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# Duty to renegotiate and contract adaptation in case of hardship

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## Abstract

This article examines the situations in which hardship takes place and offers a substantiated analysis about the desirability or necessity of certain remedies under domestic laws, model hardship clauses and international legal instruments. The authors submit that the duty to renegotiate as well as the remedies of contract adaptation and/or termination by a court or arbitral tribunal, although present in several legal systems, are neither necessary nor desirable under current trade practice and dispute resolution methods. The authors take the view that the traditional remedies, e.g. exemption of damages, duty to mitigate loss and/or avoidance of contract by a party's declaration, may serve, more adequately, the interests of contracting parties in hardship scenarios.

## I. Introduction

Unexpected changes of circumstances may constitute one of the major problems that parties may face in international trade, especially for those in long-term or complex contracts. Trade at a global scale has augmented the likelihood for greater imponderables given the involvement of multiple actors from different countries in the production and procurement of goods linked to various contracts. Changes in political and economic policies, social unrest, and natural phenomena are among the events that could considerably affect the very basis of the bargain between contracting parties. There may be an earthquake, a volcano eruption, a flood, a terrorist attack, 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 goods; or price fluctuations that were not foreseeable at the time of the conclusion of the contract may make the performance by the seller unduly burdensome or may devalue the contract performance for the buyer.

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In all legal systems, the principle *pacta sunt servanda* or sanctity of contract places the burden of such changes in the original contracting conditions upon the obligor.<sup>1</sup> However, since the classic Roman law, the concurrent principle of *impossibilium nulla est obligatio*, or there is no obligation to perform impossible things,<sup>2</sup> has constituted a valid exemption to perform. Disputes were more simple at that time; the slave or the cattle that had been sold had perished before delivery or perhaps the crop that should have been delivered was destroyed.<sup>3</sup> Furthermore, under the doctrine of *rebus sic stantibus* developed in canon law during the Middle Ages, an unforeseeable and extraordinary change of circumstances rendering a contractual obligation significantly burdensome could be recognized.<sup>4</sup> Since early days, impossibility, *force majeure*, or the like have become grounds for exemption in every legal system.<sup>5</sup> However, the question of whether simple changes in the surrounding economic conditions, also known as hardship, may exempt the debtor from liability for lack of performance has always been a highly debated issue in various legal systems and under some international law instruments.<sup>6</sup>

Today, Austria, France, Germany, the Netherlands, Italy, Greece, and Portugal, as well as many other civil law jurisdictions legal systems, accept the theory of hardship.<sup>7</sup> The most recent acknowledgement by statute can be found in France.

<sup>1</sup> In many legal systems this principle has been codified following Art. 1134 of the 1804 French Civil Code (CC) which is now stated in Art. 1103 of the 2016 CC (*Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits*) 1104 (*Les contrats doivent être négociés, formés et exécutés de bonne foi*) and Art. 1193 of the 2016 French CC (*Les contrats ne peuvent être modifiés ou révoqués que du consentement mutuel des parties, ou pour les causes que la loi autorise*). At the international level see Art. 6.2.1 International Institute for the Unification of Private Law, Principles of International Commercial Contracts, 2016 (PICC), Art. 6:111(1) Commission on European Contract Law, Principles of European Contract Law (PECL). See also Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law* (London: OUP, 2011) at 668, para. 45.87.

<sup>2</sup> The Digest 50.17.185 also cited in James Gordley, 'Impossibility and Changed and Unforeseen Circumstances', *The American Journal of Comparative Law*, 52/3 (2004), 513–30 at 514.

<sup>3</sup> *Ibid.*

<sup>4</sup> Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Oxford Clarendon Press, 1998): 'This doctrine may be traced through the Middle Ages from the Glossators right up to Grotius and Pufendorf; it was accepted in the Codex Maximilianeus bavaricus civilis of 1756 and then in the Prussian General Land Law of 1764'. See also Dubravka Klasiček and Marija Ivatin, 'Modification or Dissolution of Contracts Due to Changed Circumstances', *IZMJENA I RASKID UGOVORA ZBOG PROMIJENJENIH OKOLNOSTI*, 34/2 (2018), 27–55 at 29.

<sup>5</sup> Germany § 275 Bürgerliches Gesetzbuch (BGB); Italy Art. 1256 Codice Civile (CC); France Art. 1218 Code Civil (CC); United States § 265 Restatement (2d) of Contracts (Restatement), § 2-615 Uniform Commercial Code (UCC). For similar rules in other legal systems see, Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 651 et seq.

<sup>6</sup> Zweigert and Kötz, *Introduction to Comparative Law* at 520–2. The actual trigger for this discussion was the enormous rise in prices due to World War I (1914–18); see Hannes Rösler, 'Hardship in German Codified Private Law: In Comparative Perspective to English, French and International Contract Law' *European Review of Private Law* 15 (2007) at 491.

<sup>7</sup> Argentina Art. 1091 CC; Armenia Art. 467 CC; Austria §§ 936, 1052, 1170 BGB a through analogy; Azerbaijan Art. 422 CC; Bolivia Art. 581(1)(4) CC; Brazil Art. 478, 479 CC; China Art. 26 PRC Contract Law Interpretation (2); Colombia Art. 868 Com C; Egypt: Art. 147(2) CC; Iraq Art. 146(2) CC; Kuwait 198 CC; France Art. 1195 CC; Germany § 313 BGB; Italy Art. 1467 CC; Greece Art.388 CC; Netherlands Art. 6:258 Civil Code (BW); Portugal Art. 437 CC.; Libya Art. 147(2); Lithuania Art. 6.204 CC; Paraguay Art. 672 CC; Qatar Art. 171(2); Russia Art. 451(2) CC; Slovenia Art. 994 Com C; Syria Art. 148(2) CC; Taiwan Art. 227-2 CC; Ukraine Art. 652 CC. See also Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 666.

Article 1195 of the French Civil Code (2016) for the first time allows a private law contract to be modified in case of a change of circumstances.<sup>8</sup> Before that time, French law was not favourable to the concept of hardship; the theory of *imprévision* applied to administrative contracts only.<sup>9</sup> In Germany, another influential civil law jurisdiction, the Statute on the Modernisation of the Law of Obligations in 2001 codified the right to have the contract adapted to the changed circumstances in section 313 of the Bürgerliches Gesetzbuch (BGB).<sup>10</sup>

English law seems to reject any notion of relief for changed circumstances that do not amount to impossibility.<sup>11</sup> However, in case of frustration of contract—where the contract is rendered useless by the change of circumstances—an exception is granted to this general rule.<sup>12</sup> Most state contract laws in the USA have adopted section 2-615 of the Uniform Commercial Code (UCC),<sup>13</sup> according to which a party may be exempted if, as a result of supervening events, the performance of the contract—though remaining physically possible—has become severely more burdensome for that party.<sup>14</sup>

At the international level, the 2016 UNIDROIT Principles on International Commercial Contracts (PICC),<sup>15</sup> the 1999 Principles on European Contract Law (PECL),<sup>16</sup> and the 2008 Draft of a Common Frame of Reference (DCFR)<sup>17</sup> contain provisions purported to govern the change of circumstances that make performance more onerous or that fundamentally alter the equilibrium of the

<sup>8</sup> Francois Chénéde, *Le Nouveau Droit Des Obligations Et Des Contrats: Consolidations - Innovations - Perspective* (France: Dalloz, 2016) at 142, para. 25.51; Alain Bénabent, *Droit Des Obligations* (16 edn., Précis Domat Droit Privé; France: LGDJ, 2017) at 253, para. 309.

<sup>9</sup> Bénabent, *Droit Des Obligations* at 253, para. 309; Jean-Christophe Roda, 'Réflexions Pratiques Sur L'imprévision', in Mathias Latina (ed.), *La Réforme Du Droit Des Contrats En Pratique* (France: Dalloz, 2017) at 70.

<sup>10</sup> Hannes Unberath, 'Section 313', in Heinz Georg Bamberger and Herbert Roth (eds.), *Kommentar Zum Bürgerlichen Gesetzbuch* (Second edn.; Munich: CH Beck, 2007) at § 313 paras 1–7.

<sup>11</sup> HG Beale and Joseph Chitty, *Chitty on Contracts* (London: Sweet & Maxwell, 2010) at paras. 23–61; Schwenger, Hachem, and Kee, *Global Sales and Contract Law* at 652, para. 45.13.

<sup>12</sup> Schwenger, Hachem, and Kee, *Global Sales and Contract Law* at 652, para. 45.13; Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (International Arbitration Law Library, 18; The Hague: Kluwer Law International, 2008) at 410.

<sup>13</sup> United States § 2-615 UCC. The Restatement Second, Contracts, reiterates this position: see American Law Institute Restatement on the Law of Contracts (2nd edn, American Law Institute Publishers, St Paul, Minnesota, 1981) § 261; the seminal case on this rule is *Transatlantic Financing Corporation, Appellant, v United States of America, Appellee*, 363 F.2d 312 (D.C. Cir. 1966) cited in Alissa Palumbo, *Modern Law of Sales in the United States*, ed. Ingeborg Schwenger (International Commerce and Arbitration, 17; The Hague: Eleven International Publishing, 2015) at 165, 66; see also Larry Dimatteo, *International Contracting: Law and Practice* (3rd edn, The Netherlands: Wolters Kluwer, 2013) at 264, para. 7.23.

<sup>14</sup> Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 407.

<sup>15</sup> See PICC Article 6.2.3.

<sup>16</sup> See Article 6:111 PECL, Comment note 1, 328.

<sup>17</sup> See Article III – 1:110 Study Group on a European Civil Code, Draft Common Frame of Reference (DCFR).

contract. In 2003, the International Chamber of Commerce (ICC) published model clauses on *force majeure* and hardship.<sup>18</sup>

The 1980 UN Convention on the International Sale of Goods (CISG), however, does not contain a special provision dealing with questions of hardship. It does not mention either *force majeure* or hardship.<sup>19</sup> Article 79 of the CISG relieves a party from paying damages only if the breach of contract was due to an impediment beyond its control.<sup>20</sup> The drafting history of this provision does not clarify its scope of events leading to exemption. During the working sessions of the CISG, the question of whether economic difficulties should give rise to an exemption was a highly controversial one.<sup>21</sup> At the Vienna Conference, a proposal made by the Norwegian delegation, 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.<sup>22</sup> 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 Article 79.<sup>23</sup>

Today, however, it is more or less unanimously accepted in court and arbitral decisions,<sup>24</sup> as well as in scholarly writings,<sup>25</sup> that Article 79 of the CISG does

<sup>18</sup> ICC Force Majeure Clause 2003 and ICC Hardship Clause 2003, Developed by the ICC Commission on Commercial Law and Practice, Draftsman-in-chief: Charles Debattista, ICC Publication no. 650, ICC Publishing, 2003 (ICC Force Majeure and Hardship Clause 2003).

<sup>19</sup> Ingeborg Schwenzer, 'Article 79', in Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (4th edn, London: OUP, 2016) at 1130, para 5.

<sup>20</sup> Yesim M Atamer, 'Article 79', in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary* (München: Hart Publishing, 2011) at 1056, para. 2; Michel G Bridge, *The International Sale of Goods* (3rd edn, Oxford: Oxford University Press, 2013) at 616, para. 12.67; Clayton P Gillette and Steven D Walt, *The UN Convention on Contracts for the International Sale of Goods* (New York: Cambridge University Press, 2016) at 327; Peter Schlechtriem and Petra Butler, *UN Law on International Sales* (Berlin: Springer, 2009) at 200, para. 88.

<sup>21</sup> Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 216; Atamer, 'Article 79', at 1088, para. 78.

<sup>22</sup> The Norwegian delegation proposed that paragraph 3 of Article 65 of the 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'. See the Norwegian proposal (A/CONF.97/C.1/L.191/Rev.1) in United Nations Conference on Contracts for the International Sales of Goods, Vienna, 10 March–11 April 1980 (Official Records, New York, 1981) 381.

<sup>23</sup> Scholars taking this view include: Tallon, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987); Heuzé, Vincent, *La Vente Internationale de Marchandises*, Paris 1992 and Bernard Audit, *La vente internationale de marchandises. Convention des Nations Unies du 11 avril 1980*, Paris, LGDJ all cited by Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 216, fn 1100.

<sup>24</sup> However, courts have often decided that the equilibrium of the contract was not fundamentally altered. Therefore, the alleged impediment was non-existent. See Bulgarian Chamber of Commerce and Industry, 12 February 1998, CISG-online 436; Rechtbank van Koophandel, Hasselt, 2 May 1995, CISG-online 371; Tribunale Civile di Monza, 29 March 1993, CISG-online 102; Cour d'Appel de Colmar, 12 June 2001, CISG-online 694. Granting a right to renegotiate the contract to a seller for a 70% price increase in steel after the conclusion of the contract, Hof van Cassatie, 19 June 2009, CISG-online 1963. These decisions can be found by searching the case number on the CISG-online website at <<http://www.cisg-online.ch/>> accessed 4 April 2019.

<sup>25</sup> See CISG Advisory Council (AC) Opinion No. 7 *Exemption of Liability for Damages Under Article 79 of the CISG* (Rapporteur: Professor Alejandro Garro) 12 October 2007, Comment 26 n 28;

cover hardship situations. Accordingly, first and foremost, there is no necessity to resort to domestic concepts of hardship as there is no gap in the CISG regarding the debtor's invocation of economic impossibility.<sup>26</sup> If one were to hold otherwise, the 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, or *Wegfall der Geschäftsgrundlage* would all have to be considered.

The prerequisites for hardship are very similar in domestic laws, model hardship clauses, and international legal instruments. However, the degree of imbalance or onerosness leading to hardship in particular scenarios—that is, the threshold—is an issue that deserves further discussion and guidelines. In addition, the remedies that a party may resort to in case of hardship are not uniform among legal systems. In some instances, the disadvantaged party may be entitled to request the start of negotiations purported to rebalance the obligations of the contract. Depending on the offers and counter-offers made during a renegotiation of the original contract terms, a party may access the traditional remedies of avoidance or specific performance. In other cases, a party suffering the consequences of hardship may claim the adaptation or the termination of the contract by a third party. The priority between adaptation or termination by a third party is not uniform either among the different hardship provisions. The desirability and necessity to establish the right to renegotiate the original contract or to have it adapted or terminated by a third party is a topic that also warrants being discussed in light of today's international trade conditions.

In this article, we examine the situations in which hardship takes place, and we offer a substantiated analysis about the desirability or necessity of certain remedies under domestic and international laws. Section II revisits the prerequisites for hardship, focusing on the relevant elements that may be considered in order to determine whether the relevant threshold of onerosness or imbalance has been reached. Section III discusses the duty to renegotiate the contract stipulated in some legal systems and offers arguments to support the proposition that imposing such a duty is neither necessary nor desirable in international trade transactions. Section IV also provides elements to conclude that the remedy of contract adaptation by a court or arbitral tribunal is neither necessary nor desirable. Section V analyses the interplay of the hardship exemption with the traditional

Schwenzer, 'Article 79', at 1142, para. 31; Schlechtriem and Butler, *UN Law on International Sales* at 203, para. 91; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 213; Atamer, 'Article 79', at 1088, para. 79; John O Honnold and Harry M. Flechtner, *Uniform Law for International Sales* (The Hague: Kluwer Law International, 2009) at 627, para. 432.2; Joseph Lookofsky, *Understanding the CISG* (Fourth Worldwide Edition edn., Law & Business: Wolters Kluwer, 2012) at 150, para. 6.32; Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods* at 305; Yasutoshi Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness: Full of Sound and Fury, but Signifying Something', *Pace International Law Review*, 30/2 (2018) at 364, 65. However, see against Bridge, *The International Sale of Goods* at 618, para. 12.72.

<sup>26</sup> Honnold and Flechtner, *Uniform Law for International Sales* at 615, 27, paras. 425, 32.2.; Schwenzer, 'Article 79', at 1142, para. 31.

breach of contract remedies under the CISG, focusing on how negotiations in hardship scenarios may impact the access to the remedies of avoidance, damages, or specific performance.

## II. Prerequisites for hardship

### 1. General

Article 79(1) of the CISG provides that a party is exempted from liability for damages only if the failure to perform, first, is due to an impediment beyond its control, second, it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, and, third, it could not reasonably be expected to have avoided or overcome it or its consequences.<sup>27</sup> The other international solutions bear great resemblance to one another as far as the provisions regarding hardship are concerned.<sup>28</sup> In the first place, the relevant articles and clauses emphasize the principle of *pacta sunt servanda*.<sup>29</sup> 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.<sup>30</sup> Hardship can only be found if the performance of the contract has become excessively onerous<sup>31</sup> or if the equilibrium of the contract has been fundamentally altered.<sup>32</sup> The event in question must not fall in the sphere of risk of the disadvantaged party; it must have been unforeseeable as well as unavoidable (see section II. 2 below). 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.

### 2. Events that could not reasonably be taken into account and overcome

Hardship, as well as *force majeure*,<sup>33</sup> can only exempt the disadvantaged party from liability if the events causing the impediment could not reasonably be taken

<sup>27</sup> Regarding *force majeure*, Art. 7.1.7(1) PICC; Art. 8:808(1) PECL; Art. III–3:104(1) DCFR are practically identical to Article 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.

<sup>28</sup> Art. 6.2.2 PICC; Art. 6:111 PECL; Art. III–1:110 DCFR.

<sup>29</sup> Art. 6.2.1 PICC; Art. 6:111(1) PECL; Art. III–1:110 DCFR; ICC Hardship Clause 2003 para 1.

<sup>30</sup> Ewan Mckendrick, 'Article 6.2.1', in Stefan Vogenauer (ed.), *Commentary on the UNDRUIT Principles of International Commercial Contracts (PICC)* (Second edn.; Oxford: Oxford University Press, 2015a) at 812, para. 1; Schwenzer, 'Article 79', at 1135, para 15.

<sup>31</sup> Article 6:111(2) PECL; Article III – 1:110(2) DCFR; ICC Hardship Clause 2003 para. 2(a).

<sup>32</sup> Article 6.2.2 PICC; See Mckendrick, 'Article 6.2.2', at 824, para.2.

<sup>33</sup> Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 421: 'It has been seen above that the requirements

into account by that party at the time of the conclusion of the contract.<sup>34</sup> If they could have been foreseen, 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 unless such risk is contractually allocated to the other party.<sup>35</sup> Furthermore, the impediment must be one that cannot reasonably be overcome.<sup>36</sup> Whether the obligor can be expected to overcome the impediment has to be decided by taking the threshold for hardship into account (see section II. 3 below). This requirement may oblige the seller to 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.

### 3. Relevant threshold

A key issue is to determine the threshold of hardship. When has the performance become excessively onerous? When has the equilibrium of the contract been fundamentally altered? Either an increase in cost of performance or a decrease in value of the performance received may be relevant to answer these questions.<sup>37</sup> This means that the disadvantaged 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.<sup>38</sup> One party may have expressly or impliedly assumed the risk for a fundamental change of

of the force majeure and hardship exemptions are essentially the same, with the only qualification that the latter's scope is limited to those 'impediments' or events which 'fundamentally alter the equilibrium of the contract'. See also Atamer, 'Article 79', at 1089, para. 81: '[T]he prerequisites of hardship can be deduced by way of analogy from Art. 79(1) since both concepts aim at solving parallel problems'.

<sup>34</sup> Mckendrick, 'Article 6.2.2', at 817, para. 12; Schwenger, Hachem, and Kee, *Global Sales and Contract Law* at 672, para. 45.107; Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods* at 310; Dimatteo, *International Contracting: Law and Practice* at 265, para. 7.23. Atamer, 'Article 79', at 1089, para. 81.

<sup>35</sup> Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods* at 310. *ibid*; Atamer, 'Article 79', at 1089, para. 81; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 398.

<sup>36</sup> Atamer, 'Article 79', at 1089, para. 81; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 398; Schlechtriem and Butler, *UN Law on International Sales* at 201, para. 89.

<sup>37</sup> Honnold and Flechtner, *Uniform Law for International Sales* at 628, para. 432.2: 'Assume that the supply of material need to manufacture certain goods unexpectedly becomes so reduced in quantity and inflated of price that only a minority of manufactures that require this material can continue production . . . Comparable unfairness can result if extreme and unexpected currency dislocations make it impossible for sellers to continue to produce or buyers to purchase'. See also Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 221, 23.

<sup>38</sup> *Bulgarian Chamber of Commerce and Industry*, 12 February 1998, CISG-online 436. It is also believed that the risk allocation is dependent on the parties' choice of law at the contract conclusion: see generally Gustavo Moser, 'Choice of Law, Brexit and the 'Ice Cream Flavour' Dilemma', *Kluwer Arbitration Blog* (December 2018: Wolters Kluwer, 2018). See also Mckendrick, 'Article 6.2.2', at 818, para. 15. A best practice analysis of force majeure and hardship contract clauses is provided in Patrick Ostendorf, *International Sales Terms* (München: Hart Publishing, 2014) at 121 et seq.

circumstances, or, on the contrary, certain risks may have been expressly or impliedly excluded.<sup>39</sup> This determination can be done by contract interpretation.

If, for example, the contract is highly speculative, the obligor can be presumed to have assumed the risk involved in the transaction.<sup>40</sup> A German court of second instance<sup>41</sup> did not exempt a seller from liability under Article 79 of the CISG, although the market price for the contract item—iron molybdenum from China—had risen by 300 per cent. 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.<sup>42</sup>

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 Article 6.2.2 of the PICC,<sup>43</sup> in its first edition of 1994, suggested that an alteration amounting to 50 per cent or more would likely amount to a ‘fundamental’ alteration, the 2004, 2010, and 2016 editions of the PICC refrain from recommending any exact figure.<sup>44</sup> The new approach is right; 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.<sup>45</sup> The profit margin in the respective trade sector may also play an important role.<sup>46</sup> Finally, in cases where the financial ruin of the obligor is imminent, the threshold for allowing hardship may be lowered.<sup>47</sup>

However, legal certainty clearly calls for some benchmark. Relying on a thorough comparative analysis of domestic solutions, one author has suggested that, as a general rule of thumb in standard situations, a threshold of 100 per cent should be favoured.<sup>48</sup> Yet, courts interpreting Article 79(1) of the CISG have been

<sup>39</sup> See Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 147, 48; Avery W Katz, ‘Remedies for Breach of Contract under the Ciscg’, *International Review of Law and Economics*, 25 (2006) at 391; CISG AC Opinion No. 7, Comment para 39. Mckendrick, ‘Article 6.2.2’, at 818, para. 15.: ‘assumption of risk need not to be express; it can be inferred from the circumstances or from the nature of the contact’.

<sup>40</sup> *ICC Award*, 26 August 1989, No 6281, CISG-online 8; *Rechtbank van Koophandel, Tongeren*, 25 January 2005, No 1960, CISG-online 1106. See also Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 220.

<sup>41</sup> *Oberlandesgericht Hamburg*, 28 February 1997, No 167, CISG-online 261.

<sup>42</sup> Schlechtriem and Butler, *UN Law on International Sales* at 204, para. 7.1.3; Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods* at 312.

<sup>43</sup> Mckendrick, ‘Article 6.2.2’, at 816, para. 8.

<sup>44</sup> *Ibid.*

<sup>45</sup> Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 438–41; Mckendrick, ‘Article 6.2.2’, at 816, para. 8.: ‘the threshold is likely to be higher where the parties have entered into a highly speculative contract or the contract has been concluded in a market that is highly volatile’.

<sup>46</sup> Gillette and Walt, *The UN Convention on Contracts for the International Sale of Goods* at 312.

<sup>47</sup> Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 438, 39.

<sup>48</sup> *Ibid.*, at 428–35.

very reluctant to allow hardship in case of fluctuations of prices.<sup>49</sup> There are few reported court or arbitral decisions exempting a party—either a seller or a buyer—from liability under a CISG sales contract due to hardship. In 2009, the Cour de Cassation of Belgium overturned the earlier decision of an appeal court in dealing with economic hardship.<sup>50</sup> In this case, the price of the steel sold unexpectedly rose by about 70 per cent, and the appeal court decided that the issue regarding economic hardship was not dealt with by the CISG and applied French domestic law in allowing the seller's counterclaim for an amount based on a higher price.<sup>51</sup> The Cour de Cassation rejected the application of French domestic law, holding that there was an internal gap in the CISG (Article 7(2)) to be filled by general principles of international trade—among others, the PICC—where a party invoking a change in circumstances fundamentally disrupting the contractual equilibrium had the right to request renegotiation of the contract.<sup>52</sup>

However, most decisions dealing with hardship under Article 79 concluded that even a price increase or decrease of more than 100 per cent would not suffice.<sup>53</sup> The suggested '100 per cent 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 the latter, one may expect the potentially disadvantaged party to insist on incorporating terms for a possible adjustment in the contract or otherwise assuming the risk for higher fluctuations than usually occur on domestic markets. In cases of speculative transactions, a party may have to accept even a tripled market price.<sup>54</sup>

One author proposes to apply a 'reasonable expectation test' in order to determine whether a party could be expected to overcome a given hardship situation.<sup>55</sup> Under this test, even where performance is technically possible, if the failing party must bear huge costs that are totally disproportionate to the value of its obligation and will suffer a financial loss that is significantly greater than the risk of loss that a 'reasonable person' could be expected to assume at the time of contract formation, it should be exempted under Article 79 of the CISG.<sup>56</sup> In the case of devalued currency, the same author suggests that if the parties were aware that the contract

<sup>49</sup> Price fluctuations are considered foreseeable by most courts and arbitral tribunals: see RB Tongeren, 25 January 2005, CISG-online 1106; Cass civ 1ère, 30 June 2004, CISG-online 870; CA Colmar, 12 June 2001, CISG-online 694; Int Ct Bulgarian CCI, 12 February 1998, CISG-online 436; RB Hasselt, 2 May 1995, CISG-online 371; Int Ct Russian CCI, 16 March 1995, CISG-online 526; ICC Ct Arb, 6281/1989, CISG-online 8; *ICC Award*, 26 Aug 1989, No 6281, CISG-online 8; *Tribunale di Monza*, 14 January 1993, CISG-online 540.

<sup>50</sup> See Hof van Cassatie, 19 June 2009, CISG-online 1963.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> CIETAC, 2 May 1996, CISG-online 1067; Int Ct Bulgarian CCI, 12 February 1998, CISG-online 436; RB Hasselt, 2 May 1995, CISG-online 371; CA Colmar, 12 June 2001, CISG-online 694; Cass civ 1ère, 30 June 2004, CISG-online 870.

<sup>54</sup> OLG Hamburg, 28 February 1997, CISG-online 261; ICC Ct Arb, 6281/1989, CISG-online 8; *Trib Monza*, 14 January 1993, CISG-online 540.

<sup>55</sup> Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness: Full of Sound and Fury, but Signifying Something', at 367, 68.

<sup>56</sup> *Ibid.*

was one for a fixed valuation, the failing party should be exempted because that is what the parties intended, thus, expected.<sup>57</sup> The proposal has some merits; however, it overlooks that, unless otherwise agreed, the usual reasonable expectations of the parties at the time of the conclusion of the contract are that the seller covers its risk against falling prices but assumes the risk that prices will increase, while the buyer covers against the risk of raising prices but assumes the risk that market prices may decline after the conclusion of the contract.<sup>58</sup>

In the case of a drastic price increase due to market fluctuations, the same author proposes to have a look at historic price movements during a reasonable past period (applying the so-called Eisenberg formula)<sup>59</sup> in order to determine whether, under the ‘reasonable expectation test’, the breaching party could have foreseen the price increase leading to the hardship situation.<sup>60</sup> We share the view that this information could help in assessing whether or not the breaching party could have assumed the risk of a price increase in the market concern.

#### 4. 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.<sup>61</sup> If the goods sold had already been destroyed at the time of the conclusion of the contract, but the seller did not know about it nor could have prevented this fact, the seller may be exempted under Article 79(1) of the CISG.

In cases of hardship, however, it is argued that the changed circumstances must have occurred after the conclusion of the contract.<sup>62</sup> This is the position taken by domestic legal systems.<sup>63</sup> Similarly, the wording of Article 6:111(1) of the PECL is

<sup>57</sup> Ibid., at 371, 72.

<sup>58</sup> John Y Gotanda, ‘Dodging Windfalls: Damages Based on Market Price, Actual Loss, and Appropriate Awards’, in Villanova University (ed.), *Villanova Public Law and Legal Theory Working Paper Series* (2015) at 6, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2683525](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2683525)> accessed 4 April 2019.

<sup>59</sup> Melvin A Eisenberg, ‘Impossibility, Impracticability, and Frustration’, *Journal of Legal Analysis*, 1/1 (2009) at 245.

<sup>60</sup> Ishida, ‘CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness: Full of Sound and Fury, but Signifying Something’, at 374, 77.

<sup>61</sup> Schwenzer, ‘Article 79’, at 1134, para. 13; Atamer, ‘Article 79’, at 1073, para. 48; Franco Ferrari and Marco Torsello, *International Sales Law: CISG* (In a Nutshell: West Academic Publisher, 2014) at 325; Schlechtriem and Butler, *UN Law on International Sales* at 202, para. 89.

<sup>62</sup> Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 398, 99.

<sup>63</sup> Argentina Art. 1091 CC; Armenia Art. 467 CC; Austria §§ 936, 1052, 1170 a through analogy; Azerbaijan Art. 422 CC, Bolivia Art. 581(1)(4) CC; Brazil Art. 478, 479 CC; China Art. 26 PRC Contract Law Interpretation (2); Colombia Art. 868 Com C; Egypt: Art. 147(2) CC; Iraq Art. 146(2) CC; Kuwait 198 CC; France Art. 1195 CC; Germany § 313 BGB; Italy Art. 1467 CC; Greece Art.388 CC; Netherlands Art. 6:258 BW; Portugal Art. 437 CC; Libya Art. 147(2); Lithuania Art. 6.204 CC; Paraguay Art. 672 CC; Qatar Art. 171 (2); Russia Art. 451(2) CC; Slovenia Art. 994 Com C; Syria Art. 148(2) CC; Taiwan Art. 227-2 CC; Ukraine Art. 652 CC. See the position in most systems in Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 669, para. 45.96 et seq.

clearly based upon this assumption, as the related Comment affirms.<sup>64</sup> However, although the wording of Article 6.2.1 of the PICC<sup>65</sup> seems to point in the same direction, Article 6.2.2(a) of the PICC 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.<sup>66</sup>

In order to decide whether an initial gross imbalance between the performances of the parties due to circumstances neither known to the parties nor preventable may amount to hardship under Article 79 of the CISG, one has to consider what other remedies the disadvantaged party could rely upon when discovering that, already at the time of the conclusion of the contract, there had been a gross disparity between the respective values of the agreed-upon performances. Most likely under domestic laws, as well as under the PECL, initial gross disparity between the parties' performances will give rise to remedies for mistake.<sup>67</sup> These coexisting remedies may be tolerated within one single legal system; difficult problems, however, can arise when dealing with sales contracts under the CISG.<sup>68</sup>

As the CISG does not contain any provisions on mistake, this question would have to be resolved relying on the otherwise applicable domestic law.<sup>69</sup> 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 by mistake to this question. It is exactly these considerations that, in the case of *force majeure*, compel the same treatment for 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.<sup>70</sup> The same reasoning should apply in cases of hardship. The CISG hardship notion should be

<sup>64</sup> See Art.6:111 PECL, Comment B (ii).

<sup>65</sup> Art. 6.2.1 PICC: 'Where the performance ... becomes more onerous' (emphasis added).

<sup>66</sup> Despite the wording of Art. 6.2.2 PICC some submit that the imbalance must necessarily occur after the conclusion of the contract, see Mckendrick, 'Article 6.2.2', at 817, para. 10.

<sup>67</sup> Mm Van Rossum and J Hijma, 'Validity', in EH Hondius D Busch, HJ Van Kooten, HN Schelhaas, WM Schrama (ed.), *The Principles of European Contract Law and Dutch Law: A Commentary* (The Hague: Kluwer Law, 2002) at 193; Restatement on the Law of Contracts § 266 ('Existing Impracticability or Frustration'). The same solution is proposed by McKendrick under the PICC. See Mckendrick, 'Article 6.2.2', at 817, para. 10: 'When the event occurs prior to the conclusion of the contract, the affected party may be able to avoid the contract on the ground of mistake'.

<sup>68</sup> Patrick C Levens, 'CISG and Mistake, Uniform Law vs. Domestic Law: The Interpretative Challenge of Mistake and the Validity Loophole', in Pace International Law Review (ed.), *Review on the Convention for the International Sale of Goods 2002–2003* (Munich: Sellier, 2005) at 15.

<sup>69</sup> It is argued 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 *ibid.*, at 34; Stefan Kröll, 'Selected Problems Concerning the CISG's Scope of Application', *Journal of Law and Commerce*, 25 (2005) at 55.

<sup>70</sup> Schwenger, Hachem, and Kee, *Global Sales and Contract Law* at 670, para. 45.98.

interpreted and understood in the broadest sense, encompassing 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.<sup>71</sup>

### III. Duty to renegotiate

#### 1. Foundation

In hardship cases, Article 6.2.3(1) of the PICC, Article 6:111(2) of the PECL, and Article III–1:110(3)(d) of the DCFR provide an obligation to renegotiate the original contract terms that have become imbalanced.<sup>72</sup> The 2003 ICC Hardship Clause likewise provides that the parties are bound to negotiate alternative contractual terms that reasonably allow for the consequences of the changed circumstances within a reasonable time of the invocation of the clause.<sup>73</sup> This duty to renegotiate is seen to be based on a general duty to act in good faith,<sup>74</sup> which is common to many civil law systems.<sup>75</sup>

Other legal systems do not stipulate the same duty to renegotiate. This is not only true for common law systems—even where they recognize the general principle of impracticability, as section 2-615 of the UCC does<sup>76</sup>—but also for some civil law systems where the parties are not bound to renegotiate either.<sup>77</sup> Although there are some authors favouring such a duty to renegotiate under German law,<sup>78</sup>

<sup>71</sup> Ibid.

<sup>72</sup> However, McKendrick explains that in the case of the PICC the duty to renegotiate does not come from the wording of Article 6.2.3 ('entitled to request negotiations') but from the general principle of good faith in Article 1.7 and the parties' duty to co-operate under Article 5.1.3 PICC, see McKendrick, 'Article 6.2.3', at 819, para. 1, fn. 53.

<sup>73</sup> See ICC Hardship Clause 2003 para (2)(b).

<sup>74</sup> Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 480, 81; McKendrick, 'Article 6.2.3', at 819, para. 1.

<sup>75</sup> The principle of good faith found its way into almost every Civil Law system through the reception of Roman law. See France Article 1104(1) CC; Italy Articles 1337, 1366 and 1375 CC; Germany § 242 BGB; Switzerland Article 2 ZGB. The new French civil code endorses the principle in Article 1104(1) CC, see Chénéde, *Le Nouveau Droit des Obligations et des Contrats: Consolidations – Innovations – Perspective* at 19, para. 21.24. Good faith is also a contract integration principle engrained in Latin American laws, see Edgardo Muñoz, *Modern Law of Contracts and Sales in Latin-America, Spain and Portugal*, ed. Ingeborg Schwenzer (International Commerce and Arbitration, 6; The Hague: Eleven International Publishing, 2011) at 270. Common Law systems, however, tend to refrain from accepting good faith as a general principle of contract law: see Michael G Bridge, 'Does Anglo-Canadian Law Need a Doctrine of Good Faith?', *Canadian Business Law Journal*, 9 (1984) at 426; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies', *Modern Law Review*, 61 (1998) at 11.

<sup>76</sup> See United States § 2-615 (a) UCC stating 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 discussion of the impracticability doctrine in American law see, Palumbo, *Modern Law of Sales in the United States* at 165, 66.

<sup>77</sup> See Argentina Art. 1091 CC; Italy Arts. 1467–9 CC; The Netherlands Arts. 6:258 and 6:260 BW. See for further references, Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 480.

<sup>78</sup> Citing some German authors asserting a duty to negotiate under the BGB, Rösler, 'Hardship in German Codified Private Law: In Comparative Perspective to English, French and International

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 adjudicator asking for an adaptation of the contract.<sup>79</sup>

Article 79(5) of the CISG, as has already been pointed out, expressly relieves the disadvantaged party from damages only. Some authors, however, advocate the idea that under the CISG there is a duty to renegotiate based upon Article 7(1) of the CISG, according to which the Convention has to be interpreted having due regard to the observance of good faith in international trade.<sup>80</sup> It has been questioned many times whether Article 7(1) of the CISG may be applied not only in interpreting the Convention as such but also in establishing an obligation upon the parties to act in good faith during their contract conclusion and performance.<sup>81</sup> Other authors and courts consider that there is a gap in Article 79 of the CISG as far as the consequences of hardship are concerned and that this gap has to be filled according to Article 7(2) of the CISG by relying on the PICC.<sup>82</sup> All of these approaches seem rather questionable and unconvincing from a systematic and dogmatic point of view.<sup>83</sup> But without having to take part in such debate here, it will be shown that the duty to renegotiate is neither desirable nor necessary.

## 2. Desirability and necessity

A duty to renegotiate the contract when the prerequisites for hardship are present appears on its face to be the most practical solution. The appeal in this solution lies in its comparison to the alternatives; in the first instance, when compared to adaptation (see section IV below), it keeps control of the adaptation result in the hands of the parties and, in the second instance, when compared to termination by a third party (see section V. 3 below), it keeps the contract relationship alive.<sup>84</sup> The merits of the solution are such that it is commonly found in the model hardship clauses, the international instruments, and domestic laws discussed

Contract Law', (at 508, fn 115. Citing some German authors such as Peter Schlechtriem stating 'that a demand for negotiations should also be a prerequisite under German law based on the good faith requirement in § 242 BGB', see Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 481, fn 2371.

<sup>79</sup> Rösler, 'Hardship in German Codified Private Law: In Comparative Perspective to English, French and International Contract Law', at 508; Schlechtriem, 'The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe', *Oxford U Comparative L Forum*, (2002), <ouclf.iuscomp.org> (last accessed 1 December 2018).

<sup>80</sup> CISG AC Opinion No. 7, Comment para 40; ICC Award, March 1999, No 5953, *Clunet* 1990, 1056.

<sup>81</sup> Bridge, *The International Sale of Goods* at 509, para. 10.41; Ingeborg Schwenzer and Pascal Hachem, 'Article 7', in Ingeborg Schwenzer (ed.), *Slechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (4th edn, London: Oxford University Press, 2016) at 127, para. 17.

<sup>82</sup> Hof van Cassatie, 19 June 2009, CISG-online 1963; Schlechtriem and Butler, *UN Law on International Sales* at 204, para. 91.

<sup>83</sup> Bridge, *The International Sale of Goods* at 618, para. 12.71; Ferrari and Torsello, *International Sales Law: CISG* at 328–30; Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 673, para. 45.112.

<sup>84</sup> Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 672, para. 45.111.

before (see section III. 1 above). However, there are also difficulties with this solution, particularly where it would operate as a default rule, and this may be the reason why it is not usually found in some domestic legal systems.

In the first place, renegotiation—as negotiation—has to be based on willingness and trust. Constructive and cooperative renegotiation cannot be forced upon the parties by coercion.<sup>85</sup> The parties' freedom to modify their contract is the primary source for a new balance between the parties' obligations. The possibility of having a contract rebalanced by common agreement primarily rests on the parties' freedom to agree to such steps in case of hardship. Different model hardship clauses state such a possibility,<sup>86</sup> including the 2003 ICC Hardship Clause.<sup>87</sup>

Second, it is more than questionable whether and how the breach of an obligation to renegotiate would be redressed. Most domestic and international legal systems do not stipulate any means to enforce the duty to renegotiate imposed upon the parties.<sup>88</sup> Imposing a duty to negotiate where there are no means of specific enforcement amounts to nothing more than a best practices declaration. The duty to negotiate would gain importance only if breaching it was sanctioned. This is only envisaged by Article 6:111(3)(c) of the PECL, according to which a 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.

That being said, it is not advisable to state such a liability in damages. While the motivation in Article 6:111(3)(c) of the PECL can be understood, it does not appear to be particularly realistic. The circumstances in which hardship is claimed are often complex, and it would be very difficult to determine whether the obligor has in fact failed to act in good faith.<sup>89</sup> Cases of hardship involve fact, situations, and evaluations from which it can hardly be determined whether a party refusing or breaking off negotiations acted in bad faith. These criticisms were recognized by the drafters of the DCFR, who, according to the Official Comments, decided not to impose an obligation to negotiate (although, they made an attempt at renegotiation a prerequisite to the obligor's right to obtain relief).<sup>90</sup> Such a precondition is especially unsuitable for international trade, where actors regularly call for promptness and legal certainty, which militate against lengthy or tedious negotiations.<sup>91</sup> It is likely that parties have already negotiated before going to

<sup>85</sup> Günter Roth, '§ 313 Bgb', in Wolfgang Krüger (ed.), *Münchener Kommentar Zum Bürgerlichen Gesetzbuch* (5th edn, München: CH Beck, 2007) at para. 93.

<sup>86</sup> See for example, Clause 16.2 (Hardship) of Standard Model Contract for International Commercial Sale of Goods and Clauses 9.2 and 9.3 of the International Long-Term Supply of Goods, by the International Trade Center (an agency of the World Trade Organization): *International Trade Centre (ITC), Model Contracts for Small Firms: Legal Guidance for Doing International Business* (Geneva: ITC, 2010) at 54, 55, 70, 71, <<http://www.intracen.org/WorkArea/DownloadAsset.aspx?id=37603>> accessed 4 April 2019.

<sup>87</sup> See ICC Hardship Clause 2003 para (2)(b).

<sup>88</sup> Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 673, para. 45.112.

<sup>89</sup> *Ibid.*

<sup>90</sup> Art. III-1:110, Comment C DCFR.

<sup>91</sup> Atamer, 'Article 79', at 1091, para. 84.

court or arbitration.<sup>92</sup> However, clear cases of bad faith may be taken into account upon allocating the costs of proceedings.<sup>93</sup>

In relation to Article 79 of the CISG, its plain wording makes it clear that it only grants a possible release from the obligation to compensate any damages resulting from the obligor's breach.<sup>94</sup> For this and the difficulties associated with the duty to renegotiate elaborated before, it is submitted that there is no such duty to be found in Article 79 of the CISG, in spite of the fact that an offer to renegotiate by the obligee may impact other remedies available to the obligor (see sections 0 and 0). Against this background, imposing a duty to renegotiate by law is neither advisable nor necessary. Nevertheless, the parties may plan in advance some contract or procedural mechanisms to encourage renegotiation of their obligations in case of hardship. Liquidated damages or penalty clauses may be contemplated in a contract in case a party abruptly, or in bad faith, breaks off renegotiations. Again, assessing whether a party is entitled to such a remedy is neither automatic nor easy to be determined by any adjudicator. However, stipulating an agreed sum in case of breach may encourage performance.<sup>95</sup>

In addition, parties may—and often do—boost negotiation by agreeing to a multi-tier dispute resolution clause that subjects the right to initiate litigation or arbitration proceedings to compliance with a pre-negotiation or mediation phase.<sup>96</sup> Under such clauses, parties are bound to negotiate all conflicts, not just hardship situations. Parties in arbitration proceedings may also confer special powers to the tribunal to act as facilitator of settlements by proposing (but not imposing) solutions, especially in hardship situations. This may be done by agreeing on the application of institutional arbitration rules stating the possibility of arbitrators helping the parties to conciliate.<sup>97</sup> The same mechanism is already a default rule in some arbitration laws<sup>98</sup> or in the procedural laws of some

<sup>92</sup> Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness: Full of Sound and Fury, but Signifying Something', at 372.

<sup>93</sup> Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 483.

<sup>94</sup> Schwenzer, 'Article 79', at 1148, para. 50.

<sup>95</sup> Pascal Hachem, *Agreed Sums Payable Upon Breach of an Obligations*, ed. Ingeborg Schwenzer (International Commercial Law, 7; The Hague: Eleven International Publishing, (2011) at 45.

<sup>96</sup> See for example the Guidelines for Drafting International Clauses 2010 adopted by a resolution of the International Bar Association (IBA) Council, 7 October 2010, <[https://www.ibanet.org/ENews\\_Archive/IBA\\_27October\\_2010\\_Arbitration\\_Clauses\\_Guidelines.aspx](https://www.ibanet.org/ENews_Archive/IBA_27October_2010_Arbitration_Clauses_Guidelines.aspx)> accessed 4 April 2019, that provide three main recommendations when drafting multi-tier dispute resolution clauses: Multi-Tier Guideline 1: the clause should specify a period of time for negotiation or mediation, triggered by a defined and undisputable event (ie, a written request), after which either party can resort to arbitration; Multi-Tier Guideline 2: the clause should avoid the trap of rendering arbitration permissive, not mandatory. Multi-Tier Guideline 3: the clause should define the disputes to be submitted to negotiation or mediation and to arbitration in identical terms.

<sup>97</sup> See Art. 26 DIS Arbitration Rules 'Encouraging Amicable Settlements: Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.'

<sup>98</sup> See for example Brazil Art. 21(4) Arbitration law stating that the arbitrator, at the start of the proceedings, may attempt to conciliate the parties.

jurisdictions,<sup>99</sup> endorsing the belief that efficiency in the administration of justice is better served by a settlement than by a judgment.<sup>100</sup>

### 3. *Factual situations*

Most importantly, there are factual incentives for the parties to renegotiate their contract in a hardship situation. Let us consider the probabilities that parties in a hardship situation have to come to an agreement to renegotiate their performances in their best interests under the current system of remedies. We submit that the traditional remedies under the CISG and other legal systems, in combination with the duty to mitigate any loss,<sup>101</sup> may induce the parties to renegotiate their obligations and to distribute risks evenly in the uncertainty brought by every hardship situation. This may be demonstrated by the hypothetical case where the acquisition costs for the seller have doubled from 100 to 200, 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 to be three different scenarios.

Under the first scenario, both parties refuse to renegotiate. This makes each of them risk 100 or so. In other words, if the buyer decides, instead, to sue the seller for breach of the obligation to deliver the goods and the seller successfully raises a defence of hardship, the buyer risks that a court or arbitrator will exempt the seller from its obligation to pay damages—that is, let us say 100 as the difference between the contract price and a substitute purchase under Article 75 of the CISG or the market price under Article 76 of the CISG—and denies the remedy of specific performance, plus condemns the buyer to pay some of the costs of the proceedings. If the seller decides not to deliver the goods, it risks that no hardship situation is found by a court or arbitral tribunal and, thus, shall compensate the buyer with at least 100 as damages consisting of the difference between the contract price and a substitute purchase carried out by the buyer (Article 75 of the CISG) or the market price (Article 76 of the CISG) plus legal costs.

Under the second scenario, the seller suggests delivering the goods if the buyer is willing to pay a higher purchase price, let us say 150. The CISG does not impose a duty on the buyer to accept or even renegotiate on the basis of the seller's proposal to modify the original terms of the contract, and, as described above, those legal

<sup>99</sup> For example, Brazil Art. 334 Code of Civil Procedure (CCP); Germany Art. 278 CCP requires courts to assist parties in their attempts to settle their dispute amicably; Switzerland Art. 124(3) CCP: the judge may attempt to conciliate the parties at any stage of the proceedings.

<sup>100</sup> Gabrielle Kaufmann-Kholer and Victor Bonnin, 'Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrator's Role and Legal Background', *ICC Bulletin*, 18/2 (2007) at 84, 85.

<sup>101</sup> Finland § 70(1) Sale of Goods Act (SGA); Germany § 254 BGB; Norway § 70(1) SGA; Sweden § 70(1) SGA; Switzerland Art. 44 CO; Arts. 7.4.7, 7.4.8 PICC, Articles 9:504 and 9:505 PECL; Arts. III.-3:704 and III.-3:705 DCFR. For the CISG Art. 77 see Ingeborg Schwenzer and Simon Manner, 'The Pot Calling the Kettle Black: The Impact of the Non-Breaching Party's (Non) Behaviour on Its CISG-Remedies', in Camilla Andersen and Ulrich Schroeter (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer* (London: Wildy, Simmonds & Hill, 2008) at 480. For the duty to mitigate in domestic legal systems see Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 630, para. 44.256 et seq.

systems that expressly state such duty are imperfect (see section III. 2 above). However, Article 77 of the CISG and similar provisions impose on the parties a duty to mitigate loss.<sup>102</sup> This duty to mitigate may well require the buyer to strike a deal for 150 if doing so would be the best way to comply with such a duty, which may be the case where the buyer did not depend on the goods to fulfil fixed price contracts with third parties.<sup>103</sup> If the buyer consents, the contract is accordingly renegotiated and fulfilled. If it does not, its damages claim is reduced to 50 due to having breached the duty to mitigate.

Turning to the third scenario, the buyer offers to pay a higher price. Let us say, for example, that the buyer proposes to buy at 150 (the contract price was at 100, but under the hardship scenario, market prices rose to 200)—thus, significantly diluting the imbalance or the onerousness in the performance by the seller. In such an instance, hardship will probably disappear or at least the buyer's possibility to succeed with a claim for damages before an adjudication body will substantially increase. Thus, if the seller refuses to accept the buyer's offer, it may be obliged to pay 100 as compensation if the buyer covers from another source. This will most probably encourage the seller to renegotiate under the buyer's proposed terms. The seller will miss its forecasted profits and assumes part of the losses resulting from the hardship events, while the buyer will avoid further uncertainty and the costs associated with finding an alternative source for the goods as well as the cost of litigation to redress the seller's breach.

In conclusion, in cases of hardship, a duty to renegotiate should not be imposed upon the parties. However, this does not preclude that an offer by one party to renegotiate be accepted pursuant to the duty to mitigate damages. In most scenarios, there are thus strong factual incentives for both parties to renegotiate voluntarily.

## IV. Adaptation by a third party

### 1. Foundation

The possibility of having a contract rebalanced by a third party in case of hardship primarily rests on the parties' freedom to agree on such a remedy. Different

<sup>102</sup> Finland § 70(1) SGA; Germany § 254 BGB; Norway § 70(1) SGA; Sweden § 70(1) SGA; Switzerland Art. 44 CO; Arts. 7.4.7, 7.4.8 PICC, Articles 9:504 and 9:505 PECL; Arts. III.-3:704 and III.-3:705 DCFR. For CISG Art. 77 see Schwenzler and Manner, 'The Pot Calling the Kettle Black: The Impact of the Non-Breaching Party's (Non) Behaviour on Its CISG-Remedies', at 480. For the duty to mitigate in domestic legal systems see Schwenzler, Hachem, and Kee, *Global Sales and Contract Law* at 630, para. 44.256 et seq.

<sup>103</sup> Article 77 CISG can clearly constitute a rule for a fair distribution of risks in case of hardship despite the contrary opinion of some scholars, see Atamer, 'Article 79', at 1091, para. 85. Contrary to what Atamer states, buyers will not automatically reject an offer to renegotiate, avoid the contract and sue for damages in case of lack of delivery at the agreed price. The cost of bringing a claim and the uncertainty of the court's decision, in times where the notion of hardship and related doctrines are gaining momentum in business to business transactions, could act as disincentives in long term distribution contracts or scenarios where the goods are intended to be integrated into a manufacturing process or to inventory that has not been resold yet. In one case, for example, a court in the Netherlands held that a seller should have agreed on a change of delivery terms requested by the buyer, and ordered the seller to deliver the goods within 14 days after judgment, see *Rechtbank Arnhem*, 31 January 2008, CISG-online 2016.

hardship model clauses state such a possibility,<sup>104</sup> perhaps influenced by the 1985 edition of the ICC Hardship Clause.<sup>105</sup> The same remedy is common in many civil law legal systems.<sup>106</sup> In Germany and other civil law jurisdictions, in cases of hardship, avoidance of contract is not possible, but after determining whether adaptation of the contractual terms is either not possible or not just and reasonable having regard to the parties' respective interests.<sup>107</sup> On the other hand, laws influenced by Article 1467 of the Italian *Codice Civile*,<sup>108</sup> as well as the 2003 ICC Hardship Clause, take a different stand: the party invoking hardship is entitled to avoidance of the contract; an adaptation of the contract by a third party is not contemplated.<sup>109</sup>

At the international level, Article 6.2.3(4) of the PICC, Article 6:111(3) of the PECL, and Article III–1:110(2)(b) of the DCFR follow the adaptation of the contract as a default rule. On the other hand, it is questionable whether adaptation is possible or an adequate solution pursuant to Article 79.<sup>110</sup> Again, some authors argue that there is a gap in the CISG that can be filled in line with Article 7(2) of the CISG by relying on general principles. One author argues that Article 50 of the CISG on reduction of the purchase price evidences a general principle that the court can adjust a contract to changed circumstances.<sup>111</sup> Furthermore, it

<sup>104</sup> See for example, Clause 16.3 (Hardship) of Standard Model Contract for International Commercial Sale of Goods and Clause 9.4 of the International Long-Term Supply of Goods, by the International Trade Center (an agency of the World Trade Organization): '[Option: See comment at the beginning of Article [...]. Add if wished; otherwise delete. (4). If the Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 21. The [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances or to terminate this contract at a date and on terms to be fixed' (ITC), *Model Contracts for Small Firms: Legal Guidance for Doing International Business* at 54, 55, 70, 71. <<http://www.intracen.org/WorkArea/DownloadAsset.aspx?id=37603>> accessed 4 April 2019.

<sup>105</sup> ICC, Force Majeure and Hardship, Paris 1985 (ICC Publ No. 421): 'Third alternative (5). If the Parties fail to agree on the revision of the contract within a time-limit of 90 days of the request, either Party may bring the issue of revision before the arbitral forum, if any, provided for in the contract, or otherwise the competent Courts.' <[https://www.trans-lex.org/700650/\\_icc-force-majeure-and-hardship-paris-1985-/](https://www.trans-lex.org/700650/_icc-force-majeure-and-hardship-paris-1985-/)> accessed 4 April 2019.

<sup>106</sup> Argentina Art. 1091 CC; Armenia Art. 467 CC; Azerbaijan Art. 422 CC, Bolivia Art. 581(1)(4) CC; Brazil Art. 478, 479 CC; China Art. 26 PRC Contract Law Interpretation (2); Colombia Art. 868 Com C; Egypt Art. 147(2) CC; Germany § 313(1) BGB; Iraq Art. 146(2) CC; Kuwait 198 CC; Libya: Art. 147(2); Lithuania: Art. 6.204 CC; Paraguay Art. 672 CC; Qatar Art. 171 (2); Russia Art. 451(2) CC; Slovenia Art. 994 Com C; Syria Art. 148(2) CC; Taiwan Art. 227-2 CC; Ukraine Art. 652 CC.

<sup>107</sup> Germany § 313(3) BGB; Colombia Art. 868 Com C.

<sup>108</sup> Same approach in Bolivia Art. 581 CC.

<sup>109</sup> The ICC Hardship Clause 2003 states in para 3 that 'the party invoking this Clause is entitled to termination of the contract.' On Article 1467 of the Italian *Codice Civile*, see Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 506.

<sup>110</sup> See Atamer, 'Article 79', at 1081, para. 86. But see CISG AC Opinion No. 7, Comment para 40.

<sup>111</sup> Peter Schlechtriem, 'Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More by Harry M. Flechtner', *Journal of Law & Commerce*, 18 (1999). Adhering to Schlechtriem's view see, Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness - Full of Sound and Fury, but Signifying Something', at 378, 79.

has been suggested that, under a ‘reasonable expectation test’, proposed as another of the principles upon which the CISG is based (Article 7(2) of the CISG), adaptation should be possible: a judge or an arbitrator first determines where a party could ‘reasonably’ be expected to overcome an impediment, and, if not, he or she may adapt the contract by ordering a solution ‘reasonably’ expected to be taken.<sup>112</sup> Other authors, again, have proposed to rely on Article 6.2.3(4) of the PICC as constituting either a general principle under Article 7(2) of the CISG or an international usage in the sense of Article 9(2) of the CISG in order to reach the desirable result of adaptation.<sup>113</sup>

All of these approaches are hardly convincing from a dogmatic point of view. But, most of all, ultimately, the remedy of contract adaptation is neither necessary nor desirable under the CISG, and other hardship default rules as the same results may be achieved through voluntary renegotiation (see section III. 3) or the traditional remedies for breach of contract (see section V. below).

## 2. Desirability and necessity

The solution envisaged by the remedy of contract adaptation takes out of the parties’ hands what the latter may be able to achieve better. It is up to the parties to provide for a third party to adapt the contract to the changed circumstances—especially in long-term supply contracts, such clauses are often to be found.<sup>114</sup> Adaptation is to be exercised by a named third party, usually an expert in the field. In the default rules referred to above, the third party is a court or an arbitrator; although there is no reason why a different third party could not be appointed by the parties in their own hardship clause.<sup>115</sup> This approach contradicts the parties’

<sup>112</sup> Ishida relies on different provisions that allow the adjudicator to integrate the contract absent an agreement of the parties, such as articles 39 and 60 CISG, and the interpretation provisions in article 8 CISG allowing the adjudicator to interpret the contract in light of the surrounding circumstances, trade usages or prior practices, to argue that in many instances courts rewrite CISG contracts, see Ishida, ‘CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness: Full of Sound and Fury, but Signifying Something’, at 359, 72, 79, 80. We disagree; the task of integrating a contract works under the assumption that the parties have not agreed otherwise, while adapting a contract means to depart from what the original deal of the parties was.

<sup>113</sup> Schlechtriem and Butler, *UN Law on International Sales* at 204, para. 91.

<sup>114</sup> See clauses in Ostendorf, *International Sales Terms* at 121 and Ulrich Magnus, ‘Application of Boilerplate Clauses under German Law’, in Guiditta Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and Applicable Law* (London: Cambridge University Press, 2011) at 206, 07. See also Clause 9.4 of the International Long-Term Supply of Goods, by the International Trade Center (an agency of the World Trade Organization): ‘[Option: See comment at the beginning of Article . . . Add if wished; otherwise delete. (4) If the Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 21. The [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances or to terminate this contract at a date and on terms to be fixed’ (ITC), *Model Contracts for Small Firms: Legal Guidance for Doing International Business* at 54, 55, 70, 71. <<http://www.intracen.org/WorkArea/DownloadAsset.aspx?id=37603>> accessed 4 April 2019.

<sup>115</sup> The ICC Hardship Clause 1985 stipulates, for example, that: ‘Fourth alternative, 5. Failing an agreement of the Parties on the revision of the contract within a time-limit of 90 days of the request either Party may refer the case to the ICC Standing Committee for the Regulation of Contractual Relations in Order to obtain the appointment of a third Person (or a board of three

autonomy to fix the hardship situation; its provision as default remedy has the effect of discouraging the parties to discuss—or at least consider—the ample possibilities to come to an agreement in different scenarios (see section III. 3 above). It means that the courts are rewriting the parties' contract.

In addition, a decision adapting the contract by an adjudicatory body often comes too late. In Organisation for Economic Co-operation and Development (OECD) countries, the average length of court civil proceedings is approximately 238 days in courts of first instance, but the final disposition of cases may involve a long process of appeals before higher courts, which, in OECD countries, average 788 days and, in others, can reach seven years.<sup>116</sup> Parties may shorten the time to have their contract adapted by resorting to arbitration. Arbitral proceedings are put to an end by the issuance of an arbitral award, which is final and binding upon the parties;<sup>117</sup> it is not subject to any appeal mechanisms.<sup>118</sup> However, arbitration proceedings under well-established arbitral institutions currently take an average length of 13 months.<sup>119</sup> Moreover, arbitral proceedings with seat in some jurisdictions, particularly of the common law, may take longer or be abandoned due to the existing debate as to whether arbitrators have the power to adapt contracts where such a power has not been explicitly granted by the parties and where the *lex contractus* of the place of arbitration does not stipulate the remedy.<sup>120</sup> For any international business seeking certainty with regard to its obligations in hardship scenarios, a prompt solution is essential; the main adjudicatory systems in place today do not serve this purpose.

More modern procedural tools such as emergency or provisional measures may not guarantee the speediness sought by parties in this matter. A party that petitions a court or arbitral tribunal to 'provisionally' adapt the contract as a measure to avoid irreparable harm may not easily succeed in its request. Besides the difficulties to prove the urgency to have the contract adapted before the final

members) in accordance with the provisions of the rules for the regulation of contractual relations of the ICC. The third Person shall decide on the Parties' behalf whether the conditions for revision provided in Paragraph 1 are satisfied. If so he shall revise the contract on an equitable basis in order to ensure that neither party suffers excessive prejudice.'

<sup>116</sup> Cf. OECD, 'Judicial Performance and Its Determinants: A Cross-Country Perspective - a Going for Growth Report', (OECD, June 2013) at 13 <<http://www.oecd.org/eco/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf>> accessed 4 April 2019.

<sup>117</sup> Jean Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (2nd edn, Thomson, 2007) at 631.

<sup>118</sup> Alan Redfern et al., *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press, 2009) at 34.

<sup>119</sup> The average duration of an LCIA arbitration is 16 months, see LCIA 2017 Updated Costs and Duration Analysis, <<http://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx>> accessed 4 April 2019; the average duration of HKIAC arbitration is 14.3 months, see HKIAC Average Costs and Duration 2017 Report, <<http://www.hkiac.org/content/costs-duration>> accessed 4 April 2019; the average length of an SCC arbitration is 13.5 months, see 2016 Costs of arbitration and apportionment of costs under the SCC Rule, <[https://sccinstitute.com/media/93440/costs-of-arbitration\\_scc-report\\_2016.pdf](https://sccinstitute.com/media/93440/costs-of-arbitration_scc-report_2016.pdf)> accessed 4 April 2019.

<sup>120</sup> Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 494.

decision or award,<sup>121</sup> arbitral tribunals and courts will probably reject such an interim measure application, fearing to prejudge the merits of the case. Under the requirement of *fumus boni iuris*,<sup>122</sup> the granting of this type of interim measure may entail assessing the merits in advance; adjudicators should be cautious that the requested measures do not reflect the relief sought on the main case.<sup>123</sup> Finally, an adaptation of the contract that is forced upon the parties is not able to soothe or even solve the parties' conflict. It rather resembles the situation where, by way of a decree of specific performance, the parties are forced to remain in a long-term contract. As Lord Hoffmann rightfully pointed out in *Co-op Insurance v Argyll Stores*,<sup>124</sup> this might just lead to further wasteful litigation.

The situation may be different when the contract has already been fulfilled by one side. A buyer may have complied with its obligation to pay the price in a foreign currency whose value had increased by 100 per cent since the contract conclusion by resorting to an excessively onerous bank credit, which has placed its financial survival at peril. In relation to this scenario, a commentator advocates that hardship must relate to obligations that remain to be performed, precluding a party from claiming greater payment for work it has already done.<sup>125</sup> However, with few exceptions,<sup>126</sup> most default hardship provisions do not clarify whether a party may be exempted from obligations that have already been performed.<sup>127</sup> One may argue that such is still the case pursuant to those provisions, such as Article 79 of the CISG, that require the existence of an impediment that 'could not have been overcome' since performance may indicate that the 'ultimate limit of sacrifice' has not been exceeded.<sup>128</sup> That being said, most hardship rules do not impose the 'not-to-overcome' requirement but, instead, provide the 'substantial imbalance', 'more onerous', or 'excessive onerous' prerequisite.<sup>129</sup> Moreover,

<sup>121</sup> In case of emergency arbitrators, the requesting party would need to demonstrate urgency of adopting the measure before the tribunal is constituted, see Edgardo Munoz, 'How Urgent Shall an Emergency Be?—the Standards Required to Grant Urgent Relief by Emergency Arbitrators', in Michael Geistlinger Marianne Roth (ed.), *Yearbook on International Arbitration* (4th edn, London: INTERSENTIA, 2015) at 61.

<sup>122</sup> Jeff Waincymer, *Procedure and Evidence in International Arbitration* (The Hague: Kluwer Law International, 2012) at 626, 627.

<sup>123</sup> *Ibid.*, at 627; Jason Fry, Simon Greenberg, and Francesca Mazza, *The Secretariat's Guide to Icc Arbitration* (Paris: International Chamber of Commerce, 2012) at 290.

<sup>124</sup> *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 2 WLR 898 holding that 'It is not only a waste of resources but yokes the parties together in a continuing hostile relationship. The order for specific performance prolongs the battle. If the defendant is ordered to run a business, its conduct becomes the subject of a flow of complaints, solicitors' letters and affidavits. This is wasteful for both parties and the legal system'.

<sup>125</sup> Commenting Art. 6.6.2 PICC, see Mckendrick, 'Article 6.2.2', at 815, para. 4.

<sup>126</sup> See Colombia Art. 868 Com C '*prestación de futuro cumplimiento a cargo de una de las partes*'.

<sup>127</sup> That is the case of Art. 6:111 PECL; Art. 6.2.2. PICC, however, Art. 6.2.2 Comment 4. '*Hardship relevant only to performance not yet rendered*' of the official PICC text states that once a party has performed, it is no longer entitled to invoke hardship.

<sup>128</sup> Schwenzler, 'Article 79', at 1135, 36, para. 15.

<sup>129</sup> Austria §§ 936, 1052, 1170a BGB; France Art. 1195 CC; Germany § 313 BGB; Netherlands Art. 6:258 BW; Greece Art. 388 CC; Portugal Art. 437 CC.

Article 6.2.3(2) of the PICC states that the request for negotiations does not in itself entitle the disadvantaged party to withhold performance. This provision highlights the possibility that renegotiations and other hardship remedies may take place despite performance by the disadvantaged party.

Ultimately, the question of whether a contract may be adapted with regard to obligations already fulfilled should be answered by interpreting the parties' behaviour. A party that performed without having raised the hardship issue with its counterparty is probably assuming the risk that a third party presumes that the imbalance or onerousness threshold has not been reached (see section II. 3). However, if the party affected by hardship performed the obligation at stake after receiving assurances of subsequent renegotiations or set-off on future deliveries by the other party, or if it was reasonable for the disadvantaged party to rely on prior renegotiation or adaptation practices or industry usages (estoppel by analogy under Articles 16 and 29 of the CISG and similar provisions in other laws), one may assume an implied modification of the contract by acceptance of the performance.

## V. Additional remedies available

### 1. Exemption from liability in damages

If the non-performance is due to an impediment that fulfils the conditions set forth in Article 79(1) of the CISG or comparable *force majeure* provisions,<sup>130</sup> first and foremost, the obligor is relieved from its obligation to pay damages.<sup>131</sup> This includes so-called 'agreed sums'—that is, penalty clauses or liquidated damages (if they are at all valid under the governing domestic law)—unless the parties have agreed otherwise in their contract.<sup>132</sup> The same damages exemption should follow from a court's or arbitral tribunal's determination of hardship along with concurrent remedies. However, some authors seem to have a different view. Commenting on Article 6.2.3 of the PICC, Ewan McKendrick considers that hardship does not in itself exclude the defendant's liability for non-performance.<sup>133</sup> He cites a Centro de

<sup>130</sup> Art. 7.1.1 PICC; Art. 8:108 PECL; Art. III– 3:104 DCFR.

<sup>131</sup> Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 345; Atamer, 'Article 79', at 1060, para.13; Schwenzer, 'Article 79', at 1148, para. 50; Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 663, para. 45.60. One author asserts that express exemption to pay damages was not necessary because an impediment under article 79 CISG would fall under the category of unforeseeable damages under 74 CISG, see Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness: Full of Sound and Fury, but Signifying Something', at 340. However, Ishida seems to miss the point that the foreseeability requirement in Article 74 CISG regards the damages as a possible consequence of the breach rather than the breach itself or the impediment causing the latter. He also forgets that the CISG remedies system follows the strict liability approach and that Article 79 works as an exoneration of liability rather than a damages' limitation provision.

<sup>132</sup> Hachem, *Agreed Sums Payable Upon Breach of an Obligations* at 138; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 346, 47.

<sup>133</sup> See McKendrick, 'Article 6.2.3', at 821, para. 10.

Arbitraje de Mexico Arbitral Award,<sup>134</sup> holding that Article 6.2.3 of the PICC does not provide the remedy of damages exemption but, rather, a duty to renegotiate the remedy of contract adaptation or termination by the Tribunal, and since the breaching party did not request any of those remedies, the Tribunal decided not to exempt it from damages, skipping a determination of whether hardship had taken place. In spite of such incorrect understanding, it seems clear that once hardship is found and a court or tribunal decides to adapt a contract or terminate it upon a party's request, the latter should be exempted from paying any damages arising out of the contract modification or termination.

## 2. Specific performance excluded

Article 8:101(2) of the PECL clearly states that where a party's non-performance is excused, along with the right to claim damages, the right to performance is likewise excluded.<sup>135</sup> Whether the exemption under Article 79 of the CISG also extends to the promisee's right of performance has been a subject of considerable debate because of the somewhat misleading wording of Article 79(5) of the CISG.<sup>136</sup> It should be noted that, at the Vienna Conference, a German proposal, which held that if the wording should make it clear that if the impediment was a continuing one performance could not be insisted on, was rejected.<sup>137</sup> It was held that, in the case of actual impossibility, no problem would arise in practice, whereas the categorical removal of the right to performance could impair the promisee's accessory rights.<sup>138</sup> However, 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.<sup>139</sup>

This rule applies not only to cases of *force majeure* but also to cases of hardship.<sup>140</sup> A claim for specific performance under the original terms of the contract will not be enforceable as long as the substantial imbalance or excessive onerosity exists.<sup>141</sup> The rule in Article 6.2.3(2) of the PICC that the request for negotiations

<sup>134</sup> Arbitral Award of 30 November 2006, *Centro de Arbitraje de México*, para 251, Unilex <<http://www.unilex.info/case.cfm?pid=1&do=case&id=1149&step=FullText>> accessed 4 April 2019.

<sup>135</sup> Article 8:101 PECL: '(2) Where a party's non-performance is excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages'.

<sup>136</sup> Atamer, 'Article 79', at 1061, paras. 16, 17; Schwenger, 'Article 79', at 1050, para. 53.

<sup>137</sup> Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness: Full of Sound and Fury, but Signifying Something', at 343, 44.

<sup>138</sup> See Document A/CONF.97/C.1/L.191/Rev.1 in United Nations Conference on Contracts for the International Sales of Goods, Vienna, 10 March-11 April 1980 (Official Records, New York, 1981) 381; Schwenger, 'Article 79', at 1050, para. 53.

<sup>139</sup> Atamer, 'Article 79', at 1065, para. 27; Honnold and Flechtner, *Uniform Law for International Sales* at 642, para. 435.5; Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness: Full of Sound and Fury, but Signifying Something', at 449-51.

<sup>140</sup> Schwenger, 'Article 79', at 1150, 51, para. 55.

<sup>141</sup> *Ibid.* Atamer, 'Article 79', at 1068, paras. 35, 36.

does not in itself entitle the disadvantaged party to withhold performance, confirms that the exemption to perform the contract does not follow from the request for negotiations but may follow from the impact of the events that created the hardship.<sup>142</sup>

### 3. Termination by court or arbitral tribunal

The possibility of termination of the contract by a court or arbitral tribunal as a result of hardship is envisaged by most legal systems that recognize this concept.<sup>143</sup> In common law jurisdictions, termination is the only remedy under the doctrine of frustration.<sup>144</sup> There are, however, a few differences among legal systems with regard to the preference of the avoidance solution by an adjudicator over other remedies such as negotiation or contract adaptation. In some systems, avoidance is clearly preferred over adaptation,<sup>145</sup> while, in others, adaptation is favoured over avoidance.<sup>146</sup> At the international level, the uniform law projects do not appear to place either adaptation or avoidance over the other.<sup>147</sup>

In addition, there are some differences in relation to the relevant mechanism by which avoidance operates in cases of hardship. On the one hand, there are some legal systems that adopt an *ex nunc* avoidance of contract by order of the court or arbitral tribunal.<sup>148</sup> On the other hand, some legal systems following the English model of frustration embrace an *ipso facto* avoidance as of the moment the contract is frustrated.<sup>149</sup> Both approaches, however, contradict the international modern solution of avoidance by declaration of the aggrieved party.<sup>150</sup> Under this mechanism, a notice given by the aggrieved party is sufficient for avoidance and its effects to take place.<sup>151</sup> It has one main advantage in comparison to the

<sup>142</sup> Mckendrick, 'Article 6.2.3', at 820, para. 4.

<sup>143</sup> Article 6.2.3(4) PICC, Article 6:111(3) PECL as well as Article III-1:110(2)(b) DCFR; Argentina Art. 1091 CC; Armenia Art. 467 CC; Azerbaijan Art. 422 CC, Bolivia Art. 581(1)(4) CC; Brazil Art. 478, 479 CC; China Art. 26 PRC Contract Law Interpretation (2); Colombia Art. 868 Com C; Germany § 313(1) BGB; Iraq Art. 146(2) CC; Kuwait 198 CC; Libya Art. 147(2); Lithuania Art. 6.204 CC; Paraguay Art. 672 CC; Qatar Art. 171 (2); Russia Art. 451(2) CC; Slovenia Art. 994 Com C; Syria Art. 148(2) CC; Taiwan: Art. 227-2 CC; Ukraine Art. 652 CC. Except for Egypt Art. 147(2) CC; see also Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 674, para. 45.118.

<sup>144</sup> See for example United States Art. 2-615 UCC, Restatement Second of Contracts § 261 and E Allan Farnsworth, 'The Restatement (Second) of Contracts', *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht/The Rabel Journal of Comparative and International Private Law*, 47/2 (1983), 336–40 at 340.

<sup>145</sup> See for example, Argentina 1041 CC; Brazil Art. 478 and 479 CC; Russia Art. 451(2) CC. In Bolivia Art. 581 CC and Italy Art. 1467 CC avoidance is the sole remedy available.

<sup>146</sup> See for example, Germany § 313(1) BGB; France Art. 1195 CC; Colombia Art. 868 Com C.

<sup>147</sup> Art. 6.2.3(4) PICC; Art. 6:111(3) PECL; Art. III-1:110(2) DCFR.

<sup>148</sup> See for example, Argentina Art. 1091 CC; Bolivia Art. 581(1)(4) CC; Brazil Art. 478, 479 CC; Colombia Art. 868 Com C; Paraguay Art. 672 CC; Russia Art. 451(2) CC; Slovenia Art. 994 Com C; see also Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 674, para. 45.119.

<sup>149</sup> See for example United States Art. 2-615 UCC, Restatement Second of Contracts § 261 and Farnsworth, 'The Restatement (Second) of Contracts', (at 340; Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 754, para. 47.183.

<sup>150</sup> Art. 26 CISG; for breach of contract see Art. 7.3.2(1) PICC and Art. 9:303(1) PECL.

<sup>151</sup> Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 758, para. 47.198.

more traditional approaches before commented: certainty. When a contract is avoided *ipso facto*, the consequences of avoidance may have taken effect without the parties being aware of it, whereas avoidance by court declaration will be impractical in many instances, especially where a party needs to conclude a substitute transaction in order to cover the other party's breach. As previously discussed (see section IV. 2 above), a determination of hardship by a court or arbitral tribunal will often come too late.

#### 4. Avoidance by a party's declaration

Among the rights that are not affected by an exemption, including scenarios of hardship, is first and foremost the right to avoid the contract.<sup>152</sup> 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.<sup>153</sup> Article 25 of the CISG—and, similarly, Article 7.3.1(2) of the PICC, Article 8:103 of the PECL, and Article III–3:502(2) of the DCFR—circumscribes 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 in hardship cases is whether it is possible and—having regard to the other party's expectations—just and reasonable that the breach be remedied.<sup>154</sup> For example, in the hypothetical case where the acquisition costs for the seller have doubled from 100 to 200, thus giving rise to a plea of hardship, the seller may suggest delivering the goods if the buyer is willing to pay a higher purchase price, let us say 150. If the buyer does not accept the seller's offer but, instead, makes a cover purchase, the buyer will sue the seller for damages. The court or tribunal should then decide whether the seller is exempted 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 payment of 150 or damages for wrongful repudiation on the part of the buyer. The buyer will then rely on avoidance because of a fundamental breach. Now, the court or tribunal should decide whether the fact that the seller was willing to deliver the goods, but on different terms (at 150), amounted to a fundamental breach of contract giving the buyer the right to avoid the contract. The court here will have to consider 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 renegotiate on the basis of mitigating its loss (see section III. 3 above), it will find for the seller.

<sup>152</sup> Schwenger, 'Article 79', at 1151, para. 56; Honnold and Flechtner, *Uniform Law for International Sales* at 640, para. 435.4; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 366.

<sup>153</sup> Ulrich Schroeter, 'Article 25', in Ingeborg Schwenger (ed.), *Schlechtriem & Schwenger: Commentary on the UN Convention on the International Sale of Goods* (4th edn, London: OUP, 2016) at 424, paras. 13 et seq. *Oberlandesgericht Stuttgart*, 12 March 2001, CISG-online 841; CIETAC, 30 October 1991, CISG-online 842.

<sup>154</sup> CISG AC Opinion no. 5, *The Buyer's Right to Avoid the Contract in Case of Non-Conforming Goods or Documents* (Rapporteur: Professor Ingeborg Schwenger) 7 May 2005, Comment 3.

## VI. Conclusion

The doctrine of hardship—or similar concepts frustrating performance of the contract or making it more onerous—is acknowledged not only in many domestic legal systems but also in international instruments for the harmonization or unification of contract law: in particular, the CISG and the PICC. The prerequisites for hardship are widely the same in domestic legal systems and international instruments. Regarding the remedies in the case of hardship situations, most laws and rules of law contemplate three main remedies: renegotiation, contract adaptation, or avoidance by a third party. However, their prevalence is not the same in all legal systems; some will afford to renegotiations ancillary importance over contract adaptation or exclude the former, while, under other laws or rules of law, avoidance by a third party is the only, or an independent, remedy.

The duty to renegotiate, although present in several legal systems, is neither necessary nor desirable. A duty to renegotiate should not be imposed upon the parties, particularly if there are no legal consequences in case of breach of such duty. Hardship scenarios and the duty to mitigate damages already offer strong factual incentives to both parties to renegotiate voluntarily. Furthermore, procedural incentives for negotiation such as multi-tier dispute resolution clauses applying to all kind of conflicts are preferable to a duty to renegotiate just in cases of hardship rooted in substantive law.

Similarly, the remedy of contract adaptation by a court or arbitral tribunal is neither necessary nor desirable. This rule takes out of the parties' hands the possibility to find a solution to their problem. In addition, a decision adapting the contract by an adjudication body often arrives belatedly. Prompt solutions are essential, and the main adjudicatory systems in place today do not serve this purpose. In the same way, the remedy of avoidance by a court or arbitral tribunal is not optimal. It contradicts the international modern solution of avoidance by declaration of the aggrieved party, which has clear advantages over the mechanisms of *ipso facto* avoidance or court declaration of avoidance. Finally, the parties may resort to traditional breach of contract remedies. These tools adequately serve the interests of both parties in a hardship scenario.