Elephant in the Room: CISG, Hardship, and Uniform Application

Hüseyin Can Aksoy *

Abstract

It has long been disputed by scholars, courts, and arbitral tribunals whether or not hardship is covered by Article 79 the CISG. In 2020, the CISG Advisory Council published an opinion and expressed the view that CISG governs cases of hardship but under Article 79, the parties have no duty to renegotiate the contract; and a court or arbitral tribunal may not adapt the contract or bring the contract to an end. Council's opinion is primarily based on the aim to prevent recourse to domestic law. In fact, if one accepts that CISG contains a gap concerning hardship, domestic law will apply to fill such gap, and this would undermine the unification of the law. However, this can hardly be a reason to accept that cases of hardship are covered by Article 79 CISG. Historical, textual, and teleological interpretation of Article 79 as well as an economic analysis of the concerned remedies show that Article 79 does not cover and/or is not suited to apply to cases of hardship. Therefore, there is an internal gap within the CISG concerning hardship and except for some exceptional cases, where one could find an international trade usage between the parties, the last resort to fill such gap is resorting to the domestic law applicable through private international law.

Keywords: hardship; adaptation; renegotiation; CISG; external gap; internal gap; pacta sunt servanda; clausula rebus sic stantibus; observance of good-faith in international trade; international trade usage

* Associate Professor, Bilkent University Faculty of Law, Turkey, hcaksoy@bilkent.edu.tr, ORCID ID: 0000-0002-9243-189X

Introduction

It has long been disputed whether the United Nations Convention on Contracts for the International Sale of Goods (CISG) applies to cases where the performance of the contract becomes considerably more burdensome albeit possible (*i.e.,* hardship). [1] Unlike CISG's successors UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles or PICC), Principles of European Contract Law (PECL), Draft Common Frame of Reference (DCFR) and Common European Sales Law (CESL), the CISG does not contain explicit and specific provisions concerning hardship in addition to the provisions on *force majeure*.[2] Therefore, it is disputed if Article (Art.) 79 on the debtor's exemption from liability also covers cases of hardship, or if hardship is governed by the CISG at all.

Article 79 CISG deals with the debtor's exemption from liability.[3] It is accepted that while drafting the CIGS, the broad term "exemption" was chosen to avoid any association with a national legal system.[4] It was a deliberate choice not to use the term "*force majeure*" to prevent association with similar concepts in national systems.[5] However, it is still unclear whether exemption applies to cases of hardship or it simply refers to impossibility of performance.

In its February 2020 meeting, the CISG Advisory Council ("CISG-AC" or "Council") elaborated on "hardship under CISG," and this opinion shed light on the discussion. According to the CISG-AC,[6] CISG governs cases of hardship. It is also emphasized that under Article 79 CISG, the parties have no duty to renegotiate the contract; a court or arbitral tribunal may not adapt the contract or bring the contract to an end.

CISG-AC's opinion is primarily based on the aim to prevent recourse to domestic law. In fact, if one accepts that CISG contains a gap concerning hardship, domestic law will apply to fill such gap, and this would undermine the unification of the law. Several scholars have also raised such an opinion. For instance, Schwenzer explicity emphasizes that, if one accepts that Article 79 does not cover cases of hardship and resorts to domestic law, *"unification of the law of sales would be undermined in a very important area."*[7] In my opinion, this can hardly be a reason to accept that cases of hardship are covered by Article 79 CISG. Not only the historical and textual interpretation of the said provision, but also an teleological analysis of the said provision would demonstrate this.

In this paper, I will discuss whether the CISG via Article 79 or any other provision applies to

[1] Kuster and Andersen argue that despite the ongoing debate among scholars, there is functional uniformity on the matter and the courts consistently refuse to apply Art. 79 to hardship as a change in circumstances is never above the threshold that the courts require in international commercial contracts. David Kuster & Camilla Baasch Andersen, *Hardly Room for Hardship – A Functional Review of Article 79 of the CISG* 35 Journal of Law and Commerce 11 (2016).

[2] See Art. 6.2.1 ff, PICC, Art. 6:111 PECL, III-1:110 DCFR, Art. 89 CESL.

[3] According to Article 79 CISG, the debtor would be exempt from liability if he proves that *(i)* the failure for non-performance was due to an impediment beyond his control, *(ii)* he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, *(iii)* he could not reasonably be expected to have avoided or overcome the impediment or its consequences.

[4] Peter J. Mazzacano, *Force majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG* NJCL 50 (2011).

[5] A. H. Hudson, *Exemptions and Impossibility under the Vienna Convention* in *Force Majeure and Frustration of Contract* McKendrick (ed.) 276 (London: Lloyd's of London Press, 1995).

[6] CISG-AC, *Opinion No. 20* available at: http://cisgac.com/opinion-no20-hardship-under-the-cisg/.

[7] Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts* 39 Victoria University of Wellington Law Review 713 (2008).

cases of hardship. In the first part, I will explain that the opinion that hardship is governed and settled by Article 79 CISG is hard to accept. Relying on the historical, textual, and teleological interpretation of Article 79, I will demonstrate that Article 79 does not cover and/or is not suited to apply to cases of hardship. In the second part, I will demonstrate that there is an internal gap within the CISG concerning hardship. In this part, I will discuss whether such a gap may be filled through Article 7(1), on observance of good faith in international trade; Article 7(2), and the general principles of which the Convention is based; or Article 9(2), on international trade usages. In conclusion, I will explain that the last resort to fill such gap is resorting to the domestic law applicable through private international law.

I. Hardship is Governed and Settled by Article 79 CISG

A. In General

Some scholars, courts, and arbitral tribunals[8] as well as the CISG Advisory Council argue that the exemption provision in Article 79 is wide enough to cover cases of hardship in addition to *force majeure* and impossibility of performance. Accordingly, there is no gap under the Convention and Art. 79 that applies to hardship.[9]

Below, I will first explain CISG-AC's relevant opinion. I will demonstrate that historical, textual, and teleological interpretations as well as an economic analysis of Article 79 make it difficult to agree with such an opinion.

B. CISG Advisory Council Opinion on Hardship under the CISG

In its Opinion No. 20, CISG-AC dealt with the applicability of Article 79 to cases of hardship. Accepting that CISG does not contain a specific provision on hardship, the Council argued that CISG governs cases of hardship.[10] Accordingly, Article 79 applies to cases of hardship unless the contract provides otherwise.[11]

In the opinion, it is strongly underlined that if one accepts that there is a gap in the Convention concerning hardship, one must resort to domestic law; this would undermine the unification of sales law through the introduction of domestic concepts, such as frustration of purpose, *rebus sic stantibus*, fundamental mistake, or Wegfall der Geschäftsgrundlage.[12] In fact, such a finding is also in conformity with the Council's Advisory Opinion No. 7, where it is mentioned that hardship may qualify as an "impediment" under Article 79(1). The language of provision does not expressly equate the term "impediment" with an event that makes

[8] For instance, see *Hof van Cassatie, 19 June 2009, CISG-online Case No. 1963*.
[9] Larry A. DiMatteo, *Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines* 27 Pace International Law Review 305 (2015); Yasutoshi Ishida, *CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness —Full of Sound And Fury, but Signifying Something* 30 Pace International Law Review 365 (2018); Joseph Lookofsky, *Not Running Wild with the CISG* 29 Journal of Law and Commerce 158 (2011).
[10] CISG-AC, *Opinion No. 20* 0.5 and 0.6. In Annex 2 of the said opinion, the Council states that it has examined a sample of 17 works from scholars dealing with the issue of hardship in CISG and except for the four publications from the early years of the Convention, all remaining scholars agree that hardship is governed by Article 79. However, the Council does not explain how they have chosen such a sample. Such data is misleading as the ratio of 13/17 does not represent the prevailing opinion among the scholars working on CISG but only the opinion of the scholars chosen as the sample.
[11] CISG-AC, *Opinion No. 20* 1.
[12] CISG-AC, *Opinion No. 20* 2.3.

performance absolutely impossible.[13]

The most striking part of the opinion is the results of hardship. First, CISG-AC mentions that exemption due to hardship is effective only for the period during which it exists.[14] In such period, the parties are not entitled to claim damages and request performance of the obligation affected by hardship. However, they may exercise any other right under the CISG, including the right to avoid the contract.[15]

Second, CISG-AC is of the opinion that under the CISG, the parties have no duty to renegotiate the contract in case of hardship.[16] However, the Council emphasizes renegotiation may be the most rational or practical solution in cases of hardship, and there are factual incentives for parties to renegotiate their contract as they are under duty to mitigate damages (Art. 77 CISG).[17] Moreover, the Convention does not stipulate any means to enforce such duty, even if it is imposed upon the parties.[18] Finally, the Council states that PICC (Art. 6.2.3(1)), PECL (Art. 6:111(2)), DCFR (Art. III – 1:110(3)), and PLACL (Art. 84(1)) provide an obligation to renegotiate in case of hardship, but such obligation is not present under the CISG.[19] Within this stance, CISG-AC refutes to the opinion that there is a gap in the CISG concerning the consequences of hardship, and such gap may be filled in accordance with Art. 7(2) CISG by relying the PICC, which requires that parties renegotiate their contract.[20]

Third, a court or arbitral tribunal may not adapt the contract in case of hardship. According to the Council, the lack of a provision concerning adaptation does not create a gap in the CISG. However, the adaptation remedy is rejected by the drafters of the CISG. Art. 79 entitles the parties to all remedies under the Convention except for damages, and specific performance and adaptation is not listed as a remedy under the CISG.[21] Moreover, a remedy of adaptation contradicts the parties' autonomy.[22] However, I must underline that such view is in contradiction with the Council's former Opinion No. 7, where it stated that Article 79(5) may be relied upon by a court or tribunal to adapt the contract.[23]

Finally, a court or arbitral tribunal may not bring the contract to an end in cases of hardship.[24] The Council underlines that unlike other international instruments including PICC (Art. 6.2.3.(4)), PECL (Art. 6:111(3)) DCFR (Art. III – 1:110(2)), and PLACL (Art. 84 (3)), CISG

---

[13] CISG-AC, *Opinion No. 7* 3 available at: https://www.cisgac.com/cisgac-opinion-no7/.
[14] CISG-AC, *Opinion No. 20* 10.
[15] CISG-AC, *Opinion No. 20* 9. In parallel to Art. 79/5 CISG, the opinion states that the party affected by hardship must give notice to the other party within a reasonable time. Otherwise, such party would be liable for damages resulting from such non-receipt. CISG-AC, *Opinion No. 20* 8.
[16] CISG-AC, *Opinion No. 20* 11.
[17] CISG-AC, *Opinion No. 20* 11.1 *et seq*.
[18] CISG-AC, *Opinion No. 20* 11.6.
[19] CISG-AC, *Opinion No. 20* 11.8.
[20] CISG-AC, *Opinion No. 20* 11.9.
[21] CISG-AC, *Opinion No. 20* 12.1.
[22] CISG-AC, *Opinion No. 20* 12.3.
[23] *"…In case negotiations fail, there are no guidelines under the Convention for a court or arbitrator to "adjust," or "revise" the terms of the contract so as to restore the balance of the performances. Even if one were not ready to stretch the principle of good faith buried in CISG Article 7(1) in order to find a balance of the performances, CISG Article 79(5) may be relied upon to open up the possibility for a court or arbitral tribunal to determine what is owed to each other, thus "adapting" the terms of the contract to the changed circumstances."* CISG-AC, *Opinion No. 7* 40. However, according to the Council, this opinion cannot mean to construe that the court or tribunal has the power to adjust a term of the contract under Article 79(5) CISG. CISG-AC, *Opinion No. 20* 12.4.
[24] CISG-AC, *Opinion No. 20* 13.

does not envisage termination of the contract by a court or arbitral tribunal as a result of hardship.[25] According to the Council, both *ipso facto* termination of the common law countries and *ex nunc* termination by order of the court or arbitral tribunal contradict the CISG's understanding of avoidance by the aggrieved party. According to the CISG-AC, this would provide the certainty and speed that termination by court declaration would be lacking.[26] Therefore, only the parties may avoid the contract due to hardship following a notice of avoidance.[27]

As a result, the CISG-AC argues that hardship is to be resolved under Article 79 CISG and in accordance with the remedies under the said article. In other words, as long as hardship exists, the parties are not entitled to claim damages and request performance of the obligation affected by hardship. However, the parties are not obliged to renegotiate the contract, and the court or arbitral tribunal is not entitled to bring the contract to an end.

C. Interpretation of Article 79

In my opinion, the historical, textual, and teleological interpretation of Art. 79 CISG does not hint that hardship is included in the provision. An economic analysis also supports the view that Article 79 is not a suitable provision for cases of hardship.[28]

i. Historical Interpretation

The Vienna Convention of the Law of Treaties (1969) explicitly sets forth that when interpreting an international treaty, one may resort to the supplementary means of interpretation, including preparatory work of the treaty.[29] Therefore, *travaux preparatoire* are an invaluable source of interpretation.

The historical background of Article 79 shows that a change of economic circumstances does not exempt the promisor from performance under Article 79.[30] While drafting Article 79, the UNCITRAL Working Group intended to prevent the promisor from escaping ~~to fulfill~~ his obligations based on claims of economic difficulty.[31] Similarly, at the Vienna Conference, a

[25] CISG-AC, *Opinion No. 20* 13.1.
[26] CISG-AC, *Opinion No. 20* 13.2.
[27] CISG-AC, *Opinion No. 20* 13.3.
[28] Stine Mathilde Eggers, *Hardship within the Scope of the CISG* 31 (2020) available at: https://law.au.dk/fileadmin/Jura/dokumenter/forskning/rettid/Afh_2020/afh26-2020.pdf.
[29] See Art. 31.
[30] In this view see also Scott D. Slater, *Overcome by Hardship: The Inapplicability of the Unidroit Principles' Hardship Provisions to CISG* 12 Florida Journal of International Law 259 *et seq* (1998). According to Atamer, the *travaux preparatoire* fail to reflect the drafters' intention clearly as "they leave too much margin for both interpretations." Yeşim Atamer, *UN Convention on Contracts for the International Sale of Goods (CISG)* Kröll, Mistelis & Perales Viscasillas (eds.) Art. 79, para 78 (München: Beck; Oxford: Hart; Baden-Baden: Nomos, 2018). Some courts have also associated Article 79 with impossibility of performance and rejected to apply the said provision to cases of hardship. For instance, see *Italy 14 January 1993 District Court Monza (Nuova Fucinati v. Fondmetall International) available at: http://cisgw3.law.pace.edu/cases/930114i3.html; Germany 4 July 1997 Appellate Court Hamburg (Tomato concentrate case) available at: http:// http://cisgw3.law.pace.edu/cases/970704g1.html; Germany 28 February 1997 Appellate Court Hamburg (Iron molybdenum case) available at: http://cisgw3.law.pace.edu/cases/970228g1.html; Greece 2006 Decision 63/2006 of the Court of Appeals of Lamia (Sunflower seed case) available at: http://cisgw3.law.pace.edu/cases/060001gr.html.* Contrarily, accepting that hardship can form an impediment, see *Germany 4 July 1997 Appellate Court Hamburg (Tomato concentrate case) available at: http:// http://cisgw3.law.pace.edu/cases/970704g1.html*.
[31] Hans Stoll & Georg Gruber, *Article 79* in *Commentary on the UN Convention on the International Sale of Goods (CISG)* Schlechtriem & Schwenzer (eds.) Nr. 30 (Oxford/New York: Oxford University Press, 2005);

proposal made by the Norwegian delegation that *"the party who fails to perform is permanently exempted to the extend that, after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold him liable"* was rejected. [32] Lastly, the Secretariat Commentary supports the idea that CISG excludes hardship.[33]

ii. Textual Interpretation

Article 79 sets forth that the debtor would be exempted from liability if there is an "impediment" beyond his control. However, the term "impediment" is not defined under the CISG. According to the *travaux preparatoire* of the Convention, such a term was preferred over "obstacle" and "circumstances" to ensure a narrow and objective interpretation of the provision.[34] However, accepting that hardship is included in the scope of Article 79 would overly extend the scope of the provision. In fact, several scholars accept that hardship cannot be solved under Article 79 CISG.[35]

iii. Teleological Interpretation

Dionysios Flambouras, *Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108, in Guide to Article 79 - Comparison with Principles of European Contract Law (PECL)* 1 ff. available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp79.html.

[32] Norwegian proposal, *(A/CONF.97/C.1/L.191/Rev.1) in the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980 (Official Records, New York, 1981)* 381; See Legislative History 1980 Vienna Conference, available at: http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries79,80.html.

[33] "*Neither [Article 79] nor any other provision of this Convention would release the seller from the obligation to deliver the goods on the grounds that there had been such a major change in the circumstances that the contract was no longer that originally agreed upon. The parties could, of course, include such a provision in their contract.*" Available at: https://iicl.law.pace.edu/cisg/page/article-79-secretariat-commentary-closest-counterpart-official-commentary.

[34] Article 79 CISG is a revised version of Article 74 ULIS, which was heavily criticized for excusing non-performance too readily and unjustifiably facilitating the promisor's excuse for performance. Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and clausula rebus sic stantibus in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis* 13 PILR 265 (2001); Dionysios Flambouras, *Exemption and Hardship: Remarks on the Manner in which the Principles of European Contract Law (Articles 6:111 and 8:108) May Be Used to Interpret or Supplement CISG Article 79*, in *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* Felemegas (ed.) 501 (Cambridge/New York: Cambridge University Press, 2007); Joern Rimke, *Force Majeure and Hardship: Application in International Trade Practice - with Specific Regards to the CISG and the UNIDROIT Principles of International Commercial Contracts* Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer 211 (1999–2000) available at: http://www.cisg.law.pace.edu/cisg/biblio/rimke.html. For a comparative analysis of Article 79 CISG and Article 74 ULIS see Barry Nicholas, *Force majeure and Frustration* 27 AJCL 232 ff. (1979); Denis Tallon, *Article 79* in *Commentary on the International Sales Law* Bianca & Bonell (eds.) Nr. 1.3 ff. (Mailand: Giuffre, 1987). For full text of ULIS see http://www.unidroit.org/english/conventions/c-ulip.htm.

[35] Similarly, Rimke argues that CISG refers to a more flexible standard than that of traditional *force majeure*, but it is undoubtedly stricter than hardship. Rimke, 223 (1999-2000). Also, in the opinion that hardship cannot be solved under Article 79, see Denis Philippe, *Book III Performance and Non-performance of Obligations and Corresponding Rights in the DCFR* in *The Draft Common Frame of Reference: National and Comparative Perspectives* Sagaert, Storme & Terryn (eds.) 46 (Cambridge: Intersentia, 2012). In the contrary opinion, see Fritz Enderlein & Dietrich Maskow, *International Sales Law* Art. 79, Nr. 6.3 (New York: Oceana, 1992); Schwenzer, 715 (2008); Peter Schlechtriem & Petra Butler, *UN Law on International Sales: the UN Convention on the International Sale of Goods* Nr. 291 (New York: Springer, 2009); Ulrich Magnus, *CISG Uyarınca Tazminat, Faiz, Sorumluluktan Kurtulma* in *Milletlerarası Satım Hukuku* Atamer (ed.) 304 (İstanbul: XII Levha, 2008); Stoll & Gruber, Art. 79, Nr. 32 (2005); Ingeborg Schwenzer, Pascal Hachem & Christopher Kee, *Global Sales and Contract Law* Nr. 45.14 (Oxford: Oxford University Press, 2012).

A thorough analysis of the purpose of Article 79 shows that the provision is not suitable to cover cases of hardship. First, hardship and force majeure are conceptually and functionally different. The first is directed at the adaptation of the contract, whereas the latter is directed at settling problems arising from non-performance. Therefore, CISG's exemption from liability provisions contemplate different factual situations and remedies than those of hardship provisions found in other legal instruments.[36]

Second, Article 79 is a provision about liability. As a remedy, it simply excludes a claim for damages. However, hardship is not only about limiting the damage claims, it is also about the specific performance. When the performance becomes more difficult, the question is whether the debtor can be forced to perfom. Therefore, the issue of hardship cannot be solved under Article 79.[37]

Third, Article 79 (1) is not appropriate for the cases of hardship where performance is still possible despite being more difficult for the promisor. When Article 79 applies, the party that relies on hardship would be exempt from liability. Because Article 79 does not stipulate a duty to renegotiate or adapt the contract, such remedies will not be available to the parties in case of hardship. In fact, when one accepts that hardship is settled by Article 79, it would not be possible to argue that there is still a gap with respect to remedies and apply remedies that are not listed under the provision through gap filling. Thus, in such cases, the only available remedy under CISG might be avoidance.[38]

Even some scholars and courts that apply Article 79 to hardship are not satisfied with its legal outcome and look for ways to make other remedies available to the parties. For instance, Schwenzer states that parties cannot be forced to renegotiate, and such duty amounts to nothing as it lacks any means of specific enforcement. As a result, a duty to renegotiate should not be advocated in cases of hardship.[39] However, according to the author, although there is no duty to renegotiate under Article 79, Article 77 CISG concerning the duty to mitigation of damages may require the parties to renegotiate and accept offers to adapt the contract in cases of hardship.[40] However, as Atamer explains, this approach does not rightfully explain the boundaries of a court's right to interfere with the contractual equilibrium.[41] In fact, if a party does not renegotiate or accept an adaptation offer, the court would need to interfere. Similarly, in a legal dispute,[42] the Belgian court not only applied Article 79 to hardship but also ordered the parties to renegotiate the contract. I think it is contradictory to order a remedy that is not listed under the Convention once the court rules that hardship is covered by Article 79.[43]

Fourth, adaptation remedy provides the parties with an equitable solution. Unlike a rigid adherence to *pacta sunt servanda* or avoidance of the contract, adaptation distributes the

[36] Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG* 69 Tulane Law Review 1184 (1994–1995).
[37] Atamer, Art. 79, para. 80 (2018).
[38] Tallon, Art. 79, Nr. 3.1 (1987).
[39] Schwenzer, 723 (2008); Ingeborg Schwenzer & Edgardo Muñoz, *Duty to Re-negotiate and Contract Adaptation in Case of Hardship* 20 Internationales Handelsrecht 156 (2020).
[40] Schwenzer, 724 *et seq*. (2008); Schwenzer & Muñoz, 157 (2020).
[41] Atamer, Art. 79, para. 85 (2018).
[42] *19 June 2009, CISG-online Case No. 1963.*
[43] In the same opinion, see Julie Dewez, Christina Ramberg, Rodrigo Momberg Uribe, Remy Cabrillac & Lis Paula San Miguel Pradera, *The Duty to Renegotiate an International Sales Contract under CISG in Case of Hardship and the Use of the Unidroit Principles* 19 European Review of Private Law 129 (2011).

unforeseeable and unavoidable risk between the parties.[44] As a matter of fact, hardship refers to an unexpected change in circumstances after the formation of the contract. The adaptation option allows the judge to distribute the unwanted results of such change between the parties.

D. Remedy of Adaptation: An Economic Analysis

Some scholars are against the remedy of adaptation for several reasons. Some argue that despite widespread opinion, termination of the agreement should be given preference over adaptation due to hardship because courts are ill suited to determine the needs of the parties.[45] According to others, adaptation is neither desirable nor necessary because an adaptation decision by the court not only comes too late but also deprives parties' from what they may be better able to achieve.[46] However, these arguments are hard to accept as the parties could at all times adapt their contract without going to the court. Adaptation by the court is the last option to save the contract.

Under some circumstances, adaptation might be the best option to generate wealth. From an economic perspective, the contract is an instrument that generates gains and increases the wealth of a nation. Contracts shift scarce resources to the ones who value them the most.[47] In fact, fair contracts are win–win constellations: they make all parties better off [48] and generate the best societal improvement (Pareto improvement), provided that such contracts do not have adverse effects on any third parties.[49] However, sometimes a contract might lose its function to generate gains due to a change in circumstances following the formation of the contract.

Change in circumstances may have varying effects in different cases. Sometimes, the change is excessively high in that the seller's loss in performing would be higher than the buyer's gain in acquiring the specific performance. In such cases, specific performance would destroy the economic rationale of the contract as it would produce a negative surplus.[50] Therefore, when the performance becomes excessively high and it becomes obvious for everybody including the judge that specific performance would generate a negative surplus, termination would be the best tool.[51]

However, there is another group of cases where, economically speaking, termination of a contract due to hardship is not the best solution. As long as the contract still generates a net surplus and increases the total wealth of the society, there is no reason to terminate the contract even if performance becomes more difficult. [52] In cases where the cost of performance increases considerably but the contract still generates a net total surplus, the ideal remedy would be adaptation of the contract.[53]

---

[44] Atamer, Art. 79, para. 83 (2018).
[45] Thomas Rüfner, *Commentaries on European Contract Laws* Janse & Zimmermann (eds.) Art. 6:111, para. 24 (Oxford: Oxford University Press, 2018).
[46] Schwenzer & Muñoz, 159 (2020).
[47] Hüseyin Can Aksoy & Hans-Bernd Schäfer, *Economic Impossibility in Turkish Contract Law From the Perspective of Law and Economics* 34 EJLE 1.3.1 (2012).
[48] Cento Veljanovski, *Economic Principles of Law* 111 (Cambridge: Cambridge University Press, 2007).
[49] Robert Cooter & Thomas Ulen, *Law and Economics* 283 (Addison Wesley, 2007); Steven Shavell, *Damage Measures for Breach of Contract* 11 The Bell Journal of Economics 61 (1980).
[50] Aksoy & Schäfer, 1.4.2 (2012).
[51] Therefore, such assessment requires one to assess not only the increase in the cost of performance but also the creditor's interest (consumer surplus) in performance. Aksoy & Schäfer, 1.5.1 (2012).
[52] Aksoy & Schäfer, 1.4.1 (2012).
[53] Aksoy & Schäfer, 1.5.2 (2012).

If one accepts that hardship is settled by Art. 79, this would result in a waste of resources that could be saved if the contract was adapted to the changed circumstances. In fact, when we apply Article 79 to hardship, specific performance would be excluded and the breaching party would not be liable for damages, but the other party would resort to avoidance due to fundamental breach. In fact, avoidance is among the rights that are not affected by an exemption.[54]

II. Hardship is Governed but not Settled by the CISG

If Article 79 CISG does not cover cases of hardship, this means that there is a gap within the Convention.[55] In my opinion, while drafting the CISG, the issue of hardship was probably left unsettled as it was not possible to reach an agreement on the issue.[56] This might be caused by the fact that the *clausula rebus sic stantibus* doctrine is not accepted in common law countries. Therefore, it would be hard to reach a common ground, and the best option would be to leave the issue unsettled. However, this does not allow a broad interpretation that there is an external gap in this regards. In other words, by choosing to leave the issue unsetteled, the drafters did not reject the idea that hardship is still governed by the Convention.[57]

After accepting that hardship is governed by the Convention but not settled by Article 79, one should answer how to fill such gap. Scholars mainly rely on three provisions to deal with cases of hardship: Article 7(1), Article 7(2), and Article 9(2).

A. Resorting to the Observance of Good Faith in International Trade

According to Article 7(1) CISG in the interpretation of the Convention, regard is to be had to the observance of good faith in international trade. Therefore, some scholars rely on Article 7(1) with regards to the cases of hardship and argue that such a provision grants the judge the power to adapt the contract in cases of hardship.[58] For instance, Stoll and Gruber argue that one should apply a very strict test and if the hardship is found to impose unreasonable obligations on the promisor, the promisee should be obliged to renegotiate and adapt the contract or release the promisor from his obligation.[59] Similarly, in its opinion No. 8, the CISG Advisory Council emphasized that the obligation to interpret the CISG in good faith also imposes a duty upon the parties to deal with each other in good faith and renegotiate the terms of the contract with a view to restore a balance of the performances.[60]

Some authors argue that the good faith principle applies to the rights and obligations of the parties and an interpretation of the contract in addition to the interpretation of the

[54] Schwenzer & Muñoz, 161 (2020).
[55] For instance, in this opinion, see Eggers, 32 (2020).
[56] In the same opinion, see Eggers, 27 (2020).
[57] The question of renegotiation, adaptation, and termination of a contract due to hardship does not pertain to the validity of the contract. Therefore, there is no external gap under Article 4(a) CISG. Andre Janssen & Christian Johannes Wahnschaffe, *COVID-19 and International Sale Contracts: Unprecedented Grounds for Exemption or Business as Usual?* 25 Uniform Law Review 479 (2020).
[58] See Ishida, 380 (2018). According to Kessedjian, there is the possibility that the good faith principle on which the CISG is based (Article 7.1) may be used to deduct a hardship principle. Catherine Kessedjian, *Competing Approaches to Force Majeure and Hardship* 25 International Review of Law and Economics 421 (2005).
[59] According to the authors, this might be based on the principle of good faith (Art. 7 (1)) or on a "reasonable interpretation" of the contract by considering the contractual allocation of risk. Stoll & Gruber, Art. 79, Nr. 32 (2005).
[60] CISG-AC, *Opinion No. 7* 40.

Convention.[61] Some authors go further and argue that the good faith principle underlies many provisions of the Convention and it can be used to fill gaps.[62] As a matter of fact, such a view is popular among civil law scholars. Unlike CISG, many other unification instruments[63] acknowledge the parties's duty to renegotiate the terms of their contract in cases of hardship. Some authors argue that such duty to renegotiate is *based on* the duty to act in good faith, which is common to civil law countries.[64]

I do not think that Article 7(1) can be used to fill the internal gaps within the Convention. This provision explains how to *interpret* the provisions of the CISG.[65] Therefore, the reference to the *"observance of good faith in international trade"* should also be understood in this context. The interpretation of an existing provision and filling a gap where no provision exists are different matters.

In my opinion, broad interpretation of Article 7(1) would mean to place a civil law perspective on the issue of the scope of the impediment.[66] This would hammer the international character and autonomous interpretation of the Convention. It is true that civil law scholars associate the duty to renegotiate with the good faith principle. There may also be other provisions within the Convention that a civil lawyer would normally associate with the good faith principle. However, this does not mean that the Convention recognizes the good faith principle in general. A contrary arguement would disregard ~~the fact~~ that the domestic notions and institutions should not be imposed into the CISG.

B. Gap Filling through the General Principles on which the CISG is Based

Article 7(2) CISG explains the method of gap-filling regarding issues governed but not settled by the Convention.[67] Such a provision guides practitioners to fill the gaps within the Convention in two steps. According to the said provision: (i) *in conformity with the general principles on which it is based or, (ii) in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law*. Therefore, to fill a gap the judge or the arbitrator must first look for the general principles on which the Convention is based. If he fails to find such principles, the gap must be filled by the applicable domestic law to be found via private international law.[68]

---

[61] Bruno Zeller, *Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods* Chapter 4 available at: https://vuir.vu.edu.au/88/9/BrZeller.pdf. Similarly, Magnus argues that the differences between the CISG and PICC with regards to good faith is only in form and can be disregarded. Ulrich Magnus, *Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts* 10 Pace International Law Review 7 (1998).

[62] See Magnus, 1 *et seq* (1998); Lucia Carvalahl Sica, *Gap-filling in the CISG: May the UNIDROIT Principles Supplement the Gaps in the Convention* Nordic Journal of Commercial Law 13 (2006).

[63] See, PICC (Art. 6.2.3(1)), PECL (Art. 6:111 (2)) and DCFR (Art. III- 1:110(3)(d)).

[64] Schwenzer, 721 (2008); Schwenzer/Muñoz, 155 (2020).

[65] In the same opinion see Niklas Lindström, *Changed Circumstances and Hardship in the International Sale of Goods* NJCL 20 (2006) available at: http://www.njcl.fi/1_2006/commentary1.pdf; Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?* 1 Uniform Law Review 30 (1996).

[66] In the same opinion see DiMatteo, 283 (2005).

[67] The so-called external gaps that are intentionally left outside the scope of convention (see Art. 4 CISG) are not to be filled via Article 7(2). Instead such matters must be resolved by the applicable domestic law.

[68] According to some scholars, hardship is governed by the Convention and the drafters explicitly chose to reject a hardship doctrine. Therefore, the hardship doctrine should not be brought into the CISG through Art. 7(2). Michael Bridge, *The CISG and the UNIDROIT Principles of International Commercial Contracts* 19 Uniform

Considering that hardship is explicitly regulated under the PICC, some scholars argue that hardship provisions of the PICC may be used to fill the gap in the CISG.[69] Similarly, in its decision, an arbitral tribunal ruled that the UNIDROIT Principles are general principles in the sense of Article 7(2) of the CISG.[70] In fact, the Preambles of the UNIDROIT Principles also state that the Principles *"may be used to interpret or supplement international uniform law instruments."*

I do not think that the PICC may be regarded as general principles under Article 7(2) of the CISG. First, it is hard to argue that the PICC is universally recognized, especially in common law countries.[71] Second, the PICC may be viewed as a non-authoritative source of opinion about the general principles on which the Convention is based, but they do not possess any special authority to declare such principles.[72] In fact, the general principles on which the Convention is based should be distilled from the text of the Convention, such as the duty to mitigate losses (Art. 77), the duty to give notice of any impediment to perform (Art. 79/4), and the irrevocablity of an offer when the offeree reasonably relied and acted on the offer as irrevocable (Art. 16/2/b).[73]

The drafters of the UNIDROIT principles referred to the CISG as an obligatory point of reference,[74] but in several matters they have derogated from or expanded upon the CISG. Considering such divergence and the different approaches between civil law and common law countries concerning hardship, it is difficult to accept that the Principles represent the general principles of trade concerning hardship. In fact, an adaptation of the contract by the court is unfamiliar to the common law countries.[75]

Some scholars argue that Article 50 CISG regarding price reduction may be read as a general principle allowing for the adjustment/adaptation of a contract in cases of hardship. It is argued that the non-conformity causes an imbalance between the contractual obligations of the parties and price reduction amends such disturbed balance.[76] However, as rightfully argued by

---

Law Review 636 (2014); 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* 59 Annals of the Faculty of Law in Belgrade International Edition – Belgrade Law Review 93, 98 (2011); Joseph Lookofsky, *Walking the Article 7(2) Tightrope between CISG and Domestic Law* 25 Journal of Law and Commerce 102 (2005). Arguing that there is no general principle in CISG that provides persuasive authority for "further hardship relief" such as renegotiation and/or contract adjustment, see Lookofsky, 162 (2011).

[69] Slater, 239 (1998). In such opinion, see Garro, 1184 (1994-1995); Ndubuisi Nwafor & Chidi Lloyd, *Re-imagining the Doctrines of Hardship and Exemption/Force Majeure under the Cisg and Unidroit Principles of International Commercial Contracts* 8 Global Journal of Comparative Law 79 (2019). On the contrary, Kessedjian states that "…having been adopted in 1980, the CISG cannot be said to be 'based' on principles adopted in 1994." Kessedjian, 420 (2005).

[70] See the *Netherlands Arbitration Institute, 10.2.2005, http://www.unilex.info/principles/case/1235*

[71] Janssen & Wahnschaffe, 490 (2020).

[72] Flechtner, 96 (2011).

[73] Slater, 252 (1998); Anna Veneziano, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court* 15 ULR 141 (2010). On the contrary opinion, see Dewez, Ramberg, Uribe, Cabrillac & Pradera, 134 (2011).

[74] Bonnell, 30 (1996).

[75] Dewez, Ramberg, Uribe, Cabrillac & Pradera, 122 (2011). Unlike English law, where frustration automatically terminates the contract and releases parties from their obligations, the US doctrine of commercial impracticability gives the court the power to adapt the contract. However, such power is rarely used. See Dewez, Ramberg, Uribe, Cabrillac & Pradera, 122–123 (2011).

[76] Peter Schlechtriem, *Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and much more* by Harry M. Flechtner Journal of Law & Commerce 238 (1999). Also see Ishida, 378 (2018).

the Council, such an analogy is ill suited. The right to reduce price is a direct consequence of a breach of contract by the other party.[77] Therefore, Article 50 cannot be regarded as a general principle to fill the gap concerning hardship.

Among the general principles on which the CISG is based, one could consider relying on *favor contractus* to deal with cases of hardship.[78] According to Keller, mitigation duty under Article 77 can be read in conjunction with *favor contractus*, and this would require adjusting the contract or accepting a reduction in the damages in the amount which corresponds. The choice would be up to the aggrieved party.[79] Similarly, Eggers argues that renegotiation and adaptation of the contract favors the contract, ensures that the obligations of the parties are rebalanced, and preserves the original purpose and interests of the parties without killing the contract entirely. As a result, *favor contractus* may require adaptation of the contract in cases of hardship.[80]

In my opinion, one cannot rely on the *favor contractus* principle to adapt the terms of a contract. *Favor contractus* is a principle that is related to *pacta sunt servanda*. However, hardship relates to the exception of the *pacta sunt servanda* principle (i.e., *clausula rebus sic stantibus*). Therefore, favoring the contract would mean insisting that the debtor performs as promised — despite the changes in the circumstances. Changing the terms of a contract can hardly favor such a contract.

As a result, it is not possible to find a general principle on which the CISG is based to fill the internal gap concerning hardship. According to Article 7(2) CISG, in the absence of such principles the gap must be filled in conformity with the law applicable by virtue of the rules of private international law.

C. Renegotiation and Adaptation as an International Trade Usage

Some scholars argue[81] that one could resort to Article 9(2) on international trade usages to present the adaptation remedy to the parties in case of hardship. According to the said provision, *"The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."* If one could argue that inserting an adaptation clause due to hardship is an internationally known and regularly observed practice among merchants in a trade sector, it could be possible to argue that such usage would become a part of the contract.An international trade usage needs a regular and wide application in the relevant geographical area and in the relevant branch of activity. Moreover, the actual or presumed knowledge of the parties is also required so that such international trade usage can become a part of the contract between the parties. [82] Finally, it is accepted that such usage does not have to be universally known and observed in all trades, but

[77] CISG-AC, *Opinion No. 20* 12.4.
[78] See Eggers, 27 (2020).
[79] Bertram Keller, *Favor Contractus: Reading the CISG in Favor of the Contract* in *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* Andersen & Schroeter (eds.) 266 (Wildy, Simmons and Hill Publishing, 2008).
[80] See Eggers, 27 (2020).
[81] For instance, see Atamer, Art. 79, para. 86 (2018).
[82] Ch. Pamboukis, *The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods* 25 Journal of Law and Commerce 111 (2005).

it would suffice if the parties to similar types of contracts in the same trade widely know and regularly observe a trade usage. [83]

In my opinion, in contracts governed by CISG, it is very difficult -even if not impossible- to find that there is an international usage on the adaptation of the terms of the contract or duty to renegotiate its terms due to hardship. First, There is no consensus in different legal systems that contracts must be adapted to the changed circumstances when there is hardship. For instance, in English law, adaptation of the contract is not accepted as a possible remedy for hardship. Similarly, according to the Council's Opinion, even if adaptation is contemplated in many civil law countries and at the international level, it is not internationally accepted.[84] Therefore, it is highly unlikely that adaptation due to hardship can be a trade usage in a contract between merchants from different legal systems, even if such usage does not have to be universally known and observed.

It is even more difficult to argue that there is an international trade usage to renegotiate the contract in case of hardship. In fact, the duty to renegotiate due to hardship is unknown in the common law.[85] Moreover, the scope of duty to renegotiate or the legal consequences of not negotiating or failure to reach an agreement is hard to define. Considering that in many countries where adaptation in case of hardship is accepted a duty to renegotiate is not present, it is hard to argue that there is an internationally recognized trade practice to renegotiate.[86]

Advisory Council also accepts that it may be established under Art. 9(2) CISG that "adaptation of the contract or some of its clauses by a third party constitutes a usage in some industries". [87] However, it is practically very difficult to prove and assess if the parties knew or ought to have known about the existence of an international trade usage that is "widely known" and "regularly observed" in international trade. Such evaluation requires subjective tests that vary from one jurisdiction to another, and national courts generally lack the necessary knowledge to identify trade usages in a specific sector. [88] As a result, relying on an international trade usage to resolve disputes concerning hardship is not easy in practice. Therefore, in most of the cases, Art. 9(2) CISG will only have a theoretical applicability to cases of hardship. Finally, some authors propose to apply Art. 6.2.3(4) UNIDROIT principles as an international usage by means of Article 9(2) CISG.[89] However, the Council rightfully argues that the UNIDROIT principles were not conceived as a restatement of international trade usages.[90] In my opinion, accepting PICC as international trade usages in its entirety would almost mean amending an international treaty with a soft-law instrument.

CONCLUSION

[83] Patrick X. Bout, *Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods* 5 available at: https://iicl.law.pace.edu/sites/default/files/bibliography/bout.pdf; Juana Coetzee, *The Role and Function of Trade Usage in Modern International Sales Law* 20 Uniform Law Review 261 (2015).
[84] The Council states that *"Whether adaptation of the contract or some of its clauses by a third party constitutes a usage in some industries must be established pursuant to Article 9(2) CISG."* CISG-AC, *Opinion No. 20* 12.7.
[85] DiMatteo, 284 (2015).
[86] Atamer, Art. 79, para. 84 (2018).
[87] CISG-AC, *Opinion No. 20* 12.7.
[88] Leonardo Graffi, *Remarks on Trade Usages and Business Practices in International Sales Law* 29 Journal of Law and Commerce 282 (2011). Bout argues that unlike the local judge, an arbitrator will have knowledge about the relevant trade and have an insight about the usages that are applicable in that trade sector. Bout, 7.
[89] Atamer, Art. 79, para. 86 (2018).
[90] CISG-AC, *Opinion No. 20* 12.7.

It has long been disputed by scholars, courts, and arbitral tribunals whether or not hardship is covered by Article 79 CISG. The main argument of the authors, who are in favour of the application of Article 79 to hardship, is that if hardship is not covered under Article 79 the courts and tribunals would recourse to domestic law and invoke national concepts (such as imprevision, Wegfall der Geschäftsgrundlage, frustration, *clausula rebus sic stantibus*, etc.), and this would result in diverging interpretations of the CISG. It is argued that this would undermine the CISG's purpose *"to create a uniform sales law that is able to transcend national borders"*[91] However, such wishful thinking is not adequate to argue that Article 79 covers the cases of hardship.[92]

The aim of preventing recourse to domestic law is not sufficient on its own to accept that Article 79 covers the cases of hardship. Historical, textual, and teleological interpretation of Article 79 as well as an economic analysis of the concerned remedies show that hardship is not covered by Article 79.[93]

Article 79 of the CISG exempts the debtor from compensating the damages of the creditor. Within this stance, there is no remedy of adaptation of the contract. However, from an economic perspective, despite hardship, if the contract still generates a net surplus and increases the total wealth of the society, the ideal remedy would be adaptation of the contract. Application of Article 79 would result in a waste of resources that could be saved if the contract was adapted to the changed circumstances.

There is an internal gap within the CISG with regards to hardship. Some scholars try to find international principles on which the CISG is based to fill such a gap. Some others look for international trade usages of renegotiating or adapting the contract. In my opinion, neither exists. Therefore, the last but only option to fill such a gap is resorting to the domestic law by virtue of private international law.

Being an international treaty, CISG's uniform application is invaluable. Therefore, recourse to domestic law is the last resort. However, when it comes to hardship, this hardly justifies arguing that Art. 79 covers cases of hardship. Despite their similarities, hardship and *force majeure* are conceptually and functionally different. The first is directed at the adaptation of the contract, whereas the latter is directed at settling problems arising from non-performance. Therefore, CISG's exemption from liability provisions contemplate different factual situations and remedies than those of hardship provisions found in other legal instruments.[94]

The fact that an explicit hardship provision is present in the more recent regulations show that there is a need for such provision.[95] However, the need by itself cannot bring a provision into being. Lookofsky rightfully states that CISG expansionists are twisting Art. 7(2) and over-interpreting Art. 7(1) CISG to prevent resorting to domestic law for hardship.[96] However, stretching the borders of the Convention may result in more unpredictability than recourse to

[91] Mazzacano, 1, 48 (2011). Also in the same opinion, see Tallon, Art. 79, Nr. 3.1.2 (1987); Lindström, 25 (2006); Janssen & Wahnschaffe, 480 (2020).
[92] Hüseyin Can Aksoy, *Impossibility in Modern Private Law* 108 (Cham-Heidelberg-New York-Dordrecht-London: Springer, 2014).
[93] Aksoy, 109 (2014).
[94] Garro, 1184 (1994-1995).
[95] Lindström, 26 (2006).
[96] See, Lookofsky, 163 (2011).

domestic law.[97]

Perhaps it is time to acknowledge the elephant in the room: There is an internal gap within the CISG concerning hardship; and except for some exceptional cases, where one could find an international trade usage between the parties, the last resort to fill such gap is resorting to the domestic law applicable through private international law.

[97] Eggers, 31 (2020). The author also thinks that there is an internal gap within the CISG concerning hardship and such a gap must be filled by recourse to the domestic law by virtue of private international law. See Eggers, 33 (2020).