 February 1997), available at: <http://cisgw3.law.pace.edu/cases/970228g1.html>

of article 79(1) of the CISG. According to Professor Alejandro M. Garro<sup>19</sup>:

*“Concerns for the word “impediment” employed in Article 79 and its proper interpretation have been voiced by commentators from a broad spectrum of legal systems. According to one scholarly opinion the word “impediment” is “vague and imprecise,” another pointed to several “contradictions and ambiguities” in the use of that term, and a third characterized the word “impediment” as a “chameleon-like” example of “superficial harmony which merely mutes a deeper discord.”*

Per the cases listed it is acceptable to say that is totally left to the courts to decide whether the problem faced by a party can be considered impeded or a mere hiccup. The decisions made so far brings deformity about the requisite to be qualified under this word.

In the case A, the fact of the price of the good increased 70% turned the contract “extremely onerous”; the difference in the price range was enough to stablish a “serious imbalance” and renegotiation was found to be necessary. In the case B, the court ruled that, if

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<sup>19</sup> Professor Alejandro M. Garro, CISG-AC Opinion No. 7, *Exemption of Liability for Damages under Article 79 of the CISG*, 11th meeting in Wuhan, People's Republic of China (12 October 2007). Available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>

CISG was to be applied, the market price increase of 30% would not constitute “impossibility” of performance, and release of liability under its article 79 would be denied. In the case C, judged said “Despite of the triplication of market price...an excess of the absolute limit of sacrifice is not given”, so hardship was not accepted.

After how many per cent the judge of the first case would already consider the party is impeded? After which percentage would the judge from the second case consider impossible to perform, or he would not consider at any number? For the third case what number could be consider a sacrifice? Ultimately, what does best describe impediment under art 79 (1), an uneconomical goal in the contract or the impossibility to perform it?

The AC Opinion No.7 of October 2007<sup>20</sup> in paragraph 3.1 announced that:

*“A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous (“hardship”), may qualify as an “impediment” under Article 79(1). The language of Article 79 does not expressly equate the term ‘impediment’ with an event that makes performance absolutely impossible...”*

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<sup>20</sup> See 19.

In the thoughts of another commenters:

*“The mere fact that the transaction has become less profitable is insufficient to establish frustration of purpose; the performance must become commercially valueless, which requires near total frustration”<sup>21</sup>.*

also, *“Article 79 CISG only includes impediments which must be equated with actual impossibility”<sup>22</sup>*

Paying closer attention to the case C, the judge found reasonable the seller, in his failure of performance, to pay the difference of the amount dealt in the new contract made between the buyer and a third party, sustaining that “such an impediment can be overcome by the Seller as long as there are replacement goods available on the market”. This statement brings us the vast idea about how difficult is to describe impossibility.

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<sup>21</sup> Sarah Howard Jenkins, *Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles -- A Comparative Assessment*, Tulane Law Review (1998). Available at: <http://www.cisg.law.pace.edu/cisg/biblio/jenkins.html>

<sup>22</sup> Dionysios Flambouras, *Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108*, Editorial Remarks (May 2002). Available at: <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html>

It is also remarkable is the choice of this elastic word by its drafters. It could had been used another term, such as unexpected circumstance, *force majeure*, impracticability, frustration, but they did not want interpreters to associate this terms accordingly to their legal background. Would that be possible?

### **5.2.1 – Meaning of “Reasonably Cannot Be Expected”**

Article 79 of the CISG also reads that impediments cannot reasonably be expect. Thus, one cannot find a univocal reference within this concept may be built.

War, natural disasters, market crisis, strikes, revaluation of currency of payment, problems storing the goods, and problems with shipment are examples of reasons to failure to perform, but what a medium person would not be able to expected?

An Italian text, summarizing some of the Italian cases states<sup>23</sup>:

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<sup>23</sup> Sacco, Rodolfo, & De Nova, Giorgio, *Il Contratto*, tomo secondo, p. 675 (Torino, UTET 1993)

*"As to a contract made in 1914 to last 60 years, the outbreak of a war (or better, of a certain number of wars) was foreseeable and also foreseeable was the development of aerial arms and the resort to aerial bombardments [. . .]. As to a contract made during the Second World War, the protracted duration of that war was not foreseeable, nor were the proportions of its consequences measurable."*

The cross-examination of reasonableness needs to be done in a case-to-case basis, and even in the most extreme cases like war, it might be predictable according to the presented scenario. In the same line, a profitable business in a country that faces economic endurance is sought to assume that the current hardship might affect the company in a long run, making the likability to fail to perform in current sales increase.

### **5.2.2 – Impediment v. Risk Taken**

This part of this writing aims to show another challenge brought by article 79 of the CISG, which is to find out the cross-line between what the party zone of risk is and what external circumstances to their control are. We will discuss about the courts responses to cases whether

contracts have been affected to negative market prices and the impossibility to achieve an undisputable conclusion about this point.

Accordingly to some commenters the risk of loss brought by an unforeseen frustrating event should be allocated to the "superior risk bearer".<sup>24</sup> In the case *Societe Romay AG v. SARL Behr France*<sup>25</sup>, the court of Colmar reasoned that "significant drop in prices" are not unreasonable expected, especially when the buyer was considered "an experienced professional acting in the international market," should have addressed this possibility in the contract. An award given by the Russian Federation<sup>26</sup> "a change in market conditions cannot serve as an excuse for the buyer to avoid payment for the goods." For a German Tribunal, despite of the price of the good had become more expensive, the seller just wanted to stop delivery because he "only wanted to gain profit from the increased prices."<sup>27</sup> To give one more case, we have a position of a Tribunal attesting that strikes are supposed to be considered a foreseeable risk<sup>28</sup>.

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<sup>24</sup> Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Legal Stud. 83 (1977).

<sup>25</sup> *Société Romay AG v. SARL Behr France*, Appellate Court Colmar, (France 12 June 2001). Available at: <http://cisgw3.law.pace.edu/cases/010612f1.html>

<sup>26</sup> Payment for Goods Supplied (Russia v. Germany), *Arbitrazhnaja praktika za 1996-1997 gg Moskva (Statut) No. 63* (1998), Available at: <http://cisgw3.law.pace.edu/cases/970611r1.html>.

<sup>27</sup> *Oberlandesgericht Hamburg, OLG1 U 143/95*, Provincial Court of Appeal (July 4, 1997). Available at: <http://cisgw3.law.pace.edu/cases/970704g1.html>.

<sup>28</sup> Arbitration Proceeding 155/1994 (F.R.G. v. Russ.), *Practice of the International Commercial Arbitration Court: Scientific-Practical Comments* (Moscow 1997). Available at: <http://cisgw3.law.pace.edu/cases/950316r1.html>

All these examples given reflect the idea that decision-rulers should apply article 79 of the CISG only in cases of impossibility. This follows the idea presented in the Coronation Case, where the judge supported his decision alleging that “when the party by his own contract creates a duty or charge upon himself, he is bound to make it good”. It is understood that all contracts are to be respected in order to sustain trust among the parties.

This strictness is seen in different ways for another group. For other interpreters, it is understood that facing a situation which an event happened, changing the scope of the contract, constitutes a reason to invoke hardship.

The Case A brings clearly this idea. According to the judges:

*“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.”*

*(...)The judges on appeal found that these unforeseen increases in the price gave rise to a serious imbalance which rendered the further performance of the contracts under unchanged conditions exceptionally detrimental for [Seller].”*

### **5.2.3 – Meaning of “Extremely Onerous”**

Changes of market prices of goods most of the times have not been accepted as a possibility of an impediment within article 79 (1).

The decision of Case A was very criticized because for the point of view of most decision-makers negative market developments should be an acceptable reason to release a party from liability.

According to the judges of case C:

*“The Seller is also not exempted by the fact that acquiring the goods elsewhere would have led to considerable financial loss because it would have had to pay a higher price. The Seller generally bears the risk of considerable extra expenses in connection with*

*acquiring the goods elsewhere, even the loss of transactions, as it has accepted the risk of acquiring the goods and the risk that they cannot be acquired at a certain price.”*

In the case *Langham-Hill Petroleum INC v. Southern Fuels Company* was reasoned<sup>29</sup>:

*“The normal risk of a fixed-price contract is that the market price will change. If it rises, the buyer gains at the expense of the seller (except insofar as escalator provisions give the seller some protection); if it falls, as here, the seller gains at the expense of the buyer. The whole purpose of a fixed-price contract is to allocate risk in this way.”*

Finally, in another opinion<sup>30</sup>:

*“In most cases market fluctuations are not to be considered an "impediment" under CISG Article 79, because such fluctuations are a normal risk of commercial transactions in general”.*

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<sup>29</sup> *Langham-Hill Petroleum Inc v. Southern Fuels Company*, 813 F.2d 1327, 7 Fed.R.Serv.3d 321, Nos. 86-1596(L), 86-1632, United States Court of Appeals, Fourth Circuit (1987)

<sup>30</sup> See 19

However, this opinion is also not harmonious. Although market failure defenses are seen unsympathetically, many commenters understand that if an unexpected event has happened to a point that, if predictable, the parties would have never assumed commitments and signed the contract first place. If the harmony of the contract has been ruined due an unexpected circumstance making it impractical to move forward with the contractual obligations, than the case must be heard for a possible remedy.

Nevertheless, we don't have a cross-line, a specific number in drop of profit or market increase in the price of the good, brought by CISG, that assure us a good case based on negative price market.

Opinions about a number of monetary change that can establish what is the excessively onerosity has a range between 50%<sup>31</sup> to 125%<sup>32</sup>, but once we do not have a binding word we can affirm that is totally discretionary, according to the understanding of the interpreter. Note that according to the Case A, 70% was enough to break the aim of the contract signed by the seller, but in the case C, 300% in the context presented to the court did not impact the seller's liability.

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<sup>31</sup> Comments on the *UNIDROIT Principles supra n. 2 at p. 147*

<sup>32</sup> *Christopher Brunner, Force Majeure and Hardship under General Contract Principles: Exemption for Nonperformance in International Arbitration*, Kluwer Law International (2008)

Looking at both points of view, the writer of this paper gets to the conclusion that is impossible to choose one side and take it as right. In one hand we want to make sure the security between contracting States by enforcing the principle of *Pact Sunt Servanda*, and just in cases near or absolute impossibility a court should rule differently from what was agreed. Nonetheless, when we enter in a contract agreement, we expect the best to happen. Although situations that might make us lose money might occur we cannot rely that a medium person will think throughout all that can happen to make the contract bad, becoming a bad impact to its original purpose.

It is indispensable that all claims brought to court be analyzed in a one-by-one basis taking in consideration the principle of good faith.

Note that becoming “impossible” is really difficult to happen. In the opinion of the writer of this paper, this impossibility related to change of price market would only happen in case of bankruptcy. In the other sphere, we do not want this rule to be so elastic to the point a party can act in an opportunistically manner.

#### **5.2.4 - Avoid or Overcome the Circumstance**

To be successful invoking hardship the party facing an unexpected circumstance still needs to show what they did to avoid it and also what they did to overcome it.

In the case C presented above, not only the price increase of market was relevant. Accordingly to the case, the seller made a contract to deliver iron-molybdenum to the buyer, after a problem with the supplier, the seller informed the buyer that could not delivery the good in the conformity agreed, and offered a lower quality product, which was accepted by the buyer. The seller even after many messages from the buyer, stating his need of the good because it needed to be forward to third parties, failure to deliver and offered an insignificant amount of compensation to the buyer. Was clear that in this case that after so many back-and-forth between the parties, the buyer was still willing to renegotiate qualities, prices and compensations. There were many evidences that the seller clearly wanted to be excused at a minimum cost from his liability, he blamed his suppliers and the increased price of the good. With this thought the judged ruled: "Despite of the triplication of market price that had to be paid for Chinese iron-molybdenum, an excess of the absolute limit of sacrifice is not given".

Another important point to be highlighted in that decision was the principle of good faith, mentioned by the writer of this paper as a requirement to article 79 of the CISG. Despite the latter article does not express it in writing this, rest assured its presence is mandatory.

### **6- Unidroit Principles as a Gap Filling**

According to paragraph 2 of Art. 7 of the CISG:

*“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.”*

There are different approaches whether the Unidroit Principles of International Commercial Contracts should be this “law applicable by virtue of the rules of international law” expressed by article 7 (2) of the CISG.

The first approach defends the use of Unidroit Principles. Pursuant with this theory, the Unidroit Principles represent the general international trade rules. In agreement of this point of view we have an article that reads:

*“The main idea is to preclude an easy resort to the domestic law indicted by the conflict of law rule from the forum, thus keeping the settlement of the dispute within its international legal habitat”<sup>33</sup>.*

In the Case A presented by the author, the agreement between the parties did not express they wanted to use the Unidroid Principles, but the latter was applied as the best suit for the case, although further explanations was not given by the judges.

The article 6.2.2 of the Unidroit Principles is widely explicative. It states:

*“There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and*

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<sup>33</sup> Anna Veneziano. *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court* (2010). Available at: <http://www.unidroit.org/english/publications/review/articles/2010-1-veneziano-e.pdf>

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

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

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

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

It is important to mention that this article addresses issues left by the article 79 of the CISG, giving the definition of hardship, excuses and remedies, which are expressed in article 6.2.3 of the Unidroit Principle:

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

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

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

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

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

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

We can see the easiness using this provision as an exit for lack (or elasticity) of information left by article 79 of the CISG. Nevertheless, the author of this paper defends the other point of view, which asserts that UNIDROIT Principles should not be applied, because they do not have a bidding legal force of an international treaty. In keeping with this idea, the UNIDROIT Principle have many provisions contrary to CISG, so its applicability might not be the best reference. Thinking further, if CISG came to regulate international contracts, there is no reason to go back to provisions that was found to not be specific regarding non-domestic trades.

Another fundamental point is that article 6.2.3(4)(b) in the Principles, allows the courts to adapt the contract as a form of remedy. This is highly criticized because interpreters question whether is successful to alter the previously agreement, changing the main idea of the wording of the contract.

## 7- The Role of the Decision-Maker

The Preamble of CISG reads as follows:

*“THE STATES PARTIES TO THIS CONVENTION,*

*(...) CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,*

*BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,*

*HAVE AGREED (...)”*

It is conclusive that the Convention tries to unify the law in sales of good, but in the specific article 79 this scope fails, because its wording forwards the thoughts of the interpreters to their domestic background. The mind of the individuals will be directed to the description of ambiguous words, such as good faith, reasonable, beyond control, overcome, and they all come from different legal lenses of domestic background. Even if the decision-maker tries to be

impartial, he will have the idea of these concepts as the one he learned in his academic law school.

As reported by Dennis Tallon:

*"The judge will have a natural tendency to refer to similar concepts in his own law. Thus, the judge of a socialist country will have a restrictive approach to force majeure... On the contrary a common lawyer will feel inclined to refer to the more flexible notions of frustration and impracticability. In the Roman-German system, the judge will reason in terms of force majeure..."*<sup>34</sup>.

If one party can choose an arbitrator, better be one that comes from the same common law that might be suitable for him.

The elastic wording inserted in the article 79 is not the only challenge decision-makers encounter. This latter article also lead us to article 7(2), which we can affirm is not an aid. It responds the ambiguity of article 79 with another ambiguity. It does not settle about what

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<sup>34</sup> Denis Tallon, *COMMENTARY ON INTERNATIONAL SALES LAW, ARTICLE 79* (Giuffrè Editore, S.p.A) (1987)

comparative law best suits in these cases, having opinions suggesting that domestic law is also a valid option<sup>35</sup>.

Notwithstanding the difficulty of the norm itself, another questions may arise while ruling, such as: How many other companies can get affected if excusing a party (domino effect)? Should the profit margin be relevant or impossibility of performance is what really counts? Is the intent of the parties important to a point that whenever the goal is not reached the contract is not good anymore? Does the intent mean more than the document wording? How to appraise the economic situation of the parties? Is it plausible to compare the business economy of a party with the economy of business of same sector elsewhere? Should the wording of the contract be protected or the economy of a State?

When it comes to the remedies no direction is also given. Any decision taken will be polemic according to the point of view of interpreters.

#### 1) Avoidance

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<sup>35</sup> Anja Carlsen, Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG is the Governing Law? (Date not shown). Available at: <http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html>

Article 4 states:

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

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

According to this provision, is understood for some scholars that releasing a party from his obligation, means that the contract is being discharged. Here two points need to be mentioned: CISG never expressed that the validity of the contract should be studied; also, doing so, to determine if a contract fulfill the requisites of validity, you will have to pay attention to the domestic law requirements.

## 2) Adaption to the new reality

CISG neither recite that a judge can adapt a contract. There are debates weather can be altered the wording of a contract that is an outcome of a long process of negotiation<sup>36</sup>.

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<sup>36</sup> Dražen Peħar, INTERNATIONAL LAW OF INTERPRETATION: AN AMBIGUOUS RESPONSE TO AMBIGUITY, Journal of Diplomatic Language (ed. H. Bashor, e-journal) (June 2006)

## **8– The Efficient Remedy**

Whenever starting a new business relation we always look forward to the best outcome. The parties are happy aiming profit, and this expectation many times make drafters skip considering possible problems that may occur. As per all said so far, we can assure that the best remedy is the prevention in the case of hardship, taking in consideration that the provision expressed in article 79 is totally discretionary about its concept, whether to invoke it and how to proceed about it.

The article entails that “A party is not liable...”, but it does not mention “what is next”. It does not remark if the contract should be terminated, suspended for a limited time, if the decision-maker should alter it for the new reality presented or even give parties new obligations. In cases regarding hardship based on contracts governed by the CISG, we do not really know what to expect, due to the widely possibilities of its interpretation and even for the lack of reasoning in many decisions.

In this line, the parties shall play safe. It is better for them to agree upon the details than a judge or arbitrator.

Do you want a hardship clause in your contract? Is it convenient for you? The answer not necessarily can be yes. The following ideas listed below are related to hardship:

1) It is relevant to determine what the goals of the contract are, what both parties expect with it. It can further clarify misunderstandings and increase the change of renegotiation.

2) Article 6 from the CISG entails:

*“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”*

Following this provision, exclude partially or totally the applicability of article 79 of the Convention, describing thoroughly in the contract agreement the mutual understanding of the parties about what hardship is, in what circumstances can apply, at what range the loss of margin profit is not acceptable, and in equality importance, what to do in response.

3) If the buyer should bear the risk of price decrease or increase of the market sales price of the good. Furthermore, if the contract should be temporarily or permanently suspended.

4) The parties may want to add a clause choosing, or declining, a specific legal disposition in addition to CISG. If ambiguity persists, parties may also want to choose what domestic law will be used – the law of the forum or the law of the contract.

## 9 – Conclusion

Professor John Honnold described article 79 as “the convention’s least successful part of the half-century of work towards international uniformity”<sup>37</sup>. Moreover, he also stated that “One threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law”. In the conclusion of this paper, after all described in the topics presented above, the author of this paper could not see it differently.

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<sup>37</sup> Joseph Lookofsky & Harry Flechtner, *Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?*, 9 *Vindobona J. Int'l Comm. L. & Arbitr.* 199, 203 (2005)

Notwithstanding the success of the Convention, we can affirm that its main goal, which was to provide uniformity in the law in contracts of international sale in different States, has failed in the article 79, once its wording guides the reader to their domestic legal roots.

Although a party can always be heard, the extended possibility of interpretation of the provision leads to the conclusion that hardship is a gap in the CISG and the written guide about its interpretation is too broad, making his applicability debatable.

This international law legislation, in that specific article, needs to be more self-explicative. As per the good words of a professor: “If it is accepted that a situation of genuinely unexpected and radically changed circumstances, in truly exceptional cases, may qualify as an ‘impediment’ under Article 79(1), it deserves a legal response under the Convention that would preempt the application of domestic rules on hardship”<sup>38</sup>.

We understand the concerns of the drafters in matters concerning hardship, but rest assured that they did not want to follow the understanding of any specific State, and left opened to the courts to adapt its command according to the each situation. Furthermore, the

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<sup>38</sup> See 19.

jurisprudence will not only be an interpretation of the article, but will be its complement, making it the real law.

We can affirm that the way you interpretate this article will give you a control of possible consequences.

The last sentence of this paper will be finished with the thoughts of Tercio Sampaio:

*“The legal norm is not in the law, but in the mind of the interpreter<sup>39</sup>.”*

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<sup>39</sup> Tercio Ferraz. INTRODUÇÃO AO ESTUDO DO DIREITO. (São Paulo: Editora Atlas S.A.) (2003)