

THE CONSEQUENCES OF ECONOMIC HARDSHIP UNDER THE CISG

*Lio Vicente Bocorny**

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Resumo: Com alguma frequência uma das partes de um contrato internacional regido pela CISG se depara com uma dificuldade econômica grave, a qual, embora não caracterize impossibilidade, torna o cumprimento excessivamente oneroso. O artigo 79 da CISG exclui a responsabilidade da parte faltosa quando o descumprimento decorre de impedimento razoavelmente imprevisível e fora da sua esfera de controle, sem deixar claro se a expressão “impedimento” se restringe a casos de força maior ou abrange hipóteses de onerosidade excessiva. O presente artigo apresenta as diferentes posições adotadas pela doutrina e como o tema vem sendo decidido por tribunais arbitrais e cortes de diferentes países. Interessa saber, em especial, se uma questão governada pela CISG pode ser resolvida à luz da própria Convenção, ou se há necessidade de recorrer aos princípios gerais que lhe servem de base (e quais seriam esses princípios) ou à legislação doméstica aplicável. O objetivo proposto é auxiliar os operadores do direito a redigirem cláusulas de onerosidade excessiva e à correta aplicação do direito quando do surgimento de uma disputa envolvendo a CISG.

Abstract: Often, one of the parties to an international contract governed by the CISG is faced with an unpredictable hurdle that, although does not amount to impossibility, places an excessive burden on the performance. Article 79 CISG provides that a party is not liable for failure to perform whenever the failure is due to an impediment beyond his control and linked to unforeseen events, but it is not clear if the word “impediment” is limited to situations of *force majeure* or whether it encompasses issues of hardship. This paper presents the different approaches by scholarly writing and how courts and arbitral tribunals are tackling this issue. It is particularly relevant to assess whether an issue of hardship may be settled by the CISG or whether one needs to resort to the general principles on which the CISG is based, or to the applicable law. The goal pursued is to help legal players to draft hardship clauses and to apply the law correctly in disputes that involve the CISG.

1 INTRODUCTION

The purpose of this paper is to discuss the different approaches in case law and scholarly writing with respect to the issue of economic hardship under the Convention on Contracts for the International Sale of Goods (CISG).

The possible application of the CISG for situations of economic hardship is a very relevant issue. Allocation of risks is a major concern for practitioners who work with international contracts, given the necessity to plan ahead contingencies that are usual in global trade, such as political unrest, armed conflicts and economic upheaval. Addressing these challenges is particularly important for parties involved in long-term contracts, which are susceptible to the effects of unpredictable changes in the economic environment.

In order to achieve the aforementioned objective, section 1 of the paper will revisit the standards adopted by different domestic legal systems with respect to change of circumstances, highlighting the differences between the civil law and common law approaches. This will be followed by a debate on how situations of economic hardship are generally handled in international settings, including an analysis on the hardship clause and the non-state law sources that address the issue of hardship, notably, the UNIDROIT Principles of International Commercial Contracts.

In section 2, the research topic will be narrowed down, specifically addressing the legal treatment of economic hardship in the international sales of goods governed by the CISG. The first controversy addressing this subject (which, curiously, involved a decision that refused the application of CISG to an international contract) ruled that the CISG has nothing to do with economic hardship¹, and the most recent case, rendered in 2015, reached a contradictory conclusion², showing that this is a current and controversial theme. The principles, methods of interpretation and application of the Convention, notably the “gap-filling” mechanisms of the CISG, will also be debated in this section.

Lastly, the paper will assess the different theories from a practical perspective. The overall aim of the paper is to provide guidance for those involved in (a) contract drafting, helping practitioners to decide on the convenience of either inserting a hardship clause or relying on the legal framework of the Convention and (b) dispute resolution, as knowledge on

* Mestre em Direito (LLM) pela New York University. Advogado em Florianópolis.

¹ ITÁLIA. Tribunale Civile di Monza. Case n. R. G. n° 426788. Propositor: Nuova Fucinati S.p.A. Proposto: Fondmetall International A.B. Relator: Juiz Lapertosa. **Gazzeta Ufficiale della Repubblica Italiana**. Monza, 14 jan. 1993.

² FRANÇA. Cour de Cassation. Pourvoi n° 12-29550 13-18956 13-20230. Propositor: Dupiré Invicta Industrie. Proposto: Gabo. Non Publié Au Bulletin. Paris, 17 fev. 2015.

the possible outcomes for a situation of economic hardship under the CISG is critical for the definition of the right strategy.

2 HARDSHIP: AN OVERVIEW

2.1 HARDSHIP UNDER DOMESTIC SYSTEMS

Parties of a contract have a natural expectation that their mutual promises will be duly performed. This assumption, virtually accepted by every nation, is translated into contractual language by the expression *pacta sunt servanda*, or principle of sanctity of the contract.³

Throughout history, juridical doctrines flourished to address situations in which, due to an unexpected change of circumstances – an excessive burden was placed on them, or the contract becomes economically unfeasible – one of the parties cannot perform their obligations. These theories claim for a mitigation of the principle of sanctity (either to terminate the contract or to obtain another type of relief, such as compelling the other party to renegotiate the terms of the agreement or having the contract adapted by an arbitral or judicial decision⁴).

These concepts have been known since ancient times, under the ideas of *impossibilium nulla est obligatio* (“no obligation to do the impossible”), which emerged in the Roman imperial period⁵, and *rebus sic stantibus* (“in these circumstances”), which was developed in the Middle Ages⁶. In recent history, the economic disruption caused by World War I also prompted a review of the strict interpretation of *pacta sunt servanda* in countries

³ “[*Pacta sunt servanda*] is recognized by international practitioners as one of the fundamental rules of contract law. It is present in common law, civil law and Islamic systems and thus assumes the value of a *transnational* principle to be included in the context of *lex mercatoria*”. ZACCARIA, Elena Christine. *The Effects of Changed Circumstances in International Commercial Trade*. **International Trade & Business Law Review**, Perth, v. 9, p. 135-182, 2005. p. 135.

⁴ Situations in which the obligation becomes physically impossible to perform, due to an event beyond the parties’ control, are usually treated under the *force majeure* or Act of God doctrine, which relies on an objective finding (the physical impossibility, caused by an event outside the parties’ control). This paper, however, will deal only with cases where performance is still possible though burdensome, which is considered by several scholars as the threshold to distinguish *force majeure* from other hypothesis of nonperformance. Cf. GARRO, Alejandro. *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*. **Tulane Law Review**, New Orleans, v. 69, p. 1149-1190, 1994-1995. p. 1183-1184.

⁵ This concept, which appeared in the Justinian Digest, is attributed to the Roman jurist Celsus. PICHONNAZ, Pascal. *From Clausula Rebus Sic Stantibus to Hardship: Aspects of the Evolution of the Judge’s Role*. **Fundamina**, Pretoria, v. 17, n. 1, p. 125-143, 2011. p. 127-128.

⁶ *Ibid.*, p. 132-138.

such as Germany (gross inflation)⁷ and France (severe currency devaluation)⁸.

In terms of the underlying rationale, good faith is commonly regarded as grounds for attenuating the strict effects of the principle of sanctity⁹. According to one author, a rigorous construction of *pacta sunt servanda* would amount to abuse of rights¹⁰. One can also mention lack of consent: the non-performing party acquiescence does not extend to circumstances that had not been foreseen at the time consent was given¹¹, as “parties may not foresee or may not wish to foresee every possible change of circumstances in their contract”¹². From a more pragmatic point of view, adjusting the contract may be more desirable than facing the costs related to replace the contractual partner¹³.

Yet there are a handful of opposing arguments. To begin with, economic activity is underpinned by the existence of firm promises¹⁴. This assumption would be undermined if judicial revision of the parties’ agreement were allowed. Also, for systems that do not adopt the principle of good faith, the contractual imbalance caused by unforeseen circumstances is a mere question of windfall allocation, and there may be neither legal basis, nor social advantages to justify such allocation¹⁵. Moreover, parties are generally free to allocate the risks by using contractual clauses¹⁶. The inexistence of such provision, especially in complex or long-term contracts, can be interpreted as an intentional omission, thus leading to a strict application of the principle of sanctity. On the other hand, even though most authors defend that change of circumstances is particularly relevant in long-term undertakings¹⁷, it is precisely under these situations that, in the long run, the overburdened party has a bigger chance of redressing the losses.

Most civil law countries have adopted some sort of relativization of *pacta sunt*

⁷ RÖESLER, Hannes. Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law. **European Review of Private Law**, v. 15, n. 4, p. 485-513. 2007. p. 491.

⁸ MAZZACANO, Peter J. **Exemptions for the non-performance of contractual obligations in CISG article 79**: the quest for uniformity in international sales law. Cambridge: Intersentia, 2014. p. 101.

⁹ *Ibid.*, p. 102.

¹⁰ BRUNNER, Christoph. **Force majeure and hardship under general contract principles**: exemption for non-performance in international arbitration. Alphen Aan Den Rijn: Kluwer Law International, 2009, p. 393.

¹¹ PERILLO, Joseph M. Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts. **Tulane Journal of International & Comparative Law**, New Orleans, v. 5, p. 5-28, 1997. p. 12-13.

¹² PICHONNAZ, 2011, p. 125.

¹³ ZACCARIA, 2005, p. 137.

¹⁴ MASKOW, Dietrich. Hardship and Force Majeure. **The American Journal of Comparative Law**, v. 40, n. 3, p. 657-699, jul. 1992a. p. 658.

¹⁵ JENKINS, Sarah Howard J, Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles - A Comparative Assessment. **Tulane Law Review**, New Orleans, v. 72, p. 2015-2030, 1997-1998. p. 2020.

¹⁶ *Id.*

¹⁷ FONTAINE, Marcel; LY, Filip de. **Drafting International Contracts**. 2. ed. Leiden: Martinus Nijhoff, 2009. p. 453.

servanda with respect to changed circumstances that do not render performance impossible. Among the contracting states to the CISG, Argentina, Austria, Brazil, Czech Republic, Germany, Greece, Hungary, Italy, the Netherlands, Poland, Russian Federation, Spain, Switzerland, Arab and Scandinavian countries are usually mentioned as states belonging to this group.¹⁸

Those nations, however, use different nomenclatures to designate these kind of situations, and the factors that authorize mitigation to *pacta sunt servanda*, the threshold to be achieved, and the juridical effects, may be slightly different. A change of circumstances is implied in each different theory, but excessive onerosity is not always an essential element – as some systems provide relief in cases where the contract’s economic utility disappears for one of the parties, even with the absence of contractual unbalance. Fontaine & de Ly mention an example of this situation: “a contract for the supply of some raw material, which the buyer cannot use anymore due to a technological change”¹⁹. The following chart illustrates the different solutions adopted in some of the states pro-mitigation of the sanctity rule²⁰:

Quadro 1 – Regulation of Hardship in some Civil Law Countries (Continues)

Country	Doctrine	Requirement	Juridical effects
Brazil ²¹	<i>onerosidade excessiva</i>	extraordinary and unforeseen events/extreme advantage for one of the parties	adaptation, termination
China ²²	<i>changed circumstances</i>	material and unforeseen change/after formation of the contract/not caused by <i>force majeure</i> /outside commercial risk/ continuation would be unfair or frustrate objectives of the contract	adaptation, termination
France ²³	<i>Imprévision</i>	unpredictable change of circumstances/excessive onerosity for the party who did not assume the risk	renegotiation, adaptation, termination

Fonte: produção do próprio autor, 2018.

¹⁸ MAZZACANO, 2014, p. 101; BRUNNER, 2009, p. 401-02.

¹⁹ FONTAINE; LY, 2009, p. 454.

²⁰ An exhaustive comparison between the countries that adopt relief for change of circumstances is beyond the scope of this paper. The list hereby presented is limited to civil law countries that are contracting states to the CISG and at the same time represent the world’s largest economies.

²¹ Cf. art. 478 of the *Código Civil*. BRASIL. Lei n. 10.406, de 10 de janeiro de 2002. Institui o Código Civil. **Diário Oficial da União**. Poder Executivo: Brasília, DF. 11 jan. 2002.

²² Cf. The Supreme People’s Court Interpretation on Several Issues Concerning the Application of the Contract Law (II), art. 26 (2009), Zuigao Remin Fayuan Guanyu Hetongfa Sifa Jieshi (II) and CHAN, Gordon Y. M. **The Doctrine of Changed Circumstances in Chinese Contract Law**. 2011.

²³ Cf. art. 1195 of the *Code Civil des français*. FRANÇA. Lei de 30 ventoso no XII ano, de 21 de março de 1804. **Le Moniteur Universel**, Paris, 1804.

Quadro 2 – Regulation of Hardship in some Civil Law Countries (Conclusion)

Germany ²⁴	<i>Störung der Geschäftsgrundlage</i>	such a significant change of circumstances that parties would not enter into contract or would enter into contract with different content, if foreseeable	adaptation, termination
Italy ²⁵	<i>eccessiva onerosità sopravvenuta</i>	excessive and supervening onerosity that is not a normal risk/extraordinary and unpredictable events	termination
Japan ²⁶	<i>Jijo Henko no Hori</i>	unpredictable change of circumstances/not imputable to the non-performing party/ continuation would be unreasonable	adaptation, termination
The Netherlands ²⁷	<i>unforeseen circumstances</i>	circumstances so unforeseeable that opposing party, in light of reasonableness and fairness, cannot expect unchanged continuation of contract	adaptation, termination
Switzerland ²⁸	no specific name	extraordinary and unforeseeable circumstances/performance prevented or seriously hindered	increase in the price, termination
Russian Federation ²⁹	<i>change of circumstances</i>	change of circumstances is so essential that parties would not have established contract if they could foresee such changes, or would have established contract under different terms.	adaptation, termination

Fonte: produção do próprio autor, 2018.

²⁴ Cf. § 313 of the *Bürgerliches Gesetzbuch* (BGB). ALEMANHA. Bürgerliches Gesetzbuch, de 18 de agosto de 1896. **Rechtsgesetzblatts**, Berlin, 24 ago. 1896. Cf. RÖESLER, 2007; BRUNNER, 2009, p. 404-6; DIMATTEO, Larry A. Contractual Excuse under the CISG: Impediment, Hardship and the Excuse Doctrines. **Pace International Law Review**, v. 27, n. 1, p. 257-305, 2015. p. 262-266.

²⁵ Cf. art. 1467 of the *Codice civile*. ITÁLIA. Regio Decreto n. 262, de 16 de março de 1942. Approvazione del testo del Codice Civile. **Gazzeta Ufficiale**. Roma, 4 abr. 1942. Cf. ZACCARIA, 2005. p. 147-149.

²⁶ The doctrine of changed circumstances in Japan is based on case law. Cf. ODA, Hiroshi. **Japanese Law**. 3. ed. New York: Oxford University Press, 2009. p. 137.

²⁷ Cf. art. 6: 258 of the *Burgerlijk Wetboek*. HOLANDA. *Burgerlijk Wetboek*, de 1 de janeiro de 1992. **Tractatenblad**, Amsterdã, 1992.

²⁸ Cf. art. 373 of the *Obligationenrecht*. SUÍÇA. Lei Federal de 30 de março de 1911. **Schweizerisches Bundesblatt**, Berna, 1911. Cf. PRADO, Maurício C. A. Novas Perspectivas do Reconhecimento e Aplicação do Hardship na Jurisprudência Arbitral Internacional, **Revista Brasileira de Arbitragem**, v.1, n. 2, p. 32-60, 2004. p. 36. According to Brunner, the doctrine of changed circumstances in Switzerland is based on case law. BRUNNER, 2009, p. 401.

²⁹ Cf. art. 451 of the *Grashdanski kodeks*. RÚSSIA. Lei n. 14-FZ, de 26 de janeiro de 1996. **Rossiiskaya Gazeta**, Moscou, 1996.

On the other hand, states that adopt the common law are usually associated with a strict view of the principle of sanctity³⁰. The *impossibilium nulla obligation* principle was ignored by most of the common law countries until the Court of Queen's Bench ruling in *Taylor v. Caldwell*, rendered in 1863³¹, which inaugurated in English Law a doctrine known as "frustration" or impossibility. *Taylor* was about the extinction of the subject matter of the contract (thus making performance physically impossible), but the doctrine of frustration would expand to cover situations of "impracticability", where performance is still possible, yet unreasonably burdensome for one of the parties³². However, the acceptance of impracticability cases is "confined to dicta and extra-judicial statements"³³. Moreover, "the consequences of the application of the doctrine are drastic in that it brings the contract automatically to an end, irrespective of the wishes of the parties"³⁴ (no room for adaptation) and "it does not apply where express provision has been made in the contract for the event that is alleged to have frustrated the contract"³⁵. In the United States, as observed by Treitel, "there is a range of more realistic situations in which contracts may be discharged, even though performance has not become "impossible", on the ground of "impracticability"³⁶, as provided by § 2-615 of the U.C.C. and § 261 of the Restatement (Second) of the Law of Contracts. However, "the possibility that such circumstances may afford a ground of discharge is regarded as one which is in principle arguable, though the argument rarely succeeds"³⁷. Belgium, on the other hand, is a representative of the civil law systems attached to a rigorous construction of the sanctity rule.³⁸

Nevertheless, many scholars identify in the countries belonging to this group, a liberalization trend towards loosening the *pacta sunt servanda* rule³⁹. This tendency proves to

³⁰ TREITEL, Guenter. **Frustration and Force Majeure**. 2. ed. London: Thomson/Sweet & Maxwell, 2004. p. 1; MCKENDRICK, E. G. Performance and Discharge. In: BEALE, H. G et al. (orgs.). **Chitty on Contracts**. 36. ed. London: Thomson Reuters e Sweet & Maxwell, 2015. p. 1671; MCKENDRICK, E. G. **Contract Law: Text, Cases and Materials**. 4. ed. Oxford: Oxford University Press. 2010.

³¹ TREITEL, op. cit., p. 1. Although England is not a party to the CISG, several contracting states are based on or influenced by the English common law system, such as Australia, Canada (except for Québec), New Zealand, Singapore, and the United States, among others, hence its importance.

³² MCKENDRICK, 2015, p. 1674.

³³ TREITEL, 2004, p. 283. *Davis Contractors v. Fareham U.D.C.* illustrates the English approach with respect to impracticability. Id.

³⁴ MCKENDRICK, op. cit., p. 703.

³⁵ Ibid., p. 713.

³⁶ TREITEL, op. cit., p. 262.

³⁷ Ibid., p. 279. Cf. SPIVACK, Carla. Of Shrinking Suitsuits and Poison Vine Wax: A Comparison of Basis for Excuse under U.C.C. § 2-615 and CISG Article 79. **University of Pennsylvania Journal of International Economic Law**, Philadelphia, v. 27, n. 3, p. 757-802, 2006; DIMATTEO, 2015, p. 266-70.

³⁸ Cf. FONTAINE; LY, 2009, p. 455; PERILLO, 1997, p. 8.

³⁹ MAZZACANO, 2014, p. 102.

be real: in France, which is usually regarded as an example of a civil law country that adheres to a strict interpretation of the *pacta sunt servanda* rule, a new legislation was recently enacted providing for renegotiation, followed (in case negotiation fails) by termination or adaptation, where unforeseen circumstances emerge after the conclusion of the contract, when risk was not assumed by one of the parties⁴⁰.

2.2 THE HARDSHIP CLAUSE

In the field of international business transactions, the types of relief associated with a situation of changed circumstances usually stem from a contractual provision, a practice that apparently dates back to the 20th century⁴¹ and that consecrated the use of the term “hardship”⁴².

The use of a hardship clause is also viewed as an alternative to the inadequacy of the solutions provided by domestic laws⁴³. Indeed, the hardship clause has the obvious advantages of providing parties with a customized solution for change of circumstances and enhancing the levels of juridical certainty and predictability, as parties’ concerns regarding the applicable substantive law vanish or, at least, minimize⁴⁴.

Hardship clauses come in many different forms, but their basic formulation comprises two elements.

⁴⁰ Article 1195 of the French Civil Code, as amended by Ordonnance n° 2016-131 of February 10, 2016, provides that: *Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation. En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe*”. FRANÇA, 1804. Cf. FARIA, José Angelo Estrella. The Influence of the UNIDROIT Principles of international commercial contracts on national laws. **Uniform Law Review**, v. 21, n. 2-3, p. 238-270, ago. 2016. p. 267-69.

⁴¹ According to Fontaine & Ly: “it seems that hardship clauses have been used in international contracts in earlier troubled periods of the 20th century, but that their insertion seems to have multiplied greatly in the 1970s”. FONTAINE; LY, 2009, p. 458.

⁴² Pichonnaz notes that the term “hardship” became popular due to the widespread use of the English language to draft international contracts. Notwithstanding, it is interesting to observe that none of the domestic legal systems here mentioned employ the term “hardship” (or its literal translation to their national languages) to refer to change of circumstances. Even in England, where the word hardship is found in *Davis Contractors Ltd. v. Fareham Urban DC*, it was not used to designate a juridical doctrine, but rather to express the inconvenience experienced by one of the parties. PICHONNAZ, 2011, p. 138-139.

⁴³ Cf. ZACCARIA, 2005, p. 149.

⁴⁴ When a dispute relating to change of circumstances arises, the applicability of the hardship clause will depend on the dispute resolution system adopted by the parties (national court or arbitral tribunal) and on the conformity of the clause’s terms with the applicable substantive and procedural law. That is because some legal systems may not accept a *contra legem* solution or simply do not recognize party autonomy to regulate their interests in this particular field.

The first is the description of the situations that will be deemed to impair the contractual balance. Whenever possible, a specific formulation of the circumstances is highly recommended: “If the price of crude oil rises more than 50%...” is the typical example of a precise definition for hardship. Nevertheless, in most cases, parties are trying to protect themselves from risks that cannot be identified in anticipation, and therefore the clause will be written in broader terms, as in the following example: “In the case of supervening economic events...”⁴⁵

The second part of a hardship clause deals with the consequences that may be triggered, ranging “from the simple agreement to renegotiate the contract, formulated without any further details, to the organization of an extremely complex procedure, involving, in particular, resorting to third parties, arbitrators or experts”⁴⁶. Again, a precise formula to restore the contractual balance is desirable, but nevertheless unlikely to be achieved, due to the unpredictability of the circumstances surrounding a future and uncertain event of hardship. Hence, it is not surprising that the duty to renegotiate, sometimes followed by a suspension of the contract, is a recurrent consequence under the hardship clause. The renegotiation period is meant to allow the parties to “cure” the contract without the intervention of a third party (save to compel one of the parties to engage in the renegotiation, when the clause so provides).

If parties fail to reach an agreement (or if the contract does not predict a renegotiation phase), hardship clauses will usually allow for termination or adaptation of the contract. Termination, although drastic, is a very straightforward solution for an unsurpassable contractual upset, and the role of the adjudicator will be limited to define the consequences of termination. Adaptation, on the other hand, involves a much more complex scenario, as the third party interveners (a court, tribunal, or expert in a specific area of trade) shall not only assess whether the conditions for relief are present, but they might also “proceed to determine the manner in which the terms of the contract should be revised in order to comply with the parties’ objective of restoring the contractual equilibrium”⁴⁷.

According to Fouchard *et alli*, a clause providing for adaptation of the contract faced some reservations in the past⁴⁸. In response to such criticism, in 1978 the International Chamber of Commerce (ICC) produced specific rules for contract adaptation, providing for

⁴⁵ Cf. FONTAINE; LY, 2009, p. 460-70.

⁴⁶ Ibid., p. 460.

⁴⁷ KONARSKI, Hubert. Force Majeure and Hardship Clauses in International Contractual Practice. **International Business Law Journal**, n. 4, p. 405-428, 2003. p. 424.

⁴⁸ FOUCHARD, Philippe; GAILLARD, Emmanuel; GOLDMAN, Berthold. **Fouchard Gaillard Goldman on International Commercial Contracts**. The Hague: Kluwer Law International, 1999. p. 24.

“the indication of a “third party”, who would make either a recommendation or a decision”⁴⁹. The rules, however, were withdrawn in 1994 without ever being used⁵⁰, and the authors agree that opposition to the adaptation clause no longer exists⁵¹. Notwithstanding, it is interesting to note that in 2003 the ICC published a hardship clause, and it does not provide for adaptation, only for termination of the contract⁵².

2.3 HARDSHIP UNDER NON-STATE LAW SOURCES

When an international contract is silent on the issue of hardship and a dispute arises, circumstances will determine whether the omission is intentional (and therefore no relief should be granted), or whether an answer should be sought on the applicable substantive law. This may or may not provide relief for change of circumstances, depending on the domestic system elected by the contract or applicable under conflict of law rules. Parties of an international contract, however, may also be subject to the application of “non-national” substantive law, alone or in conjunction with a domestic applicable law. This hypothesis can take place either as a consequence of a choice of law provision or under the adjudicator’s discretion⁵³.

2.3.1 The Unidroit Principles

The most prominent example of non-national law addressing the issue of hardship are the UNIDROIT Principles of International Commercial Contracts (“UNIDROIT

⁴⁹ Ibid., p 26.

⁵⁰ Id.

⁵¹ Ibid., p 27.

⁵² The ICC 2003 hardship clause was drafted in the following terms: [1] A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract. [2] Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that: [a] the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that [b] it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event. [3] Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.

⁵³ It should be observed, however, that choice-of-law clauses selecting non-national rules are barely seen in international business transactions. In addition, contractual provisions demanding resort to non-national law can arise issues of validity, especially among national courts, who may take the view that only a domestic law is suitable to govern a contract. Cf. BORN, Gary. **International Arbitration: Law and Practice**. 2. ed. Alphen aan den Rijn: Kluwer Law International, 2012. p. 260.

Principles”). The UNIDROIT Principles, first published by the International Institute for the Unification of Private Law (UNIDROIT) in 1994 and revised in 2004 and 2010, resulted as an effort of distinguished scholars and practitioners to draft a “restatement” of the international commercial contracts.

The UNIDROIT Principles are not binding, and their application relies on the parties’ intention and the will of the adjudicator to make them effective. A recent study on cases registered within the ICC revealed that choice of law clauses leading to the application of the UNIDROIT Principles are unusual: in 2014, almost all of them contained an express choice of law, and less than 2% referred to non-State rules, including the UNIDROIT Principles. Analogically, only a small fraction of the ICC awards found in the Unilex database refers to cases in which parties chose the UNIDROIT Principles as the governing law⁵⁴. Lack of sufficient knowledge by the international business players and little support from their counsels are possible reasons for such underuse⁵⁵. Nevertheless, the Principles seem to have a growing acceptance in the international community, especially by arbitral tribunals.⁵⁶ Moreover, application of the hardship provisions of the UNIDROIT Principles as a result of a Court or Tribunal’s own initiative is relatively common, notably as a means of supplementing municipal law⁵⁷.

Article 6.2.2 of the UNIDROIT Principles explicitly recognizes the *pacta sunt servanda* rule⁵⁸, but at the same time accepts a mitigation of its effects with respect to changed circumstances, provided that the event causing non-performance: (1) is unforeseeable, (2) beyond the non-performing party’s control, (3) does not reflect a risk assumed by the non-breaching party⁵⁹. Once hardship is recognized, the non-performing party

⁵⁴ GENY, Dora; MUNOZ, Alexandra. The UNIDROIT principles in international arbitration. **International Business Law Journal**, n. 2, p. 109-117, 2016. p. 112-113.

⁵⁵ *Ibid.*, p. 113.

⁵⁶ For a current perception of the UNIDROIT Principles, cf. VOGENAUER, Stefan. The UNIDROIT Principles of International Commercial Contracts at twenty: experiences to date, the 2010 edition, and future prospects. **Uniform Law Review**, v. 19, n. 4, p. 481-518, dez. 2014. p. 481; BERGER, Klaus Peter. The Role of the UNIDROIT Principles of International Commercial Contracts in international contract practice: the UNIDROIT Model Clauses. **Uniform Law Review**, v. 19, n. 4, p. 519-541, dez. 2014. p. 519.

⁵⁷ In fact, the vast majority of the decisions on the UNIDROIT Principles available from the Unilex database refer to interpretation of domestic law. Cf. MEYER, Olaf. The UNIDROIT Principles as a Means to Interpret or Supplement Domestic Law. **Uniform Law Review**, v. 21, n. 4, p. 599-611, dez. 2016. p. 600. The most recent case of hardship available in that database refers to a domestic issue, governed by Québec law, in which the hardship provisions of the UNIDROIT Principles were regarded as a “comparative law summary providing an indication of a path for the case law to follow in civil law jurisdictions such as Quebec”. CANADÁ. Cour D’Appel. Case n. 500-09-024690-141. Propositor: Churchill Falls (Labrador) Corporation Limited. Proposto: v. Hydro-Québec. Quebec, 1 out. 2016.

⁵⁸ “Where the performance of a contract become more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship” (Art. 6.2.1). UNIDROIT. **UNIDROIT Principles of International Commercial Contracts**. 2016.

⁵⁹ Art. 6.2.2. *Id.*

will be entitled to request for renegotiation and, upon failure to reach a consensual solution, termination or adaptation of the contract⁶⁰.

2.3.2 General principles of law

It is controversial as to whether a party could find relief for change of circumstances, when a choice of law provision leads to the application of “general principles of law” (an expression usually employed to refer to principles of law shared by different legal systems)⁶¹. However, the fact that change of circumstances is not accepted by every jurisdiction makes it difficult for hardship to be considered a general principle of law, and therefore it is not advisable for the parties to rely on such a form of non-State rule⁶².

2.3.3 *Lex mercatoria*

Lastly, it should be analyzed whether the principle of hardship can be extracted from trade usages or *lex mercatoria*. This is an arid issue. Gary Born argues that *lex mercatoria* is an idea without substance and it has more academic than practice importance. The author considers that “very few arbitral awards rely on, or even refer to notions of *lex mercatoria*, or anything similar, and arbitration agreements virtually never select such a body of rules”⁶³. Other scholars defend the existence of an “ancient” and a “new” *lex mercatoria*, the latter being represented by the UNIDROIT Principles⁶⁴.

⁶⁰ Art. 6.2.3. Id.

⁶¹ As noted by Born, “[s]ome non-national choice-of-law clauses provide for application of “general principles of law”, particularly in contracts with states or state entities. The meaning of this formula is controversial, but it is generally intended to refer to principles of law common to leading legal systems. There are inevitable difficulties in identifying the contents of such principles, particularly with sufficient specificity to provide meaningful guidance in commercial contexts. These difficulties lead parties, in most cases, to avoid such provisions.” BORN, 2012, p. 261.

⁶² Brunner presents a string of reasons to assert that hardship is a general principle of law, but his conclusion is that such principle is nowadays embodied in the UNIDROIT Principles. Cf. BRUNNER, 2009, p. 417-419. Therefore, electing the UNIDROIT Principles as the choice-of-law would generate the same results, while eliminating the uncertainty associated with the application of “general principles”.

⁶³ BORN, Gary. **International Commercial Arbitration**. 3. ed. Alphen aan den Rijn: Kluwer Law International, 2014. v. 2. p. 2759-2764.

⁶⁴ Cf. BARON, Gesa. Do the UNIDROIT Principles of International Commercial Contracts Form a New *Lex Mercatoria*? **Arbitration International**, v. 15, n. 1, jun. 1999. p. 115; PRADO, 2004. This subject was recently revisited in an article by Massimo Benedetelli, who acknowledges the difficulties in assessing whether the UNIDROIT Principles in general are an expression of international trade usages, because “most of the thousands and thousands of contracts which are daily executed in the world remain confidential, only a limited part of them gives rise to disputes, and only a few of the judgements and awards by which such disputes are settled then gets published”. BENEDETELLI, Massimo. Applying the UNIDROIT Principles in International Arbitration: An Exercise in Conflict. **Journal of International Arbitration**, v. 33, p. 653-686, 2016. p. 668.

It also should be taken into account that many rulings or awards proffered in international disputes addressing hardship issues are in fact based on contractual provisions or municipal law, without any reference to the *lex mercatoria*, which makes it difficult to conclude whether the approach adopted was an expression of international trade practice⁶⁵.

In any event, at least two awards proffered within the ICC (prior to the release of the UNIDROIT Principles) explicitly recognized the admissibility of hardship as an expression of trade usages. ICC Award 2291, rendered in 1975, involved a controversy over the necessity for price adjustment in the transport of a rolling machine from France to Africa by a French conveyer. The tribunal ultimately denied the request for adjustment, but held that

It is a rule of the *lex Mercatoria* that the performances on the financial plane stay in equilibrium” and that is why in almost every international contract “the price is determined according to the conditions which exist in the moment of the conclusion of the contract and it will vary according to the parameters, which reflect the variations of values of the different elements that compose the product or the performance⁶⁶.

ICC Award 4761, issued in 1987, addressed a dispute concerning the revision of a contract price for execution of civil works by a Libyan company for an Italian consortium. Even though the tribunal did not apply any relief for hardship, it recognized that Libyan law, just like the *lex mercatoria*, accepts the notion of changed circumstances⁶⁷.

From what has been seen so far, relief for hardship can also be found in the different sources of non-state Law. However, the UNIDROIT Principles (which, to some authors, is deemed to summarize the “general principles of law” and trade usages on hardship) provide the most precise and comprehensive treatment for change of circumstances.

3 ECONOMIC HARDSHIP UNDER THE CISG

It is not possible to ascertain whether the CISG addresses situations of economic hardship without a previous agreement on the meaning of the word “economic hardship”. The previous section showed that the approach with respect to hardship, or the doctrine of changed circumstances, might be different according to each domestic system.

Despite these difficulties, it is possible to agree on the creation of a more or less

⁶⁵ PRADO, 2004, p. 33.

⁶⁶ FRANÇA. International Chamber of Commerce. ICC Award No. 2291. **Clunet**. Paris, 1976. p. 989.

⁶⁷ “Libyan law, like other national laws, such as German and Swiss law, or the *Lex Mercatoria* (see ICC decision 1512, *Clunet* 1974, 905, ICC decision 2291, *Clunet* 1976, 999) gives effect to the theory of unpredictability which proceeds from the principle that the rule “*pacta sunt servanda*” finds its limit in the superior principle of good faith”. FRANÇA. International Chamber of Commerce. ICC Award No. 4761. **Clunet**. Paris, 1987. p. 1012. Cf. PRADO, 2004, p. 34-35.

unambiguous concept of hardship in international settings, in particular, to move it away from the idea of *force majeure*. The repeated use of contractual provisions addressing these situations, the existence of common features on distinct national laws, and the release of the UNIDROIT Principles support these findings. Against this backdrop, the definition set forth in Article 6.2.2 of the UNIDROIT Principles⁶⁸ is the concept of hardship adopted for the purposes of this paper.

Article 79 of the Convention is the element in the CISG which is closest to the idea of economic hardship. Article 79 provides, in its opening section, that

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.⁶⁹

The heart of the matter is to ascertain whether Article 79, often seen as a typical *force majeure* provision⁷⁰, also embraces situations of economic hardship⁷¹.

3.1 Initial commentaries on Article 79: prevalence of literal and historic approaches

The first obstacle in the interpretation of Article 79 CISG is deciding what method of interpretation should be used. Despite the existence of a rich and extensive literature on the specificities of the CISG methodology⁷², one author acknowledges that “a strict literalist approach to the interpretation and application of the CISG is the most prevalent approach found in the case law”⁷³. Usually, the decision makers “simply quote the relevant articles and apply them to the facts before them without reference to any authority or other relevant materials”.⁷⁴

The plain meaning interpretation of Article 79 CISG, in itself, is a challenge. Eyes

⁶⁸ Cf. Section 2.3.1 *supra*.

⁶⁹ Cf. Art. 79(1) CISG. UNITED NATIONS. **United Nations Convention on Contracts for the International Sale of Goods**. 1980. It must be noted, though, the discussion of hardship is only a fraction of the multiple issues arising from Art. 79 CISG and its five paragraphs. For a complete assessment on the study of Art.79 CISG and its vast history on case law, cf. MAZZACANO, 2014.

⁷⁰ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW. **Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods**. New York, 2016. p. 373.

⁷¹ Relief under Article 79 is also subject to an extensive merit analysis, which involves the demonstration that the event was unforeseeable, unavoidable and beyond control of the non-performing party. The discussion of this paper, though, is restricted to the gateway issue, i.e., the admissibility *in thesis* of economic hardship issues under the CISG.

⁷² Cf. JANSEN, André; MEYER, Olaf (org.). **CISG Methodology**. Munich: Sellier European Law Pub, 2009.

⁷³ EISELN, Sieg, Literal Interpretation: the Meaning of the Words. In: JANSEN, André; MEYER, Olaf (org.). **CISG Methodology**. Munich: Sellier European Law Pub, 2009, p. 80.

⁷⁴ *Id.*

that were trained to recognize hardship provisions would find it difficult to identify Article 79 CISG with change of circumstances. To begin with, the terms “hardship” or “change of circumstances” are not found in any provision of the Convention. At the same time, the use of the term “impediment” does not authorize to simply rule out the possibility that hardship is dealt with by Article 79 CISG.

Not surprisingly, the early comments on Article 79 CISG were centered on the legislative history of the Convention, in an effort to capture the drafter’s intention. As observed by some authors, “when it is necessary to fall back on the purpose of the CISG, because doubts, in particular discrepancies in the original texts, cannot be solved in any other matter, it is necessary to have regard to the *travaux préparatoires*”⁷⁵.

Several scholars, based on the legislative history of Article 79 CISG, shared the view that economic hardship “has not found its expression in the CISG”⁷⁶, as attempts to introduce it on the text of the Convention⁷⁷ were turned down⁷⁸. The rejection to these efforts to introduce hardship provisions reflected a resistance from the drafters “to embark on the problems of frustration or *imprévision*”⁷⁹. Therefore, Article 79 CISG did not allow to consider any issue other than impossibility of performance⁸⁰, as it is clear that the authors of the Vienna Convention did not intend to accept the theory of *imprévision*.⁸¹ Moreover, the explicitly of this rejection forbid resorting to the principle of good faith and preempted application of domestic concepts analogues to *imprévision*⁸².

⁷⁵ HERBER, Rolf; JUNG, Werner Jung; SCHLECHTRIEM, Peter. General Provisions. In: SCHLECHTRIEM, Peter (org.). **Commentary on the UN Convention on the International Sale of Goods (CISG)**. Tradução Geoffrey Thomas. 2. ed. Oxford: Clarendon Press, 1998. p. 618.

⁷⁶ MASKOW, 1992a, p. 658. Cf. ENDERLEIN, Fritz; MASKOW, Dietrich. **International Sales Law: United Conventions on Contract for the International Sale of Goods/Convention on the Limitation Period in the International Sales of Goods: Commentary**. New York: Oceana, 1992b. p. 324 (stating that “at present it cannot be determined with sufficient security how the issue of changed circumstances can be decided on the basis of the CISG”).

⁷⁷ Scholars often refers to a proposal made by the Norwegian delegation. Cf. MASKOW, 1992a, p. 658. But Nicholas underscores that “similar proposals had also been rejected at earlier stages in the drafting of the Convention”. NICHOLAS, Barry. Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods. In: GALSTON, Nina M.; SMIT, Hans (org.) **International Sales: The United Nations Convention on Contracts for the International Sale of Goods**. Matthew Bender, 1984. p. 5-16.

⁷⁸ MASKOW, 1992a, p. 658.

⁷⁹ NICHOLAS, op. cit., p. 5-16.

⁸⁰ HEUZÉ, Vincent. **La vente internationale de marchandises: droit uniforme**. Paris: GLN Joly, 1992, p. 345.

⁸¹ Ibid., p. 345. In the second edition of his book, Heuzé added that the consequence of exoneration of damages instead of extinction of the obligation appears to be incompatible with the doctrine of changed circumstances. Cf. HEUZÉ, Vincent. **La vente internationale de marchandises: droit uniforme**. 2. ed. Paris: L.G.D.J., 2000, p. 425.

⁸² AUDIT, Bernard. **La vente internationale de marchandises: convention des Nations-Unies du 11 avril 1980**. Paris: L.G.D.J., 1990. p. 174-175.

Honnold, in the first edition of his *Uniform Law for International Sales*⁸³, also acknowledged that “proposals were made to enlarge the grounds for exemption to include situations in which performance would cause economic hardship”⁸⁴, which were rejected “on the ground that they cut too deeply into parties’ obligation to perform the contract”⁸⁵. Nevertheless, Honnold reached a slightly different conclusion from the foregoing scholars with respect to the intention of the drafters. For him, the legislative history “does not show that an extreme and unforeseeable change in economic circumstances cannot constitute an “impediment” leading to exemption under paragraph (1).”⁸⁶

Schlechtriem’s early comments on Article 79 CISG⁸⁷ coincided with those of Honnold. Schlechtriem emphasized that Article 79 CISG language was rooted on Article 74 of the *Uniform Law on the International Sale of Goods (ULIS)*, presenting, however, a remarkable change. The ULIS says that a party is not liable for non-performance caused by “circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he [the party] was not bound to take into account or to avoid or overcome”⁸⁸, in CISG Article 79 the term “circumstances” was replaced by “impediment”⁸⁹. Notwithstanding, Schlechtriem stated that this change of terminology does not mean that “an impediment in the sense of Article 79(1) of the Convention is only an occurrence that absolute bars performance, but – under very specific conditions – impediment also includes “unaffordability”.⁹⁰

A similar position was shared by Tallon. In light of the *travaux préparatoires*, Tallon noted that the Convention has “set aside the theory of changed circumstances”⁹¹, opting instead for a “unitary conception of exemption”⁹². Even so, following the steps of Honnold

⁸³ HONNOLD, John. **Uniform Law for international sales under the 1980 United Nations convention**. Deventer: Kluwer Law and Taxation Publishers, 1982.

⁸⁴ *Ibid.*, p. 442.

⁸⁵ *Ibid.*, p. 443.

⁸⁶ *Id.* Noteworthy, in the second edition of Honnold’s *Uniform Law*, references to the legislative history were suppressed from the comments on the issue of economic hardship under Article 79 CISG. Although expressing its defense on the issue of hardship on different grounds, Honnold finished with a pessimistic view, urging for a contract drafting solution: “In spite of strenuous efforts of legislators and scholars we face the likelihood that Article 79 CISG may be the Convention’s least successful part of the half-century of work towards international uniformity. This prospect calls for careful, detailed contract drafting to provide solutions to fit the commercial situation at hand.” HONNOLD, John. **Uniform Law for international sales under the 1980 United Nations convention** 2. ed. Deventer: Kluwer Law and Taxation Publishers, 1991. p. 484.

⁸⁷ SCHLECHTRIEM, Peter. **Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods**. Wien: Manz, 1986.

⁸⁸ Art. 74(1) ULIS. United Nations. **Convention relating to a Uniform Law on the International Sale of Goods**. 1964.

⁸⁹ SCHLECHTRIEM, 1986. p. 102.

⁹⁰ *Id.*

⁹¹ TALLON, Denis. Article 79. In: BIANCA, Massimo; BONELL, Michael Joachim. **Commentary on the International Sales Law** Giuffrè: Milan, 1987. p. 593.

⁹² *Id.*

and Schlechtriem, Tallon conceded the existence of an uncertain “borderline between impracticability and a reasonably insurmountable impediment”⁹³, which could authorize the application of “a more flexible standard than that of traditional *force majeure*”⁹⁴.

The assumption that protection for situations of economic hardship was rejected during the legislative history of the Convention is not unanimous. One author stated that there was a conscious attempt by the drafters “to combine the concepts of *vis major* (*force majeure*, act of God) and frustration (*imprévision*)”⁹⁵, an attempt which “was very unfortunate since it causes confusion by trying to combine different things”⁹⁶. Other scholars took the view that the refusal to consider change of circumstances “cannot be deduced from the *travaux préparatoires*”⁹⁷ and, therefore, “should be allowed in accordance with the principle of good faith and for reasons of commercial loyalty”⁹⁸.

What can be concluded from these commentaries is an attempt to define whether hardship is covered by the CISG, based on the legislative history of the convention and, to some extent, from a strict literalist approach. References to the methodological rules set forth by the Convention, such as its international character, underlying principles and concerns about its uniform interpretation were few or inexistent. This led to the prevailing opinion that Article 79 CISG deals only with situations of strict impossibility⁹⁹, a position that would resonate strongly in the early case law¹⁰⁰.

3.2 A new approach for the interpretation of Article 79 CISG

The primacy of historic and literalist approaches by the early CISG commentaries on the issue of hardship sheds doubt on the completeness of such approaches. Notwithstanding the unquestionable merit of these “pioneers”, it is debatable whether such studies have

⁹³ Ibid., p. 591.

⁹⁴ Id.

⁹⁵ VILUS, Jelena. Provisions Common to the Obligations of the Seller and the Buyer. In: ŠARČEVIĆ, Petar; VOLKEN, Paul. (org.). **International Sale of Goods: Dubrovnick lectures**. New York, Oceana, 1986. p. 253-254.

⁹⁶ Ibid., p. 254.

⁹⁷ MING, Catherine; NEUMAYER, Karl H. **Convention de Vienne sur les contrats de vente internationale de marchandises**. Lausanne: Centre du droit de l'entreprise (droit industriel, droit d'auteur, droit commercial) de l'Université de Lausanne, 1993. p. 535.

⁹⁸ Ibid., p. 535-536.

⁹⁹ MASKOW, 1992b; NICHOLAS, 1984; AUDIT, 1990; HEUZÉ, 2000.

¹⁰⁰ Cf. Section 3.3 *infra*.

advanced the “international character” of the Convention, as set forth by Article 7(1) CISG¹⁰¹. It appears, particularly, that attention¹⁰² was rarely given to the fact that “While the CISG purports to regulate various aspects of international sales, and explicitly exclude others, some issues may fall between those two categories”¹⁰³, hence the existence of the gap-filling mechanism provided by Article 7(2) of the Convention.

Indeed, unlike the usual approach to many other treaties or statutes, there is a specific method to infer whether any given issue (as is the case of economic hardship) “belongs” or “is covered” by the Convention. In line with the interpretative rules of the CISG, the subject of any inquiry in this field should be two-pronged. The first task is to assess whether the issue is “settled” by the Convention and, if it is not “settled”, whether it could still be “governed” by the CISG¹⁰⁴.

The majority of the studies drafted in the mid-1990s onwards started to incorporate these premises, allowing for a complete shift in the way in which Article 79 CISG has been discussed so far.

An article written in 1995 by Alejandro Garro can be given credit as a watershed. Garro accepted that, in accordance with the legislative history of the Convention, Article 79 CISG failed “to include any provision governing failure to perform in a situation short of total impossibility”¹⁰⁵, therefore providing “for an exemption of liability only on account of “impossibility” or *force majeure*”.¹⁰⁶ Nevertheless, Garro envisioned that the lack of a provision directly addressing the issue of changed circumstances in the CISG should be interpreted as a gap, deserving to be supplemented by the gap-filling tool dictated by Article

¹⁰¹ Art. 7(1) CISG provides: “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.” UNITED NATIONS, 1980.

¹⁰² Ming and Neumayer mentioned the risk of applying domestic law under Article 7(2) CISG, and Honnold opined that resort to domestic law to decide the issue of economic hardship was not admitted, but no further elaboration on the existence of a “gap” was present on their studies. Cf. MING; NEUMAYER, *op. cit.*, p. 537; HONNOLD, 1982, p. 443.

¹⁰³ GILLETTE, Clayton; WALT, Steven D. **The UN Convention on Contracts for the International Sale of Goods: Theory and Practice**. 2. ed. New York: Cambridge University Press, 2016. p. 20.

¹⁰⁴ An issue that is not governed by the CISG (*e.g.*, validity, which Article 4 CISG explicitly excludes from the purview of the Convention) is considered an “external gap”, whereas an “internal gap” appears when the issue, although governed, is not settled by the Convention. Cf. MCMAHON, Anthony. Differentiating between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of goods: A Proposed Method for Determining “Governed By” in the Context of Article 7(2). **Columbia Journal of Transnational Law**, New York, v. 44, n. 3, p. 992-1032, 2005-2006. p. 992. For further developments on Article 7(2) CISG and the gap-filling mechanism of the CISG, cf. FERRARI, Franco. Implementation of the Convention on Contracts for the International Sale of Goods (CISG). **International Business Law Journal**, n. 7, p. 835-839, 1989 and FERRARI, Franco. Gap-Filling and Interpretation of the CISG: Overview of International Case Law. **International Business Law Journal**, v. 2, p. 221-239, 2003.

¹⁰⁵ GARRO, 1995, p. 1182.

¹⁰⁶ *Ibid.*, p. 1183.

7(2) CISG¹⁰⁷.

Likewise, Schlechtriem stated in a conference held in 1998 that “perhaps we are moving to a situation where the majority of the Contracting States would have a rule of hardship and of adapting contracts”¹⁰⁸, therefore,

it would be possible to develop a similar doctrine under Article 7(2) of the Convention by saying that there is a gap in the CISG with respect to hardship rules. Then the gap could be filled by invoking the general principles of the Convention, and those general principles include good faith and fair dealing, and this requires both parties try to adapt the contract in the event of unforeseeable developments¹⁰⁹.

The change of perspective was so intense, that practically every study written about economic hardship in the CISG thereafter discussed, directly or indirectly, the existence or inexistence of a gap in Article 79 CISG¹¹⁰.

¹⁰⁷ Ibid., p. 1184.

¹⁰⁸ FLECHTNER, Harry M. Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More. **Journal of Law and Commerce**, Pittsburgh, v. 18, p. 191-258, 1997-1998. p. 236.

¹⁰⁹ Id.

¹¹⁰ Cf. BUND, Jennifer M. Force Majeure Clauses: Drafting Advice for the Cism Practitioner. **Journal of Law and Commerce**, Pittsburgh, v. 17, p. 381-413, 1997-1998. p. 392; DIMATTEO, 2015; FLAMBOURAS, Dionysios P. The Doctrines of Impossibility of Performance and Clausula Rebus Sis Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law – A Comparative Analysis. **Pace International Law Review**, White Plains, v. 13, n. 2, p. 261-293, 2001; FLECHTNER, Harry M. Uniformity and Politics: Interpreting and Filling Gaps in the CISG. In: Mankowski, Peter; WURMNEST, Wolfgang (org.). **Festschrift für Ulrich Magnus**. Munich: Sellier european law publishers, 2014, p. 204; GARRO, Alejandro M. Exemption of liability for damages: Comparison between provisions of the CISG (Art. 79) and the counterpart provisions of the UNIDROIT Principles (Art. 7.1.7). In: FELEMEGAS, John (org.). **An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods 1980 as Uniform Sales Law**. Cambridge: Cambridge University Press, 2007; GILLETTE; WALT, 2016; LINDSTRÖM, Niklas. Changed Circumstances and Hardship in the International Sale of Goods. **Nordic Journal of Commercial Law**, n. 1, 2006; LOOKOFSKY, Joseph. Not Running Wild with the CISG. **Journal of Law and Commerce**, Pittsburgh, v. 29, n. 2, p. 141-169, 2011; MAZZACANO, 2014; MONBERG, Christian. **The Unidroit Principles: The Ugly Duckling of Gap-Filling Instruments under the CISG**. Originalmente apresentado como tese. University of Copenhagen Faculty of Law, 2012; PERILLO, 1997; RAMBERG, Christina. Problems Legal Practitioners Face in Finding the Law Relating to CISG – Hardship, Defective Goods and Standard Terms. **Scandinavian Studies in Law**, v. 57, p. 283-291, 2012; RIMKE, Joern. Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts. In: PACE INTERNATIONAL LAW REVIEW. **Review of the Convention on Contracts for the International Sale of Goods**. The Hague: Kluwer Law International. (1999-2000); RÖSLER, Hannes. Changed and Unforeseen Circumstances in German and International Contract Law. **Slovenian Law Review**, v. 5, p. 47-57, 2008; SCHWENZER, Ingeborg. Force Majeure and Hardship in International Sales Contracts. **Victoria University of Wellington Law Review**, v. 39, n. 4, p. 709-726, 2008; SLATER, Scott D. Overcome by Hardship: The Inapplicability of the UNIDROIT Principles’ Hardship Provisions to CISG. **Florida Journal of International Law**, v. 12, p. 231-262, 1998-2000; URIBE, Rodrigo Momberg. Change of Circumstances in International Instruments of Contract Law. The approach of the CISG, PICC, PECL and DCFR. **Vindobona Journal of International Law**, v. 15, n. 2, 2011. p. 233; VENEZIANO, Anna. Unidroit Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court, **Uniform Law Review**, v. 15, n. 1, p. 137-149, jan. 2010; Zaccaria, op. cit.; ZELLER, Bruno. Article 79 Revisited. **Vindobona Journal of International Law**, v. 14, p. 151-164, 2010. p. 151. Only a reduced number of authors continued to construe Article 79 CISG without expressing any opinion with regards to the existence or inexistence of a gap to be fulfilled by Article 7(2) of the Convention. Cf. DRAETTA, Ugo. Hardship and Force Majeure Clauses in International Contracts. **International Business Law**

3.2.1 Existence of a gap in the CISG with respect to economic hardship

Those who advocated there was a gap with respect to economic hardship were split in two major groups. One group defended that the gap should be fulfilled in accordance with the first gap-filling mechanism set forth by Article 7(2) CISG (*i.e.*, through resorting to the “general principles” on which the CISG is based), and the other group supported the idea that the law applicable by virtue of the rules of conflict of laws (the second mechanism) should prevail.

3.2.1.1 Use of “general principles on which the CISG is based” as a gap-filler

Different trends can be observed in the group who defend that the economic hardship gap should be settled based on the “general principles on which the CISG is based”. Some scholars defend that the UNIDROIT Principles should be considered as an expression of such general principles, consequently applying the hardship provisions of Article 6.2.1 UNIDROIT Principles to supplement the CISG¹¹¹. This theoretic approach is subject to criticism as, among other reasons, the UNIDROIT Principles were released more than one decade after the Convention was signed, hence, it was impossible to match the UNIDROIT Principles with the principles that informed the CISG¹¹². Another hurdle is that application of Article 6.2.1 UNIDROIT Principles would impose either a duty to renegotiate, or a renegotiation of the contract, and both are strange elements to the CISG¹¹³.

Journal, n. 3-4, p. 347-358, 2002. p. 349 (stating that the “Convention, as it is known, refers in its article 79 only to *Force Majeure* as a case of exclusion of liability for non performance”).

¹¹¹ GARRO, 2016, p. 1184. PERILLO, 1997, p. 9; BUND, 1997-1998, p. 392; URIBE, 2011, p. 264; VENEZIANO, 2010, p. 141 (opining that the UNIDROIT Principles may be used to clarify general existing principles on which the Convention is based). For a discussion on the interaction between the Unidroit Principles and the CISG, cf. BONELL, Michael Joachim. Unidroit Principles of international commercial contracts and the United Nations Convention on Contracts for the International Sale of Goods – alternatives or complementary instruments? **Business Law International** v. 2000, p. 91-100, 2000; BRIDGE, Michael. The CISG and the UNIDROIT Principles of International Commercial Contracts. **Uniform Law Review**, v. 19, n. 4, p. 623-642, 2014; DENNIS, Michael J. Modernizing and harmonizing international contract law: the CISG and the UNIDROIT Principles continue to provide the best way forward. **Uniform Law Review** v. 19, n. 1, p. 114-151, 2014 and MAGNUS, Ulrich. General Principles of UN-Sales Law. **International Trade & Business Law Annual**, v. 3, p. 33-56, 1997.

¹¹² “Since the Principles were published well after Convention delegates had finished their work on CISG, common law nations that struggled to include a meaningful gap-filling provision based on domestic law will surely view the supplementation of CISG by the Principles as a subversion of their diplomatic agreement.” SLATER, 1998-2000, p. 249.

¹¹³ Cf. FLAMBOURAS, 2000, p. 262-263; FLECHTNER 2014, p. 204 (“such an approach is simply contrary to the express rule in Article 7(2), which permits “first step” gap-filling only on the basis of general principles on

The second group, led by an opinion rendered by the CISG Advisory Council¹¹⁴, took the view that the issue of economic hardship should be settled “within the four corners” of the Convention. The opinion was that this solution was more adequate than resorting to domestic legal rules, “because leaving the question to the conflict of law rules leads to a great diversity of potentially applicable legal doctrines”.¹¹⁵ The opinion was also that the problem of hardship could be resolved either by renegotiation (in accordance with the principle of good faith set forth in Article 7(1) CISG) or adaptation (also based on the principle of good faith or, alternatively, as a consequence of Article 79(5) CISG)¹¹⁶. The opinion was not immune of criticism, especially by Lookofsky, who rejected the Advisory Council’s view allowing for renegotiation and adaptation of the contract, as these types of relief are “fundamentally different from a liability exemption, i.e., the *only* kind of relief expressly authorized by Article 79”.¹¹⁷ Although stating that there is no gap in the Convention with respect to Article 79 CISG, Schwenzer also supported the idea that hardship should be settled “within the four corners” of the CISG.¹¹⁸ Opposing the Advisory Council opinion though, Schwenzer stated that satisfactory results should be sought under “The usual remedy mechanism under the CISG in combination with the duty to mitigate as a general principle”.¹¹⁹

3.2.1.2 Use of domestic law as a gap-filler

Although seen by the majority of the scholars as the worst enemy of the quest for uniformity¹²⁰, some authors brought forward several arguments supporting the idea that issues of economic hardship under the CISG should be approached by resorting to the domestic law resulting from the application of conflict of laws rule.

which the *CISG* is based; it does not authorize gap-filling on the basis of other legal texts or compilations of legal principles”) and ZELLER, 2010, p. 160.

¹¹⁴ The CISG Advisory Council is “a private initiative which aims at promoting a uniform interpretation of the CISG. It is a private initiative in the sense that its members do not represent countries or legal cultures, but they are scholars who look beyond the cooking pot for ideas and for a more profound understanding of issues relating to the CISG”. CISG ADVISORY COUNCIL. **About us**. 2018.

¹¹⁵ CISG ADVISORY COUNCIL. **Opinion n. 7: Exemption of Liability for Damages Under Article 79 of the CISG**. Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007.

¹¹⁶ *Id.* The wording of the opinion is very similar to that of a paper drafted by Alejandro Garro in that same year. The paper concluded that the application of the gap-filling technique for the issue of economic hardship could also justify termination: “Other than the payment of damages, a court or tribunal may order, if justified under the CISG, the termination of the contract as of a certain date.” GARRO, 2007, p. 246.

¹¹⁷ LOOKOFSKY, 2011, p. 162.

¹¹⁸ SCHWENZER, 2008-2009 p. 715-717.

¹¹⁹ *Ibid.*, p. 724.

¹²⁰ For a discussion on the principle of uniformity under the CISG, cf. FERRARI, Franco. Homeward Trend: What, Why and Why Not. **Internationales Handelsrecht**, v 9, n. 1, p. 8-24, 24 fev. 2009.

As noted by Gillette and Walt, “the lack of uniformity across jurisdictions about the legal principles that govern hardship also indicates a diversity of opinion too great to conclude that the drafters of the CISG intended to resolve the issue without addressing it explicitly”¹²¹; and a solution under the “general principles on which the CISG is based” is unwarranted, because these principles “are too varied to provide a clear answer to the question”.¹²² Therefore, Gillette and Walt took the view that “the issue of hardship in any individual case should be resolved in conformity with the law applicable to the contract by virtue of the rules of private international law”.¹²³ Gillette and Walt acknowledge that this result goes against the idea of uniformity dictated by Article 7(1) CISG. Nonetheless, they counter-argue that “There seems little reason to advance internationality over the commercial objective of minimizing the costs that parties must incur to obtain and enforce their desired contract”.¹²⁴

Lookofsky also disagrees that “the CISG regime preempts domestic hardship rules”¹²⁵, but his main idea is that there should be a competition between rule-sets, as

at least some arbiters might opt for rule-concurrence (as opposed to preemption) in hardship situations where the applicable law provides clear authority for the censorship of unreasonable contract terms (footnote omitted). Alternatively, the same arbiters might put the same authority to more “covert” use, e.g., by deciding the case on the basis of a more “expansive” economic force majeure reading of Article 79 (footnote omitted).¹²⁶

In the same vein, Slater observed that, if a tribunal fails to find a general principle, “it must, under Article 7, look to the domestic law applicable via contract of law rules”¹²⁷, a situation which “presents a much greater likelihood of relief for a party facing hardship since many nations provide some remedy for this predicament”.¹²⁸

3.2.2 Inexistence of a gap in the CISG with respect to economic hardship

Several scholars disagree that there was a “gap” in the CISG with respect to economic hardship. Although each position has its own singularities, the majority of the

¹²¹ GILLETTE; WALT, 2016, p. 313.

¹²² Id.

¹²³ Id. Gillette and Walt also expressed their sympathy for the theory that hardship is an issue of validity, therefore, not governed by the Convention in accordance with Article 4 CISG. However, “the nebulous nature of “validity” makes that a more difficult route”. GILLETTE; WALT, 2016, p. 313.

¹²⁴ Id.

¹²⁵ LOOKOFSKY, 2011, p. 161.

¹²⁶ LOOKOFSKY, Joseph. Impediments and Hardship in International Sales: A Commentary on Catherine Kessedjian’s “Competing Approaches to Force Majeure and Hardship. **International Review of Law and Economics**, v. 25, n. 3, p. 434-445, 2005. p. 442-443.

¹²⁷ SLATER, 1998-2000, p. 261.

¹²⁸ Id.

opinions of this group agree that the Convention exhausts the issue of economic hardship, and any conclusion that there is a gap would undermine the goal of uniformity in the application of the CISG.

In his comments to Article 79 CISG, Stoll conceived that, in spite of the ambiguity of the Convention,

in the event of a subsequent, unforeseeable impediment to performance as a result of a material change in economic conditions there must be a ‘limit of sacrifice’ beyond which, in view of the severe economic disadvantages involved, the promisor can no longer be expected to perform the contract¹²⁹.

However,

The history of Article 79 and its purpose of definitively setting the limits of the promisor’s responsibility for breach of contract rule out the assumption that there is a gap in the Convention as regards the promisor’s invocation of ‘economic impossibility’ and the adaptation of the contract to radically changed circumstances¹³⁰,

otherwise, “If the domestic law applicable under conflict of rules were applied to fill a supposed gap, there would be a danger that the CISG’s system would “burst””¹³¹. Mazzacano reached an identical conclusion¹³².

In the same vein, Flethner stated that “the legal effect of post-contract developments that render a party’s performance more difficult, including more expensive, is fully addressed in the Convention’s exemption provisions”¹³³. Therefore, the only remedy available for a situation of economic hardship under the Convention is exemption of damages¹³⁴, and

The fact that the CISG articles governing exemption do not authorize a tribunal to impose modified contracts terms not agreed to by the parties does not create a “gap” in the Convention; it merely reflects the Convention’s rejection of the adaptation remedy, as reflected in the *travaux préparatoires*.¹³⁵

Likewise, Lindström took the view that the issue of economic hardship “is governed by the Convention and that a gap allowing for the application of national laws cannot be

¹²⁹ STOLL, Hans. Article 79. In: SCHLECHTRIEM, Peter (org.). **Commentary on the UN Convention on the International Sale of Goods (CISG)**. Tradução Geoffrey Thomas. 2. ed. Oxford: Clarendon Press, 1998. p. 618.

¹³⁰ Ibid., p. 617.

¹³¹ Ibid., p. 618. In the second edition of the *Commentary*, Stoll and Gruber refused both the existence of an internal gap (as it contradicts the legislative history of Article 79 CISG) and an external one (as, in their view, it cannot be argued that hardship is an issue of validity). Cf. STOLL, Hans. Article 79. In: SCHLECHTRIEM, Peter; SCHWENZER, Ingeborg (org.). **Commentary on the UN Convention on the International Sale of Goods (CISG)**. 2. ed. Oxford: Oxford University Press, 2005. p. 824.

¹³² MAZZACANO, 2014, p. 103-104.

¹³³ FLECHTNER, Harry M. The Exemption Provisions of the Sales Convention, Including Comments on “Hardship” Doctrine and the 19 June 2009 Decision of The Belgian Cassation Court. **Annals of the Faculty of Law in Belgrade – International Edition**, v. 2011, p. 93-101, 2011.

¹³⁴ FLECHTNER, 2014, p. 200-201.

¹³⁵ Cf. FLECHTNER, 2011, p. 92.

found”¹³⁶. Moreover, the UNIDROIT Principles cannot be used to complement the CISG, unless the parties have so agreed¹³⁷.

Zeller also concluded that there is no gap in the CISG with respect to change of circumstances¹³⁸. As a consequence, the UNIDROIT Principles “cannot be imported into the CISG”¹³⁹, as “It would be tantamount of importing domestic laws”¹⁴⁰. His ultimate finding, however, is that the issue was settled by the Convention in order to *exclude* relief for economic hardship.¹⁴¹ A similar position was adopted by Rösler¹⁴².

3.3 Case law on economic hardship under the CISG

As previously stated¹⁴³, the aim of this paper is to analyze the issue of economic hardship as a gateway issue. If assuming that the Convention does not provide relief for this situation, then any inquiry into the merits of the case would be useless. In particular, there would be no need to discuss whether the event causing hardship was foreseeable, avoidable and beyond the non-performing party’s control.

Despite the vast case law on Article 79 CISG issues¹⁴⁴, only a few precedents have

¹³⁶ LINDSTRÖM, 2006, p. 24.

¹³⁷ Id.

¹³⁸ ZELLER, 2010, p. 160.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ “Hardship does not equate to an impediment as described in Art. 79 CISG and therefore cannot be used to assist in the interpretation of Art. 79.” ZELLER, 2010, p. 160. Zeller has come to this conclusion based on the assumption that hardship is a general principle. Though there is no further elaboration on this argument, it is interesting to note that this circumstance may be the dividing line between the existence or inexistence of a gap with respect to economic hardship under Article 79 CISG. Indeed, if considered that hardship is not a principle – but rather an *exception* to a principle, then the inexistence of a specific provision dealing with the issue of changed circumstances cannot be interpreted as a “gap”. Instead, it simply means that the drafters did not intend to create an exception to the principle of sanctity. Although the aim of this paper is to provide a general view instead of providing a new theory or the personal view of its author, Zeller’s argument seems very compelling. In the same vein, it could be added that, if it was the intention of the drafters to provide relief for situations of hardship, Article 79 CISG would be drafted in different terms, as the possible consequences under such provision are manifestly ill-suited for changed circumstances, given that no mention to duty to renegotiate or adaptation exists, be it under Article 79 CISG or any other provision of the Convention. Moreover, there seems to be some confusion between the alleged existence of gaps with respect to the *admissibility* of granting relief for situations of economic hardship (which is very debatable), and the existence gaps with regards to the *consequences* of a given issue of hardship (which conflicts with the provision on exemption of damages).

¹⁴² “Although the provision [Article 79 CISG] is somewhat unclear, it seems to exclude the concept of hardship. This is disputed and it is suggested that in exceptional cases “hardship” can also be interpreted as “radically changed circumstances”. But the diplomatic attempt to insert a hardship provision in the CISG was turned down by the Vienna Conference. It would thus overstretch the CISG when one argues that hardship could be regarded as a “general principle” which has to be taken into account according to Article 7(2) CISG. The codification of hardship in public international law does not change this appraisal. Else, it would have been included like it happened in Article 62 Vienna Convention on the Law of Treaties 1969”. RÖSLER, 2008, p. 54.

¹⁴³ Cf. note 71 *supra*.

¹⁴⁴ Cf. MAZZACANO, 2014.

addressed the issue of changed circumstances as being preliminary. In some cases, even though the dispute clearly involved a scenario of changed circumstances, the court jumped right away into the merits, and denied relief under a *foreseeability* approach¹⁴⁵. The Digest¹⁴⁶ lists a few cases that have so far engaged in a discussion whether the merits of a hardship case under the CISG can be heard.

Probably the first case to address a situation of hardship involving the CISG was decided by an Italian court (“Tribunale di Monza”), in January of 1993¹⁴⁷. The dispute concerned a contract for the sale of 1000 tons of iron chrome between an Italian seller (“Nuova Funicinati S.p.A.”) and a Swedish buyer (“Fondmetall International A.B.”).

The controversy in *Nuova Funicinati* was triggered by the seller’s refusal to deliver the goods, which led the buyer to obtain an order for specific performance, issued by the *Tribunale di Monza*. The seller objected to the order and counterclaimed, asking the Court to declare the dissolution of the contract, due to supervening excessive onerousness. The bulk of the seller’s argument was that, between the date of formation of the contract and the date of delivery, the market price of iron chrome rose 43.71%, jumping from Lire 1.496 to Lire 2.150 per kilo, an increase that was unforeseeable when the agreement was formed, and that disrupted the balance of the contract, thus justifying its termination. In addition, efforts made by the seller to find a consensual adjustment of the price were reportedly turned down by the buyer.

Although the reasoning of the case does not mention under which provision the seller’s counterclaim was grounded, the decision made it clear that the buyer opposed the counterclaim by arguing that the relief sought was not provided by Article 79 of the Convention.

The court in *Nuova Funicinati* ultimately ruled that the case was not governed by the CISG¹⁴⁸, finding for the buyer, as the seller did not match the requirements set forth by the hardship provision of the Italian law (*eccessiva onerosita sopravvenuta*).

Nonetheless, the court expressed *in dicta* that the doctrine of changed circumstances “does not fit within the structure of the Convention”.¹⁴⁹ According to the *Tribunale di Monza*, Article 79 of the Convention provides for exemption of a supervening impediment that is

¹⁴⁵ SPIVACK, 2006, p. 792.

¹⁴⁶ UNCITRAL, 2016, p. 374-375.

¹⁴⁷ ITÁLIA, 1993. Curiously, this was also the first case concerning the CISG to be decided by an Italian court. Cf. FERRARI, Franco. Uniform Law of International Sales: Issues of Applicability and Private International Law. *Journal of Law and Commerce*, Pittsburgh, v. 15, p. 159-174, 1995. p. 161.

¹⁴⁸ An aspect that was criticized by Ferrari. FERRARI, 1995, p. 168.

¹⁴⁹ Cf. ITÁLIA, 1993.

similar to Article 1463 of the Italian Civil Code (*i.e.*, the Italian version of *force majeure*), “but it does not seem to contemplate the remedy of dissolution for supervening onerousness of a performance as provided for in article 1467 of the Civil Code”.¹⁵⁰

Following the pattern of the first scholars to comment on Article 79 of the Convention, the court in *Nuova Funcinati* apparently drew its conclusions from a purely literal construction of the CISG. This is the method of interpretation that would prevail in the ensuing years. In 1994, a Belgium court heard a case on problems related to fluctuation of prices, deciding that they do not render performance impossible, therefore, Article 79 CISG was not applicable.¹⁵¹

In 1998, a Bulgarian arbitral tribunal ruled that a buyer’s claim to suspend delivery of products was not under the purview of Article 79 CISG, as there was no objective impossibility to accept the goods¹⁵². A decision rendered by a German Court in 1993, regarding a dispute between a German seller and an Italian buyer, took the view that the CISG “fills the field” in the area, hence the issue of economic hardship is settled by the CISG. But it is not clear whether the ultimate conclusion was that the issue was covered to *include* or to *exclude* relief for hardship, or what type of relief would be available, which makes this decision inconclusive at best¹⁵³.

In contrast with these early precedents (where a literalist approach predominated), the decision by the Belgium Supreme Court in *Scafom International v. Lorraine Tubes S.A.S.* (“*Scafom*”), would mark the entrance of a new approach in case law, based on the gap-filling method set forth by Article 7(2) CISG.

Scafom dealt with contracts for the sale of warm-rolled steel tubes. The seller (Exma, later succeeded by Lorraine Tubes S.A.S.) agreed to deliver the goods in accordance with price and date previously determined in writing. Before the delivery date, though, the seller faxed the buyer (Scafom), giving notice that the price of the goods should be recalculated, due to an unpredictable increase of 70% in the price of steel. The buyer did not agree with the surplus and, after unsuccessful negotiations, filed a complaint with the Commercial Court (*Rechtbank van Koophandel*) of Tongeren. The court issued an interim relief, ordering the seller to deliver the goods within 20 days, against payment of the agreed price plus one-half of the surplus requested in the seller’s fax. In response, among other arguments, the seller asked

¹⁵⁰ *Id.*

¹⁵¹ BÉLGICA. *Rechtbank van Koophandel*. Case n. AR 1849/94. Propositor: Vital Berry Marketing NV. Proposto: Dira-Frost NV. Tongeren, 2 mai. 1995.

¹⁵² BULGÁRIA. Arbitration Tribunal of Bulgarian Chamber of Commerce & Industry. Case n. 11/1996. Sofia, 12 February 1998.

¹⁵³ ALEMÁNHA. District Court Aachen. Case n. 43 O 136/92. Aachen, 14 mai. 1993.

for relief under Article 79 of the CISG as a consequence of changed circumstances¹⁵⁴.

The ruling of the Commercial Court in *Scafom* followed the strict literalist approach that was seen in *Nuova Funcinati*. The court simply held that the issue of economic hardship “is not expressly settled in Article 79 CISG, or in any other Article of the CISG”, thus confirming the order granting interim relief.

However, the Appellate Court (*Hof von Beroep Antwerp*), upon appeals by both parties, took a completely different route. This court held that “The explicit rule in the Convention on exemptions based on force majeure does not imply that the Convention excludes the possibility of price adaptation because of unforeseen changed market conditions”¹⁵⁵, therefore, under Article 7(2) CISG, the issue should be resolved in accordance with the law applicable under the conflict of laws rule (in this case, French law). Then the court decided that “the seller had not committed a breach by refusing to deliver without a reasonable adaptation of the price”¹⁵⁶ and, by a judgment of equity, ordered the buyer to pay € 450,000 in addition to the agreed price.

The *Scafom* saga ends with a decision rendered by the Supreme Court (*Hof van Cassatie*), who ultimately upheld the Appellate Court ruling, but with a single remark, established in *dicta*: that (1) due to uniformity concerns, the gap in Article 79 CISG should be filled by “the general principles which govern the law of international trade”¹⁵⁷ and (2) the UNIDROIT Principles are an example of such general principles, hence, the seller was entitled to request the renegotiation of the contract. Therefore, “the Appellate Court could, on the basis of these findings, without violation of the statutory provisions indicated in the plea, decided that the buyer must renegotiate the contractual provisions”¹⁵⁸.

Scafom became the subject of several analysis¹⁵⁹, and any further elaboration here would extrapolate the limits of this paper. It can be said, however, that comments on *Scafom* generally reflect the different theories discussed above. The Appellate Court ruling is aligned with a view that there is a gap to be fulfilled by domestic law, while the Supreme Court

¹⁵⁴ BÉLGICA. Commercial Court Tongeren. Propositor: Scafom International. Proposto: Lorrain Tubes S.A.S. Tongeren, 25 jan. 2005.

¹⁵⁵ Procedural history found in BÉLGICA. Supreme Court. Propositor: Scafom International. Proposto: Lorrain Tubes S.A.S. Brussels, 19 jun. 2009.

¹⁵⁶ Id.

¹⁵⁷ Id.

¹⁵⁸ Ibid.

¹⁵⁹ Cf. DAVIES, Martin. Excuse of Impediment and its Usefulness. In: DIMATTEO, Larry (org.). **International Sales Law: A Global Challenge**. New York: Cambridge University Press, 2014; DIMATTEO, 2015; FLECHTNER, 2014; GILLETTE; WALT, 2016; LOOKOFSKY, 2011; MAZZACANO, 2014; MONBERG, 2012; RAMBERG, 2012; URIBE, Rodrigo Momberg. The Duty to Renegotiate an International Sales Contract in the Case of Hardship – International Case Note. **European Review of Private Law**, v. 19, p. 101-154, 2011. p. 119; VENEZIANO, 2010.

decision endorsed the application of the UNIDROIT Principles as a gap-filler, dissatisfying those who see no gap in Article 79 CISG¹⁶⁰.

Despite the criticism of the holding in *Scafom*, the gap theory was reproduced by the holding in *Société D21 Dupiré Invicta Industrie S.A. v. Société Gabo*¹⁶¹ (“*Dupiré*”), recently decided by the French Supreme Court. *Dupiré* dealt with several sales contracts for the delivery of heating units. Controversy arose when the seller, due to a price increase of the raw materials, refused to deliver the goods at the previously agreed price. The Supreme court upheld the judgment by the Reims Court of Appeal, who rejected the seller’s argument of economic hardship and their request for termination of the contract. According to the Court of Appeal holding (which was affirmed by the Supreme Court), the Convention does not exclude the possibility of hardship, and the disadvantaged party is entitled to ask for relief in accordance with the UNIDROIT Principles¹⁶².

4 A REFLECTION ON THE DIFFERENT APPROACHES

The plethora of different opinions emerging from the gap-filling approach, as shown in section 3 of this paper, apparently was not enough to prevent an understanding that the issue of economic hardship is covered by the CISG. As noted by Schwenger in the 2016 edition of Schlechtriem’s *Commentary*, the prevailing opinion is that

economic impossibility, i.e. a change of economic circumstances which is of such gravity that the procurement or fabrication of the goods would cause the seller to incur unreasonable costs in relation to the contract price, can justify exemption under Article 79¹⁶³.

While this assumption seems to be accurate, it may mask the fact that important divergences remain on the underlying theories that lead to the conclusion that hardship is

¹⁶⁰ Cf. FLECHTNER, 2011.

¹⁶¹ FRANÇA. Supreme Court. Case n. 12-29550 13-18956 13-20230. Propositor: Dupiré Invicta Industrie. Proposto: Gabo. Paris, 17 fev. 2015.

¹⁶² It is not clear whether the court admitted the application of all of the solutions for situations of hardship provided by the UNIDROIT Principles. Explicit mention was made, however, to the duty to renegotiate: “en cas de hardship, précise l’article 6-2-3 des Principes d’Unidroit, la partie lésée peut demander l’ouverture de négociations” [in case of hardship, in accordance with Article 6-2-3 of the Unidroit Principles, the aggrieved party may require opening of negotiations] (tradução nossa). UNIDROIT, 2016.

¹⁶³ Cf. SCHWENZER, Ingeborg. Article 79. In: SCHWENZER, Ingeborg (org.) **Commentary on the UN Convention on the International Sale of Goods (CISG)**. 4. ed. Oxford: Oxford University Press, 2016. Schwenger’s finding is based on the holding in *Scafom*, the Advisory Council’s Opinion No. 7 and the opinions reflected in more than twenty studies.

covered by the Convention¹⁶⁴ and, above all, on the consequences that may be triggered under Article 79 CISG. As observed by one author,¹⁶⁵ to say that the CISG covers hardship “is of little help to solve the problem”¹⁶⁶, because, Article 79 CISG deals primarily with exemption of damages, and “in the case of hardship there are other problems which have to be solved”¹⁶⁷, such as “[h]ardship is not only about limiting the claim of damages; it is also about the specific performance claim”¹⁶⁸.

Instead of evaluating the merits of each different position – and it is certain that each have their pros and cons -, this paper is concerned with the following questions: how would (or should) the approach by courts and arbitrations be, on the issue of economic hardship under the CISG, considering this lack of common understanding on such fundamental issues? How could a decision maker provide a solution that is consistent with the “international character and the need to promote uniformity” in the application of the Convention, as set forth by Article 7(1) CISG?

The answer to these questions will largely depend on the level of familiarity of each court or tribunal of the CISG, and their willingness to render a decision consistent with the idea of “autonomous interpretation” (resorting to foreign case law, arbitral awards and scholarly writing). According to Di Matteo, the use of such sources “is implied by the uniformity and good faith principles found in Art. 7 of the CISG”.¹⁶⁹

A survey shown by DiMatteo some years ago observed that in the United States, for instance, 82% of the judges are not familiar with the CISG, whereas 30% of the practitioners “were thoroughly or moderately familiar with the CISG”¹⁷⁰. Courts that follow this pattern are more likely to ignore the foreign case law and the ongoing discussion by CISG scholars with respect to economic hardship. In situations like these, a “homeward trend” type of interpretation, i.e., a methodology that “reflects the use of purely domestic legal sources to aid in the interpretation of CISG provisions”¹⁷¹ can be naturally expected. Under this scenario, the final outcome will much likely hinge on how the issue of economic hardship is interpreted

¹⁶⁴ A divergence that is particularly noted between the studies who discussed the existence of a “gap” in the Convention, and those limited to literalist and historic approaches. Cf. Sections 2.1 and 2.2 *supra*.

¹⁶⁵ ATAMER, Yesim M. Article 79. In: KRÖLL, Stefan; MISTELLIS, Loukas; VISCASILLAS, Pilar Perales (org.). **U.N. Convention on Contracts for the International Sale of Goods (CISG): Commentary**. München: Hart Pub., 2011.

¹⁶⁶ *Ibid.*, p. 1089.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ DIMATTEO, Larry. Case Law Precedent and Legal Writing. In: JANSEN, André; MEYER, Olaf (org.). **CISG Methodology**. Munich: Sellier European Law Pub, 2009. p. 120.

¹⁷⁰ *Ibid.*, p. 115-116.

¹⁷¹ *Ibid.*, p. 113.

under the domestic law of that jurisdiction.

On the other hand, arbitral tribunals and jurisdictions that recognize the value of foreign case law and arbitral decisions as persuasive authority will much likely take notice of the few existing cases on economic hardship under the CISG, nowadays easily accessible on specialized websites, such as Unilex¹⁷² and Pace Law¹⁷³. If this assumption is correct, then the challenge is to determine what degree of comity will be given to such precedents. DiMatteo suggests that the adequate use of foreign case law implies that

[t]he better, more reasoned decisions (based on a review of foreign cases) would reach the level of persuasive authority while the parochial, poorly reasoned ones would be delegated to the misinterpretation side of CISG jurisprudence¹⁷⁴.

It cannot be said, for any existing case law on the issue of economic hardship under the CISG¹⁷⁵, that a careful, thorough reasoning was adopted. It is noteworthy that none of them mentioned foreign case law¹⁷⁶. From this particular angle, the precedents are all relatively similar, with the distinctive remark that *Scafom* and *Dupiré* are the most recent cases (all the others were rendered more than 15 years ago), were decided by highest courts, and were the only ones to discuss the consequences that could be theoretically accepted to a genuine issue of economic hardship.

In face of this deadlock, resorting to scholarly writing, which is also praised as a method to achieve the desired uniformity in the interpretation of the CISG, may be the differential for a decision maker to reach a decision, by assisting in distinguishing good from bad cases¹⁷⁷. This is especially true for jurisdictions known to apply scholarly writing in their CISG decisions, as well as arbitral tribunals¹⁷⁸.

Whereas it may not be possible to make a fair comparison on the merits of each different theory, a quantitative approach may be of some help. From the universe of 20 commentaries that approached the issue of economic hardship under the existence or inexistence of a “gap”¹⁷⁹, only 2¹⁸⁰ do not agree that (one way or another), hardship is covered by the CISG. Among the other 17 scholars, there seems to be no discussion that exemption of damages is a possible solution, and 5 of them admit that a duty to renegotiate could be

¹⁷² Cf. UNILEX. **CISG & UNIDROIT principles**. 2018.

¹⁷³ Cf. INSTITUTE OF INTERNATIONAL COMMERCIAL LAW. **CISG Database**. 2018.

¹⁷⁴ DIMATTEO, 2009, p. 121.

¹⁷⁵ Cf. discussion on Section 3.3 *supra*.

¹⁷⁶ Cf. discussion on Section 3.3 *supra*.

¹⁷⁷ Cf. DIMATTEO, 2015, p. 121.

¹⁷⁸ *Ibid.*, p. 128 (observing that, from a random selection of 217 judicial and 45 arbitral decisions, around 68% of the arbitral awards mentioned scholarly opinions, whereas in Civil Law courts that percentage was 62%).

¹⁷⁹ Cf. note 110 *supra*.

¹⁸⁰ Cf. RÖSLER, 2008; ZELLER, 2010.

implied either by resort to the general principles or the UNIDROIT Principles¹⁸¹ - a solution that was also admitted by the Belgium Supreme Court holding in *Scafom*¹⁸². Adaptation is a solution expressly acknowledged by only one scholar¹⁸³, but it should be remembered that this is also the position advocated by the CISG Advisory Council Opinion No. 7¹⁸⁴. The decision rendered by the French Supreme Court on *Dupiré* held that the UNIDROIT Principles can be considered as an example of the “general principles” on which the CISG is based¹⁸⁵. This leaves ample room to argue that the remedy of adaptation for change of circumstances is available under the CISG.

Following these parameters is certainly not the only tool that should be considered to predict how a court or tribunal would decide an issue of economic hardship under the Convention. Particular attention should be given to the fact that very often decision makers will prefer to skip this problematic gateway issue and make a decision based on the merits, and there is vast literature showing that, in those cases, the threshold to recognize the occurrence of economic hardship has never been met. Nevertheless, an overview of the different approaches may be very helpful in order to define the strategy to be adopted in each individual case.

5 FINAL REMARKS

Concerns about economic hardship that may fall under the purview of the Convention require simultaneous consideration of many aspects. Choosing a governing law and a method of dispute resolution that best suit the interest of the client is a major concern for the transactional lawyer, whereas litigation scenarios lead to the adoption of a strategy that takes into account the multiple outcomes that may arise in a hardship issue under the CISG.

This paper aimed to present how scholarly writing and case law evolved in the discussion of economic hardship, and revealed that no definite answer can be provided. Although the majority of the modern scholarly writing views hardship covered by the CISG, conflicting views persist on what consequences could be envisioned to redress a case of changed circumstances, with a growing acceptance of duty to renegotiate besides the traditional exemption of damages, and a major reluctance on granting adaptation of the

¹⁸¹ Cf. BUND, 1997-1998; GARRO, 2017; PERILLO, 1997; URIBE, 2011; VENEZIANO, 2010.

¹⁸² Cf. BÉLGICA, 2009.

¹⁸³ Cf. GARRO, op. cit.

¹⁸⁴ Cf. CISG Advisory Council, note 115 *supra*.

¹⁸⁵ Cf. FRANÇA, 2015.

contract as a solution. With respect to case law, although the number of precedents is reduced, it is relevant to consider the decisions rendered by the Supreme Courts of two different countries, thus suggesting the possibility of applying the hardship provision found in the UNIDROIT Principles (which could indirectly provide for renegotiation and adaptation).

This paper suggests, nevertheless, that it is time to revisit the pessimistic vision that Article 79 CISG is the “least successful part”¹⁸⁶ of the CISG. The new interpreters of the Convention have a vast array of scholarly writing and easy access to a substantial amount of case law and arbitral decision on the subject. They are in the position to make a judicious use of it, and the expectation is that a convergence will be reached with the principles of internationality and uniformity serving as a guide

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¹⁸⁶ Cf. HONNOLD, 1991, p. 484.

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