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EXEMPTION IN CASE OF FORCE MAJEURE AND HARDSHIP – CISG, PICC, PECL AND DCFR –

Ingeborg Schwenzer[1]

***Sumario**: 1. Introduction. 2. Some domestic solutions. 3. International Approaches. 4. Prerequesites for **force majeure** and hardship under the CISG. 5. Consequences of **force majeure** and hardship. 6. Conclusion.*

1 INTRODUCTION

Unforeseeable changed circumstances are probably one of the major problems parties – especially those to a long or longer term complex contract – may face in international trade. Indeed, with globalisation these problems are increased as the involvement of more and more countries in production and procurement entail even greater imponderabilities. Natural disasters or changes of political and economic factors may considerably affect the very basis of the bargain. There may be an earthquake, a flood or a civil war in one of the production countries, forcing the producer to resort to countries with much higher production costs; import or export bans may hinder the envisaged flow of the goods; or price fluctuations that were not foreseeable at the time of the conclusion of the contract make the performance by the seller unduly burdensome or devaluate the contract performance for the buyer.

The paradigm of *pacta sunt servanda*[2] simply places the burden of such a change of circumstances upon the party on which it

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falls. However, since the old Roman days the principle of *impossibilium nulla est obligatio*[3] has been recognized. Things were simple at that time; the slave or the cattle that had been sold had perished; or perhaps the crop that should be delivered was destroyed. Furthermore, under the doctrine of *rebus sic stantibus*[4] developed by the Roman *praetor*[5] an unforeseeable and extraordinary change of circumstances rendering a contractual obligation extremely burdensome could be recognized. Since these days impossibility, *force majeure* or the like have become grounds for exemption in every legal system[6]. However, the question whether simple changes of the surrounding economic conditions may exempt the debtor from liability under the contract has always been a hotly debated issue[7]. It is to this very day. Let me first start with a short overview of how some select domestic legal systems treat this question.

2 SOME DOMESTIC SOLUTIONS

The position of French law represents one extreme and it has been described many times. Whereas the rule for *force majeure* is laid down in art. 1148 Code Civil (CC), neither general civil nor commercial law has been favourable to the concept of hardship[8]. The famous theory

2 I.e. sanctity of the contract.

3 I.e. There is no obligation to perform impossible things; Dig. 50.17.1985.

4 The term *rebus sic stantibus* was mentioned the first time in the early 16th century. *In* 1507, *Jason de Mayno* (1435 – 1519) suggested to use the *rebus sic stantibus* doctrine as a general principle in contract law. For further details on this matter see KÖBLER, Ralf. **Die "clausula rebus sic stantibus" als allgemeiner Rechtsgrundsatz**. Tübingen: J. C. B. Mohr, 1991. p. 30 et seq.

5 The idea of adapting agreements and promises to an unforeseeable and extraordinary change has its roots in roman philosophy with *Cicero* and *Seneca*. The doctrine found its way into the Canon law in the 14th century, referring to it as *rebus sic se habentibus*. For further details see Köbler, above n. 4, p. 28 et seq.

6 See Germany: § 313 Bügerliches Gesetzbuch (BGB) (*Störung der Geschäftsgrundlage*); Italy: Artt. 1.467-1.469 Codice Civile (CC) (*eccessiva onerosità sopravvenuta*); France: Art. 1.148 Code Civil (CC) (*force majeure*). See also ZWEIGERT, Konrad; KÖTZ, Hein. **Einführung in die Rechtsvergleichung**. 3. ed. Tübingen: J.C.B. Mohr, 1996. p. 533.

7 See ZWEIGERT; KÖTZ, above n. 6, p. 534 et seq. The actual trigger for this discussion was the enormous rise in prices due to World War I (1914-1918).

8 See KESSEDJIAN, Catherine. Competing Approaches to Force Majeure and Hardship, **25 Int'l Rev. L. & Econ.**, p. 415, 427, 2005.

of *imprévision*[9] that allows a contract to be modified in case of a change of circumstances has been applied to administrative contracts only[10]. However, the *Cour de Cassation* has apparently moved away slightly from the strict *pacta sunt servanda* principle; it appears to be heading in the direction of eventually recognizing some kind of hardship[11].

Many continental legal systems, however, accept the theory of hardship. Among them are Germany, The Netherlands, Italy, Greece, Portugal, Austria as well as the Scandinavian countries[12]. The most recent acknowledgement by statute can be found in Germany. The Statute on the Modernisation of the Law of Obligations in 2001 finally codified the right to have the contract adapted to the changed circumstances in § 313 Bürgerliches Gesetzbuch (BGB)[13].

English law seems to reject any notion of relief for changed circumstances that do not amount to impossibility[14]. However, in case of frustration of contract – that means where the contract is rendered useless

9 For details, see Phillippe Stoffel-Munck Regards sur la théorie de l'imprévision: vers une souplesse contractuelle en droit privé français contemporain (Presses universitaire d'Aix-Marseille, Aix-en-Provence, 1994).

10 See Conseil d'Etat, 30 Mar 1916, D.P.1916, 325; ABAS, Piet. **Rebus sic stantibus** (Cologne: Karl Heymanns, 1993) p. 43.

11 See MALAURIE, Philippe; AYNÈS, Laurent. **Droit Civil**: Les obligations. 3. ed. Paris: Juridiques Associées, 2007. p. 379 et seq., stating that the judge still does not have the possibility to alter the contract directly on his own unless the parties have agreed upon a *clause de sauvegarde* (hardship clause) or the law itself provides for the possibility of the judicial adjustment of the contract. However, the judge is allowed to apply the principle of good faith according to Art. 1134(3) CC if there is a severe inequity and one party is of bad faith. See also above KESSEDJIAN, 8, (2005) 25 **Int'l Rev. L. & Econ.**, p. 415, 425.

12 Germany: § 313 BGB (*Störung der Geschäftsgrundlage*); Netherlands: Art. 6:258 Dutch Civil Code (BW); Italy: Art. 1467 CC (*eccessiva onerosità sopravvenuta*); Greece: Art. 388 Greek Civil Code; Portugal: Art. 437 Portuguese Civil Code; Austria: §§ 936, 1052, 1170a Austrian BGB through analogy; Scandinavia: see Art. 6:111 PECL 1999, Comment note 1, p 328; see also LANDO, Ole. **CISG and Its Followers**: A Proposal to Adopt Some International Principles of Contract Law (2005) 53 Am. J. Comp. L. 379, 397.

13 See UNBERATH, Hannes; BAMBERGER, Heinz Georg; ROTH, Herbert (Eds.). **Kommmentar zum Bürgerlichen Gesetzbuch**. 2. ed., Munich: C. H. Beck, 2007, § 313 BGB, § 2 et seq. For the prerequsites concerning the adaptation to changed circumstances, see § 25 et seq.

14 In Common Law systems, "hardship" seems to be a mere term describing a fact and not a judicial concept. See PERILLO, Joseph. **Hardship and its Impact on Contractual Obligations**: A Comparative Analysis Saggi. Conferenze e Seminari #20 (1996), p. 3; PUELINCKX, A. H. Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances, 3 J. **Int'l Arb. 47**, 1986. p. 64.

by the change of circumstances – an exception is granted to this general rule[15]. In the United States the Uniform Commercial Code[16] has enacted the general doctrine of impracticability. The Restatement Second, Contracts 2d, reiterates this position[17].

3 INTERNATIONAL APPROACHES

The Principles on International Commercial Contracts (PICC 2004)[18], the Principles on European Contract Law (PECL 1999)[19] as well as the Draft of a Common Frame of Reference (DCFR 2008)[20] expressly provide for rules in cases of a change of circumstances. In 2003 the ICC has published its *Force Majeure* as well as its Hardship Clause as model clauses.

The CISG, however, does not contain a special article dealing with questions of hardship. It does neither mention *force majeure* nor hardship[21]. Art. 79 CISG relieves a party from paying damages only if the breach of contract was due to an impediment beyond its control[22]. The

15 See TREITEL, Guenter. **Frustration and Force Majeure**. 2. ed., London: Sweet & Maxwell, 2004. p. 314 et seq. The frustration of purpose doctrine amounts to the discharge of the contract, see MCKENDRICK, Ewan; GUEST A. G. (Ed.). **Chitty on Contracts**: General Principles. 29. ed., London: Sweet & Maxwell, 2004, v. I, § 23-001 et seq.

16 § 2-615 UCC.

17 § 261 Restatement Second, Contracts 2d.

18 See Art. 6.2.3 PICC 2004.

19 See Art. 6:111 PECL 1999.

20 See Art. III. – 1:110 DCFR 2008.

21 See SCHWENZER, Ingeborg; SCHLECHTRIEM, Peter; SCHWENZER, Ingeborg (Eds.). **Kommentar zum einheitlichen UN Kaufrecht CISG**. 5. ed. Munich: C. H. Beck, 2008. Art. 79 § 4; TALLON, Denis; BIANCA, Cesare; BONELL, Michael (Eds.). **Commentary on the International Sales Law**: The 1980 Vienna Convention. Milan: Giuffrè, 1987. Art. 79, § 1.3.

22 See HONNOLD, John. **Uniform Law for International Sales**. 3. ed. The Hague: Kluwer Law, 1999. Art. 79, § 423.4; TALLON; BIANCA; BONELL (Eds.). above n 21, Art. 79, § 2.6.2.; ACHILLES, Wilhelm-Albrecht; **Kommentar zum UN-Kaufrechtsübereinkommen (CISG)**. Berlin: Hermann Luchterhand, 2000. Art. 79, § 3; SALGER Hanns-Christian; WITZ, Wolfgang; SALGER, Hanns-Christian; LORENZ, Manuel (Eds.). **International Einheitliches Kaufrecht**: Praktiker-Kommentar und Vertragsgestaltung zum CISG. Heidelberg: Recht und Wirtschaft, 2000. Art. 79, § 4; BRUNNER, Christoph. **Force Majeure and Hardship Under General Contract Principles**: Exemption of Non-Performance in International Arbitration. Manus, p. 157.

drafting history of this provision is not quite clear. During the preparations of the CISG the question whether economic difficulties should give rise to an exemption was a highly controversial one[23]. At the Vienna Conference a proposal made by the Norwegian delegation that aimed at releasing the debtor from its obligation if after the cessation of a temporary impediment there had been a radical change in the underlying circumstances was rejected[24]. Thus, it is quite understandable that during the first years after the coming into force of the CISG some scholars argued that there was no room to consider hardship under art. 79 CISG[25].

Today, however, it is more or less unanimous amongst court and arbitral decisions[26] as well as in scholarly writing[27] that art. 79 CISG indeed does cover issues relating to hardship. Accordingly, first and foremost, there is no room to resort to domestic concepts of hardship[28] as

23 See HONNOLD, John. **Documentary History of the Uniform Law for International Sales**: The studies, deliberations and decisions that led to the 1980 United Nations Convention with introductions and explanations. Deventer: Kluwer, 1989. p. 602. See also SCHLECHTRIEM, Peter. **Internationales UN-Kaufrecht**. 4. ed. Tübingen: Mohr Siebeck, 2007, § 288; BRUNNER, Above n. 22, p 202; TALLON; BIANCA; BONELL (Eds.). above n. 21, Art. 79, § 2.6.7.

24 The Norwegian delegation proposed, that para (3) of Art. 65 of 1978 UNCITRAL Draft Convention should be changed in the following way: "*[...] Nevertheless, the party who fails to perform is* ***permanently exempted*** *to the extent that, after the impediment is removed, the* ***circumstances are so radically changed*** *that it would be manifestly unreasonable to hold him liable*". (emphasis added). See U.N. DOCUMENT A/CONF.97/C.1/L.191/Rev.1.

25 See STOLL, Hans; SCHLECHTRIEM, Peter (Ed.). **Commentary on the UN Convention on the International Sale of Goods**. Oxford: 1 English Ed., Oxford University Press, 1998, Art. 79, § 39.

26 However, the courts often decided that the equilibrium of the contract was not fundamentally altered. Therefore, the alleged impediment was inexistent. See *Bulgarian Chamber of Commerce and Industry*, 12 Feb 1998, CISG-online 436; *Rechtbank van Koophandel, Hasselt*, 02 May 1995, CISG-online 371; *Tribunale Civile di Monza*, 29 Mar 1993, CISG-online 102; *Cour d'Appel de Colmar*, 12 Jun 2001, CISG-online 694.

27 See CISG AC Opinion n. 7 *Exemption of Liability for Damages Under Article 79 of the CISG* (Rapporteur: Professor Alejandro Garro), 12 Oct 2007, Opinion 3.1; SCHWENZER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 21, Art. 79 § 4; LINDSTRÖM, Niklas. Changed Circumstances and Hardship in the International Sale of Goods. **Nordic Journal of Commercial Law**, 1, p. 1, 23, 2006; BRUNNER, above n. 22, p. 204; SCHLECHTRIEM, above n. 23, § 291.

28 See HONNOLD, above n. 22, Art. 79 § 425 and para 432.2; TALLON; BIANCA; BONELL (Eds.), above n. 21, Art. 79 § 3.1.2.; SCHWENZER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 21, Art. 79 § 12; 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. **Pace Int'l L. Rev. eds.**, p. 197, 219, 1999-2000.

there is no gap in the CISG regarding the debtor's invocation of economic impossibility and the adaptation of the contract to changed circumstances. If one were to hold otherwise unification of the law of sales would be undermined in a very important area. Domestic concepts such as frustration of purpose, *rebus sic stantibus*, fundamental mistake, *Wegfall der Geschäftsgrundlage* would all have to be considered.

However, which cases of hardship amount to an impediment under art. 79 CISG and what remedies the aggrieved party may resort to is still a matter of dispute.

4 PREREQUISITES FOR *FORCE MAJEURE* AND HARDSHIP UNDER THE CISG

4.1 General

Art. 79(1) CISG provides that a party is exempted from liability for damages only, if the failure to perform is due (1) to an impediment beyond its control and (2) that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or (3) to have avoided or overcome it or its consequences[29]. Art. 7.1.7(1) PICC 2004, art. 8:808(1) PECL 1999, as well as art. III. – 3:104(1) DCFR 2008 are practically identical to art. 79(1) CISG. The same holds true for the ICC Force Majeure Clause. However, the latter gives a list of events that may amount to an impediment, such as war, natural disasters, explosions, strikes, acts of authority etc. Thus, concerning the *force majeure* issue there are three clearly distinct prerequisites; the impediment must not fall in the sphere of risk of the obligor; it must have been unforeseeable; and it or its consequences must have been unavoidable[30].

As far as the provisions regarding hardship are concerned, again the international solutions bear great resemblance to one another[31]. In the

[29] See STOLL, Hans; GRUBER, Georg; SCHLECHTRIEM, Peter; SCHWENZER, Ingeborg (Eds.). **Commentary on the UN Convention on the International Sale of Goods**. Oxford: 2 English ed, Oxford University Press, 2005. Art. 79, § 10 et seq.; MANKOWSKI, Peter; SCHMIDT, Karsten (Eds.). **Münchener Kommentar zum Handelsgesetzbuch**. Munich: C. H. Beck, 2004. Art. 79 CISG, § 34 et seq.; SCHLECHTRIEM, above n. 23, § 289.

[30] See STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 79, § 10 et seq.; TALLON; BIANCA; BONELL (Eds.). above n. 21, Art. 79, § 2.6.1. et seq.; HONNOLD, above n. 22, Art. 79, § 423.4; BRUNNER, above n. 22, p. 102.

[31] See above III.

first place the relevant articles and clauses emphasize the principle of *pacta sunt servanda*[32]. The mere fact that performance has been rendered more onerous than could reasonably have been anticipated at the time of the conclusion of the contract does not exempt the obligor from performing the contract[33]. Hardship can only be found if the performance of the contract has become *excessively* onerous[34], or in other words if the equilibrium of the contract has been fundamentally altered[35]. Again, as in the *force majeure* provisions, the event in question must not fall in the sphere of risk of the aggrieved party; it must have been unforeseeable as well as unavoidable. Thus, hardship can be considered as a special group of cases under the general *force majeure* provisions. All that is added to the *force majeure* provisions on the level of prerequisites is a clarification of the term *impediment* in cases where performance in the strict sense is possible but just too onerous. This may justify dealing with hardship under the CISG as well as under the other international harmonization projects in a consolidated manner.

4.2 Relevant threshold for hardship

The crucial point in the first place is to determine the threshold of hardship. When has performance become excessively onerous? When has the equilibrium of the contract been fundamentally altered? Thereby either an increase in cost of performance or a decrease in value of the

[32] Art. 6.2.1 PICC 2004; Art. 6:111(1) PECL 1999; Art. III. – 1:110 DCFR 2008; ICC Hardship Clause 2003, § 1.; see also RIMKE, above n. 28, p. 197, 237.

[33] See SCHWENZER in SCHLECHTRIEM and SCHWENZER (Eds), above n. 21, Art. 79, § 14; see also RIMKE, above n. 28, p. 197, 200; SCHLECHTRIEM, above n. 23, § 291.

[34] Art. 6:111(2) PECL 1999; Art. III. – 1:110(2) DCFR 2008; ICC Hardship Clause 2003 para. 2(a). See also SCHLECHTRIEM, Peter. **Uniform Sales Law**: The UN-Convention on the International Sale of Goods. Vienna: Manz, 1986. p 102; MAGNUS, Ulrich. **J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen, Wiener UN-Kaufrecht (CISG)**. 15. ed. Berlin: Sellier, 2006, Art. 79, § 4; MASKOW, Dietrich; ENDERLEIN, Fritz; MASKOW, Dietrich; STROHBACH, Heinz (Eds.). **Internationales Kaufrecht**. Berlin: Haufe, 1991, Art. 79, § 6.3; PERILLO, Joseph. *Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts.* **5 Tul. J. Int'l & Comp. L.**, p. 1, 9, 1996; BUND, Jennifer. *Force Majeure Clauses: Drafting Advice for the CISG Practicioner.* **17 J.L. & Com.**, p. 381, 389, 1998; AUDIT, Bernard. **La vente internationale de marchandises, Convention des Nations-Unies du 11 avril 1980**. Paris: L. G. D. J., 1990. p. 174; HEUZÉ, Vincent. **La vente internationale de marchandises, Droit uniforme**. (Paris: L. G. D. J., 2000. P. 425.

[35] Art. 6.2.2 PICC 2004.

performance received may be relevant[36]. This means that the aggrieved party can be either the seller or the buyer.

The starting point has to be the contract itself. Primarily it is up to the parties to define their respective spheres of risk in the contract[37]. One party may have expressly or impliedly assumed the risk for a fundamental change of circumstances or – on the contrary – certain risks may have been expressly or impliedly excluded[38]. This determination can be done by mere contract interpretation.

If for example the contract is highly speculative, the obligor can be presumed to have assumed the risk involved in the transaction[39]. Thus a German court of second instance[40] did not exempt a seller from liability under art. 79 CISG although the market price for the contract item, iron molybdenum from China, had risen by 300%. The court reasoned that in a trade sector with highly speculative traits the threshold for allowing hardship should be raised. As such, typical fluctuations of price in the commodity trade generally will not give rise to an acknowledgement of hardship[41].

It is questionable how the relevant threshold for giving rise to a hardship excuse is determined if no such special circumstances exist. Whereas the Comment to art. 6.2.2 PICC[42] in its first edition of 1994 suggested that an alteration amounting to 50% or more would be likely to amount to a "fundamental" alteration, the second edition of the PICC in 2004 refrains from recommending any exact figure.

36 See BRUNNER, above n. 22, p. 207 et seq.

37 See *Bulgarian Chamber of Commerce and Industry*, 12 Feb 1998, CISG-online 436; KATZ, Avery. *Remedies for Breach of Contract under the CISG*. **25 Int'l Rev. L. & Econ.**, p. 378, 381, 2006. It is also held that the risk allocation is dependant on the parties' choice of law at first, see OBERMAN, Neil. **Transfer of risk from seller to buyer in international commercial contracts**: A comparative analysis of risk allocation under the CISG, UCC and Incoterms July 1997, available online at <http://www.cisg.law.pace.edu/cisg/thesis/Oberman.html>. Last accessed on: 16 Jul 2008.

38 See BRUNNER, above n. 22, p 136 et seq.; TREITEL, above n. 15, p 455 et seq.; KATZ, above n. 37, 25 **Int'l Rev. L. & Econ.**, p. 378, 391, 2006; CISG AC Opinion n. 7, above n. 27, Comment, § 39.

39 BRUNNER, above n. 22, p. 206; *ICC Award*, 26 Aug 1989, 6281, CISG-online 8; *Rechtbank van Koophandel, Tongeren*, 25 Jan 2005, CISG-online 1106.

40 See *Oberlandesgericht Hamburg*, 28 Feb 1997, CISG-online 261.

41 See LEISINGER, Benjamin. **Fundamental Breach Considering Non-Conformity of the Goods**. Munich: Sellier, 2007. p. 119.

42 Comment 2.

Certainly, in ascertaining whether any alteration amounts to hardship primary consideration is to be given to the circumstances of the individual case. Thus it may be relevant whether we are dealing with a short term sales contract or a long term instalment contract[43]. The profit margin in the respective trade sector may also play an important role. Finally, in cases where the financial ruin of the obligor is impending the threshold for allowing hardship may be lowered[44].

However, legal certainty clearly calls for some benchmark. Relying on a thorough comparative analysis of domestic solutions one author[45] has suggested that as a general rule of thumb in standard situations a threshold of 100% should be favoured. However, courts interpreting art. 79(1) CISG have been very reluctant to allow hardship in case of fluctuations of prices[46]. Up to now, there is no single reported court or arbitral decision exempting a party – neither a seller nor a buyer – from liability under a CISG sales contract due to hardship. All decisions dealing with hardship under art. 79 CISG concluded that even a price increase or decrease of more than 100% would not suffice[47]. The suggested "100% threshold" seems to be based upon considerations of domestic markets where price fluctuations are not to be expected to the same degree as in international markets. In an international market one may expect the potentially aggrieved party that it insists on incorporating terms for a possible adjustment in the contract or otherwise assumes the risk for higher fluctuations than they usually occur on domestic markets. Thus the margin certainly has to be set at a higher point. A 150-200% margin seems to be advisable.

43 BRUNNER, above n. 22, p. 405 et seq.

44 BRUNNER, above n. 22, p. 406.

45 BRUNNER, Christoph. **UN-Kaufrecht** – CISG, Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980, unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht. Bern: Stämpfli, 2004, Art. 79 CISG, § 26; BRUNNER, above n. 22, p. 396.

46 See ICC Award, 26 Aug 1989, n. 6281, CISG-online 8; Tribunale di Monza, 14 Jan 1993, CISG-online 540; LOOKOVSKY, Joseph. **Impediments and Hardship in International Sales**: A Commentary on Catherine Kessedjian's "Competing Approaches to Force Majeure and Hardship". **25 Int'l Rev. L. & Econ.**, p. 434, 438, 2005.

47 It is argued that an increased price is foreseeable for a company acting in international trade, see *CIETAC*, 10 May 1996, CISG-online 1067; *Bulgarian Chamber of Commerce and Industry*, 12 Feb 1998, CISG-online 436; *Rechtbank van Koophandel, Hasselt*, 23 Feb 1994. CISG-online 371; *Cour d'Appel de Colmar*, 12 Jun 2001, CISG-online 694; *Cour de Cassation*, 30 Jun 2004, CISG-online 870.

4.3 Time factor

In cases of *force majeure* it is more or less unanimously held that it is irrelevant whether the impediment arose after the conclusion of the contract or if it already existed at the time of conclusion[48]. Thus if the goods sold had already been destroyed at the time of the conclusion of the contract but the seller did not know about nor could have prevented this fact the seller may be exempted under art. 79(1) CISG[49].

In cases of hardship, however, it is argued that the change of circumstances must have occurred after the conclusion of the contract[50]. This is the position taken by domestic legal systems[51]. Similarly, the wording of art. 6:111(1) PECL 1999[52] is clearly based upon this assumption. The respective Comment affirms this position[53]. However, although the wording of art. 6.2.1 PICC 2004[54] seems to point in the same direction, art. 6.2.2(a) PICC 2004 clarifies that hardship may be found if either the events that are causing the imbalance of the performances occur or if they become known to the disadvantaged party after the conclusion of the contract[55].

To the date, neither case law nor scholarly writing have up to now discussed the relevant time factor under the CISG – assuming one accepts hardship as being covered by art. 79 CISG. In order to decide whether an *initial* gross imbalance between the performances of the

48 See STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 79, § 12; HERBER, Rolf; CZERWENKA, Beate. **Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf**. Munich: C. H. Beck, 1991, Art. 79, § 11; *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat* (U.N. DOC. A/CONF. 97/5), O.R. p 14, Art. 65, § 4; NEUMAYER, Karl; MING, Catherine. ***Convention de Vienne sur les contrats de vente internationale de merchandise, commentaire***. Lausanne: CEDIDAC, 1993, Art. 79, § 6; disapproving TALLON; BIANCA; BONELL (Eds.). above n. 21, Art. 79 note 2.4.3.

49 See STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 79, § 12; CISG AC Opinion n. 7, above nn 27, Comment § 8.

50 See STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 79, § 12; Comment n. 3.a on Art. 6.2.2. PICC 2004; BRUNNER, above n. 22, p. 369.

51 See § 313(1) BGB: "Haben sich die Umstände [...] nach Vertragsschluss schwerwiegend verändert [...]" (emphasis added).

52 "*[...] if performance* ***has become*** *more onerous [...]*" (emphasis added); see also Art. III. – 1:110(2) DCFR 2008.

53 See Art. 6:111 PECL 1999 Comment B. (ii).

54 "Where the performance [...] **becomes** more onerous [...]" (emphasis added).

55 The ICC Hardship Clause 2003 seems to be open for interpretation.

parties due to circumstances neither known to the parties nor preventable may amount to hardship under art. 79 CISG one has to consider what other remedies the aggrieved party could rely on when discovering that already at the time of the conclusion of the contract there has been a gross disparity between the respective values of the agreed upon performances. Most likely under domestic laws as well as under PECL 1999 initial gross disparity between the performances will give rise to remedies for mistake[56]. These coexisting remedies may be tolerable within one single legal system; difficult problems, however, can arise when dealing with sales contracts under the CISG[57]. As the CISG does not contain any provisions on mistake this question would have to be resolved relying on the otherwise applicable domestic law[58]. However, this may well lead to unpredictable results. For example, it might be questionable at what point in time production costs have risen, be it before the conclusion of the contract or only afterwards. Furthermore, uniformity in such an important area of sales law would be endangered by applying domestic rules on mistake to this question. It is exactly these considerations that in the case of *force majeure* compel an equal treatment of initial and subsequent impediments. Thus if the goods have been destroyed at the time of the conclusion of the contract, domestic rules declaring such a contract as being void are excluded[59]. Nothing else, however, can apply in cases of hardship. Thus the very term of hardship under the CISG should be interpreted and understood in the broadest sense; encompassing both any change of circumstances after the conclusion of the contract as well as a gross disparity of the value of performances already existing at the time of conclusion of the contract.

56 See Art. 6:111 PECL 1999 Comment B. (ii); Netherlands: ROSSUM, M. Van; BUSCH, Danny *et al.* (Eds.). **The Principles of European Contract Law and Dutch Law**. The Hague Kluwer Law, 2002. p 193; USA: § 266 Restatement (2d) of Contracts ("Existing Impracticability or Frustation").

57 See LEYENS, Patrick. CISG and Mistake: Uniform Law vs. Domestic Law: The Interpretative Challenge of Mistake and the Validity Loophole. **Pace Int'l L. Rev. eds**., p. 3, 15, 2003-2004.

58 It is held that a party can rely on mistake where the CISG and the domestic law provide the same remedies. For a detailed discussion about this matter see LEYENS, above n. 57. **Pace Int'l L. Rev. eds**., p 3, 34, 2003-2004; KRÖLL, Stefan. Selected Problems Concerning the CISG's Scope of Application, **25 J.L. & Com**., p. 39, 55, 2005.

59 See STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 79, § 12; NICHOLAS; BIANCA; BONELL (Eds.). above n. 21, Art. 68, § 3.1; MAGNUS; STAUDINGER, above n. 34, Art. 4, § 44 and Art. 79, § 33; SIEHR, Kurt; HONSELL, Heinrich (Ed.). **Kommentar zum UN-Kaufrecht**. Berlin: Springer, 1997, Art. 4, §§ 5 and 15; BRUNNER, above n 45, Art. 4, § 9; MASKOW; ENDERLEIN; MASKOW; STROHBACH (Eds.). above n. 34, Art. 79, § 5.2; but see TALLON; BIANCA; BONELL (Eds.). above n. 21, Art. 79, § 2.4.3.

4.4 Events that could not reasonably be taken into account or avoided or overcome

Force majeure as well as hardship can only exempt the aggrieved party from liability if the events causing the impediment could not reasonably be taken into account by the aggrieved party at the time of the conclusion of the contract[60]. If they could have been taken into account by the aggrieved party then it can be expected that this party would insist on incorporating a specific contract clause to deal with the problem. Thus this party must be assumed to have taken the risk[61].

Furthermore, even an impediment that the aggrieved party could not foresee at the time of the conclusion of the contract does not exempt it if overcoming the impediment is both possible and reasonable[62]. Whether the obligor can be expected to overcome the impediment has to be decided by taking the above mentioned threshold for hardship into account[63]. Thus, for example, the seller must turn to another supplier or consider alternative possibilities for the transportation of the goods if the increase in costs does not exceed the relevant threshold.

5 CONSEQUENCES OF *FORCE MAJEURE* AND HARDSHIP

5.1 Exemption from liability

If the non-performance is due to an impediment that fulfils the conditions set forth in art. 79(1) CISG or the comparable provisions[64] first and foremost the obligor is relieved from its obligation to pay

60 See STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 79, § 22; TALLON; BIANCA; BONELL (Eds.). above n. 21, Art. 79, § 2.6.3.; SALGER; WITZ, SALGER; LORENZ (Eds.). above n. 22, Art. 79, § 5; MAGNUS; STAUDINGER, above n. 34, Art. 79, § 32.

61 See STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 79 § 22; AUDIT, above n. 34, p. 174; TALLON; BIANCA; BONELL (Eds.). above n. 21, Art. 79, § 2.6.3.; NEUMAYER; MING, above n. 48, Art. 79, § 4.

62 See STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 79, § 23; HONNOLD, above n. 22, Art. 79, § 432.1; BRUNNER, above n. 22, p. 298; MAGNUS; STAUDINGER, above n. 34, Art. 79, § 34.

63 See above IV. 2.

64 See Art. 7.1.1 PICC 2004; Art. 8:108 PECL 1999; Art. III. – 3:104 DCFR 2008.

damages[65]. This includes so-called "*liquidated damages*"[66] as well as penalties (if they are at all valid under the governing domestic law), unless the parties have provided otherwise in their contract[67].

Art. 8:101(2) PECL 1999 clearly states that where a party's non-performance is excused alongside with the right to claim damages the right to performance is likewise excluded[68]. Whether the exemption under art. 79 CISG also extends to the promisee's right of performance has been a subject of considerable debate[69] because of the somewhat misleading wording of art. 79(5) CISG[70]. A German proposal that the wording should make clear that if the impediment were a continuing one performance could not be insisted on was rejected at the Vienna Conference. It was held that, in the case of actual impossibility, no problems would arise in practise whereas the categorical removal of the right to performance could impair the promisee's accessory rights[71]. Although especially among German authors there still remain doubts about the dogmatic justification[72]

65 See STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 79, § 43; MASKOW; ENDERLEIN; MASKOW; STROHBACH (Eds.). above n. 34, note 4 to part IV: BEFREIUNGEN; HONNOLD, above n. 22, Art. 79, § 423.4; BRUNNER, above n. 22, p. 320.

66 See MCKENDRICK, Ewan; GUEST, A.G. (Ed.). **Chitty on Contracts**, above n. 56, § 26-010; CALAMARI, John; PERILLO, Joseph. **The Law of Contracts**. 5. ed. St. Paul: Thomson West, 2003. p. 611 et seq.; BRIDGE, Michael. **The International Sale of Goods, Law and Practice**. 2. ed. Oxford: Oxford University Press, 2007, § 10.44.

67 See STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 74, § 48 et seq.; *ICC Award*, 1992, n. 7585, CISG-online 105.

68 See also FLAMBOURAS, Dionysios. **Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108**, January 2007 <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html>. Last accessed: 10 Jul 2008).

69 See STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 79, § 43; HONNOLD, above n. 22, Art. 79, § 495.2; BUND, above n. 34, (1998) 17 JL & Com 381, 388; BRUNNER, above n. 22, p. 320; BRIDGE, above n. 66, § 12.61; HEUZÉ, above n. 34, p. 430.

70 "Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention".

71 See United Nations (ed) UN Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, New York (1981) (UN DOC. A/CONF. 97/19), p. 381 et seq.; SCHWENZER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 21, Art. 79, § 52; but see BRUNNER, above n. 22, p. 336.

72 See MAGNUS; STAUDINGER, above n. 34, Art. 79 para 58; MANKOWSKI; SCHMIDT (Ed.). above n. 29, Art. 79, § 8; HUBER, Peter; REBMANN, Kurt *et al.*

nowadays it seems to be undisputed that wherever the right to claim performance would undermine the obligor's exemption performance cannot be demanded as long as the impediment exists[73]. This rule not only applies for example to cases of actual impossibility of performance but also to cases of hardship.

5.2 Right of avoidance

Among the rights that are not affected by an exemption is first and foremost the right to avoid the contract[74]. However, this right presupposes that the non-performance amounts to a fundamental breach of contract. Whether such a fundamental breach exists largely depends upon the circumstances of the individual case[75].

Art. 25 CISG – and likewise art. 7.3.1(2) PICC 2004, art. 8:103 PECL 1999 and art. III. – 3:502(2) DCFR 2008 – circumscribe a fundamental breach of contract as one that results in such detriment to the other party as substantially to deprive it of what it is entitled to expect under the contract. One of the central questions thereby is whether it is possible and – having regard to the other party's expectations – just and reasonable that the breach be remedied[76]. We will return to this question during the following discussions.

(Eds.). **Münchener Kommentar zum Bürgerlichen Gesetzbuch**. 5. ed. Munich: C. H. Beck, 2008, Art. 79, § 29; SALGER; WITZ; SALGER; LORENZ (Eds.). above n. 22, Art. 79, § 12; BRUNNER, above n. 22, p. 321.

73 See SCHWENZER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 21, Art. 79, §§ 53 and 54; MAGNUS; STAUDINGER, above n. 34, Art. 79, §§ 59 and 60; ACHILLES, above n. 22, Art. 79, § 14. See also HONNOLD, above n. 22, Art. 79, § 435.5.

74 See Art. 79(5) CISG; STOLL; GRUBER; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 79 para 4.; BRUNNER, above n. 22, p 340; Honnold, above n. 22, Art. 79, § 435.1; ACHILLES, above n. 22, Art. 79 para 14; RIMKE, above n. 28, p 197, 217; MAGNUS; STAUDINGER, above n. 34, Art. 79, § 55.

75 See SCHLECHTRIEM; SCHLECHTRIEM; SCHWENZER (Eds.). above n. 29, Art. 25, § 5 "*[...] any abstract definition [of the fundamental breach] must expect criticism [...]*"; Magnus in Staudinger, above n 46, Art. 25 para 3; Brunner, above n 45, Art. 25, § 8; *Oberlandesgericht Stuttgart*, 12 Mar 2001, CISG-online 841; *CIETAC*, 30 Oct 1991, CISG-online 842.

76 See CISG AC Opinion n. 5 *The buyer's right to avoid the contract in case of the non-conforming goods or documents* (Rapporteur: Professor Ingeborg Schwenzer), 7 May 2005, Opinion 3.

5.3 The obligation to renegotiate in cases of hardship

In true cases of hardship art. 6.2.3(1) PICC 2004, art. 6:111(2) PECL 1999 as well as art. III. – 1:110(3)(d) DCFR firstly state an obligation to renegotiate. The ICC Hardship Clause 2003 likewise provides that the parties are bound to negotiate alternative contractual terms which reasonably allow for the consequences of the changed circumstances within a reasonable time of the invocation of the Clause[77]. This duty to renegotiate is seen to be based on a general duty to act in good faith[78] which is common to many Civil Law systems[79].

Other legal systems do not know such a duty to renegotiate. This is not only true for Common Law systems even where they recognize the general principle of hardship or impracticability as Sec. 2-615 UCC,[80] but also some Civil Law systems such as Germany where under the newly enacted § 313 BGB the parties are not bound to renegotiate either[81]. Although there are some authors favouring such a duty to renegotiate under German law[82], the prevailing view follows the clear wording of the provision that does not mention any such duty but instead allows a party to immediately resort to the court asking for an

77 See ICC Hardship Clause 2003 para (2)(b).

78 See BRUNNER, above n 22, p 445; MAGNUS; STAUDINGER, above n 34, Art. 79 para 24; BRUNNER, above n 45, Art. 79, § 24.

79 The principle of good faith found its way into almost every Civil Law system due to the reception of Roman law. See France: Art. 1148 CC; Italy: Art. 1337 CC; Germany: § 242 BGB; Switzerland: Art. 2 ZGB. Common Law systems however tend to refrain from accepting good faith as a general principle of contract law, see BRIDGE, Michael. **Does Anglo-Canadian Law Need a Doctrine of Good Faith?** Can Bus LJ 412, 426, 9, 1984; FARNSWORTH, Allan. *Duties of Good Faith and Fair Dealing under the Unidroit Principles, Relevant International Conventions, and National Laws.* **3 Tul. J. Int'l & Comp. L.** 47, 51 et seq., 1995.

80 Sec. 2-615 (a) UCC states that "[d]elay in delivery or non-delivery [...] is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency [...]". For a detailed discussion of the impracticability doctrine in American law, see TREITEL, above n. 15, § 6-001 et seq.

81 See § 313 BGB which does not mention a duty to renegotiate the contract.

82 See GRÜNEBERG, Christian; PALANDT, Otto *et al.* (Eds.). **Bürgerliches Gesetzbuch**. 67. ed, Munich, 2008, § 313, BGB, § 41; HEINRICHS, Helmut. Vetragsanpassung bei Störung der Geschäftsgrundlage: Eine Skizze der Anspruchslösung des § 313 BGB. *In*: LORENZ, Stephan *et al.* (Eds.). **Festschrift für Andreas Heldrich zum 70**. *Geburtstag.* Munich: C. H. Beck, 2005. p 183, 195; RIESENHUBER, Karl. **Vertragsanpassung wegen Geschäftsgrundlagenstörung – Dogmatik, Gestaltung und Vergleich**. Betriebs-Berater 2004, 59, 2697, 2698.

adaptation of the contract[83]. Likewise, neither the Italian nor the Dutch Code provisions on hardship[84] oblige the parties to renegotiate.

Art. 79(5) CISG – as has already been pointed out[85] – expressly relieves the aggrieved party from damages only. Some authors, however, advocate the idea that also under the CISG there is a duty to renegotiate based upon art. 7(1) CISG according to which the Convention has to be interpreted with regard to the observance of good faith in international trade[86]. It has been questioned many times whether art. 7(1) CISG may be applied not only in interpreting the Convention as such but may also be used to establish the principle of dealing in good faith among the parties[87]. Without having to decide this dispute the question of any duty to renegotiate can be answered in the negative.

In the first place renegotiation as negotiation has to be based on voluntariness and trust. Constructive and cooperative renegotiation cannot be forced upon the parties by coercion[88].

Furthermore, lacking any means of specific enforcement the duty to renegotiate amounts to nothing more than a farce. The duty to negotiate would gain importance only if breaching it were sanctioned. Indeed, this is envisaged by art. 6:111(3)(c) PECL 1999. Accordingly, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing. However, it is certainly not advisable to state such a liability in

83 See SCHLECHTRIEM, Peter. The German Act to Modernize the Law of Obligations in the Contest of Common Principles and Structures of the Law of Obligations in Europe Oxford University Comparative Law Forum 2, 2002, available online at <http://ouclf.iuscomp.org/articles/schlechtriem2.shtml> (last accessed on 22 Jul. 2008); UNBERATH; BAMBERGER; ROTH (Eds.). above n. 13, § 313 § 85; Barbara Dauner-Lieb and Wolfgang Dötsch Prozessuale Fragen rund um § 313 BGB (2003) NJW 921, 922.

84 See Artt. 1467-1469 Italian CC (*onerosità*) and Artt. 6:258 and 6:260 Dutch BW; Art. 451 of the Civil Code of the Russian Federation. See also BERGER, Klaus. Renegotioation and Adaptation of international Investment Contracts: The Role of the Contract Drafters and Arbitrators, () **36 Vand. J. Transnat'l L.**, p. 1347, 1356, 2003. For further references, see BRUNNER, above n. 22, p. 445.

85 See above V. 1.

86 CISG AC Opinion n. 7, above n. 27, Comment para 40; *ICC Award*, Mar 1999, n. 5953, Clunet 1990, 1056 et seq.

87 See Schlechtriem in Schlechtriem and Schwenzer (eds), above n 29, Art. 7 para 7; Farnsworth, above n 79, 1995, 3 Tul. J. Int'l & Comp. L. 47, 56.

88 See ROTH, Günter; KRÜGER, Wolfgang (Ed.). **Münchener Kommentar zum Bürgerlichen Gesetzbuch**. 5. Ed. Munich: C. H. Beck, 2007, § 313 BGB, § 93; DAUNER-LIEB and DÖTSCH, above n. 83, 2003, NJW 921, 925.

damages. Cases of hardship involve such complex fact situations and evaluations that it can hardly be determined whether a party refusing or breaking off negotiations acted in bad faith. In addition, international trade regularly calls for promptness and legal certainty which in itself militates against lengthy negotiations. Clear cases of bad faith may be taken into account upon allocating the costs of proceedings[89].

To sum up; in cases of hardship a duty to renegotiate should not be advocated. This, however, does not preclude that an offer by one party to adapt the contract to the changed circumstances becomes relevant when dealing with the possible respective remedies of the parties.

5.4 Adaptation of the contract and avoidance

Under some legal systems of the civil law tradition in cases of hardship the court is primarily called upon to adapt the contract to the changed circumstances[90]. Avoidance is allowed only as a remedy of last resort if an adaptation of the contractual terms is either not possible or not just and reasonable having regard to the respective interests of the parties[91]. Art. 6.2.3(4) PICC 2004, art. 6:111(3) PECL 1999, as well as art. III. – 1:110(2)(b) DCFR 2008 also follow this approach. On the other hand, art. 1467 Italian Codice Civile as well as the ICC Hardship Clause 2003 take a different stand; the party invoking hardship is entitled to an avoidance of the contract, an adaptation of the contract is not contemplated[92].

If one recognizes hardship as an impediment under art. 79 CISG it is questionable whether an adaptation of the contract is possible[93]. It can hardly be conceived that there is a gap in the CISG that can be filled by giving the court or tribunal the power to adapt the contract to the changed circumstances. Therefore, it has been proposed to rely on art. 6.2.3(4) PICC 2004 as constituting an international usage in the sense of art. 9(2) CISG in order to reach the desirable result of adaptation[94]. This dogmatic method does not seem to be necessary, however. The usual

89 See BRUNNER, above n. 22, p. 448.

90 See § 313(1) BGB; SWITZERLAND: Swiss Federal Supreme Court (Bundesgericht) on *clausula rebus sic stantibus*, BGE 107 II 343, 348.

91 See e.g. § 313(3) BGB.

92 The ICC Hardship Clause 2003 states in para 3 that: "[...] the party invoking this Clause is entitled to termination of the contract".

93 But see CISG AC Opinion N. 7, above n. 27, Comment § 40.

94 See Peter SCHLECHTRIEM, above n. 23, § 291.

remedy mechanism under the CISG in combination with the duty to mitigate as a general principle[95] may yield satisfying and flexible results in practice. This may be demonstrated by the following hypothetical.

Suppose in a given case the acquisition costs for the seller have tripled thus giving rise to a plea of hardship. Upon the seller informing the buyer that it is not able to perform the contract because of this event, there appear two possible scenarios.

Scenario 1: The seller suggests delivering the goods if the buyer is willing to pay a higher purchase price. If the buyer consents the contract is accordingly adapted. If the buyer does not consent and the seller repudiates the contract – based on its original terms – on the ground of hardship the buyer in turn will sue the seller for specific performance or – most probably – for damages. The court or tribunal will then find that the seller is released from its obligations due to hardship. If the seller wants to go through with the contract – albeit on different terms – it will initiate a counter claim seeking at performance or damages for wrongful repudiation on the part of the buyer. The buyer will then rely on avoidance because of fundamental breach. Now the court or tribunal has to decide whether the fact that the seller was willing to deliver the goods but on different terms amounted to a fundamental breach of contract giving the buyer the right to avoid the contract. It hereby considers whether it would have been just and reasonable for the buyer in the circumstances of the given case to accept the different terms offered by the seller. If it finds that the buyer should have consented to an adaptation on the basis of good faith it will find for the seller.

Scenario 2: The buyer offers to pay a higher price whereas the seller wants to get out of the contract. Under these circumstances again, probably the buyer will claim either specific performance or damages for a cover purchase. The court or tribunal now has to determine whether having regard to the different contract terms offered by the buyer hardship can still be held to exist. If not, the seller is neither released from its obligation to perform nor to pay damages.

[95] See SCHWENZER, Ingeborg; MANNER, Simon. The Pot Calling the Kettle Black: The Impact of the Non-Breaching Party's (Non-) Behaviour on its CISG-Remedies. *In*: ANDERSEN, Camilla; SCHROETER, Ulrich (Eds.). **Sharing International Commercial Law Across National Boundaries**. Festschrift for Albert H Kritzer. London: Wildy, Simmonds & Hill, 2008. p. 470, 480.

Thus in both scenarios results can be reached similar to those legal systems that expressly provide for the power of the court or tribunal to adapt the contract to the changed conditions. Although there is no explicit duty to renegotiate under the CISG there certainly is a duty to mitigate damages according to art. 77 CISG. This duty to mitigate may well require the aggrieved party to strike a deal even with the contract breaching party and – *a fortiori* – in cases where unforeseen circumstances make performance excessively onerous for one party[96].

Although this mechanism seems to be especially warranted in cases of hardship it might also come into play in cases of other impediments in the sense of art. 79 CISG. Thus where the seller has sold specific goods that were destroyed after the formation of the contract it may well be the case that substitute goods exist serving the buyer's interests just as well as the original ones. If the seller offers these goods as "cure" the buyer may well be obliged to accept them as no fundamental breach of contract can be ascertained in this case.

6 CONCLUSION

Whereas many systems – especially in recent times PICC 2004, PECL 1999 and DCFR 2008 – clearly distinguish between *force majeure* and hardship under the CISG both situations have to be dealt with under the same provision, namely art. 79 CISG. And rightly so. All too often drawing the line between *force majeure* and hardship is not possible. The days of the old Roman notion of "impossibility" are gone; most subsequent events do not render performance impossible and thus do not constitute a veritable impediment in the sense of art. 79 CISG, they just render performance more or less onerous for the obligor. Thus it seems preferable to deal with both situations under the same heading with the same prerequisites and the same consequences.

It has been shown that under the remedies mechanism of the CISG there is enough flexibility to reach just and equitable results that on the one hand guarantee legal certainty and that on the other hand contribute to implement good faith and fair dealing in international sales law. Thus the very scarcity of the CISG on questions of hardship facilitates solutions that are well adjusted to the everyday needs of globalized international trade.

[96] See SCHWENZER; MANNER, above n. 95, p. 470, 486 et seq.