



NORTH-WEST UNIVERSITY
YUNIBESITI YA BOKONE-BOPHIRIMA
NOORDWES-UNIVERSITEIT
POTCHEFSTROOM CAMPUS

Initials and Surname: VC KING

University Number: 22507124

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**HARDSHIP AS AN IMPEDIMENT TO PERFORMANCE IN TERMS OF ARTICLE 79
OF THE CISG**

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by

VICTORIA CECILIA KING

22507124

Study leader: Prof S Eiselen

CO study leader: Prof S de la Harpe

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Preface

In international trade agreements the term 'hardship' is often used to describe the position when an unexpected event occurs, after a contract has been entered into, which would cause one party to be placed at a severe disadvantage should it perform. Hardship could serve as an impediment which prevents (albeit not objectively) the party from performing. The disadvantaged party might be excused from liability, based on that hardship, for its non-performance. The performance has in that situation become excessively onerous but not impossible in an objective sense.

The above situation is also of importance in the application of the CISG. If article 79 of the CISG was designed to deal with cases of impossibility then what are the potential effects of including hardship as an impediment which results in excusing non-performance? The question leads to the interpretation of what the term 'impediment' means and how it was intended to be interpreted in terms of the CISG.

The discretion as to the interpretation of article 79 and the inclusion of hardship in its scope of application is left entirely to the courts. The courts usually take into consideration the drafting history of article 79 and other international instruments to guide their discretion. There hasn't been anonymous acceptance of either including or excluding hardship in article 79's sphere of application. This uncertainty does not provide the unification which the CISG seeks to achieve as it creates skepticism as to the ability of the CISG to ensure certainty and to both protect and enforce parties' rights and duties.

KEYWORDS: CISG, Hardship, Article 79, Frustration

LIST OF ABBREVIATIONS

CISG United Nations Convention on Contracts for the International Sale of Goods

UP Principles of International Commercial Contracts

PECL Principles of European Contract Law

INDEX

1. Chapter 1: Introduction	1 - 3
2. Chapter 2: CISG Article 79: Impossibility and hardship	4
2.1 Introduction	4 - 9
2.2 Legislative history	9 - 14
2.3 Scafom decisions	14 - 22
2.4 CISG Opinion No 7	22 - 26
2.5 Conclusion	26
3. Chapter 3: Hardship under UP and PECL	26
3.1 Introduction	26 - 27
3.2 UP	27 - 30
3.3 PECL	31 - 33
4. Chapter 4: Comparative analysis CISG, UP and PECL	34 - 36
5. Chapter 5: Conclusion	36 - 38
Bibliography	39 - 41

1 INTRODUCTION

Contracts are the facilitator of all commercial relationships. Without contracts people would be forced to engage in gentlemen's agreements. While that is a great concept, it only works when one deals with gentlemen. Unfortunately most are not willing to take that risk anymore and for that reason people make use of contracts. However, parties sometimes fail to perform their obligations in terms of a contract. Failure to perform is sometimes due to circumstances beyond the control of a party. Legal systems have struggled over the years to determine exactly when such circumstances should excuse a party from liability for the apparent breach. Some legal systems set strict requirements, namely that performance must have become impossible in an objective sense. However, some legal systems set more lenient requirements by also allowing circumstances that make performance impossible in a subjective sense.

Hardship occurs when:

an external event fundamentally alters the balance of the performances under the contract and an unreasonable burden is placed on one of the parties. The performance of the contract becomes excessively onerous due to changed circumstances for one of the parties who is thus faced with hardship. In case of hardship it is not impossible to perform the contract, only excessively more onerous than at the time of contracting.¹

The term given to describe what has caused an act to become impossible to perform is an 'impediment'. 'Impediment' is defined in the Oxford dictionary as 'something that delays or stops the progress of something'.²The impediment which causes non-performance must materialise post conclusion of a contract of sale through changed circumstances.

¹ Lindström 2006 *Nordic Journal of Commercial Law* 2006 4.

² Hornby Oxford Advanced Learner's Dictionary of Current English 598.

The United Nations Convention on Contracts for the International Sale of Goods (1980)³ which came into force on 1 January 1988⁴ is a unified set of rules which attempt to regulate the international sale of goods which has been adopted, as of 7 July 2010, by 76 states.⁵ In the CISG's sections on exemptions⁶ lies a provision which deals with the situation where an impediment causes a party to a contract to fail to perform and such party may be excused from damages under certain instances.⁷ Article 79 of the CISG⁸ does not state that performance of the obligations agreed upon in the contract need be impossible as a result of the impediment. The obligations which are to be performed might become excessively onerous by the impediment, but this does not mean impossible. It is this grey area within article 79 which could cause courts to entertain the idea that if performance need not be absolutely impossible, then hardship might also find application in article 79.⁹ The question then is whether or not article 79 can be interpreted to cover not only impossibility but also non-performance due to hardship. The purpose of this dissertation is to critically examine whether in the interpretation of article 79 hardship as an impediment to non-performance should be included.¹⁰

A legal principle does not exist as a separate function which exists in isolation. Each legal principle (and its application) lends itself to the development of practices followed by entrepreneurs and jurists. The result of applying certain legal principles in a particular manner, in this instance article 79 with specific reference to non-performance, can have far reaching effects and therefore need to be interpreted and applied strictly

³ United Nations Convention on Contracts for the International Sale of Goods (1980) (hereafter referred to as "CISG").

⁴ Flambouras 2002 <http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html>.

⁵ Kritzer 2010 <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.

⁶ Article 79 – 80 of the CISG.

⁷ Article 79 of the CISG.

⁸ Hereafter referred to as "article 79".

⁹ The Appeal court in *Scafom International BV v. Lorraine Tubes S.A.S.*

(<http://cisgw3.law.pace.edu/cases/090619b1.html>) did find that an impediment could include hardship and as such hardship could find application in terms of Article 79 of the CISG. This case will be discussed further in Chapter 2.

¹⁰ If hardship is to be included in the interpretation of Article 79 it is uncertain what the consequences and the limits of its application will be and how strictly it should be interpreted.

and with caution. It is therefore necessary to determine the exact nature and scope of article 79.

In Chapter 2 the legislative history of article 79 and the traditional approach thereto will be discussed in order to gain a platform from which to understand the principle of hardship. The most recent case, which included the concept of hardship in the scope and application of article 79, *Scafom International BV & Orion Metal BVBA v. Exma CPI SA* (2005)¹¹ as well as the CISG's Opinion No 7,¹² will further be discussed.

In Chapter 3 the principles as contained in the Principles of International Commercial Contracts Article 1.6(2) formulated by the International Institute for the Unification of Private Law (Rome 2004)¹³ and the Principles of European Contract Law 1999¹⁴ will be dealt with. The PECL and the UP are important in the discussion of the CISG because all three of these international instruments combine the civil and common law legal systems of different countries, creating a uniform set of rules. The UP as well as the PECL both in practice compliment the CISG in that where the CISG is silent on a specific matter help is often sought by looking to the PECL and UP for a clearer interpretation of the legal principle under discussion.

Chapter 4 will deal with the comparison between the CISG, the UP and the PECL to determine the similarities and differences between them and also to determine how each of these international instruments have dealt with the principle of non-performance and the inclusion or exclusion of hardship.

The last Chapter will serve as a conclusion which will present remarks on the discussion of article 79 and the inclusion of hardship in its interpretation and application.

¹¹ *Scafom International BV & Orion Metal BVBA v Exma CPI SA* 2005

<http://cisgw3.law.pace.edu/cases/050125b1.html> (hereafter referred to as the "Scafom case").

¹² CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG (hereafter referred to as "CISG Opinion No. 7").

¹³ Principles of International Commercial Contracts Article 1.6(2) formulated by the International Institute for the Unification of Private Law (Rome 2004) (hereinafter referred to as "UP").

¹⁴ Principles of European Contract Law 1999 (hereafter referred to as "PECL").

Chapter 2: CISG Article 79: Impossibility and hardship

2.1 Introduction

The South African common law term of *vis major* or *force majeure*¹⁵ is used to describe a situation where a party or parties to a contract are excused from performance, in whole or in part, in terms of their contract.¹⁶ The exemption from performance stems from the occurrence of an unforeseeable event beyond the party's control and the occurrence prevents it from performing. Force majeure can also be extended to apply to the failure of third parties to perform where for instance a party to the contract uses a subcontractor. Hardship has been described 'as a situation that does not quite amount to being a force majeure'¹⁷(performance is not necessarily impossible).

Hardship is a result of an event/s that does not constitute a normal risk and these events are both extraordinary and unforeseeable.¹⁸ In order for hardship to become relevant there must be an impediment and that impediment must be the cause of the non-performance. A practical example of a situation where the principle of hardship may occur is as follows:

Seller A in country B concludes a contract of sale with a buyer in country Z for the sale of 1 ton of freshly cut flowers. It is known to both parties at the time of conclusion of the contract that there is only one service provider, an airliner, which transports freshly cut flowers of that volume, in country B. The buyer needs the flowers for a specific event and the flowers must arrive 1 day before this event. The arrival date is a condition of the contract. The seller arranges the transportation with the airliner and the airliner agrees to provide one aircraft suitable for the cargo load. On the day of transportation

¹⁵ The term 'force majeure' is not actually used in the CISG. The CISG does address the issue of changed circumstances but it has developed a system of its own and therefore does not refer to existing concepts as they might be understood or applied in different legal systems. The reason for this is because the conditions under which a defence such as force majeure might be allowed differs from legal system to legal system. Rimke Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts in Review of the Convention on Contracts for the International Sale of Goods (CISG) 198.

¹⁶ Guest et al (eds) Chitty on Contracts (Sweet & Maxwell London 1994).

¹⁷ Southerington Review of the Convention on Contracts for the International Sale of Goods (CISG) 261.

¹⁸ Perillo 2006 <http://www.cisg.law.pace.edu/cisg/biblio/perillo4.html>.

the South African Civil Aviation Authority (SACAA) grounds the airliner's entire fleet due to a non-conformance finding. The grounding of the fleet is indefinite and the airliner predicts that it will take approximately 1 week to rectify the non-conformance. The seller immediately notifies the buyer of the problem. The seller contacts a private charter company who agrees that they will be able to assist but the price will be considerably more expensive, due to the urgency and last minute arrangements and also informs the seller that it does not have a suitable aircraft to carry a cargo of 1 ton. Therefore, three smaller aircraft will have to be used. The first two aircraft will be able to arrive in country Z on time but the third aircraft will only be available for departure one day after the buyer's event.

The impediment is the grounding of the aircraft and the subsequent lack of transport. The seller could not reasonably have foreseen that the airline's fleet would be grounded nor could he have done anything to prevent or avoid it. The seller did notify the buyer as soon as he became aware of the situation that two thirds of the flowers would arrive on time but at a price 6 times of that agreed upon and that one third of the flowers would not be on time. Performance in respect of the last third of flowers has become impossible, however the first two thirds is possible however performance has become extremely onerous for the seller. The seller is a small company, this being its first big order. If the seller pays the private charter company their price and the buyer does not cover the increase the seller will not be able to continue operating with such a loss.

An important difference between hardship and force majeure is the requirement of unforeseeability. When dealing with hardship the fact that the circumstances might change can be foreseeable but the cause and the seriousness of the change must not have been foreseeable.¹⁹

Impossibility of performance is where the performance which is required in terms of the contract cannot be realised because it is neither physically nor practically possible or it

¹⁹ Pace International Law Review (ed) Review of the Convention on Contracts for the International Sale of Goods (CISG) (Kluwer Law International The Netherlands 2004).

is prohibited by a legal order.²⁰ Hardship on the other hand does not imply that the performance became impossible but it does cause an imbalance to the contractual obligations where performance is nonetheless carried out.²¹

When two parties to an international contract for the sale of goods have their places of business in different states the CISG will apply to their contract if:

- a) The states are contracting states;²² or
- b) When the rules of private international law lead to the application of the law of a contracting state.²³

The reliance on the rules of private international law will only be needed where the parties have not made use of a choice of law clause²⁴ in their contract.²⁵ It has been held by an international arbitration tribunal²⁶ that in certain instances where neither party to the contract has its place of business in a contracting state and the CISG's application has not been included in the contract, that certain provisions within the CISG may nevertheless be applicable to the contract. For instance, it has been held that where a contract contains no choice of law clause prevailing trade usages may be considered and where the domestic law differs from generally accepted trade usages as reflected in the CISG, the CISG may be applicable.²⁷ If the CISG applies to a contract in terms of Article 1(a) and (b) of the CISG but the parties do not want the CISG to apply

²⁰ Southerington Review of the Convention on Contracts for the International Sale of Goods (CISG) 263.

²¹ Southerington Review of the Convention on Contracts for the International Sale of Goods (CISG) 263.

²² Article 1(a) of the CISG.

²³ Article 1(b) of the CISG.

²⁴ Choice of law clause refers to a clause within a contract wherein the parties to the contract agree as to which law will govern the contract.

²⁵ Christiansen CISG – what risks does it involve to seller and how does he secure against them? – a practical guide6.

²⁶ ICC Arbitration Case No. 5713 of 1989 <http://cisgw3.law.pace.edu/cases/895713i1.html>.

²⁷ ICC Arbitration Case No. 5713 of 1989 <http://cisgw3.law.pace.edu/cases/895713i1.html>.

the CISG's application can be expressly excluded in the contract. International contracts for the sale of goods have developed considerably²⁸ and for this reason the:

Adoption of uniform rules which govern contracts for the international sale of goods and [the taking] into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.²⁹

Article 79(1)³⁰ provides for a promisor's exemption from having to pay damages³¹ in cases where it is unable to perform its obligations, as set out in the contract, due to an unforeseeable impediment beyond the promisor's control.³² Article 79(2)³³ limits the promisor's exemption by stating that the promisor will not be able to avoid liability by relying on third parties to fulfil the promisor's obligations. The promisor in such an instance is responsible for a third party's conduct in the same way as it is responsible for the conduct of its own personnel.³⁴ The exemption is further limited to the duration for which the impediment exists in article 79(3).³⁵ If the impediment is, for whatever reason, removed the promisor will no longer be entitled to claim an exemption from having to pay damages for its continued non-performance.³⁶ In other words the promisor is only exempted from paying damages for the period that the impediment exists. If the impediment ceases and the promisor still does not perform, the promisor

²⁸ As economies and relations have developed it has become increasingly easier to engage in trade with countries from around the world. With the success and rapid improvement of instruments like the internet, transport and modes of communication the sharing of products and ideas with people from other countries has become part of everyday living. However, with the growth of international trade comes the need to regulate these business transactions. The involvement of different countries in one transaction creates even a more important need for a contract of because unlike with a domestic contract where the common law or laws of one specific country will apply to the transaction you now have to consider that two or more country's legal systems will come into play. Unfamiliar laws of other countries pose potential hurdles to a contract of sale which are unnecessary and avoidable by applying the CISG, which is familiar to both contracting parties.

²⁹ Preamble to the CISG.

³⁰ Article 79(1) of the CISG.

³¹ The promisee will however still be entitled to invoke the other remedies available to him in terms of the CISG.

³² Schwenzer (ed) Commentary on the UN Convention on the International Sale of Goods (CISG) (Oxford University Press Oxford 2010).

³³ Article 79(2) of the CISG.

³⁴ Schwenzer (ed) Commentary on the UN Convention on the International Sale of Goods (CISG) (Oxford University Press Oxford 2010).

³⁵ Article 79(3) of the CISG.

³⁶ Schwenzer (ed) Commentary on the UN Convention on the International Sale of Goods (CISG) (Oxford University Press Oxford 2010).

will be in breach and therefore liable for damages. The damages that can then be claimed will only be for the period after the impediment ceased and the promisor was in breach. The promisor is required to give notice to the other party to the contract in accordance with article 79(4)³⁷ and article 79(5)³⁸ limits the sphere of the exemption's application to claim damages. In summary article 79 is the limitation to the 'principle of strict liability for non-performance of the contract which underlies the CISG'.³⁹

In order for article 79 to apply certain requirements must be fulfilled. In this regard the promisor's failure to perform must be due to:⁴⁰

- a) An impediment which is beyond his control;
- b) Which is unforeseeable;
- c) Unavoidable in the sense that the promisor could not reasonably be expected to avoid or overcome the impediment or its consequences; and
- d) the impediment must be the cause for the failure to perform.

Where article 79 finds application it's application does not infer that there is no breach of contract and the exemption will only apply to that obligation which has not been performed.⁴¹ The promisor will only be exempted from having to pay damages in respect to the obligation which it has been prevented from performing where it has only been prevented from performing in part.⁴² The promisee's right to claim specific performance where performance becomes possible at a later stage is not excluded by article 79.⁴³ All other remedies⁴⁴ which the CISG grants to the promisee are still available to it except its claim for damages.

³⁷ Schwenger (ed) Commentary on the UN Convention on the International Sale of Goods (CISG) (Oxford University Press Oxford 2010).

³⁸ Article 79(5) of the CISG.

³⁹ Schwenger (ed) Commentary on the UN Convention on the International Sale of Goods (CISG) (Oxford University Press Oxford 2010).

⁴⁰ Schwenger (ed) Commentary on the UN Convention on the International Sale of Goods (CISG) (Oxford University Press Oxford 2010).

⁴¹ Schwenger (ed) Commentary on the UN Convention on the International Sale of Goods (CISG) (Oxford University Press Oxford 2010).

⁴² Schwenger (ed) Commentary on the UN Convention on the International Sale of Goods (CISG) (Oxford University Press Oxford 2010).

⁴³ Schwenger (ed) Commentary on the UN Convention on the International Sale of Goods (CISG) (Oxford University Press Oxford 2010). The promisee's right to claim specific performance will however not be applicable where the specific goods have been destroyed.

The CISG address the issue of changed circumstances but it does not make any specific reference to hardship or its inclusion in the application of article 79 (or anywhere else for that matter). Rimke⁴⁵ states that the CISG developed its own system with regard to impediments. This system does not make use of the accepted wording and concepts of different domestic laws.⁴⁶ Because the CISG does not make reference to these concepts, interpreting the application of the CISG can be difficult. In attempting to decipher the sphere of applicability of article 79 one needs to look at the history of hardship and the opinions of courts and academics.

2.2 Legislative history

The CISG was drafted using as its basis, the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). Both these conventions were drafted by the International Institute for the Unification of Private Law (UNIDROIT) and are collectively referred to as the 1964 Hague Conventions.⁴⁷

In the drafting of Article 74 of the ULIS which deals with exemptions there was debate as to whether the term “circumstances” or the term “obstacles” should be used.⁴⁸ These terms needed to describe the trigger event that would allow for exemption.⁴⁹ The clause received criticism because it was said that:

⁴⁴ Other remedies will include those for non-performance, defective performance, avoidance of the contract, a reduction in the contract price, interest on the purchase price and other sums due (under certain circumstances) and claims for compensation of expenses incurred in terms of Article 85 and 86 of the CISG.

⁴⁵ Rimke *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts* 219.

⁴⁶ Accepted legal doctrines such as imprévision, frustration of contract, commercial impracticability, Wegfall der Geschäftsgrundlage, eccessiva onerosita sopravvenuta.

⁴⁷ Rimke *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts* 210.

⁴⁸ Rimke *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts* 222.

⁴⁹ Rimke *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts* 222.

The clause could also apply to situations where performance had unexpectedly been made more difficult, it was thought to make it too easy for the promisor to excuse his non-performance of the contract.⁵⁰

When the CISG's article 79 was drafted the term "circumstances" was replaced with the term "impediment".⁵¹ Rimke⁵² is of the view that the insertion of the word "impediment" illustrates that the intention of the drafters was to narrow the exemption's scope.

Tallon⁵³ agrees that there is uncertainty between impracticability and a reasonably insurmountable impediment in the CISG. But Tallon states that if the CISG appears more flexible than the standard of force majeure it is 'undoubtedly stricter than frustration or impracticability.'⁵⁴

According to Fucci⁵⁵ the theory of hardship's origins can be found in how Roman law evolved:

The basic principle was that if performance of a contract was possible, but a fundamental change in the circumstances surrounding the contract had rendered performance much more burdensome, so that continued performance by the party affected would amount to an undue hardship, then the affected party could invoke the principle of *clausula rebus sic stantibus*. This means that the contract contained an implied term (*clausula*) that certain important circumstances must remain unchanged (*sic stantes*).⁵⁶

Hardship, as a part of Roman law, provided for the principle that where performance was not impossible, but the circumstances were changed fundamentally and performance became more burdensome, that continued performance would result in

⁵⁰Rimke *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts* 222.

⁵¹Rimke *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts* 222.

⁵²Rimke *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts* 222.

⁵³ Tallon Article 79 592.

⁵⁴ Tallon Article 79 592.

⁵⁵ Fucci 2007 <http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>.

⁵⁶Fucci 2007 <http://www.cisg.law.pace.edu/cisg/biblio/fucci.html> in Horn Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law in Horn (ed) *Adaptation and Renegotiation of Contracts in International Trade and finance*.

undue hardship.⁵⁷ Under Roman law it was termed *clausula rebus sic stantibus* which translated means that it was an implied term of a contract that important conditions would remain unchanged.⁵⁸

Hardship is not a legal concept accepted and applied by all legal systems. France does not grant relief for hardship in relation to contracts in the private sector.⁵⁹ France does give relief in terms of the doctrine of *imprévision* for supervening hardship in the performance of government contracts.⁶⁰ The origin of article 79's language echoes that of French law:

which accepts justification or excuse for non-performance in the face of a *force majeure* event, as far as this event is unforeseeable, insurmountable, irresistible and not attributable to the promisor of the obligation.⁶¹

The First World War brought about a decision in the French courts which granted relief using the hardship principle. The French court ordered the parties to agree on an amount of compensation and if they failed to do so the court would decide thereon.⁶²

After World War I Germany accepted the theory of *Wegfall der Geschäftsgrundlage*.⁶³ This application or consequence of this theory meant that:

The party who is unduly burdened because of changed circumstances may obtain a discharge of the contract, or the court can adapt the contract to changed circumstances if both parties want the contract to continue. The changed

⁵⁷Fucci 2007 <http://www.cisg.law.pace.edu/cisg/biblio/fucci.html> in Horn Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law in Horn (ed) Adaptation and Renegotiation of Contracts in International Trade and finance.

⁵⁸Fucci 2007 <http://www.cisg.law.pace.edu/cisg/biblio/fucci.html> in Horn Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law in Horn (ed) Adaptation and Renegotiation of Contracts in International Trade and finance.

⁵⁹Perillo Force Date Unknown <http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html>.

⁶⁰Perillo Force Date Unknown <http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html>.

⁶¹Flambouras Date Unknown <http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html>.

⁶²Fucci 2007 <http://www.cisg.law.pace.edu/cisg/biblio/fucci.html> in Horn Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law in Horn (ed) Adaptation and Renegotiation of Contracts in International Trade and finance.

⁶³ Which means the disappearance of the foundations of the contract.

circumstances must be exceptional and the court must balance the interests of both parties.⁶⁴

England stands by the traditional rule that:

[a] contract will only be frustrated if the substance of it has become impossible or illegal, or the commercial purpose has been completely destroyed.⁶⁵

In early English common law an impossibility to perform did not grant a promisor relief from non-performance.⁶⁶ A person was held to be strictly bound by his obligations in terms of the contract. The rule laid down was that a contract which was “absolute” allowed for no exception in favour of the party who fails to perform his obligations as a result of an occurrence which prevented him from performing.⁶⁷ For performance to be absolutely impossible performance would have to be:

Beyond the reach of all men, no matter their wisdom, ability or training. In other words, “The thing cannot be done”.⁶⁸

Important case law with regards to the development of relief available where performance becomes impossible is the case of *Paradine v Jane*.⁶⁹ In the *Paradine-case* a tenant failed to pay his rent and blamed his failure to perform on the fact that he had been ousted from possession of the leased premises by the King’s enemies, during a civil war. In the court’s ruling it stated that:

First, the tenant would have been entitled to the benefits of unanticipated profits if there had been any. Therefore, the tenant should bear the burdens of unanticipated losses. Second, the actions of the King’s enemies might have excused an obligation imposed by law, but it would not excuse a self-imposed obligation. This is because the tenant could have guarded against the risk by contract, that is, by negotiating an excuse to the effect that ouster from possession by the King’s enemies would excuse the obligation to pay

⁶⁴ Perillo Date Unknown <http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html>.

⁶⁵ Perillo Date Unknown <http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html>.

⁶⁶ Vogel 1977 *Public Contract Law Journal* 111.

⁶⁷ Guest et al (eds) *Chitty on Contracts* (Sweet & Maxwell London 1977).

⁶⁸ Vogel 1977 *Public Contract Law Journal* 111.

⁶⁹ *Paradine v Jane Alyne* 26, 82 Eng. Rep. 897 (K.B. 1647) (hereafter the *Paradine-case*).

rent. In short, an obligation voluntarily assumed has greater rigidity than an obligation imposed by law.⁷⁰

The above case was not deemed a case of impossibility. The tenant was able to pay the rent, the payment of the rent was however a hardship.

This absolute rule was the rule of law in English law until 1863⁷¹ when the *Taylor v Caldwell*⁷²-case was decided. In the *Taylor*-case the parties had entered into a contract whereby the defendants permitted the plaintiffs to use a music-hall for the performance of concerts for four specific nights. Prior to the first concert night the music-hall was destroyed in a fire and subsequently the defendants would be unable to perform in terms of the contract. In giving his judgment Blackburn J, stated that the defendants were not liable for damages. The judge employed the concept of an implied condition which allowed for the introduction of the doctrine of frustration into English law.⁷³ The judge did this with the following reasoning:

It might appear from the nature of the contract that the parties must have known from the beginning that the fulfillment of the contract depended on the continuing existence of a particular person or thing...as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contractor...⁷⁴

The principle was further extended in 1874 in the *Jackson v Union Marine Insurance Co. Ltd*⁷⁵-case. Whereas the *Taylor*-case dealt with the physical destruction of the subject-matter, the *Jackson*-case dealt with the frustration of the commercial adventure as envisaged by the parties to the contract.⁷⁶ The *Jackson*-case revolved around a cargo ship which ran aground. It took six weeks to refloat her and another six months to complete the necessary repairs. The question posed was whether the time needed to

⁷⁰ Perillo 2006 <http://www.cisg.law.pace.edu/cisg/biblio/perillo4.html>.

⁷¹ Guest et al (eds) *Chitty on Contracts* (Sweet & Maxwell London 1977).

⁷² *Taylor v Caldwell* 1863 3 B. & S. 826 (hereafter the *Taylor*-case).

⁷³ Guest et al (eds) *Chitty on Contracts* (Sweet & Maxwell London 1977).

⁷⁴ Guest et al (eds) *Chitty on Contracts* (Sweet & Maxwell London 1977).

⁷⁵ *Jackson v Union Marine Insurance Co. Ltd* 1974 L.R. 10 C.P. 125 (hereafter the *Jackson*-case).

⁷⁶ Guest et al (eds) *Chitty on Contracts* (Sweet & Maxwell London 1977).

repair the ship so that she could continue with the charter party was so long that the commercial sense of contract had ended. The court found that:

A voyage undertaken after the ship was sufficiently repaired would have been a different voyage...different as a different adventure...⁷⁷

The English doctrine of frustration discharges the contract in whole. The contractual obligations of the parties to the contract are also discharged.⁷⁸ Article 79 on the other hand only discharges the non-performing party from his liability to pay damages.⁷⁹ In order for a contract to be discharged by frustration an event would have to occur after the contract has been concluded, which renders performance in terms of the contract physically or commercially impossible to fulfil.⁸⁰ Alternatively the event may transform the obligations to such a degree that differs greatly from the obligation which was undertaken at the time the contract was concluded.⁸¹ The principle operates very narrowly and this is because:

The courts do not wish to allow a party to appeal to the doctrine of frustration in an effort to escape from what has been proved to be a bad bargain: frustration is “not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.” The second is that parties to commercial contracts commonly make provision within their contract for the impact which various possible catastrophic events may have on their contractual obligations.⁸²

2.3 Scafom decisions

The CISG’s lack of clarity as regards hardship’s inclusion in article 79’s sphere of application, forces jurists and academics to search for guidance through mediums other than the CISG’s express words. The courts and tribunals hearing matters concerning this matter are being forced to apply what insight and reason they have to the

⁷⁷ Guest et al (eds) *Chitty on Contracts* (Sweet & Maxwell London 1977).

⁷⁸ Flambouras Date Unknown <http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html>.

⁷⁹ Flambouras Date Unknown <http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html>.

⁸⁰ Guest et al (eds) *Chitty on Contracts* (Sweet & Maxwell London 1994).

⁸¹ Guest et al (eds) *Chitty on Contracts* (Sweet & Maxwell London 1994).

⁸² Guest et al (eds) *Chitty on Contracts* (Sweet & Maxwell London 1994).

interpretation of article 79. The most recent case, heard by a Belgium court, which was tasked with interpreting article 79 and hardship's inclusion therein, was the case of *Scafom International BV & Orion Metal BVBA v. Exma CPI SA*.⁸³ The *Scafom-case* involved companies registered under Belgium and French law respectively. The facts of the case can be set out as follows: BV Scafom, the Plaintiff in the *Scafom-case* concluded a number of contracts of sale with SA Exma, the Defendant. The contracts were for the delivery of warm rolled steel tubes which were to be used in the production of scaffolds. The contracts were clear on the price of the steel as well as the place and date of delivery. The contracts did not however contain any clause regulating price adjustment in the event of supervening circumstances.⁸⁴

On 18 March 2004, SA Exma ("the Seller") notified BV Scafom ("the Buyer") by way of a fax that it had been forced to recalculate the prices which had been agreed upon because the price of steel had increased by 70%, along with the other unpredictable developments associated with such increase. The seller stated that it would not accept any claims from the buyer because of any subsequent shortages or delays in the amounts delivered. The seller also stated that it was recasting its pricing for all deliveries that were to take place between 1 April 2004 and 30 April 2004.

On 19 March 2004 the buyer gave the seller written notice of the deliveries which were already ordered and still due. The buyer requested that the seller deliver those items in accordance with the contract.

The seller proceeded to give the buyer notice of its new prices on 23 March 2004 and asked the buyer to issue acceptance of the new prices. The parties' negotiations with respect to the new prices failed and on 25 March 2004 the seller stated, by way of registered post, that it refused to process any more steel deliveries. Deliveries would

⁸³ *Scafom International BV & Orion Metal BVBA v. Exma CIP SA* 2005 Commerciale Court Tongeren <http://cisgw3.law.pace.edu/cases/050125b1.html> (hereafter the *Scafom-case*).

⁸⁴ Veneziano *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court in Uniform Law Review* 138.

not commence until such time that the buyer unequivocally accepted the price increase. The buyer's attorneys then notified the seller on 29 March 2004 that the buyer did not accept the price increases and that failure by the seller to deliver the steel, as contracted to do, would be considered a breach of contract.

On 31 March 2004 the buyer summoned the seller to appear before the Commercial Court of Tongeren ("the Court"). The court issued an interim injunction ordering the seller to deliver the steel products against payment of the agreed price and against one-half of the extra price that was claimed by the seller in its fax dated 23 March 2004. The seller was ordered to pay a penalty to the buyer for each day of delay if the delivery did not take place within 20 days from the date of the interim injunction. The seller was further liable for a penalty payable to the buyer for each day of delay for those deliveries not yet due but where the deliveries did not take place within 20 days after the date agreed upon.

The CISG was found to be applicable to the *Scafom*-case in that the *Scafom*-case involved a contract for the sale of goods. Furthermore both parties had their places of business in different contracting states⁸⁵ and the parties never protested against the application of the CISG, in fact they agreed to its application.

Before the court could go on to determine the case on its merits the court had to answer the objective question as to whether or not there was in fact an increase in the price of steel. The court allowed the seller to put forth evidence proving the increase in the price of steel.⁸⁶

The contracts which were formed between the Parties were not done so in a standard written form. The contracts were formed in the following manner:

⁸⁵ Belgium and France are both contracting states to the CISG.

⁸⁶ Although the seller was able to prove that the price in steel had in fact risen the court noted that nothing prevented the seller from negotiating a 'price adjustment clause'. It is important to note here from the start that the law of contract provides for many security measures. There are many clauses which have been developed for the prime purpose of protecting the parties where the unforeseeable happens. Failure to utilise one of these precautionary measures should, in the writer's opinion, not entitle the party who subsequently finds himself in a difficult position, to fall back on remedies which were actually developed to mitigate loss where no precautions could have been reasonably taken.

The buyer would send the seller a “purchase order”. The purchase order would contain the number, quantity, delivery period, price and the description of the quality to which the steel should conform. The purchase order also contained a request to the seller to return the document signed as well as stamped with the seller’s corporate stamp. The seller would then proceed to write its order number on the purchase order and fax the document back to the buyer. Once the buyer received the document back it would enter the orders, together with the agreed upon delivery dates and prices. The orders, periodically listed, would then be sent to the seller. The seller would thereafter confirm the order with the buyer and together with such confirmation, attached its general conditions. The seller’s general conditions attached were sent in both German and French. The general conditions which were sent contained a provision which provided for a price adjustment in the event that the seller’s purchase prices⁸⁷ increased significantly.

The court went on to determine when the contracts were formed, what the precise contents of the contracts were and whether or not the seller’s general conditions were or were not part of the agreement between the parties. With regard to the seller’s general conditions the court stated that the purchase orders, signed and sent back by the seller to the buyer were accepted by the seller in a legal sense. The parties therefore concluded their contracts according to the conditions provided for in the purchase orders. The court furthermore stated that the seller was free to note in his acceptance of the purchase order that his acceptance was subject to the buyer’s acceptance of the seller’s general conditions. The buyer would then have had to accept or reject the seller’s general conditions. The court on considering the above factors as well as others, which need not be discussed in detail here, decided that the general conditions of the seller were not applicable to the relationship between the parties.

It is at this point that the seller turned to the question of hardship and its application in terms of article 79. It was the seller’s contention that if its general conditions were not to be accepted as being applicable, then it would refer to article 79. The seller relied on

⁸⁷ The prices at which the seller bought the steel from its supplier.

the price increase on the one hand and on the fact that as a result of the market situation in the steel sector, its suppliers' supplies had strongly decreased and as a result were insufficient to meet the demands.

Article 79 exempts a party from liability where his failure to perform any of his obligations is proved to be as a result of an impediment which was beyond his control and which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract. In addition the party could also not have reasonably avoided or overcome the impediment or its consequences.⁸⁸

Article 79 does not state that the failure to perform must be as a result of an impossibility to perform or as a result of incredible hardship which leads to nonperformance.

In the courts' consideration, it referred to the Commercial Court of Hasselt which ruled that 'changes in prices are foreseeable and do not exempt the parties from performance of their obligations'.⁸⁹ The Commercial Court of Hasselt went on to state that performance in the case where the prices have increased, would result in a financial loss. However a financial loss does not prevent performance of the agreement and is one of the risks of engaging in commercial transactions.

The court again referred to the parties' right to insert clauses within their contracts which would prevent problems in performance caused by changes in circumstances. The parties to a contract could mutually agree that where a change in circumstances occurs, the parties agree to modify their original agreement to the extent necessary.

One of the elements which must be proved before enjoying the remedial effects of article 79 is that of foreseeability. Although the seller's general conditions were not deemed to have been applicable to the contracts they did give away a clue as to the

⁸⁸ Article 79(1) of the CISG.

⁸⁹ Judgment of May 2, 1995, Rechtbank van koophandel Hasselt (Belgium)
<<http://www.cisgw3.law.pace.edu/cases/950502bl.html>.

seller's foreseeability of the price increase. The court stated that the fact that the seller's general conditions contained a price adjustment clause proved that the seller did foresee the possibility of a price increase. The court said the same about the shortages in stock, which were also foreseeable.

In its conclusion, the court stated that article 79 could not be invoked by the seller as the CISG does not deal with issues of economic hardship. The reasons given by the court in support of its decision were that the circumstances upon which the seller relied on could and should have been reasonably foreseeable and it was the seller's own negligence which precluded it from providing for the circumstances in its contracts. Article 79, according to the court, only covers instances of force majeure which lead to an exemption from performance. A supervening change of circumstances which renders a party's performance more onerous is not expressly settled by article 79.⁹⁰ The court did not allow recourse to domestic law. The gap in the CISG should have been prevented by the seller agreeing with the buyer to a price adjustment clause.⁹¹

In the Court of Cassation (Supreme Court) on 19 June 2009 the Supreme Court overturned the decision given in the Commercial Court of Tongeren.⁹² The Supreme Court stated that the CISG, where inadequate, could be substituted by the general principles of international trade. In his editorial remarks on the Appeal case, Eiselen⁹³ stated that in the Appeal Court's consideration of the matter, it came to the following conclusion:

Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision of the treaty.⁹⁴

⁹⁰ Veneziano UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court in Uniform Law Review 139.

⁹¹ Veneziano UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court in Uniform Law Review 139.

⁹² *Scaфом International BV v. Lorraine Tubes S.A.S.* <http://cisgw3.law.pace.edu/cases/090619b1.html> (hereafter the *Scaфом Appeal-case*).

⁹³ Eiselen Date Unknown <http://cisgw3.law.pace.edu/cases/090619b1.html>.

⁹⁴ Eiselen Date Unknown <http://cisgw3.law.pace.edu/cases/090619b1.html>.

The Appeal court also took cognisance of article 7(2) of the CISG which states that where the Convention raises questions which aren't expressly answered within the CISG then those questions should be settled in conformity with the general principles on which the CISG is based. Where no such general principles exist, the questions should be answered in conformity with the law applicable by virtue of the rules of private international law. In this regard the Appeal court took cognisance of the UP which states in article 6(2)(3)'s comments that 'the party who invokes changed circumstances that fundamentally disturb the contractual balance is also entitled to claim the renegotiation of the contract'.

The Appeal court made the finding that the unforeseen increase in the price of the steel gave rise to a 'serious imbalance which rendered the further performance of the contracts under unchanged conditions exceptionally detrimental' for the seller. On these findings the Appeal court found that the buyer must renegotiate the contractual conditions.

In criticism of the *Scaфом Appeal-case* article 79 of the CISG does not expressly include or exclude the application of hardship. Therefore the next step is to look at the legislative history of article 79 to determine whether or not the drafters intended for article 79 to include hardship. As a point of departure the term 'circumstances' was changed to 'impediment' so that the conditions for exemption would be more narrow and objective. Then, the proposal by the Norwegians to extend the application of article 79 to include a 'situation of genuine hardship' was rejected.⁹⁵ The proposal was rejected after the French delegate raised the concern that if the proposal was accepted it would amount to an 'acceptance of doctrines such as *imprévision*, frustration of purpose, and the like'.⁹⁶

⁹⁵ Garro 2005 <http://www.cisg.law.pace.edu/cisg/principles/uni79.html>.

⁹⁶ Garro 2005 <http://www.cisg.law.pace.edu/cisg/principles/uni79.html>.

In interpreting the CISG article 7(1)⁹⁷ provides that regard must be had to the CISG's international character. The need for promoting uniformity in the CISG's application is also provided for.⁹⁸ Article 7(2)⁹⁹ then states that if a matter is not expressly settled in the CISG then that gap should be filled on the basis of the general principles on which it is governed. Where there are no such principles, then recourse can be made to the domestic law applicable. In the *Scafom Appeal-case* the court stated that the general principles governing the law of international commerce could be found in the UP. The court in this instance did not take cognisance of domestic law.

If the parties had expressly agreed to the UP's application in respect of their contract such inclusion could have amounted to a choice of law clause.¹⁰⁰ The parties however, did not do so in the *Scafom-case*. The CISG (in respect of article 79 for the purposes of this research) appears to be more 'open' in that it neither includes nor excludes hardship. The UP on the other hand specifically includes hardship so it could be said that the UP is more defined.¹⁰¹ If the CISG applies to a contract and the parties have not expressly included the application of the UP then in essence if you use the UP to interpret the CISG you are applying rules that the parties did not agree upon. The interpretation of the contract becomes more defined.

Not all countries agree on the issue of hardship or how and when it should be applied. This is clear from the fact that hardship was not specifically included in article 79. If delegates from different countries chose not to expressly include hardship in article 79, for whatever reasons, then surely it was also not their intention for courts to simply resort to another international instrument which does expressly include hardship to interpret the CISG. If the answer to whether hardship should be included in article 79 lies in the legislative history of article 79 and the intention of the drafters then it lies in the decision taken to not include or exclude it. By neither including nor excluding

⁹⁷ Article 7(1) of the CISG.

⁹⁸ Article 7(1) of the CISG.

⁹⁹ Article 7(2) of the CISG.

¹⁰⁰ Veneziano *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court in Uniform Law Review* 139.

¹⁰¹ It is defined in that there is less need for trying to interpret what the article applies to or to which circumstances it applies to. The article on hardship in the UP is clear.

hardship countries would still be free to apply hardship as they deem fit, in terms of their domestic laws. It is undoubtedly clear that the purpose of the CISG is to unify the law of sales in international contracts but nothing can be gained by ignoring the fact that some principles or laws have not yet reached the point where they are unified. By simply applying the principles laid down in the UP the courts are ignoring the fact that some countries never agreed to hardship being included in the sphere of application of article 79.

2.4 CISG Opinion No 7

In order to promote a more unified understanding of the CISG the CISG-Advisory Council¹⁰² was formed. The CISG-AC is made up of scholars. The scholars do not represent any specific country and are therefore able to critically address issues which arise in the application of the CISG from an independent perspective. The opinions given by the CISG-AC are tools which help courts, professionals or organisations with the interpretation and application of the CISG. The CISG-AC provides these opinions in an attempt to clarify the interpretation of the CISG; they do not have force of law.

The CISG Advisory Council¹⁰³ adopted the CISG-AC Opinion No.7¹⁰⁴ in 2007. The Opinion 7 deals with the exemption of liability for damages under article 79. In a brief summary Opinion 7 explains article 79(1) as an exemption to buyers and sellers from performing if they can establish that their nonperformance was as a result of:

1. an “impediment”
2. beyond their control
3. which they could not reasonably have been expected to take into account when the contract was concluded; and
4. the “impediment” or the consequences of which, could not reasonably have been avoided or overcome.¹⁰⁵

¹⁰² The CISG-Advisory Council (hereinafter the CISG-AC) <http://www.cisgac.com/>.

¹⁰³ Hereafter referred to as “CISG-AC”.

¹⁰⁴ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG.

¹⁰⁵ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG.

Opinion 7 goes on to say that the second paragraph of article 79 makes provision for a third party's failure to perform which failure may constitute grounds for exemption if and when the requirements as set out in the first paragraph are met. The requirements will need to be satisfied with respect to the third party as well as the party claiming exemption.¹⁰⁶

Opinion 7 also discusses the requirement that notice be given by the party who fails to perform, of his failure.¹⁰⁷ Mention is also made of the last paragraph of article 79 which states that neither party is restricted from claiming relief by means of another method in terms of the CISG, a claim for damages is however restricted.¹⁰⁸

According to the CISG's Opinion 7 most of the decided case law and arbitral awards which look at article 79 focus on the standards for exemption that may qualify as excuses under the guise of "impediments". Even so, the courts do not always identify the facts that may be relevant in drawing conclusions and some courts only state that the requirements as laid down by article 79 have not been met, without going into any detail. This is possibly both the cause of and the result of courts and arbitrators being left with a wide berth when it comes to discretion in applying article 79. It is said that the reason for this is the flexibility in the language used and the 'unusual level of ambivalence in its drafting history.' Opinion 7 discusses a number of issues that have resulted there from. One issue is whether or not a seller, where it has delivered non-conforming goods, may be entitled to claim an exemption under article 79. In addition, the requirements which must be met with regard to a seller who claims exemption for impediments suffered by a third-party, from whom the seller required performance for its own performance. Lastly, whether hardship qualifies as an impediment and if so, what relief is available to the aggrieved party?

¹⁰⁶ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG para 14.

¹⁰⁷ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG para 1.

¹⁰⁸ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG para 1.

Only the issue of hardship qualifying as an impediment will be discussed further. According to Opinion 7 article 79's drafting history does not provide conclusive evidence as to whether or not hardship was intended to be included or excluded within its scope. On the date at which Opinion 7 was drafted there had been no reported decisions in which a court, on the basis of hardship, exempted a party from liability where it had failed to perform. Therefore, Opinion 7 predates the *Scafom*-decisions.

Scholars are divided on whether or not a situation of hardship is governed by article 79.¹⁰⁹The division is caused on the one hand by some believing that the wording of article 79 is not 'sufficiently flexible to include an extreme situation of unexpected hardship within the meaning of "impediment"'.¹¹⁰ On the other hand some believe that there is no scope within the CISG which allows for 'any relief on account of economic hardship'.¹¹¹ This uncertainty has probably occurred as a result of the many different legal doctrines which have formed part of different national laws.¹¹²These legal doctrines, together with the uncertain interpretation of the word 'impediment' create ample room for divergent interpretations as to whether or not a party's performance is truly extraordinarily burdensome.

If hardship is claimed and the CISG applies then, according to Opinion 7 article 7(2)¹¹³ might find application. Article 7(2) states that where the CISG does not expressly settle a question then the matter should be settled 'in conformity with the general principles on which it is based' or, where no such principles exist, 'in conformity with the law applicable by virtue of the rules of private international law'. The result of this would be that courts would need to look to the domestic legal system (as well as international instruments such as the UP used in the *Scafom*-case) for relief where hardship is claimed. The CISG was created with the aim of unifying all legal systems, with regard to contracts for the sale of goods. If a court automatically referred to the domestic

¹⁰⁹ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG para 26.

¹¹⁰ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG para 26.

¹¹¹ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG para 26.

¹¹² Imprévision, frustration of contract, commercial impracticability, Wegfall der Geschäftsgrundlage, eccessiva onerosita sopravvenuta.

¹¹³ Article 7(2) of the CISG.

systems for relief, the underlying purpose of the CISG would be defeated. In keeping with the purpose of the CISG an answer to hardship should be found within the CISG's sphere of application.

The CISG includes within its provisions the duty of good faith.¹¹⁴ Observing the principle of good faith in the CISG, the CISG could be interpreted as imposing a duty on the parties to renegotiate the contract, to restore the imbalance. However, where the parties fail to reach consensus the CISG provides no guidelines as to how a court should rectify the imbalance by revising or adjusting the terms of the contract.

The CISG-AC makes a logical statement about hardship in terms of article 79:¹¹⁵

The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79.

The above statement made in Opinion 7 is absolutely correct in that article 79 does not state that performance must be impossible, so yes there is room for the possible inclusion of hardship. In terms of what law then should courts and arbitrators decide if a specific situation amounts to hardship because there does not appear to be one internationally accepted interpretation and application of hardship? Opinion 7 points to the UP which does clearly set out the application of hardship. How can unity be said to be achieved by the CISG in such an instance? Does looking to the UP, which does include hardship, not amount to the same result that would have occurred if at the time article 79 was drafted, the concerns and/or objections raised by delegates were simply ignored? In essence it is clear that hardship was not expressly included in article 79 because of a lack of consensus. To simply now refer to an instrument that is clear on the issue of hardship is to simply ignore the fact that reference to hardship was excluded because there was no unified understanding or interpretation of its application.

¹¹⁴ Article 7(1) of the CISG.

¹¹⁵ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG provision 3.1 para 25.

If it is argued that the UP has developed the unified understanding or interpretation of hardship and should therefore be used to help promote unity in terms of the CISG then the problem has been solved and there should be little variance in the manner in which courts and arbitrators apply and interpret hardship under the CISG.

2.5 Conclusion

The legislative history of article 79 shows that there was no consensus as to express inclusion of hardship in article 79. The application of hardship in different legal systems differs and instead of being able to find an internationally accepted application and interpretation the issue was 'left open'. What can be seen by Opinion 7 and the Scafom case is that because performance was not equated to impossibility in article 79, fertile ground was created for including hardship in Article 79's application. Opinion 7 asserts that courts should seek to exhaust all means available within the CISG itself to answer questions of hardship. Neither international instruments which could be used to help interpret the CISG nor domestic laws applicable are means 'of resolving the hardship problem within the four corners of the CISG'.¹¹⁶ These are secondary options which could be used when the answer cannot be found within the four corners of the CISG. Carlsen¹¹⁷ states that where the UP's articles support the CISG's intention then the UP can be used as a gap filler or guideline in interpreting the CISG's provisions. The CISG's intention in that case seems to be an important element which should not be ignored in the quest for uniformity. The goal of uniformity is ultimate; however, trying to find an answer that forces uniformity (without actual consensus) could have the potential of damaging the parts of the CISG which are internationally accepted.

Chapter 3: Hardship under UP and PECL

3.1 Introduction

As countries have developed and modernised, business relationships between parties from different countries have increased as a necessity. This increase resulted in the

¹¹⁶ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG para 35.

¹¹⁷ Carlsen Date Unknown <http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html>.

formation of various international instruments governing the principles of international contract. International instruments with specific relevance are the CISG, the UP and the PECL.

This research requires the study of the CISG, the UP and the PECL with specific focus on the application of article 79.

Each of the above mentioned international instruments contains a provision which provides for the exclusion of liability under certain circumstances. Both the PECL and the UP provide for cases where a party to a contract experiences unforeseen hardship and this hardship impedes the 'disadvantaged' party's performance.

3.2 UP

The UP¹¹⁸ is a:

Non-binding restatement of general principles of international commercial contracts which are common to most of the existing legal systems... [And] is more exhaustive than the CISG because the UNIDROIT Principles also governs issues that are not governed by the CISG such as the validity issue and the UNIDROIT Principles also applies to other commercial contracts than international sale of goods.¹¹⁹

The UP is a non-binding instrument therefore the CISG has more influence and binding power over the UP.¹²⁰ The UP will generally only be applicable where the CISG does not govern the contract of sale.¹²¹

Article 6 of the UP deals with hardship and its application in respect of the UP. Article 6(2)(1)¹²² states:

¹¹³ Unidroit Principles of International Commercial Contract, Rome, Unidroit, 2004. The UP was first published in 1994 but has since been revised by the 2004 edition which contains 5 additional chapters. The additional chapters do not deal with hardship and are therefore of little relevance in this research.

¹¹⁹ Carlsen Date Unknown <http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html>G.

¹²⁰ The CISG is a binding instrument.

¹²¹ Carlsen Date Unknown <http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html>G.

¹²² Article 6(2)(1) of the UP.

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

The underlying principle of the UP is that of *pacta sunt servanda* which translated means ‘agreements are to be observed’¹²³ and the principle is expressly included in Article 1(3) of the UP. This means that the main aim of the UP is to uphold the contract and the parties to the contract are also required to ensure that the contract is upheld as far as possible. The UP therefore requires performance to be rendered for as long as is possible regardless of the burden which such performance may impose on the performing party.¹²⁴

The UP does in exceptional cases derogate from its strict approach with regards to performance under onerous circumstances. The UP states that:

When supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract, they create an exceptional situation referred to in these Principles as “hardship”.

Hardship is defined in Article 6.2.2 of the UP as follows:

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

- a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- c) the events are beyond the control of the disadvantaged party; and
- d) the risk of the events was not assumed by the disadvantaged party.

Based on the definition given above it is clear that the events which cause the non-performance must ‘fundamentally alter’ the equilibrium. Whether or not something is considered fundamental will naturally depend on the circumstances and the specific contract. The exception to this; that the circumstances will determine whether

¹²³ Hiemstra and Gonin (eds) Trilingual Legal Dictionary (Juta 1992).

¹²⁴ Commentary to Article 6(2)(1) of the UP.

something is fundamental, is where the performance due in terms of the contract can be measured precisely in monetary terms. If an alteration amounts to 50% or more of the cost of the performance or the value of the performance then the alteration will in all likelihood constitute a fundamental alteration.¹²⁵

The definition of hardship in the UP gives two scenarios in which a fundamental alteration may occur. The first of these is an increase in the cost of the performance due in terms of the contract. An example of this is where the price in raw materials rises dramatically and those raw materials are necessary for the performance of the promisor's obligations. This will only apply where the performance is not of a monetary nature.¹²⁶ The second scenario is where the performance received by one party to the contract decreases in value. Here the performance may be of either a monetary or non-monetary nature. It is not sufficient for a party who receives performance to merely assert that there is a decrease in value, the decrease in value must be capable of being determined objectively.¹²⁷

The UP also makes provision for those instances where non-performance could be as a result of hardship or that of force majeure, due to their similar nature. In such a case the party who is affected by the events will be entitled to elect which remedy it would like to pursue.¹²⁸

If a party has claimed hardship in terms of the UP and has been successful in proving that the non-performance is as a result of hardship then certain remedies are available to the disadvantaged party. The disadvantaged party will be entitled to request that the contract be renegotiated.¹²⁹ Such a request must be made without undue delay and the request must also indicate the grounds on which the request is made.¹³⁰ The

¹²⁵ Commentary to Article 6(2)(2) of the UP.

¹²⁶ Commentary to Article 6(2)(2) of the UP.

¹²⁷ Commentary to Article 6(2)(2) of the UP.

¹²⁸ Commentary to Article 6(2)(2) of the UP.

¹²⁹ Article 6(2)(3) of the UP.

¹³⁰ Article 6(2)(3)(1) of the UP.

request made by the disadvantaged party to renegotiate the contract does not entitle him however to withhold performance.¹³¹

If the parties fail to reach agreement within a reasonable time either party shall be entitled to approach the court in order to settle the matter.¹³² If the parties refer the matter to a court of law and the court finds hardship it will, if reasonable:

- a) terminate the contract at a date and on terms to be fixed; or
- b) adapt the contract with a view to restoring its equilibrium.¹³³

The UP is not a binding instrument. Due to the fact that the UP was not developed with the aim of unifying national laws it was 'much less conditioned by the differences existing between the various legal systems.'¹³⁴ That fact made it possible for the UP to include within its scope of application matters which were either excluded completely or matters insufficiently regulated by the CISG.¹³⁵ Another important difference between the CISG and the UP is that the UP is not limited to sales contracts. The UP is a useful tool in interpreting the CISG when a matter is not sufficiently settled within the CISG because the UP is 'less hampered by the differences between the various domestic laws'.¹³⁶ It is however proposed that the correct procedure for applying the UP to interpret the CISG is to actually include the UP's application in the contract of sale.¹³⁷

¹³¹ Article 6(2)(3)(2) of the UP.

¹³² Article 6(2)(3)(3) of the UP.

¹³³ Article 6(2)(3)(4)(a) and (b) of the UP.

¹³⁴ Bonell The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments? in 1996 <http://www.cisg.law.pace.edu/cisg/biblio/ulr96.html#ii>.

¹³⁵ Bonell The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments? In 1996 <http://www.cisg.law.pace.edu/cisg/biblio/ulr96.html#ii>.

¹³⁶ Bonell The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments? In 1996 <http://www.cisg.law.pace.edu/cisg/biblio/ulr96.html#ii>.

¹³⁷ A clause to this effect could read as follows: : "This contract shall be governed by CISG, and with respect to matters not covered by this Convention, by the UNIDROIT Principles of International Commercial Contracts" in Bonell The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments? In 1996 <http://www.cisg.law.pace.edu/cisg/biblio/ulr96.html#ii>.

3.3 PECL

The self appointed Commission on European Contract Law¹³⁸ had the aim of developing common principles of contract law within the European Union.¹³⁹ The instrument developed was the PECL. The aim was to reduce trade barriers created by the differences of law found within the European Union.¹⁴⁰ The CECL not only took into consideration the European Union's various legal rules, it also considered legal systems found outside the European Union. The PECL does not go into great detail in its provisions and the PECL only covers the general laws of contracts.

The PECL is broken up into three parts, or editions.¹⁴¹ The first part deals with performance, breach of contract and the remedies available where there is non-performance.¹⁴² The second Part deals with aspects such as the contents of contracts, formation, interpretation and validity.¹⁴³ Part three deals with set-off, interest, illegality, plurality of creditors and debtors and substitution of debtors.¹⁴⁴

The PECL are applied as general rules of contract law within the European Union.¹⁴⁵ They apply where the parties to an agreement have incorporated them into their contract, agreed that the contract is to be governed by them¹⁴⁶ or where they have not chosen another system of rules.¹⁴⁷ The PECL does not have binding power on the courts, 'they can only work by their force of persuasion.'¹⁴⁸

¹³⁸ Commission on European Contract Law (hereafter referred to as the "CECL").

¹³⁹ Lando 2003

http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-13.pdf.

¹⁴⁰ Lando 2003

http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-13.pdf.

¹⁴³ Lando and Beale (eds) The Principles of European Contract Law Parts I and II

http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature.htm.

¹⁴² Part 1 of the PECL was published in 1995.

¹⁴³ Part 2 was published in 1999 and included a revised version of Part 1 of the PECL.

¹⁴⁴ Part 3 was published in 2003.

¹⁴⁵ Article 1:101(1) of the PECL.

¹⁴⁶ Article 1:101(2) of the PECL.

¹⁴⁷ Article 1:101(3) of the PECL.

¹⁴⁸ Lando 2003

http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-13.pdfin

Denis A propos du droit virtuel des contrats: Reflexions sur les principes d'Unidroit et de la Commission Lando. Mélanges Michel Cabrillac 205.

The PECL's scope is not as limited as the UP or CISG's scope of application and its wealth lies in the numerous combined legal principles. The PECL applies to 'domestic European contracts as well as to trans-European Union international contracts' and 'virtually all European contracts, including merchant consumer contracts and contracts between commercial parties'¹⁴⁹ where the parties have agreed to the PECL's application.

The PECL confirms the rule of *pacta sunt servanda*. Article 6:111(1) of the PECL states the following:

A party is bound to fulfill its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.

The PECL however provides for an exception¹⁵⁰ to the *pacta sunt servanda*-rule. The exception applies where performance in terms of the contract has become excessively onerous. This state of affairs is as a result of a change in circumstances. The parties to the contract are then bound to renegotiate the contract with the purpose of adapting it or terminating it. The condition to this is that:

1. the changed circumstances must have occurred after the contract was concluded;¹⁵¹ and
2. the possibility of a change in circumstances occurring could not reasonably have been taken into consideration at the time that the contract was concluded;¹⁵² and
3. the risk of the change in circumstances is not, in terms of the contract, a risk that the party who is affected should be required to bear.¹⁵³

The PECL does not expressly include hardship within its scope but Article 6:111 does provide for its application where the right circumstances present themselves. In the event that the circumstances as set out in Article 6:111(2) are present, and as such the exception applies, the PECL provides for the approach which must be taken where the parties fail to reach agreement on the renegotiation of the contract. If the parties fail to

¹⁴⁹ Author Unknown 2004 http://article.chinalawinfo.com/ArticleHtml/Article_24403.asp.

¹⁵⁰ Article 6:111(2) of the PECL.

¹⁵¹ Article 6:111(2)(a) of the PECL.

¹⁵² Article 6:111(2)(b) of the PECL.

¹⁵³ Article 6:111(2)(c) of the PECL.

reach agreement, within a reasonable time,¹⁵⁴ the court is entitled to a) end the contract at a date and on terms to be determined by the court,¹⁵⁵ or b) adapt the contract in a just and equitable manner.¹⁵⁶

With regard to the rights of the court, the court is also entitled to award damages for losses suffered as a result of the other party refusing to negotiate.¹⁵⁷ Damages may also be awarded if a party breaks off the negotiations contrary to good faith and fair dealing.¹⁵⁸

The duty to act in accordance with good faith and fair dealing is one of the basic concepts which underlie the PECL.¹⁵⁹ The duty to act with good faith and fair dealing is expressly included in the PECL in Article 1:120(1) and may not be excluded or limited by the parties.¹⁶⁰

The PECL has one main difference to the UP with regards to hardship.¹⁶¹ The PECL provides for a courts option to adapt or terminate the contract¹⁶² as well as its right to award damages.¹⁶³ The damages awarded are 'for the loss suffered through the other party refusing to negotiate or breaking off negotiations in bad faith'.¹⁶⁴ The effect of this is that a person acting *mala fide* could find itself at the short end of the stick with regards to damages.

¹⁵⁴ Article 6:111(3) of the PECL.

¹⁵⁵ Article 6:111(3)(a) of the PECL.

¹⁵⁶ Article 6:111(3)(c) of the PECL.

¹⁵⁷ Article 6:111(3) of the PECL.

¹⁵⁸ Article 6:111(3) of the PECL.

¹⁵⁹ Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* (Kluwer Law International 2004).

¹⁶⁰ Article 1:120(2) of the PECL.

¹⁶¹ Kessedjian2005<http://www.cisg.law.pace.edu/cisg/biblio/kessedjian.html>.

¹⁶² Which is consistent with the right afforded a court in the UP.

¹⁶³ Kessedjian 2005 <http://www.cisg.law.pace.edu/cisg/biblio/kessedjian.html>.

¹⁶⁴ Kessedjian 2005 <http://www.cisg.law.pace.edu/cisg/biblio/kessedjian.html>.

Chapter 4: Comparative analysis CISG, UP and PECL

UP can find its way into the application of the CISG by reason of its international character.¹⁶⁵ In other words, the UP can be consulted when interpreting the CISG in order to provide clarity where the CISG is perhaps unclear.¹⁶⁶ The CISG provides that it (the CISG) is to be interpreted in such a manner that regard must be had to 'its international character and to the need to promote uniformity in its application'.¹⁶⁷ In accordance with the principle of party autonomy the parties to a contract are also entitled to expressly include or exclude the UP's application.¹⁶⁸

The CISG makes no specific reference to hardship or its inclusion in the sphere of application of the CISG. The CISG only refers to an impediment, which causes performance to become impossible or incredibly onerous. Therefore a lot of importance has been placed on the interpretation of the word impediment as has been mentioned already. Another option is to look to the UP to supplement the CISG as was done in the Scafom-case.

Unlike the CISG the UP actually makes specific reference to hardship thereby incorporating it into the sphere of application of the UP. The UP puts a great deal of importance on the word "fundamental". The events which cause the non-performance must fundamentally alter the equilibrium of the contract.¹⁶⁹ The UP also provides that the party claiming hardship must make a request to renegotiate the contract (including the grounds therefore) and this request must be done without undue delay.¹⁷⁰ Failure to do so will impact whether or not the court believes that hardship actually existed.¹⁷¹

¹⁶⁵ Carlsen A 1998 <http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html>.

¹⁶⁶ Article 7(2) of the CISG.

¹⁶⁷ Article 7(1) of the CISG.

¹⁶⁸ Unidroit Principles of International Commercial Contract, Rome, Unidroit, 2004 Preamble.

¹⁶⁹ Article 6.2.2 of the UP.

¹⁷⁰ Starzmann *The relationship between the use of the Unidroit Principles and the CISG in a comparative view and how the Unidroit Principles contribute to the interpretation of the CISG* 37.

¹⁷¹ Starzmann *The relationship between the use of the Unidroit Principles and the CISG in a comparative view and how the Unidroit Principles contribute to the interpretation of the CISG* 37.

Where no agreement is reached, the court may be approached for relief. The UP then sets out what relief is available in article 6.2.3(4)(a) and (b).¹⁷²

In a comparison between the CISG's article 79 and the UP's article on hardship Carlsen¹⁷³ states that:

The UP's article on hardship has a different effect to the effect of an impediment in Article 79. Under the UP the effect of hardship is that where the parties fail to renegotiate the contract may be terminated or adapted by the court. The effect of this is that the entire contract is affected, not just a remedy. In terms of Article 79 the effect is that the party is not liable for damages. The other remedies available in the case where an impediment causes non-performance still apply, regardless of the impediment. The effects of Article 79 and UP's hardship article are not the same.

In the *Scafom*-case the parties were ordered to renegotiate the contract in good faith.¹⁷⁴ The problem with an order such as that is that the CISG does not give guidelines as to how the court should adjust or revise a contract to restore the imbalance.¹⁷⁵ Opinion 7 however states that the court may possibly resort to article 79(5) of the CISG to determine what is owed between the parties which will enable the court to adapt the terms of the contract.¹⁷⁶

Carlsen notes a second distinction between the two. The UP makes specific provision for the courts right to adapt the contract. The CISG makes no express provision for the adaptation of the contract. Lastly, relief in terms of article 79 may only be sought once there is breach of contract. In contrast the UP's article on hardship may be applied even before the performance is due. Therefore breach of the contract is not required for the UP's hardship article to be applied.

The PECL does not expressly include the term 'hardship' in its application. The expression "change of circumstances" is used in the place of hardship. The PECL does not differ greatly from the UP. The PECL merely includes that the change of

¹⁷² The relief which the court may grant could be the termination of the contract on a specified date and on specific terms or may adapt the contract with the aim of restoring the equilibrium.

¹⁷³ Carlsen A 1998 <http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html>.

¹⁷⁴ The obligation of good faith can be found in article 7(1) of the CISG.

¹⁷⁵ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG.

¹⁷⁶ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG para 40.

circumstances must result in the contract becoming excessively onerous.¹⁷⁷ The PECL places the obligation to renegotiate on both parties to the contract. What makes the PECL distinct in this regard is that it grants a court the discretion to award damages for loss suffered by one of the parties due to the other party's failure to negotiate.¹⁷⁸

An impediment is dealt with separately in the PECL. Article 8:108 of the PECL specifically deals with excuse due to an impediment. The article resembles article 79 with two main differences. Firstly the PECL states that:

The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.¹⁷⁹

Secondly, article 8:108 of the PECL only applies where the impediment prevents performance, not as with the CISG where performance might not be prevented but becomes excessively onerous.¹⁸⁰

The CISG, PECL and UP were all drafted with the purpose of obtaining clarity on the laws applicable to certain international contracts. Each instrument is either more or less specific with regard to its provisions and laws contained therein. Where two instruments refer to the same principle and it is clear to what they refer, but one is perhaps insufficiently clear, then yes perhaps they can assist each other in a quest for clarity. But where one is insufficiently clear on a principle the point of departure should first be to establish what was intended with regard to that provision before resorting to other instruments. These instruments were not all drafted by the same entities¹⁸¹ with the same intentions. They are, in the writer's opinion, not so closely linked that 'they finish each other's sentences'.

¹⁷⁷ Kessedjian 2005 <http://www.cisg.law.pace.edu/cisg/biblio/kessedjian.html>.

¹⁷⁸ Article 6:111(3) of the PECL.

¹⁷⁹ Article 8:108(3) of the PECL.

¹⁸⁰ Kessedjian 2005 <http://www.cisg.law.pace.edu/cisg/biblio/kessedjian.html>.

¹⁸¹ Entities being people, legal representatives, delegates appointed by countries etc.

Chapter 5: Conclusion

Parties to a contract have the necessary tools at their disposal to ensure, or at least ensure as best as they can, against various possible catastrophic events which have the potential to devastatingly affect their contract. Relying on hardship as an excuse for non-performance should only be allowed where it is clear from the face of it that the parties took all the necessary precautions available to them when concluding the contract. Even then the courts should rather look at supplementing or adapting the contract rather than relieving the non-performing party from its obligations.

Force majeure clauses, hardship clauses and intervener clauses are all available to a contracting party and failure by a party to utilize them should not entitle the party to a 'back-door'. Where possible it is best to reduce the amount of discretion a court has in interpreting laws if clarity and certainty can already be provided for in a contract.

It has been established at the beginning of this research that hardship has been a part of many different legal systems for centuries. It is not a new concept, nor is it an incredibly difficult one to interpret where the parameters of its application are set out clearly. If the CISG intended for the word 'impediment' to include hardship could it not just have done so expressly? In addition, the CISG seeks to provide uniformity; uniformity of all legal systems.

The Scafom-case as well as Opinion 7 both supports the notion that hardship can fall within the ambit of article 79. Opinion 7 suggests that recourse can be made to the UP in interpreting article 79 and the Scafom-case was decided by using the UP to interpret article 79. Although Opinion 7 does make reference to article 79's legislative history and the importance thereof, it finds the legislative history inconclusive in determining the intention of the drafters. As a result thereof, it goes on to look for answers elsewhere, where in fact the writer believes that the question was already answered at that point. The decision of the drafters of the CISG, regardless of whether that decision was actually worded and put onto paper, was to not expressly include hardship in article 79.

The question asked in this research is whether hardship as an impediment to performance can be included in the sphere of application of article 79 of the CISG. It is not disputed that article 79 does not expressly include nor does it exclude hardship. Article 79 does not state that performance must be impossible, which does open the door for hardship to find application. To then determine whether hardship should be included in article 79 surrounding factors, or indicators, should be consulted. The first of these is article 79's legislative history. What was the intention when article 79 was drafted? It is the writer's opinion that the fact that, due to concerns, hardship was not expressly included implies the following: There was no consensus on the issue. It was neither included nor excluded so that the rules of private international law could apply hardship as and when it deemed acceptable according to the domestic laws of the applicable country. The use of instruments such as the UP or the PECL, which are more detailed on the issue of hardship (without actual agreement by the parties of their application) ignores the fact that the different legal systems did not agree on the issue of hardship's inclusion in article 79.

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