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THE EXEMPTION PROVISIONS OF THE SALES
CONVENTION, INCLUDING COMMENTS ON
“HARDSHIP” DOCTRINE AND THE 19 JUNE 2009
DECISION OF THE BELGIAN CASSATION COURT

This paper addresses the exemptions provisions, articles 79 and 80, of the United Nations Convention on Contracts for the International Sales of Goods (CISG). It begins with a general comparison of the two provisions, exploring the significance of stylistic differences between the detailed, complex, even baroque approach of article 79 and the general, straightforward and vague mode of article 80. The paper then explores a recent decision of the Belgian Court of Cassation holding that the CISG incorporates, as part of its general principles, the “Hardship” provisions (articles 6.2.1 through 6.2.3) of the UNIDROIT Principles of International Commercial Contracts. The paper argues that this decision distorts the meaning of the CISG, violates the mandate to interpret the Convention with regard for its international character, and threatens the political legitimacy of the treaty.

Key words: *Exemption. – Force Majeure. – Hardship. – CISG. – International Sales.*

This paper explores the exemption provisions – Articles 79 and 80 – of the United Nations Convention on Contracts for the International Sale of Goods (CISG).¹ These articles contain rules under which parties to international sales contracts may be shielded from at least some of the

¹ This paper was written for a conference on the CISG organized by the University of Belgrade Faculty of Law in November 2010. I was honored by and grateful for the opportunity to participate in this conference. The honor, and my gratitude, was increased greatly by two facts: members of the University of Belgrade Law Faculty have made extraordinary contributions to understanding the Convention; the conference was held in conjunction with a meeting of the CISG Advisory Council, one of the most ambitious and creative projects to encourage an intelligent and uniform approach to the CISG.

usual legal consequences that flow from a failure to perform a contractual duty. The question of when a party should be so shielded is certainly one of the most challenging in the field of uniform commercial law.

Article 79, the broader and more significant of the two exemption provisions, is related to traditional doctrines – *force majeure*, impossibility/impracticability – with long and interesting histories in both domestic and international legal traditions.² The provision is one of the most complex and difficult in the CISG. Article 79(1), the core of the provision, establishes six elements (depending on how one counts) that must be satisfied before a party that has failed to perform may claim exemption under the article: 1) an “impediment” to performance must have arisen; 2) the party’s failure to perform must have been “due to” the impediment (causation); 3) the impediment must have been “beyond the control” of the party claiming exemption; 4) the impediment must be one that the party claiming exemption “could not reasonably be expected to have taken . . . into account at the time of the conclusion of the contract”; 5) the impediment must be such that the party claiming exemption “could not reasonably be expected . . . to have avoided . . . it or its consequences”; and 6) the impediment must be such that the party claiming exemption “could not reasonably be expected to have . . . overcome it or its consequences.”

Although Article 79 is one of the most challenging and important CISG provisions, it is not necessarily the best example of the Convention’s methods. Alluding to the necessarily vague standards employed in the provision, Professor Honnold asserted that “Article 79 may be the least successful part of the half-century of work towards international uniformity.”³ Perhaps in response to these challenges, Article 79 has produced a rich and varied body of case law. Some of those decisions reflect great credit on the tribunals that have applied the provision; others raise disturbing questions about the tribunal’s methods.⁴ At any rate, Article 79 poses many fascinating and significant questions that demand thoughtful analysis. I will attempt to comment on one of those questions in greater depth later in this paper.

² See I. Schwenzer, *Article 79, Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010³, para. 4; J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (ed. H. M. Flechtner), Kluwer Law International 2009⁴, para. 425.

³ *Ibid.*, 627.

⁴ See J. Lookofsky, H. M. Flechtner, “Nominating *Manfred Forberich*: The Worst CISG Decision in 25 Years?”, *The Vindobona Journal of International Commercial Law and Arbitration* 9/2005, available at SSRN: <http://ssrn.com/abstract=1311459> (discussing *Raw Materials Inc. v. Manfred Forberich GmbH*, 2004 WL 1535839 (U.S. District Court for the Northern District of Illinois, 7 July 2004), available online at <http://cisgw3.law.pace.edu/cases/040706u1.html>).

Article 80 is, in a sense, the poor relative of Article 79. It appears to be a straightforward statement of a simple and obvious general principle: “A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission.” A Belgian court has characterized Article 80 as embodying a principle “close to *estoppel*.”⁵ Professor Honnold has opined that the provision “has the seductive charm of a self-evident statement,”⁶ and he notes that at the 1980 Vienna Diplomatic Conference at which the text of the CISG was approved, “both supporters and opponents of this provision claimed that it embodied self-evident truth.”⁷

Comparing the approaches of the Convention’s two exemption provisions is revealing. Whereas proving exemption under Article 79 requires satisfying a long list of requirements that can be difficult to understand, challenging to distinguish, and daunting to apply, Article 80 only requires proof that 1) there was an “act or omission” by the other side, and 2) it caused the failure to perform by the party claiming exemption. Article 80 contains nothing beyond these two requirements that expressly limits, conditions or adjusts its application.

Article 79 includes special rules addressing a variety of specific sub-issues and procedural details, including exemption claims based on a third party’s failure to perform (Article 79(2)), treatment of temporary impediments (Article 79(3), and a party’s obligation to notify the other side of a claim to exemption (Article 79(4)). Article 80 includes no such detail. The fact that Article 79 has five subsections, whereas Article 80 is uncluttered by subdivisions, says much about the different approaches of the two provisions.

The consequences of exemption under Article 80 also appear to be simple and more straightforward, as well as more far-reaching, than under Article 79. Article 79(5) specifies that the article exempts a party only from liability for *damages* for non-performance, leaving other remedies for breach (such as avoidance of contract or price reduction under Article 50) unaffected.⁸ Exemption under Article 80, in contrast, apparently shields a party from all remedies for its failure to perform⁹: when the

⁵ Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005, English translation available at <http://cisgw3.law.pace.edu/cases/050125b1.html>.

⁶ Honnold, §436.

⁷ *Ibid.* § 436.4 at 646.

⁸ See I. Schwenzer, paras. 49, 55; Honnold, §§435.4, 435.6. The extent to which a breaching party who is exempt under Article 79 remains subject to an order for specific performance is subject to some debate. See *Ibid.* §435.5 (in particular, n. 63). Compare I. Schwenzer, paras. 52–54.

⁹ See Ingeborg Schwenzer, “Article 80”, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010³, paras. 8, 9; Honnold, 644.

provision's requirements are satisfied, the other side "may not rely" on the failure to perform. Stripping a party of the right to "rely" on a breach is the same approach used in Article 39, which denies all remedies for non-conforming goods if the notice requirements of that provision are not satisfied.

The simplicity of Article 80 (particularly in comparison to Article 79) no doubt reflects its origins and history.¹⁰ Although similar to an idea that appeared in Article 74(3) of the Uniform Law on the International Sale of Goods (1964) ("ULIS"), an antecedent of the CISG, Article 80 was a late addition to the Convention. It was added at the 1980 Vienna Diplomatic Conference at which the text of the Convention was finalized, based on a proposal by the (former) German Democratic Republic. Professor Honnold has observed: "Some delegates [to the 1980 Vienna Diplomatic Conference] stated that the proposal expressed the important general principle that one should not gain by a wrongful act; others noted that such a statement was unnecessary and, in any event, followed from the good faith requirement of Article 7(1) Most delegates seemed to feel that there might be some value and, at any rate, no danger in stating the obvious; the provision was approved."¹¹

The simple structure and straightforward language of Article 80, however, belies the power of the provision: as was noted above, the consequences of exemption under Article 80 are considerably more far-reaching than under Article 79. The lack of express limitations or exceptions on the principle expressed in Article 80, furthermore, creates the possibility of far-ranging applications that are, in my view, improper, and may even undermine important aspects of the Convention's system for regulating international sales.

Perhaps unsurprisingly, given the history mentioned above, the drafting of Article 80 seems out of character for the CISG – not in keeping with the general approach of the Convention, which is characterized (usually) by more carefully-crafted and detailed provisions. In fact, Article 80 appears less like a legal provision, and more like a statement of one of the general principles of the CISG, designed to be used (according to Article 7(2)) to deal with "gaps" in the Convention – i.e., situations that the drafters did not specifically anticipate, and for which they therefore did not provide a particular rule.¹²

Because it is an express provision (whereas other "general principles" are implied from the Convention's express terms) and because it contains almost nothing in the way of express limitations on or distinc-

¹⁰ The following account of the drafting history of Article 80 is derived from I. Schwenzer, para. 1, and Honnold, §436.1.

¹¹ Honnold, §436.1.

¹² See Honnold, §436.4.

tions in its use, it strikes me that Article 80 may be difficult for judges and arbitrators to apply with the kind of precision that justice, the complex demands of international commerce, and the purposes of the Convention demand. An example of this dangerous malleability is the fact that some authorities have invoked Article 80 to justify an aggrieved party's refusal to perform its duties under a contract, even though it has not avoided the contract, on the footing that the non-performance was "caused by" the other side's prior breach¹³ Other authorities (with whom I agree) reject this approach; they argue that the causal link required by Article 80 between a party's failure to perform and the other party's acts or omissions is the same kind of "objective" causation required by Article 79.¹⁴ In other words, according to the latter authorities it is not enough that the other side's prior breach *motivated* a refusal to perform; rather, the other party's acts or omissions must have prevented performance – must have, in the words of one arbitration decision, made it "impossible or nearly impossible"¹⁵ for the other party to perform.

Among the many interesting and complex issues that have arisen under Article 79 – far more than I could hope to cover in this paper – is one that I will in fact attempt to discuss, and that was addressed in a recent decision by the Belgian Court of Cassation.¹⁶ The issue is this: in transactions governed by the CISG, what is the status of "hardship" doctrine – "*imprévision*," *eccessica onerosita sopravvenuta*, *Wegfall der Geschäftsgrundlage* and the like – that permit a contract to be terminated, or its terms "adjusted," in the event of a "hardship" event that upsets the equilibrium of contractual burdens and benefits between the parties? Do domestic hardship doctrines continue to apply in CISG transactions, or are they displaced by the Convention? Alternatively, might the CISG it-

¹³ See, e.g., decisions discussed in T. Neumann, "Shared Responsibility under Article 80 CISG", *Nordic Law Journal (Nordic L. J.)* 2/2009, 16, available online at <http://www.cisg.law.pace.edu/cisg/biblio/neumann1.html>.

¹⁴ See, e.g., Supreme Court, Poland, 11 May 2007, English translation available at <http://cisgw3.law.pace.edu/cases/070511p1.html>; CIETAC Arbitration Decision, China, 18 December 2003, English translation available at <http://cisgw3.law.pace.edu/cases/031218c1.html>; ICC Arbitration Case No. 11849, 2003, English text available at <http://cisgw3.law.pace.edu/cases/031849i1.html>. A leading commentary put it this way: "If, for example, the buyer, without cause, refuses payment of the due price or refuses payment for previous obligations, the seller is not entitled to refuse delivery of the goods under Article 80. The breach of contract on the part of the promisee is the occasion but not the cause of the non-performance." H. Stoll, G. Gruber, "Article 80" *Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2005², para. 6.

¹⁵ ICC Arbitration Case No. 11849, 2003, English text available at <http://cisgw3.law.pace.edu/cases/031849i1.html>.

¹⁶ Cour de Cassation/Hof van Cassatie, Belgium, 19 June 2009, Editorial Comments by Professor Siegfried Eiselen and English translation available at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

self provide for termination or adaptation of a contract in case of hardship?

These questions concerning the status of hardship doctrine in CISG transactions are made more interesting by the drafting history of the Convention, which includes episodes in which “hardship” provisions were proposed to be added to the express provisions of the CISG, and such proposals were rejected.¹⁷ Those rejected proposals included one that would specifically have empowered tribunals to adjust contract terms in the event of hardship in order to reestablish contractual equilibrium. The status of “hardship” doctrine under the Convention has previously been addressed in case law¹⁸ and by scholars.¹⁹ The recent decision by the Belgian Court of Cassation dealing with this area, however, suggests further exploration is required.

As my reference point for hardship doctrine I will use the hardship provisions in the UNIDROIT Principles of International Commercial Contracts. Under Article 6.2.2 of the Principles, “hardship” exists:

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

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

The consequences of “hardship” are specified in Article 6.2.3 of the Principles, which provides:

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

¹⁷ For accounts of this history, see N. Lindström, “Changed Circumstances and Hardship in the International Sale of Goods”, *Nordic L. J.* 1/2006, 2, available online at <http://www.cisg.law.pace.edu/cisg/biblio/lindstrom.html>; J. Rimke, “Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts”, *Pace Review of the Convention on Contracts for the International Sale of Goods* (1999–2000), 197, 218–19.

¹⁸ E.g., Tribunale Civile di Monza, Italy, 14 January 1993, CLOUT case No. 54, English translation available at *Journal of Law and Commerce (J.L. & Comm.)* 15/1995, 153, and online at <http://cisgw3.law.pace.edu/cases/930114i3.html>; decisions discussed in Lindström, 2.

¹⁹ E.g. I. Schwenzler, paras. 4, 42.; Honnold, §435.2; Stoll, Gruber, paras. 30–32; Lindström, 2; S. D. Slater, “Overcome by Hardship: The Inapplicability of the UNIDROIT Principles’ Hardship Provisions to CISG”, *Florida Journal of International Law* 12/1998, 231.

- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
 - (a) terminate the contract at a date and on terms to be fixed; or
 - (b) adapt the contract with a view to restoring its equilibrium.

These provisions are completely separate from the “force majeure” provision (Article 7.1.7) of the Principles, which reproduces the exemption rule of CISG Article 79(1). This distinction between “force majeure” and “hardship” reproduces a common dichotomy: in the Civil Law tradition, force majeure doctrine generally provides for release from liability for non-performance if post-contract-formation events rendered that performance impossible; hardship doctrine provides relief, even where a party’s performance remains possible, if post-contract developments fundamentally change the expected equilibrium between that performance and what the party was to receive in exchange.²⁰ The relief provided by hardship doctrine, furthermore, differs from that for force majeure: under Article 6.2.3 of the UNIDROIT Principles, for example, the occurrence of “hardship” requires the parties to attempt to renegotiate the terms of their agreement in a fashion that restores the original contractual equilibrium; should such renegotiation fail, a court is empowered to terminate the agreement or, more interestingly (from the common law perspective), “adapt” the contract – i.e., impose changed contractual terms not agreed to by the parties – to restore that equilibrium.

In short, the hardship regime of the UNIDROIT Principles (reflecting, I believe, most Civil Law hardship doctrines in this regard) has *two* significant features that distinguish it from traditional force majeure doctrine. First, the standard for triggering relief is different – and more relaxed – under hardship doctrine: hardship includes events that do not render a party’s performance impossible, but merely (much) more difficult and/or expensive (or that render the return performance that a party is to receive much less valuable to it) so that the contractual equilibrium is upset. Second, hardship doctrine provides for the possibility of relief

²⁰ It is not clear if the dichotomy between the “impossibility” standard traditionally required under “force majeure” and the “something-less-than-impossibility standard” for “hardship” is maintained in the UNIDROIT Principles. Comment 6 to the UNIDROIT Principles’ definition of hardship, Article 6.2.2., states that “there may be factual situations which can at the same time be considered as cases of hardship and of force majeure,” and, as the Comment explains, “hardship” doctrine looks “to allow the contract to be kept alive although on revised terms” – an approach that cannot be pursued if performance is impossible. On the other hand, both situations in which the comments to UNIDROIT Article 7.1.7 suggest that the Principles’ force majeure provision could be invoked successfully – Illustrations 1(2) and 2 – appear to involve impossibility.

not available under force majeure doctrine – an obligation on the part of the parties to attempt to renegotiate the contract and, most strikingly, the possibility that a court will impose changed contractual terms not agreed to by the parties in order to restore the contractual equilibrium.

From the perspective of one trained in U.S. commercial law, the standard defining “hardship” in Article 6.2.2 of the UNIDROIT Principles is not particularly surprising or disturbing. At least in a rough way, it resembles the concept of “impracticability” under U.S. domestic law, found in § 2–615 of the Uniform Commercial Code (“U.C.C.”). The U.S. impracticability provision provides a party relief from liability for non-performance where that performance was rendered “impracticable” – more difficult in the extreme, including extremely more expensive, but not necessarily impossible – by a post-contract-formation “contingency,” provided the contingency was not reasonably foreseeable at the time the contract was formed and its risk was not otherwise assumed by the adversely-affected party. Certainly the examples of “hardship” in contracts for the sale of goods offered in the Comments to Article 6.2.2 of the UNIDROIT Principles – e.g., “a dramatic rise in the price of the raw materials necessary for the production of the goods or ... the introduction of new safety regulations requiring far more expensive production procedures” – present the kind of situations that might invoke “impracticability” under U.C.C. § 2–615.²¹ Although it is not clear whether the U.S. domestic law standard for relief (whether post-contract-formation events have rendered performance “impracticable”) is identical to the standard for relief under the UNIDROIT hardship doctrine (whether events after the conclusion of the contract have “fundamentally” altered the “equilibrium” of the contract), the necessary vagueness of those standards renders this debate largely an academic exercise.

Furthermore, CISG Article 79 itself is usually read to be satisfied by “impediments” that render performance extremely more difficult even if performance has not been made literally impossible.²² If this is accepted, defining the precise difference between the level of difficulty of performance that will trigger relief under CISG Article 79 and the standard for relief under domestic hardship provisions is, again, largely an academic exercise.

²¹ Under the UNIDROIT Principles, “hardship” encompasses situations in which events occurring after the conclusion of the contract produce, not an extreme increase in the cost of a party’s performance, but an extreme decrease in the value of the performance a party is entitled to receive. Under U.C.C. § 2–615, U.S. impracticability doctrine technically applies only to a seller’s increased difficulty in performing, but exemption for an extreme diminishment in the value of the performance that a party (particularly a buyer) is to receive under a contract is possible either by analogical application of 2–615, or by invoking the U.S. common law doctrine of “frustration of purpose” (see Restatement of Contracts 2d § 265) to supplement the U.C.C. (see U.C.C. § 2–103(b)).

²² See, e.g. I. Schwenzer, para. 30; Honnold, §432.2; Lindström, 2.

Whereas the “less-than-impossibility” standard for relief under hardship doctrine is not unfamiliar to a U.S. lawyer, the relief available for hardship under the UNIDROIT Principles is unfamiliar – indeed, almost shocking – to one trained in U.S. law. The long-held attitude of U.S. courts is expressed in the traditional maxim that the job of courts is to enforce the contract the parties made, and that they should not “make a contract” for the parties. Some of the more extreme expressions of this attitude have been abandoned – in particular the idea that “an agreement to agree is unenforceable,” which sometimes led U.S. courts to refuse enforcement of agreements with missing terms even though the parties clearly intended the agreement to be legally enforceable.²³ It remains almost inconceivable, however, that a U.S. court would overrule terms expressly agreed to by parties to a contract in favor of terms imposed by the court – the remedy expressly authorized by Article 6.2.3(4)(b) of the UNIDROIT Principles. The rejection of the remedial approach of Civil Law hardship doctrine in the domestic legal tradition of the U.S. (and in other Common Law systems) provides context for viewing the recent decision on hardship and the CISG by the Belgian Cassation Court, to which I now turn.

In the Belgian case, the buyer and seller had entered into contracts, governed by the Convention, for the sale of steel tubing to be used by the buyer to make scaffolding. After a severe (approximately 70%) increase in the cost of the steel used for producing such tubing, the seller stopped making deliveries and demanded an adjustment to the price in the existing contracts. When negotiations between the parties for an adjustment failed, the seller refused delivery unless the buyer agreed to pay an increased price set by the seller, and the buyer sought a court order requiring the seller to resume deliveries at the original price specified in the parties’ contracts.

The court of first instance, the Rechtbank van Koophandel Tongeren,²⁴ held that, although situations of economic hardship could constitute an impediment triggering exemption under CISG Article 79, the possibility of the increased market prices that occurred in the case was something the seller should reasonably have taken into account at the time of the conclusion of the contracts; because the seller did not insist on a price adjustment clause in the contracts to address this possibility, the

²³ See, e.g., Official Comment 1 to § 2–305 (dealing with sales agreements lacking a price term) in the (U.S.) Uniform Commercial Code: “This section applies when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement. This Article rejects in these instances the formula that ‘an agreement to agree is unenforceable’”

²⁴ Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005, English translation and editorial comments by Professor Siegfried Eiselen available at <http://cisgw3.law.pace.edu/cases/050125b1.html>.

Article 79 exemption was not available. The court also refused to apply the theory of *imprévision* as grounds to adjust or adapt the terms of the contract to restore its balance in light of the hardship caused by the seller's increased costs: the court cited authority suggesting that hardship theory was inconsistent with the provisions of the Convention, and noted that the Belgian courts have rejected the theory as a matter of Belgian domestic law. Invoking a general principle of equity, however, the court ruled that the buyer would have to pay half of the price increase demanded by the seller.

On appeal, the intermediate appeals court²⁵ ruled that the lower court had improperly rejected the possibility of adapting the contract to changed conditions pursuant to the theory of *imprévision*; that there was a gap in the Convention concerning the issue of adapting the terms of the contract under this theory; that to fill that gap, pursuant to Article 7(2), reference should be made to the law applicable under rules of private international law; that PIL rules led to the application of French law; and that French law, although it formally rejected the theory of *imprévision*, provided for adaptation of contractual terms in situations of hardship pursuant to the doctrine of good faith. The court applied the approach to hardship in French domestic law and held that the buyer was required to pay an additional € 450,000 beyond the original price in the parties' contracts.

I do not agree with this analysis. I believe that the legal effect of post-contract developments that render a party's performance more difficult, including more expensive, is fully addressed in the Convention's exemption provisions.²⁶ The Convention's provisions, in my view, preempt national domestic law on the question.²⁷ The fact that the CISG articles governing exemption do not authorize a tribunal to impose modified contract terms not agreed to by the parties does not create a "gap" in the Convention²⁸; it merely reflects the Convention's rejection of the adaptation remedy, as reflected in the *travaux préparatoires*. By failing to recognize that there is no "gap" in the Convention's coverage that could

²⁵ Hof van Beroep Antwerp, Belgium, 29 June 2006 and 15 February 2007. Information concerning the interim appeals court opinion in this case is taken from the English translation of the decision by the Belgian Hof van Cassatie and the comments thereon by Professor Siegfried Eiselen: Hof van Cassatie, Belgium, 19 June 2009, English translation and Editorial Comments by Professor Siegfried Eiselen available at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

²⁶ Accord. Stoll, Gruber, para. 31 (referring to "the history of Article 79 and its intent to exhaustively determine the limits of the promisor's performance guarantee").

²⁷ Honnold, §432.2. *Accord*, Rimke, 219. *Contra*, e.g., J. Lookofsky, "Not Running Wild with the CISG", *J.L. & Comm.* 29/forthcoming, 2011; J. Lookofsky, "Walking the Article 7(2) Tightrope between CISG and Domestic Law", *J.L. & Comm.* 25/2005, 87, 99, available online at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky16.html>.

²⁸ Accord. *id.*; Lindström, 2.

be filled by applicable national domestic law, the intermediate appeals court undermines the utility and purposes of the Convention, which focuses on reducing the significance of choice-of-law issues in international sales transactions. The Convention cannot be extended beyond its intended scope with undermining its legitimacy, but where it does cover an issue, failing to properly recognize its full preemptive scope brings back into play domestic doctrines in a fashion that improperly re-elevates the importance of the choice-of-law issue.

At least the approach of the Belgian intermediate appellate court did not mandate that Civil Law approaches to “hardship” rejected in the Convention be applied in all CISG transactions: under this decision, tribunal-imposed adaptation of contract terms in the event of hardship would be required in CISG transactions only where PIL rules led to the application of “supplementary” domestic law that provided for that approach. Under the approach that emerged when the buyer appealed the intermediate appeals court decision to the Belgian Court of Cassation, however, such adaptation would be required in *every* transaction governed by the Convention, and by every tribunal hearing disputes in such transactions.

The Cassation Court affirmed the result in the intermediate appeals court, although on a significantly different basis than that adopted by the lower court.²⁹ The Cassation Court opined that a situation involving economic hardship could constitute an impediment under Article 79 of the CISG that would trigger exemption that provision.³⁰ The Cassation Court nevertheless agreed with the intermediate appeals court that the Convention’s failure to provide, in the event of hardship, for an obligation to renegotiate or for the possibility for a court to adapt the terms of the contract constituted a “gap” in the Convention that should be addressed by means of the methodology described in Article 7(2) of the Convention.

Article 7(2), of course, provides that a question that is governed by the Convention but that is not expressly addressed therein should be resolved, first, by reference to the Convention’s general principles; if the Convention contains no general principles adequate to resolve the issue, reference should be made to the law applicable under the principles of Private International Law (“PIL”), as the intermediate Belgian appeals court had done. The Cassation Court, however, determined that, pursuant to Article 7(2), the Convention itself, rather than applicable national law, required a court to adapt the terms of the parties’ contracts in light of the

²⁹ Hof van Cassatie, Belgium, 19 June 2009, English translation and Editorial Comments by Professor Siegfried Eiselen available at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

³⁰ “Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision of the Convention.” *Ibid.*

seller's hardship; on this basis, the Cassation Court affirmed the intermediate appeals court's order increasing the price buyer was obliged to pay by € 450,000.

The English translation of the reasoning that led the Belgian Cassation Court to find, within the CISG itself, a doctrine authorizing a tribunal to devise and impose "adapted" contract terms is worth quoting. After citing Article 7(2), the court stated: "Thus, to fill the gaps in a uniform manner, adhesion should be sought with the general principles which govern the law of international trade. Under these principles, as incorporated *inter alia* in the Unidroit Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance, as mentioned in paragraph 1, is also entitled to claim the renegotiation of the contract."

Assuming this English translation captures the court's statement with reasonable accuracy – and I certainly admit my inability to judge that – it offers a very interesting window into the court's reasoning. The mandate in Article 7(2) to resolve gaps by reference to the general principles upon which *the Convention* is based is transformed by the court into an obligation to refer to "the general principles which govern the law of international trade." The general principles of the Convention and the general principles governing the law of international trade certainly seem to me to be two quite different things. The difference is not hard to discern: the general principles on which the Convention is based are derived from the text of the CISG itself; the general principles governing the law of international trade could be found in many sources *outside* the Convention, including domestic laws to the extent they have been applied to international sales or any other international transaction.³¹ Indeed, the court's linguistic sleight of hand immediately paves the way for the court to look outside the Convention for general principles to fill the posited "hardship gap" – to the UNIDROIT Principles of International Commercial Contracts, which by their express terms, attempt to be a compendium or restatement of internationally-recognized contract principles (not just sales law principles) derived from domestic and international legal sources from around the globe, including – but most certainly not limited to – the CISG.³²

I admire the substance of the UNIDROIT Principles, as I have publically declared in the past.³³ But, as I have also publically declared, I do

³¹ See H. M. Flechtner, "The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law", *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences* (ed. F. Ferrari), Verona 2003, 190.

³² See *Introduction to the 1994 Edition* in UNIDROIT Principles of International Commercial Contracts (2004 edition). See also Flechtner, (2003), 170–74.

³³ See, e.g., the description of Article 7.2.2 of the Principles ("Performance of non-monetary obligation") as "a carefully-crafted and thoughtful provision that could well

not agree that they can legitimately be used to supplement the CISG.³⁴ The Sales Convention – which is actual law, and on the basis of whose actual text the Contracting States bound themselves to it – specifies in Article 7(2) how it is to be supplemented when gaps in its coverage appear. The rule in Article 7(2) requires those applying the Convention to look within its provisions to determine *its* general principles, not to look outside the Convention to determine general international law principles, especially ones that, like the UNIDROIT Principles, are expressly based on sources beyond the CISG.

Furthermore, in my view, the claim that the UNIDROIT Principles can be used to supplement the CISG because the Principles declare the general principles on which the CISG is based,³⁵ at best, adds several additional and unnecessary steps to the Article 7(2) analysis: to use a UNIDROIT Principle to supplement the CISG in a legitimate fashion, one would have to determine if the Principle in question actually derives from the provisions of the CISG, as opposed to the many other sources on which the UNIDROIT Principles are based, and then determine whether the UNIDROIT Principles (which are not law, and whose drafters are not lawmakers nor authorized by CISG Contracting States as a source of supplementary principles) got the CISG general principles right. Why not just follow the methodology mandated by CISG Article 7(2) when filling gaps – determine directly what the general principles of the Convention are. Of course the UNIDROIT Principles can be consulted as a (non-authoritative) source of opinions about those general principles. Beyond their intrinsic persuasiveness, however, they do not possess any special

form the basis of a compromise between the common law and civil law positions” in Flechtner, (2003), 196.

³⁴ *Ibid.*, 189–93. For similar opinions see Slater, 253–60; U. Drobnig, *The Use of the UNIDROIT Principles by National and Supranational Courts* (paper presented at the colloquium on “les contrats commerciaux internationaux et les nouveaux Principes UNIDROIT: Une nouvelle lex mercatoria” in Paris, 20–21 October 1994), quoted in M. J. Bonell, “The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention – Alternatives or Complementary Instruments?”, *Uniform Law Review* 26/1996, 36. Compare J.S. Ziegel, “The UNIDROIT Contract Principles, CISG and National Law”, *Los principios de UNIDROIT: ¿Un derecho Común de los Contratos para las Américas? / The UNIDROIT Principles: A Common Law of Contracts for the Americas? (Actas/Acts – Congreso Interamericano/Inter-American Congress – Hacia un nuevo régimen para la contratación mercantil internacional: los Principios de UNIDROIT sobre los contratos comerciales internacionales/ A new approach to international commercial relations: the UNIDROIT Principles of International Commercial Contracts, Valencia, Venezuela (6–9 November 1996))*, (1998) 221, available at <http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html>. For contrary views see, e.g., M. J. Bonell, 34–37; A. M. Garro, “The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG”, *Tulane Law Review* 69/1995, 1152.

³⁵ See the Preamble and Official Comment 5 thereto in UNIDROIT Principles (2004 edition), *supra* note 32.

authority to declare the general principles of the Convention for purposes of CISG Article 7(2).

In addition, the Principles often seem to me to favor the Civilian as opposed to the Common Law positions on controversial questions. Witness, for example, the very hardship provisions at issue in the Belgian case³⁶, the Principles' position on specific performance,³⁷ the approach to good faith,³⁸ and the treatment of pre-contractual liability.³⁹ As a result, incorporation of provisions of the UNIDROIT Principles into the CISG via gap-filling – particularly where those same approaches were proposed and rejected during the drafting of the CISG – can appear to be a back-handed way of imposing the approaches of the Civil Law on non-Civil Law states that never agreed to those approaches.

Frankly, however, the use of the UNIDROIT Principles by the Belgian Cassation Court is not the aspect of the opinion that, in my view, poses the greatest threat to the proper application of the CISG. More disturbing to me, by far, is the court's approach to determining whether there is a gap in the Convention's rules – although the court is hardly forthcoming or articulate on its approach to this issue. In order to invoke the UNIDROIT Principles "hardship" rules (as an expression, in the court's view, of the general principles that can be used to supplement the CISG), the court must of course have agreed with the intermediate appeals court that a gap existed in the Convention with respect to a matter "governed by this Convention." The Cassation Court, however, expressly found that "hardship" could constitute an "impediment" that would result in exemption under Article 79. In other words, the court found that situations falling short of impossibility – situations in which a party's performance would be possible, but entail "hardship" – were governed by Article 79. Because Article 79 provides only for the remedy of exemption from damages, however, – and not for adaptation of the terms of the contract by a court or arbitration tribunal – the Cassation Court found a "gap" that it could fill by reference to the UNIDROIT Principles, which does provide for such adaptation. In other words, the "gap" that the court must have found is the failure to the Convention to provide expressly for the particular remedy of tribunal-imposed adaptation (modification without the agreement of the parties) in the event of hardship .

Dear readers, please understand how this holding strikes one not from the Civil Law tradition. Although the Belgian Cassation Court found that CISG Article 79 provides a remedy for "hardship," it also posited a

³⁶ On the Civil Law basis for the hardship provisions of the UNIDROIT Principles, *see* Slater, 241.

³⁷ See UNIDROIT Principles Art. 7.2.2 and Official Comment 2 thereto.

³⁸ See UNIDROIT Principles Art. 1.7 and Official Comment 4 thereto.

³⁹ See UNIDROIT Principles Art. 2.1.15.

gap in the Convention because the treaty does not provide for a specific additional remedy from the Civil Law tradition – a remedy that is vehemently rejected in the Common Law tradition. The court then filled this supposed gap by a version of the Civil Law remedy found in a compendium of Principles that does not even purport to be based solely on the Convention, although Article 7(2) mandates that gaps be filled by reference to general principles on which *the Convention* is based. This court performs this rather perverse tour de force despite the fact that a provision to incorporate this very remedy was proposed *and rejected* during the drafting of the CISG – although the court gives no hint that it was aware of this history.

The Belgian court, of course, is by no means the first to hallucinate a gap in the Convention when it could not find a familiar domestic rule. I am reminded of a decision by a U.S. court ludicrously asserting that the Convention does not address disclaimers of the implied quality obligations imposed by CISG Article 35(2),⁴⁰ even though Article 35(2) itself expressly (and redundantly, given Article 6) states that its obligations apply “[e]xcept where the parties have agreed otherwise.” You see, U.S. domestic sales law has quite elaborate rules governing attempts to disclaim quality obligations (“warranties”) – an entire lengthy section of the Uniform Commercial Code, § 2–316, with four subsections, is devoted solely to warranty disclaimers. The U.S. court apparently just could not fathom that the CISG addressed the question in a simple seven-word phrase. Therefore, the court concluded, there must be a gap in the CISG concerning disclaimers of the Article 35(2) obligations – a view even more clearly the product of the distorting influence of the homeward trend than that of the Belgian Court of Cassation.

The Belgian Cassation Court invokes the value of uniformity articulated in CISG Article 7(1) to justify its approach. Its holding, however, is likely to have just the opposite effect: it is likely to seriously increase non-uniformity in the application of the Convention. I find it almost unimaginable that a U.S. court would follow the Belgian decision, given that it lacks any real support in the text or *travaux* of the Convention, that it contradicts deeply-held views on the proper role of courts, and that it is based on the UNIDROIT Principles, which have failed to gain any significant traction in the U.S. The fact that following the Belgian Court’s lead would require U.S. courts to devise tribunal-imposed contract adaptations for which they have no experience and no developed decisional traditions further supports my prediction.

Indeed, I would encourage U.S. courts – and all other tribunals – to ignore this particular foreign precedent, just as I would urge tribunals not

⁴⁰ *Supermicro Computer Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147 (U.S. District Court of the Northern District of California, U.S.A., 30 January 2001, CLOUT case No. 617, full text available at <http://cisgw3.law.pace.edu/cases/010130u1.html>).

to follow the seriously misguided decisions of some U.S. courts that have applied the CISG.⁴¹ The Belgian Cassation Court decision fails what I believe the most important criterion for determining how much deference should be paid to a particular decision on the CISG: the Belgian opinion does not itself comply with the mandate in Article 7(1) to interpret the Convention with regard for its *international* character.⁴² In fact, the decision shows a clear parochial bias by assuming that the Convention's failure to include the Civil Law doctrines with which it is familiar must constitute a "gap" that should be filled with those familiar doctrines derived from sources outside the CISG. This is, in my view, the homeward trend at its corrosive worst. And in this instance the UNDRIT Principles acted as an enabler by providing cover for the court to fill its imaginary gap with the Civil Law oriented doctrines for which it apparently yearned.

Please understand – my objection is not that adaptation for hardship is not part of U.S. domestic law; my objection is that it is not part of the Convention, and is "found" by the Cassation Court within the Convention by a process that violates the express terms of Article 7(2) and runs counter to the implications of the Convention's drafting history. The fact that the remedy of court-devised modification of contract terms has been vigorously rejected in U.S. domestic law merely points up how seriously corrosive the Belgian Court's holding is to both uniform interpretation and the political legitimacy of the CISG – a political legitimacy based on the consent of States, including those in which court-imposed contract modifications have traditionally been viewed as fundamentally objectionable.

I have not hesitated to condemn the very serious violations of the methodologies mandated by CISG Article 7 (as well as the damage to the goals of the CISG caused thereby) when those violations were committed by U.S. courts.⁴³ In its opinion on the hardship question, the Belgium Cassation Court commits a violation of CISG Article 7 that is every bit as serious as the ludicrous proposition in U.S. decisions that U.S. domestic sales law should guide the interpretation of the CISG.⁴⁴ If tribunals find a "gap" in the Convention every time familiar domestic law approaches

⁴¹ See Lookofsky, Flechtner, *supra* note 4.

⁴² See H. M. Flechtner, "Recovering Attorneys' Fees as Damages Under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on *Zapata Hermanos v. Hearthside Baking*", *Northwestern Journal of International Law and Business* 22/2002, 145–46. For further discussion of the problem of assessing the precedential weight to be accorded a CISG decision see J. Lookofsky, (forthcoming 2011); J. Lookofsky, *Understanding the CISG*, Worldwide, 2008³, 35.

⁴³ See J. Lookofsky, H. M. Flechtner.

⁴⁴ See H. M. Flechtner, "The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation", *Quo Vadis CISG: Celebrating the 25th Anniversary*

do not appear in the Convention (even where those courts admit the Convention actually addresses the situation), there is little hope that the Convention can achieve its goal of creating a uniform international sales law. If Civil Law and Common Law courts engage in a competition to see which can incorporate more familiar traditional domestic approaches into decisions construing the CISG – which courts can more flagrantly engage in the homeward trend in interpreting the Convention –, then we should begin the process of analyzing why the Convention failed. At least then we can more quickly begin the process of starting over again – one hopes, with greater wisdom.

A number of years ago I speculated on the possibility that interpretation of the Convention would break down along regional lines – that non-uniform regional interpretations would develop.⁴⁵ I fear that this prediction may be coming true – except that the break-down is not along literal geographical lines (reflecting, e.g., trade patterns and the magnitude of trading volumes) as I speculated, but rather along the fault lines of mental geography. I underestimated the importance of legal ideology – the thought patterns ingrained by one’s legal education. One split in interpretational patterns seems to be following, for example, the divide between the Civil Law and Common Law traditions. Decisions like that of the Belgian Cassation court, unfortunately, encourage the process of creating CISG subcultures. As Prof. Michael Bridge has eloquently stated: “The challenge facing the CISG is no less than the manufacture of a legal culture to envelope it before the centrifugal forces of nationalist tendency take over.”⁴⁶

Unfortunately, the centrifugal forces of nationalist (or, I would say, legal ideologist) tendencies may be winning, as evidenced by the decision of the Belgian Cassation Court. I freely admit that many decisions by U.S. courts are, in this regard, at least as bad. Unfortunately, bad decisions from tribunals in one tradition are not counter-balanced by bad decisions from tribunals in a different tradition: the “evil” is cumulative.

I have not, however, given up hope. A new generation of lawyers and judges, less imprisoned by those legal traditions and more aware of the alternative approaches of other traditions, is being educated in law schools around the world. They may yet save us from the disintegration of a globally coherent and consistent interpretation of the Convention,

of the United Nations Convention on Contracts for the International Sale of Goods (ed. F. Ferrari), Sellier European Law Publishers, 2005.

⁴⁵ H. M. Flechtner, “Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations”, *J.L. & Comm.* 15/1995, 127.

⁴⁶ M. R. Bridge, “The Bifocal World of International Sales: Vienna and Non-Vienna”, *Making Commercial Law: Essays in Honour of Roy Goode* (ed. R. Cranston), 1997, 288.

provided we can hold on to basic shared understandings and agreements until this new generation takes over. And if the next generation cannot so save us, at least we will have a rich body of material to mine for lessons to help in the next attempt to create genuinely uniform international commercial law. Even in that event the CISG should not be considered a failure – just an interim experiment to build on. But the entrenchment of different approaches to interpreting the CISG by tribunals from different legal traditions would mean that the Convention’s ultimate goals, the ambitious vision that inspired it, would not have been achieved. That would be a loss to the prosperity of the world. It would also be a serious setback to the process of developing a global legal culture – a process on which, I genuinely believe, the very survival of our species may depend. So let us at least make the attempt to listen to and understand each other.