HARDSHIP IN INTERNATIONAL COMMERCIAL CONTRACTS. A COMPARATIVE ANALYSIS OF THE RULES IN TRANSNATIONAL COMMERCIAL LAW*

ONEROSIDADE EXCESSIVA NOS CONTRATOS COMERCIAIS INTERNACIONAIS. UMA ANÁLISE COMPARADA DAS SOLUÇÕES DO DIREITO COMERCIAL TRANSNACIONAL

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Abstract:
Contracts have a vital role in modern economy, establishing parties' expectations when contracting. Parties must have autonomy to enter into contracts, providing they respect the principle of *pacta sunt servanda* (sanctity of the contracts). On the other hand, due to their economic rationality, parties will often seek contract termination (or, at least, its renegotiation) once it is not profitable anymore, which can happen due to supervening events that frustrate the economic function of the contract. When these risks are not allocated in the contract, it is necessary to find mechanisms to solve the problem. Many international rules deal with the issue, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles and the Principles of European Contract Law. If, on the one hand, the two latter expressly deal with hardship cases, on the other hand the CISG has only a generic clause of exoneration that creates doubts about its scope of application. Under this variegated framework, this paper discusses how to interpret hardship problems in international commercial contracts under this set of rules, which remedies are best suited for the needs of trade and how the international rules should interact to harmonize international commercial law.

Keywords: International commercial contracts. CISG. Hardship. Force majeure. Contractual imbalance. Risks.

Resumo:
Os contratos desempenham função imprescindível na economia moderna, estabelecendo expectativas de partes que desejam negociar. Estas partes devem ter autonomia para contratar, desde que respeitado o princípio da *pacta sunt servanda.* Por outro lado, pela racionalidade econômica dos agentes, eles buscarão a resolução do contrato (ou, pelo menos, sua renegociação) a partir do momento em que este deixar de se tornar vantajoso, o que pode ocorrer devido a acontecimentos supervenientes que frustrem a função econômica idealizada. Caso as partes não contratem essa alocação de riscos, é necessário buscar mecanismos que solucionem o problema. Várias normas internacionais buscaram tratar dessa questão, como a Convenção de Viena sobre Compra e Venda Internacional de Mercadorias (CISG),

* I would like to thank Prof. Rodrigo Octávio Broglia Mendes, who brilliantly served as my advisor in the academic thesis that enabled the production of this paper.

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os Princípios UNIDROIT e os Princípios de Direito Contratual Europeu. Se, por um lado, os dois últimos tratam expressamente de casos de hardship, por outro lado a CISG possui somente uma cláusula genérica de exoneração que cria dúvidas quanto ao seu escopo de aplicação. Diante deste cenário plural, este artigo discute como interpretar situações de hardship em contratos comerciais internacionais sob este conjunto de normas, quais soluções são mais apropriadas para as necessidades do comércio e como estas normas internacionais interagem entre si para harmonizar o direito comercial internacional.

Palavras-chave: Contratos comerciais internacionais. CISG. Onerosidade excessiva. Força maior. Desequilíbrios contratuais. Riscos.

1. Introduction

Contracts play a vital role in the modern economy, by accommodating the interests of parties who want to enter into businesses. Without contracts, the global economy as we know it would be unthinkable, since there is no economy, market or international commerce without them. After all, the market is made of contracts, which are born from and in it,[1] and in modern economy they create wealth.[2]

Especially within Commercial Law, parties' autonomy is a paramount feature of the contracting process. However, this autonomy presupposes the respect to the *pacta sunt servanda* principle, since this freedom would be useless if the parties could terminate their relationship whenever they wanted.[3] The good performance of the market demands a binding effect of contracts, especially regarding the assumption of risks related to the transaction and to the possibility of such transaction, instead of generating profits, causing losses.

After all, the contract is the manner through which parties allocate the risks inherent to the economic activity between themselves. As long as an eventual hardship fits within the risks undertaken, it is coherent with the system that it is borne by the party that suffers it, otherwise an opportunist behavior of the parties would be stimulated (which would cause a dangerous legal uncertainty).[4] The economic rationality (but also

1 OPPO, Giorgio. *Categorie contrattuali e statutti del raporto obbligatorio.* apud FORGIONI, Paula Andrea. *Teoria geral dos contratos empresariais*. 2. ed. São Paulo: Revista dos Tribunais, 2010. p. 26. "O mercado é feito de contratos, os contratos nascem do e no mercado".

2 ROPPO, Enzo. *O contrato*. Tradução de Ana Coimbra e M. Januário C. Gomes. Coimbra: Almedina, 2009. p. 262.

3 "[…] a parte, ao celebrar um contrato, gostaria de vincular o parceiro comercial, mas também de permanecer livre para deixar aquela relação e abraçar outra que eventualmente se apresente como mais interessante […]", FORGIONI, Paula Andrea. *Teoria geral* … cit., p. 65.

4 ROPPO, Enzo. *O contrato* … cit., p. 262. According to the author: "É justo e racional que o risco das circunstâncias ordinárias e previsíveis seja suportado pelos contraentes: a lei só os protege contra as circunstâncias que representam matéria de riscos absolutamente anômalos, como tais subtraídos à possibilidade de razoável previsão e controle dos operadores".

self-interest and opportunism) of the agents will lead them to seek the termination of the contract (or at least its renegotiation) whenever it ceases to be profitable. In other words, once the contracted conditions become negative, a rational agent will try to get rid of the risks undertaken, letting the other party bear the losses.

However, there are cases in which the contract does not allocate the risks of certain situations where there is an imbalance. In these cases, the strict application of the *pacta sunt servanda* seems to make less sense, since, if the parties did not contract a certain risk, it would not be fair to demand one of them to entirely bear the losses of its materialization. After all, certain supervening events may frustrate, for several reasons and through several ways, the economic and social function desired by the parties, turning the contract deprived from the purpose and advantages attributed to it when contracting.[5]

If, on the one hand, the *lex contractus* must be followed, on the other hand the evolution of the contracts theory (and of the *rebus sic stantibus* doctrine) added to the picture concepts such as the economic-financial balance and the contractual purpose, conferring a social functionality to the private autonomy.[6] Before this paradigm, Leães (2011, p. 159-161)[7] argues that parties contract precisely to shield themselves against future events and it would be incongruent to let one party unilaterally terminate or amend the contract, even though nowadays exceptions to the sanctity of the contracts have been admitted for equity reasons. Even so, *pacta sunt servand* has its value in ensuring legal certainty and the survival of contracts.

As the contracts presuppose an economic purpose, they stop making sense from the moment that their purposes are frustrated. This creates the need of redirecting them to the path of the balance, so that the expectations of both parties are satisfied. After all, parties do no contract for fun, but have in mind a certain scope and function they expect from the business.[8]

This social function of the contract is particularly important in cases where a certain event causing the supervening imbalance had not been predicted by the parties. Since businessmen behave through a limited rationality while contracting, contractual

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5 ROPPO, Enzo. *O contrato* … cit., p. 253.

6 LEÃES, Luiz Gastão Paes de Barros. A onerosidade excessiva no código civil. In: WALD, Arnoldo (Org.). *Doutrinas essenciais de direito empresarial.* Contratos mercantis e outros temas. São Paulo: Revista dos Tribunais, 2011. v. 4.

7 "Quem contrata quer precisamente se resguardar de eventos futuros; e seria uma incongruência que, sendo esta a sua finalidade básica, pudesse o ajuste ser rompido, ou alterado, segundo a vontade unilateral dos contratantes. No entanto, exceções ao princípio da intangibilidade têm sido admitidas (…) por razões de equidade, sem que se queira com isso sinalizar a pretensão de bani-la do direito atual dos contratos, até porque a função de certeza e segurança jurídicas do princípio pacta sunt servanda é que garante a sobrevivência do instituto." (LEÃES, Luiz Gastão Paes de Barros. *A onerosidade excessiva* … cit., p. 159-161).

8 FORGIONI, Paula Andrea. *Teoria geral* … cit., p. 58.

gaps can naturally occur, due to either the impossibility of predicting the future, either the parties' inexperience. More than that, due to the lack of probability of occurrence of certain facts, an eventual attempt to negotiate the risks of their materialization can lead to abusive transaction costs, undesired by the parties, so that several improbable events are not even negotiated.[9]

In order to solve this problem, each juridical system created its own mechanism of dealing with the contractual imbalance, such as *imprévision,* hardship*, eccessiva onerositá, exoneration, failure of consideration*, among others. Despite being similar, these concepts contain fundamental differences, at times pending to the preservation of the contract by amending it and at other times determining the termination of the contract and the liberation of the parties.

In the international private law, several documents tried to deal with the imbalance in the execution of the contract, such as the UNIDROIT Principles (PICC),[10] broadly used in the regulation of international commercial contracts, the Principles of European Contract Law (PECL)[11] and, above all, the United Nations Convention on the International Sale of Goods of 1980 (CISG).[12] Before this plurality of concepts, a comparative analysis of the international solutions for the interpretation of hardship situations is needed. This question is currently very relevant since the CISG recently came into force in the Brazilian legal system[13] and problems may arise in case a domestic interpretation of the provisions of the Convention is applied.

In the case of commercial contracts, this question is especially relevant, as they bear a singular characteristic that is not always seen in other areas of law: its cosmopolitan and globalized character. Since rational agents will look for businesses with agents that produce comparatively cheaper goods, trade tends to become international. Due to the different expectations and practices around the world, the occurrence of an unforeseen event can create future surprises and frustrations to the parties from different

9 FORGIONI, Paula Andrea. *Teoria geral* … cit., p. 72. Especially in the field of commercial law, t is important to remind that "[…] a empresa contrata porque entende que o negócio trar-lhe-á mais vantagens do que desvantagens. As contratações são também resultado dos custos de suas escolhas; o agente econômico, para obter a satisfação de sua necessidade, opta por aquela que entende ser a melhor alternativa disponível, ponderando os custos que deverá incorrer para a contratação de terceiros ("custos de transação")."

10 International Institute for the Unification of Private Law (UNIDROIT). UNIDROIT Principles Related to International Commercial Contracts of 2010 (3rd edition of 2010 created by the UNIDROIT after the original version of 1994) (UNIDROIT Principles or PICC).

11 Principles of European Contract Law (European Principles or PECL).

12 United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention of 1980 drafted by UNCITRAL). United Nations Commission for the International Trade Law (UNCITRAL).

13 The Convention was ratified by the Legislative Decree No. 538, on 18 October 2012, was deposited with the UN General-Secretary on 4 March 2013, and entered into force in Brazil on 1 April 2014.

legal backgrounds.[14] Economic agents from different locations bear different legal expectations regarding their businesses, often based in domestic legal concepts. Therefore, leaving the solution of this problem to the indication of a domestic applicable law seems to be a dangerous and uncertain way for the parties.

Indeed, in this international context, the application of transnational rules, comprised within the so-called *lex mercatoria*, is more appropriate to the solution of the disputes than the resource to a certain domestic law.[15] As stated by Baptista (2011, p. 229), in the context of international commercial contracts, the law is still fluid and under construction, so that the commercial practice is of the utmost importance.

Despite seeming impossible, it is essential to find harmonic criteria applicable to the international commercial contracts, so as to avoid conceptual misunderstandings based in a strictly domestic view that favor opportunistic behaviors of the parties. The mutual observation of the transnational law and the domestic legal systems can harmonize national interests with the stabilization of business expectations.[16]

2. The International Regulation of Hardship

In the international scenario, solutions for a contractual imbalance are usually related to two major concepts: force majeure and hardship. The concept of force majeure has is origins in the Napoleonic Code. It occurs when the performance of the contract is impossible due to unforeseen events out of the control of the parties (similarly to the definition of art. 7.1.7 of the UNIDROIT Principles). On the other hand, hardship usually occurs in circumstances that comprise three elements: 1) lack of control by the parties; 2) fundamental change of circumstances; and 3) complete unpredictability.[17]

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14 LIU, Chengwei. *Force majeure:* perspectives from the CISG, UNIDROIT principles, PECL and case law. 2. ed. Case annotated update (April 2005). Disponível em: <http://www.cisg.law.pace.edu/cisg/biblio/liu6.html>. Renmin University of China. In this sense, in the international trade it must be presumed, at first, that the parties undertake the risks of the performances, unless a different risk allocation is provided.

15 Cf. MENDES, Rodrigo Octávio Broglia. *Arbitragem, Lex Mercatoria e direito estatal*. Uma análise dos conflitos ortogonais no direito transnacional. São Paulo: Quartier Latin, 2010. p. 150.

16 Cf. MENDES, Rodrigo Octávio Broglia. *Arbitragem* … cit. "É possível o desenvolvimento de critérios a partir dos quais, tanto árbitros quando juízes possam se orientar para enfrentar regras conflitantes, de modo a "neutralizar" a concepção subjacente de uma solução estritamente "nacional" e verificar respostas que possam atender o problema social demandante de uma solução".

17 RIMKE, Joern. Force majeure and hardship: application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts. In: _____. *Review of the Convention on Contracts for the International Sale of Goods (CISG).* Hage: Kluwer Law International, 1999-2000. p. 197-243.; PUELINCKX, A. H. Frustration, hardship, force majeure, imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, changed circumstances. *Journal of International Arbitration*, Geneve, v. 3, n. 2, p. 47-66, 1986. According to the author "force majeure occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible. I promised to do this

Although the concepts of hardship and force majeure are related, since both deal with situations of a change in circumstances, there are essential differences between them. Hardship occurs when the party's duty becomes more burdensome, although not impossible, while force majeure occurs when the duty is impossible, at least temporarily. More than that, there is a functional difference between the concepts: hardship is a reason to amend the contract, with the purpose of maintaining the contract in force. Its goal is to solve the problems of the fundamentally changed circumstances through the adaptation of the contracts to the new situations.[18] Force majeure, on the other hand, is located in the non-performance arena, and deals with the suspension or termination of the contract. Thus, it relates to the party's liability and the consequences of its fail to perform.[19]

In this paper we will only focus in the provisions related to hardship in the international private law, comparing the different consequences and solutions brought by these provisions.

2.1. The United Nations Convention on the International Sale of Goods (CISG)

The CISG is an international Convention created to promote a uniform application of rules for the international trade,[20] coming into force on January 1st, 1988, after the signing of ten Member-States.[21] The CISG seeks to harmonize the interests of different legal systems and countries with different levels of economic development. Therefore, it is a text appropriate to be implemented both in *civil law* and *common law countries*, as well as in developing and developed economies. Since it is an international treaty, signed by authorities of different States and ratified by them, its clauses are legally binding.[22]

but I cannot due to some irresistible unforeseeable and uncontrollable event".

18 MASKOW, Dietrich. Hardship and force majeure. *American Journal of Comparative Law*, Baltimore, v. 40, n. 3, p. 657-669, 1992.

19 MASKOW, Dietrich. *Hardship and force majeure* … cit., p. 657-669.

20 RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243.

21 According to Article 99(1) CISG, the Convention would enter into force on the first day of the month following the expiration of twelve months after the adherence of the tenth State-Party, which occurred after the adherence of the United States of America on 11 December 1986. UNCITRAL's website: <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

22 SLATER, Scott D. Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG. *Florida Journal of International Law,* Gainesville, v. 12, n. 2, p. 231-262, Summer 1998.

2.2. The UNIDROIT Principles on International Commercial Contracts (PICC)

In 1980, UNIDROIT's Governing Council created a Working Group with the purpose of preparing several drafts of principles that were seen as applicable to international commercial contracts. This group comprised members of the most important legal and social-economic systems in the world. In a majority, these members were academics and specialists in the fields of comparative law and international trade law.[23]

The PICC were created as the most important effort to harmonize and unify the international contractual law, due to the fragmentation of the international Conventions, and its main purpose was redrafting the general principles of contractual law, reflecting the most important legal systems in the world. They are based in a general wording, avoiding expressions attached to a certain legal systems and preferring terms more usual in the international commerce.[24]

Since the CISG is an international treaty, it was a mandatory starting point for the Working Group, and several provisions of the CISG are also incorporated within the Principles. However, UNIDROIT knew the typical limitation of an international Convention, so that in some moments it derogates and expands the provisions of the CISG, so as to establish more appropriate solutions. One typical example is the case of hardship: while in the CISG there is no mention to it at all, the Principles deal with hardship in three articles.[25]

However, since the Principles are neither a model law nor a Convention, they have no binding effect and are applied due to its persuading effect. According to its preamble, it shall be applied in five contexts: a) incorporation in a contract; b) reference to the *lex mercatoria*; c) as a model for national laws; d) as a substitute for the applicable national laws; and e) as a mean of interpretation and supplementation of international treaties.

2.3. The Principles of European Contract Law (PECL)

The project began as an academic exercise by Professor Ole Lando of the *Copenhagen Business School*. The professor's desire was to create a unified model of

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23 RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243.

24 RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243; JENKINS, Sarah Howard. Exemption for nonperformance: UCC, CISG, UNIDROIT principles - A comparative assessment. *Tulane Law Review*, New Orleans, v. 72, n. 6, p. 2.015-2.030, 1998. SLATER, Scott D. *Overcome by Hardship* … cit., p. 231-262.

25 RIMKE, Joern. *Force majeure and hardship* … cit., p. 2.015-2.030; KESSEDJIAN, Caroline. Competing approaches to force majeure and hardship. *International Review of Law and Economics*, New York, v. 25, p. 641-670, Sept. 2005.

contractual law for Europe, as a service to the business' community. The drafting of the Principles was partially funded by the European Commission, although they were never a product of European authorities. Therefore, the status of these Principles is not very clear, even though they bring some benefits that are still not recognized.[26]

The PECL, in the same way as the PICC, has two different provisions, one for hardship and another for force majeure. The PECL tried to consider European legal systems, among others, and were deeply influenced by the PICC. Their final and complete version was concluded in 1998. According to its art. 1:101, they shall only be used within the European community, and are applicable in situations similar to the PICC.[27]

2.4. CISG's provision and the similar provisions under PICC and PECL

There are often cases in which the contracts contain gaps, due to the "transaction costs" problem, the unpredictability or improbability of some events, or even due to the lack of sophistication of the parties.[28] For these cases, CISG's article 79 applies in order to fill the contractual gaps concerning the consequences for one party's failure to perform, providing for its limited exemption of liability.[29]

Although art. 79 was based in a variegated soil, the Convention seeks to depart from national concepts, avoiding references to them and developing its own specific system.[30] However, this autonomy of the CISG renders its interpretation very difficult, since the enforcer of the norm cannot use domestic concepts as guidelines. Moreover, art. 79's system is unitary since it does not differentiate supervening impossibility and hardship, creating doubts as to the inclusion of hardship situations within its sphere of application.[31]The text refrains from using the terms force majeure and hardship.

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26 KESSEDJIAN, Caroline. *Competing approaches* … cit., p. 641-670.

27 SOUTHERINGTON, Tom. *Impossibility of performance and other excuses in international trade*. Turku: Faculty of Law of the University of Turku 2001.

28 Cf. note 18. "Transaction costs" is the name given to those costs undertaken by an economic agent to enter into a contractual transaction, especially regarding the negotiation of the contractual risks and responsibilities. They are costs for the externalization of activities that could be performed within the company.

29 LOOKOFSKY, Joseph. The 1980 United Nations Convention on Contracts for the International Sale of Goods: Article 79 – Liability exemptions for failure to perform. In: HERBOTS, Jacques; (Ed.); BLANPAIN, Roger. (General Ed.). *International Encyclopedia of Laws*: Contracts. Suppl. 29. Dec. 2000. Hague: Kluwer Law International. p. 1-192. However, before analyzing this through the article, one must check whether the basis for the parties' liability for the non-performance of contractual duties is regulated by the contract.

30 RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243. Art. 79 is a revised version of Art. 74 ULIS, which dealt with the exoneration clause. Art. 74 ULIS was very criticized by UNCITRAL Working Group for to readily exonerating parties of their duties. Therefore, several members of the group wished to restrict the exoneration cases, making them more objective.

31 TALLON, Denis. Art. 79. In: BIANCA, Cesare Massimo; BONELL, Michael Joachim. *Commentary on the international sales law*. Milano: Giuffrè, 1987. p. 572-595. See Chapter IV, where the author analyzes the

Therefore, any consideration regarding domestic law shall be the last resource, in case all other interpretation methods fail. According to art. 7 of the Convention, its interpretation shall be guided by its international character and the need to promote uniformity in its application.[32]

The article provides that the party who has failed to perform any of its contractual duties will be exonerated from liability for the damages caused. To be so, it has to prove that the non-performance was caused by an impediment out of his control and that it was not reasonable to expect the party to foresee it at the time of conclusion of the contract, to avoid it or overcome its consequences.[33] The provision contains a definition comprised of five elements: 1) the occurrence of an impediment beyond the party's control; 2) an impediment that could not have been reasonably taken into account by the party; 3) it was not reasonable to expect the party to avoid the impediment or its consequences; 4) it was not reasonable to expect the party to overcome the impediment or its consequences; and 5) there was a causal link between the impediment and the failure to perform.[34]

There may be problems and divergences in the application of the Convention, as occurs with any kind of uniform law. However, when applying it one must bear in mind that the purpose of this article, absent any express will of the parties, is to give effect to reasonable expectations. Thus, one must take into consideration the contractual terms, the context in which it was concluded and the current commercial practices.

On the other hand, the PICC and PECL deal with the same problem under both hardship and force majeure.[35] The PICC and PECL enlarge the applicability of the exonerations outside the cases of impossibility or force majeure. Art. 7.1.7 PICC and art. 8:108 PECL resemble considerably and deal with the impossibility as a case for the exoneration for non-performance, while art. 6.2.2 PICC and art. 8:108 PECL deal with fundamental contractual imbalances. The requirements for exoneration under art. 7.1.7 PICC and art. 8:108 PECL are practically the same of art. 79 CISG.[36] They are necessarily

applicability of the CISG to hardship cases.

32 SOUTHERINGTON, Tom. *Impossibility of performance* ... cit.

33 The official English version was obtained through UNCITRAL's webpage. Available at: <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>. Access on: 18 Oct. 2014.

34 SOUTHERINGTON, Tom. *Impossibility of performance* ... cit.; TALLON, Denis. Art. 79 … cit., p. 572-595; and also LIU, Chengwei. *Force majeure* ... cit. According to the authors, these elements would be the traditional components of the force majeure concept.

35 PERILLO, Joseph M. Force majeure and hardship under the UNIDROIT Principles of International Commercial Contracts. In: _____. *Contratación internacional*. Comentarios a los principios sobre los Contratos Comerciales Internacionales del Unidroit. México: Universidad Nacional Autónoma de México, 1998. p. 111-133.

36 SCHWENZER, Ingeborg. Force majeure and hardship in international sales contracts. *Victoria University of Wellington Law Review*, Wellington, v. 39, p. 709-725, 2008. According to the author, arts. 7.1.7(1) PICC

drafted in general terms, due to the variety of factual situations to which they apply, such is the case in international contracts.

3. Hardship in the CISG

Article 79 comprises a tension between the *pacta sunt servanda* principle and the impossibility that falls upon one of the parties to fulfill its obligations. CISG solves this tension by providing the exoneration of the party of its liability for the damages arising from the non-performance, as long as certain requirements are met.[37]

Several legal doctrines, among which there is the *rebus sic stantibus*, allow the termination or amendment of the contract when unforeseen and extraordinary changes in the contractual circumstances render the contractual obligation extremely burdensome, although not entirely impossible. This variety, added to the broadness of the term impediment, provides a fertile ground for divergent interpretations between judges and arbitrators about the scope of art. 79.[38]

While a part of the authorities understands that art. 79 is flexible enough to comprise the extreme situation of an unexpected hardship within the concept of impediment, another branch understands that there is no provision for the excuse base in an economic hardship. Moreover, there is a lack of hard cases in the case law concerning hardship up to this moment. Therefore, discussing the application of CISG in hardship cases is still a very hot topic.[39] Under art. 79, there is not a single reference to the situation where a party's obligation becomes extremely and unforeseeably burdensome. There is no mention neither to hardship, nor to *force majeure*, as the provision exonerates the party based on the "out of the control impediment" criterion, with no reference to domestic concepts.[40]

On the other hand, the UNIDROIT Principles, in their art. 6.2.2, expressly deal with hardship, additionally to the provision on force majeure of art. 7.1.7, allowing

and 8:808(1) PECL are almost identical. Therefore, regarding the force majeure concept there would be three different elements: the impediment cannot fall within the party's sphere of risk; it must be unforeseeable; its consequences must be unavoidable.

37 PERALES VISCASILLAS, María del Pilar. *El contrato de compraventa internacional de mercancías (Convención de Viena de 1980)*. Disponível em: <http://www.cisg.law.pace.edu/cisg/biblio/perales1.html>.

38 CISG SECRETARIAT. *Guide to CISG Article 79:* Secretariat Commentary on article 65 of the 1978 Draft (draft counterpart of CISG article 79). p. 1-8. Available at: <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html>. Access on: 18 Oct. 2014.

39 GARRO, Alejandro M. *Comparison between provisions of the CISG regarding exemption of liability for damages (Art. 79) and the counterpart provisions of the UNIDROIT principles (Art. 7.1.7)*. 2005. Available at: <http://cisgw3.law.pace.edu/cisg/principles/uni79.html>. Access on: 18 Oct. 2014.

40 FLAMBOURAS, Dionysios P. *Comparative remarks on CISG article 79 & PECL articles 6:111, 8:108*. May 2002. Available at: <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html>. Access on: 18 Oct. 2014.

the party to choose one of the two excuses.[41] In the same fashion, the PECL establish rules for the case of a change in circumstances.[42]

Although there is no consent, several courts and authorities (JENKINS, 1998; RIMKE, 2000; SLATER, 1998; SOUTHERINGTON, 2001) seem to support the idea that the term impediment *would not* comprise the hardship situations.[43] Several cases support this view,[44] understanding that an impediment would be more attached to the idea of impossibility. According to these authors, the drafting history of art. 79 would support this idea, as during the Vienna Conference the hardship issue was considered when producing art. 79, but its specific handling was deliberately omitted from CISG.[45] Thus, there would be no grounds to state that hardship had been left unresolved by the Convention.[46]

Viscasillas (2001, p. 180) states that there are doubts about the inclusion of hardship cases in the scope of the term "impediment beyond its control", in which situation the specificities of the case should be analyzed to see if it fulfills the requirements of the article. Moreover, the effect established for the circumstance that creates the exoneration is the suspension of the execution of the obligation, which is more related to the force majeure cases, while in hardship cases the amendment of the contract would be the main consequence.

Slightly differently, Tallon (1987, p. 572-595) argues that, although the Convention seems to deal with a more flexible standard than force majeure, it would be stricter than impracticability or frustration. Therefore, art. 79 would adopt an intermediate solution that ensures contractual justice and legal certainty.

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41 GARRO, Alejandro M. *Comparison between provisions* ... cit.

42 SCHWENZER, Ingeborg. *Force majeure and hardship* … cit., p. 709-725.

43 According to Jenkins (1998, p. 2.015-2.030), the exoneration within the CISG is very broad in scope, as it is limited to impediments that result in the impossibility to perform but not to cases of frustration, impracticability or *imprévision*. Therefore, domestic law's concepts should not be used, otherwise the purposes of the Convention of uniformity and international interpretation would be jeopardized. However, the author concedes that if the character of the international trade evolve and it is reflected in the usages and practices, the interpretation shall mirror this change.

44 Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex; CLOUT case no. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (suggesting that a seller could be exonerated for the failure to deliver the goods only if similar goods were not available in the market); CLOUT case no. 54 [Tribunale Civile di Monza, Italy, 14 January 1993].

45 FLAMBOURAS, Dionysios P. *Comparative remarks* ... cit. According to the author, the drafting history of the Convention would be a legitimate and valuable aid to the interpretation of art. 79, showing that art. 79 provides a stricter version of its predecessor in ULIS. Under UNCITRAL's *travaux preparatoires*, it would be clear that CISG's drafters were against allowing an economic or commercial hardship as an excuse and that the purpose of art. 79 CISG would be to define limits of the party's liability. Therefore, the impediment requirement was used for representing a unitary concept of exoneration, as opposed to other theories based on changed circumstances. Thus, the party could not rely on the exoneration under the excuse that the performance was unpredictably harder or non-profitable.

46 RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243.

A second great list of authorities *supports* the inclusion of hardship situations within art. 79 CISG,[47] even if under different grounds. According to Enderlein and Maskow (1992, p. 258-272), the Convention would offer sufficient pre-requirements to the application, since changed circumstances could constitute impediments in certain cases, for constituting an obstacle to the fulfillment of the right to the performance.

Honnold (1999, p. 472-495)[48] states that the wording of art. 79(1) seems to leave an open space to exonerations based in economic shifts that cause an impediment to the performance comparable to non-economic obstacles. Therefore, the application of art. 79 to unforeseen economic difficulties would be possible as long as it was consistent with the general principles applied to it, i.e., since there is a true barrier to the performance and since the impediment result in a general economic difficulty comparable to other exonerating causes.

As for Garro (2005, p. 1-8), a hardship situation, although not constituting a barrier to the performance, imposes a so-called "sacrifice limit" beyond which the party cannot be reasonably expected to perform. In general, as demonstrated by the case law,[49] market fluctuations are not considered as impediments, since these changes are a normal risk in commercial transactions. On the other hand, radical and totally unexpected shifts could be an impediment in rare circumstances. For Southerington (2001), an impediment can also be economic, as long as the requirements are fulfilled. At last, although there are not many cases that allow the inclusion of hardship within art. 79, the majority of the authorities would not deny the possibility, in rare situations, of a judicial excuse due to a true hardship case.

Certainly, one of the most controversial issues in UNCITRAL's preliminary discussions was whether economic hardship would constitute a reason for exoneration.

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47 PRADO, Maurício Curvelo de Almeida. Interpretação e aplicação da regra de "Exoneração" da Convenção de Viena (1980). In: _____. *Arbitragem internacional*: UNCITRAL, CISG e direito brasileiro. São Paulo: Quartier Latin, 2010. p. 1-20. According to the author, Alejandro Garro, Joseph Perillo, Michael Joaquim Bonell and Ugo Draetta would support this view.

48 For the author, a situation in which there is a shortage of a raw material in the market, with a highly inflated price so that only few of those who depend on it can continue the production, clearly constitutes an impediment to perform for a great part of the manufacturers. In other words, it would be impossible to require the performance from everyone, and requiring one of the manufacturers or a minority of them to keep the production can damage some in favor of their competitors. This injustice can occur in cases where unexpected monetary shifts make it impossible to continue the production in the values provided in the contract.

49 Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case no. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral sentence no. 6281)]; CLOUT case no. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case no. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March and 21 June 1996]; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995 (according to the court, market fluctuations would be predictable aspects in international trade, and its losses would be part of the normal risk of commercial activities.

According to Schlechtriem (1986, p. 101-105), in the end, the general opinion was that both physical and economic impossibilities could burden the party. However, as a rule the party guarantees its financial capacity of acquiring and producing the promised goods, and an eventual increase in costs does not consist of an impediment capable of exonerating the party.

As reported by the Legislative History, there was a great dispute regarding the exoneration to economic difficulties. The article was written in response to criticisms towards art. 74 ULIS, which allowed a party to be too readily excused for a non-performance. These criticisms led to the substitution of the word "circumstances" for "impediment", so that the conditions for the exoneration were seen in a stricter and more objective manner.[50] Moreover, at the Vienna Conference, a proposal of Norway to exonerate the debtor of its obligation after a temporary impediment, if there was a radical change in the condition, was rejected.[51] Therefore, it is argued whether the CISG would have refrained from including a provision on hardship since art. 79 was already sufficient for such cases, or whether the absence of such mention would mean a rejection of hardship.[52] However, there is no doubt that this problem *was not* specifically discussed in the midst of the proposals.[53]

As for the Drafting History, discussions of isolated proposals could lead some authors to the conclusion that there had been a certain consensus against hardship. Some excerpts of the *travaux preparatoires* indicate that the choice of the term "impediment" had been done to adopt a unitary concept of exoneration, so as to push away the *rebus sic stantibus* idea. However, the Report simply shows that a proposal for the readjustment or termination of the contract due to unexpected hardship was not adopted, without discussions.[54] Therefore, the Drafting and Legislative Histories seem to be rather inconclusive.[55]

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50 GARRO, Alejandro M. *Comparison between provisions* ... cit.

51 SCHWENZER, Ingeborg. *Force majeure and hardship* … cit., p. 709-725.

52 GARRO, Alejandro M. *Comparison between provisions* ... cit.

53 CISG SECRETARIAT. *Guide to CISG* ... cit., p. 1-8. The Norwegian proposal, related to art. 79(3), dealt with the case of a temporary impediment leading to a permanent exoneration if after the impediment the circumstances had drastically changed, so that it was manifestly not reasonable to demand the party to perform. The French delegation raised questions concerning possible confusion with doctrines such as *imprévision,* and the proposal was rejected. According to the Opinion, however, the rejection of the Norwegian proposal does not settle the hardship issue, since it did not really discuss it. Moreover, as stated by Nicholas (1984, p. 5-1 to 5-24), as a palliative solution to such rejection the word "only" was extracted, opening the possibility for an exoneration to continue even after the impediment.

54 CISG SECRETARIAT. *Guide to CISG* ... cit., p. 1-8; GARRO, Alejandro M. *Comparison between provisions* ... cit.

55 PRADO, Maurício Curvelo de Almeida. Interpretação e aplicação … cit., p. 1-20.

There are not many cases expressly dealing with hardship in which the exoneration has been accepted. Moreover, there is no case where it was decided that there were well grounded reasons for the change in the circumstances to be considered unforeseeable or even for the exoneration to be more appropriate than other remedies. However, it does not mean that some flexibility of the *pacta sunt servanda* should not be given in some hardship cases. The problem is identifying which situations would deserve an exoneration.[56]

Indeed, it seems logical to conclude that a reasonably unexpected change in circumstances that makes the performance excessively burdensome could be qualified as an impediment under art. 79(1). In case law, some decisions seem to head this way.[57] The term "impediment" on itself does not exclude an economic burden or impossibility. If art. 79(1) does not expressly neither implicitly exclude the possibility of hardship, a broad interpretation of art. 79 is needed.[58] What the term "impediment" does is setting the bar higher for the right to the exoneration. Although the term distances from domestic notions of hardship (including by not providing contractual amendment mechanisms) and force majeure, it may include a situation of an economically impossible performance.

However, a simple change in circumstances does not suffice, as could be supposed in hardship, but a true economic impossibility, i.e., a higher standard, especially because the solution of art. 79 could lead to the contract termination. Moreover, it is important to stress that the article provides that the impediment should be "reasonably unavoidable or insurmountable", which does not limit the cases to objective impossibility, since the reasonability requirement mitigates and relaxes what is surmountable.[59] According to Rimke (2000, p. 197-243), the impediment should be comparable to other cases of physic or legal impossibility.

3.1. Minimum relevant standard for a hardship situation

If hardship cases are included within the scope of art. 79, it is crucial to define when a performance would be extremely burdensome and the economic balance

56 CISG SECRETARIAT. *Guide to CISG* ... cit., p. 1-8.

57 Amtsgericht Charlottenburg, Germany, 4 May 1994. Available at: <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/386.htm>, in which the tribunal suggested that article 79 would impose a barrier smaller than impossibility, exonerating the buyer from the interest on a delayed payment, although the timely payment was possible but not reasonably expected under the circumstances. Hof van Cassatie, Belgium, 19 June 2009 (Scafom International BV v. Lorraine Tubes S.A.S.). Available at: <http://cisgw3.law.pace.edu/cases/090619b1.html>. The tribunal held that, under the general principles applicable through art. 7 (2) CISG, hardship would be possible within the Convention, and its consequences would include the duty to renegotiate the contract.

58 GARRO, Alejandro M. *Comparison between provisions* ... cit.

59 PRADO, Maurício Curvelo de Almeida. Interpretação e aplicação … cit., p. 1-20.

fundamentally changed. In other words, which increase in the cost of performance or decrease in the value of a consideration would be relevant, since there is no mention to any value that defines a fundamental change.[60]

Enderlein and Maskow (1992, p. 258-272) state that investigating whether the party would be economically ruined was it not for the exoneration is irrelevant, as this is a matter of its subjective financial liquidity. The criterion would be the limit of what could be reasonably expected, which would differ depending of the economic sector involved. Therefore, in highly speculative contracts, the parties are assumed to have undertaken the risk involved in the transaction, so that the standard for hardship is much higher.[61]

According to Schwenzer (2009, p. 709-725), the departing point is the contract itself, since the parties should contractually define their risk spheres. While evaluating whether a change would lead to hardship, the peculiarities of the concrete case should be considered, so that factors such as the timeframe of the contract, the profit margin of the involved sector and even a possible bankruptcy of the party could be relevant. According to the author, some legal certainty would demand an estimated percentage. In her opinion, a 100% variation in the value, based on a comparative analysis of domestic solution, would not be applicable to art. 79(1), since these considerations were of domestic fluctuations, which are not in the same level as in international contracts. Therefore, considering that in international contracts parties are expected to incorporate contractual clauses on possible adjustments, this value should be higher, around 150% to 200%.

However, it seems that the author's opinion is not very accurate for three important reasons. First, a 150% to 200% variation seems to be extremely high, similar to a sanction for the parties not having foreseen a readjustment in the contract. According to Enderlein and Maskow (1992, p. 258-272), even in a 100% variation, the limit of efforts reasonably expected is surpassed, which frequently happens even when the variation is much smaller.

Second, parties are not expected to foresee all the contractual risks. There will always be a degree of uncertainty, for which the law shall indicate the path to the

60 SCHWENZER, Ingeborg. *Force majeure and hardship* … cit., p. 709-725.

61 SCHWENZER, Ingeborg. *Force majeure and hardship* … cit., p. 709-725. However, in this topic it must be stressed that the risk should be that one involved in the specific transaction, which is part of its contractual scope. Therefore, in a future sale of commodities, the risk associated to the transaction is that of the variation of the commodity's price, variation of the production, etc. On the other hand, if the commodity perishes due to a fire or flood in the crop, with the complete destruction of the crop, such risk would likely not within the normal risk of the transaction, so that the parties are not assumed to have undertaken it.

equilibrium. The fact that they did not allocate the risk of an unforeseeable risk does not mean that it was spontaneously undertaken, as evidence by transaction costs' economics.

At last, the arbitrary stipulation of a value, detached to the specificities of the concrete case, seems unreasonable. The Convention does not provide guidelines for any value and, differently from terms like "preponderant" or "relevant", the term "impediment" does not indicate any value. To state that a 50% variation would be irrelevant and a 200% variation would be an economic impossibility is nothing more than an educated guess. Moreover, there would be no need to establish an absolute standard for attaining legal certainty. This legal certainty comes with the harmonization of the interpretation in similar cases, depending on the particularities of the trade sector, the sophistication of the parties and the wording of contract.

In no way parties should be expected to risk their own existence to perform the contract and overcome the impediment,[62] but they should do whatever is in their power to fulfill the obligation.[63] The limit to measure a party's efforts is that which can be reasonably expected from the party, based on what similar individuals would be in the same situation and what is common in that economic sector.[64] In other words, it is the requirement of the reasonable economic agent.[65] As it may sound obvious, this reasonability requirement is uncertain, since it depends on the case.[66]

3.2. Frustration of purpose

Another relevant issue concerns cases known as "frustration of purpose", which comprise the famous *coronation cases*, in which a supervening event frustrates the purpose of the contract, making the performance useless.[67] The issue arises since in those cases there is no true impediment to the performance, but a supervening lack of need

62 SOUTHERINGTON, Tom. *Impossibility of performance* ... cit.; CISG SECRETARIAT. *Guide to CISG* ... cit., p. 1-8.

63 LIU, Chengwei. *Force majeure* ... cit.

64 COMMENT and Notes: PECL Article 8:108: Excuse Due to an Impediment. In: LANDO, O.; BEALE, H. *Principles of European Contract Law:* Parts I and II. Kluwer Law International, 2000. p. 322-328; 378-384. Available at: <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html>. Access on: 18 Oct. 2014. Also in the case of the PECL, the reasonableness also qualifies the fact that the impediment is irresistible or impossible to overcome. It depends on the facts whether an event can be avoided and its consequences can be overcome, so that a party can neither be expected to take precautions out of the risk's proportion, nor be expected to adopt illegal means to contain the impediment.

65 This standard refers to the diligent, rational economic agent, used to the businesses and practices and usages of a certain sector. Therefore, it must be questioned what such agent would do in the same situation.

66 LIU, Chengwei. *Force majeure* ... cit.; TALLON, Denis. Art. 79 … cit., p. 572-595.

67 As an example, if a fire destroys the plant of the buyer of a machine (which would be used in that plant), there is neither an impediment to the payment for the machine, nor to its production or delivery. What happens is that the machine is no longer necessary, and the performance is useless to the party.

of the consideration. It is not clear from the wording of art. 79 whether the impediment could comprise situations of frustration of purpose.[68] The problem is that it is not feasible to list all the circumstances that would excuse a failure to perform, and that would be, therefore, out of the party's control, so that there is a *continuum* between hardship and total impossibility.[69]

Neither CISG nor the PICC and PECL expressly handle these cases, even though the definition of hardship in the latter seems to comprise this phenomenon. According to Enderlein and Maskow (1992, p. 258-272), the analysis of good faith cannot be excluded in these cases, since frustration of purpose could not be solved simply under art. 79. According to Nicholas (1984, p. 5-1 to 5-24), art. 79 would refer to the cases of impossibility or impracticability of the duty and not of frustration of purpose. Therefore, the party that intends the exoneration would not have the right to terminate the contract, even if, due to the change in the circumstances, the obligation was completely different from that expected when concluding the contract.

However, although it is difficult to accept frustration cases within art. *79,* (since there is no impediment to the performance of the party), some of these cases may fit art. 79, especially concerning hardship. The performance expected by the party suffers from a decrease in its value (a decrease to zero), since the contractual purpose can no longer be attained. This case corroborates the need to comprise the concept of hardship within the CISG, so as to regulate situations which are not exactly a force majeure case, but in which the purpose of the contract is frustrated.

3.3. Duty to renegotiate and the possibility of amendment of the contract in case of hardship

One important issue (which is commonly held as an argument against the application of hardship by the Convention) relates to the consequences of a hardship situation, and whether there is a duty to renegotiate, or the possibility to amend the contract.[70] Still, it is questioned whether there would be a gap in the Convention regarding such consequences, and how the problem could be solved.

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68 ZIEGEL, Jacob S.; Samson, Claude. *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods.* Toronto: [s.n], July 1981.

69 According to Honnold (1999, p. 472-495), the different results from domestic laws can establish a departing point. Nicholas (1984, p. 5-1 to 5-24), on the other hand, argues that the best interpretation would be to look for what the parties could be reasonably expected to take into account, based on the contractual practices and usages in the trade sector of a certain good. Tallon (1987, p. 572-595) suggests that the Convention is between the strictest and most liberal systems.

70 One Belgium court stated that, under the general principles applicable under art. 7(2) CISG, the hardship consequences would comprise a duty to renegotiate the contract. Hof van Cassatie, Belgium, 19 June

There are no general principles in the CISG concerning any duty of the parties to renegotiate the contractual terms – although according to the opinion of CISG's Advisory Council, the interpretation of the Convention according to the good faith (art. 7(1)) would create this duty in order to reestablish the equilibrium.[71]

However, the fact is that in case negotiations fail, there are no guidelines in the Convention that allow an arbitrator or a judge to amend or revise the contractual terms. What is possible, under art. 79(5), is for the tribunal to determine what one party owes to the other, in a certain way amending the contract. Except for the payment of damages, the courts can determine the termination of the contract under CISG, as well as the reduction of the price (art. 50).[72] Moreover, once the exonerating hardship occurs, the other party could either wait for the disadvantaged party to terminate the agreement, or to accept the wish of the other party to amend the contract.[73]

In hardship cases, other international provisions – such as art. 6.2.3(1) PICC and art. 6:111(2) PECL – establish the parties' duty to renegotiate alternative contractual terms, which seems to be based in the good faith duty. In case there is no renegotiation, the contract can be brought before the courts to be adapted, and the termination is only allowed as a last resort in case the amendment is not possible, fair or reasonable.

Fried (1981, p. 70-71) provides that the risk sharing would be a guideline principle to fulfill gaps, absent any fault by the parties. According to him, since in case of a frustrating event there is no negligence that justifies the allocation of the losses to one party instead of the other, the unforeseen costs should be shared.

According to Jenkins (1998, p. 2.015-2.030), such analysis would be similar to the UNIDROIT Principles in hardship cases. The party in disadvantage can demand the other to renegotiate the contract. However, this renegotiation would not be exactly a "sharing" of the losses determined by the law, but a sharing based in a mutual agreement of the parties.[74]

2009 (Scafom International BV v. Lorraine Tubes S.A.S.). Available at: <http://cisgw3.law.pace.edu/cases/090619b1.html>.

71 CISG SECRETARIAT. *Guide to CISG* ... cit., p. 1-8.

72 GARRO, Alejandro M. *Comparison between provisions* ... cit.; CISG SECRETARIAT. *Guide to CISG* ... cit., p. 1-8.

73 ENDERLEIN, Fritz; MASKOW, Dietrich. *International sales law:* United Nations Convention on contracts for the international sale of goods. New York: Oceana Publications, 1992. p. 258-272. According to the authors, the Convention does not contain a specific rule about a hardship situation being considered an impediment. The facts should be considered under art. 79. It would not be extraordinary to take the wording of CISG literally (duty to avoid and overcome) and apply it to the main cases of changes in circumstances.

74 According to the author, the PICC grant to the parties the opportunity to allocate the losses after the event. This approach would be efficient, unlike the *superior risk bearer* theory that encourages parties to extensively negotiate before the events to avoid the judicial allocation of losses. In this case, the renegotiation occurs after the event, when each party is aware of its needs and potential risks and costs to be allocated. According to the author, these transactions costs would only be incurred if the event materializes.

On the other hand, several domestic systems, although dealing with the possibility of termination of the contract, do not provide for its adaptation, or for any duty to renegotiate, allowing the party to demand directly in courts the amendment of the contract.[75] In such cases, some authors (PRADO, 2010, p. 1-20; PERILLO, 1998, p. 111-113) argue that courts should considered CISG to have a gap and fulfill it with the aid of UNIDROIT Principles,[76] as international trade usages and practices, which would be allowed by art. 9(2) CISG.

According to Schwenzer (2009, p. 709-725), this method would not be necessary, since the problem could be solved by CISG's remedies, such as the duty to mitigate the loss, which leads to satisfactory and flexible results. However, it seems that this will hardly be the result in practice. The author makes some assumptions that may not materialize in the concrete case. Moreover, one party accepting the other's proposal is completely different from a judge himself deciding in which terms the contract will be amended.

Indeed, while in the UNIDROIT Principles the judge or arbitrator can directly amend the contractual terms to restore the equilibrium, the best that would be available under the Convention would be to determine if the party was in bad faith by not accepting the proposal or a substitute transaction, for example.

It seems very questionable that there should be a "duty to renegotiate" under art. 7(1), based on good faith in the international trade.[77] Still, it is not reasonable to argue that in this case there would be a gap to be fulfilled by the PICC, thus giving the courts the power to amend the contract. The preparatory works do not solve the problem, and the 1956 Report of the Hague Conference tried to overcome it without great success.[78]

One must be careful with the possibility of amendments, otherwise the uniformity of the convention may be jeopardized. The judge can only act within the limits of CISG, confined to the legality. Differently from the PICC and PECL, in which the judge can directly chose the new contractual terms as if he was the parties – supposing

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75 SCHWENZER, Ingeborg. *Force majeure and hardship* … cit., p. 709-725. According to the author, there should not be a duty to renegotiate within the UNIDROIT Principles. First, renegotiation is based in the will and trust of the parties, and a constructive and cooperative negotiation cannot be forced. Moreover, if there is no coercion a duty to renegotiate is a fake, and would only be important if the party was sanctioned for its refusal in negotiating in good faith (art. 6:111(3) (c) PECL.). However, it would be very complex and difficult to know whether the interruption of the negotiations was in bad faith.

76 According to these authors, art. 79(5) would allow the amendment of the contract with its joint interpretation with art. 7(2) CISG and UNIDROIT Principles.

77 SCHWENZER, Ingeborg. *Force majeure and hardship* … cit., p. 709-725.

78 TALLON, Denis. Art. 79 … cit., p. 572-595; RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243; FLAMBOURAS, Dionysios P. *Comparative remarks* ... cit.

what they would have done were they aware of the change in circumstances – within the CISG there is a closed list of rights and possibilities.

As stated by Rimke (2000, p. 197-243), the good faith principle cannot be used to overcome explicit rules of the Convention, especially art. 79(5) that establishes the exoneration's effects, otherwise the harmonization in the application of the Convention would be under attack. Art. 79(5) already provides for a solution regarding the exoneration for damages, excepting other remedies available under the Convention. Therefore, in a hardship case, it is only possible to exercise the duties and the exoneration consistent with CISG and its general principles, since the contract amendment is not dealt with by the Convention and goes against its provisions.

4. Hardship in the European and UNIDROIT Principles and supplementation of the Convention

4.1. Hardship in the PICC

Differently from the CISG, hardship is expressly provided in arts. 6.2.1, 6.2.2 and 6.2.3 of the UNIDROIT Principles.[79] Hardship is dealt with by art. 6.2.1, which establishes as a precondition the importance of the contracts, so that the parties must perform as long as possible and regardless of the burden it can cause on the party. Therefore, even if the party suffers considerable losses instead of the anticipated profits, the contractual terms should be respected.[80] Arts. 6.2.2 and 6.2.3 deal with the definition of hardship and its effects, with a similar content to the PECL.[81]

The hardship definition on art. 6.2.2 is very complex, since it not only defines the nature as well as establishes the elements that shall coexist to make the burden relevant. Moreover, it provides that the burden may occur in two situations: through an increase in costs or decrease in the value of the expected consideration.[82]The first case usually occurs with the non-monetary performance. The substantial increase may occur either to a dramatic increase in the price of raw materials or through the introduction of new sanitary or safety regulations, which require more expensive procedures. The second case can either occur through drastic changes in the conditions of the market, or

79 GARRO, Alejandro M. *Comparison between provisions ...* cit.

80 UNIDROIT. *UNIDROIT principles of international commercial contracts 2010*. Available at: <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>. Access on: 23 Oct. 2014.

81 MASKOW, Dietrich. *International sales* … cit., p. 657-669.

82 RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243; KESSEDJIAN, Caroline. *Competing approaches* … cit., p. 641-670; PERILLO, Joseph M. *Force majeure and hardship* … cit., p. 111-113.

through frustration of purpose situations, in which the consideration loses its value since its purpose can no longer be reached.[83]

The Hardship requires a severe and fundamental change in circumstances so that the party can no longer by bound by its contractual promise. Even if the performance is possible, it is more burdensome. The fundamental condition is that the change is decisive, even though no fix amount is mentioned. The definition of fundamental is crucial. Normal economic risks are not fundamental, but only consequences of much more serious events than the normal for an economic transaction (even if it is turbulent), that hit a party by chance. Regardless of the distribution of the economic burdens. This concept depends on the circumstances of the case, and according to the Official Comment, a variation of 50% or more in the value of the performance will lead to a fundamental change.[84]

Additionally, the Principles provide for specific and objective criteria for hardship to occur:[85]

> a) hardship will only occur if the equilibrium of the contract is fundamentally changed by events that occur or are known after contracting, since the party could have taken them into account if it was aware of it before concluding the contract;
> b) the events could not be reasonably taken into account;
> c) the events were not within the party's control;
> d) the risks were not expressly or implicitly (due to the contract's own nature) by the party. This last rule differs from *force majeure*: it excludes hardship when the party took the risk related to the events.[86]

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83 UNIDROIT. *UNIDROIT principles* ... cit.; MASKOW, Dietrich. *International sales* … cit., p. 657-669. According to the author, the decrease in the value of the consideration should be able to be objectively calculated. Regarding frustration of purpose, it could only be argued if the scope of the contract was known or should have been known by both parties.

84 JENKINS, Sarah Howard. Exemption for nonperformance: … cit., p. 2.015-2.030; MASKOW, Dietrich. *International sales* … cit., p. 657-669. According to the author, a variation of at least 50% should be required; UNIDROIT. *UNIDROIT principles* ... cit.

85 UNIDROIT. *UNIDROIT principles* ... cit. In some cases, the change in the circumstances, even if gradual, can produce a final result that leads to a hardship situation. If this change began before the conclusion of the contract, there will only be hardship if the speed of the change has drastically changed. PERILLO, Joseph M. *Force majeure and hardship* … cit., p. 111-113. As in the case of force majeure, the predictability constitutes a central concern. If the event is foreseeable, the parties should deal with it in the contract, or the disadvantaged party should bear its burden. However, most of the things are predictable, so that the question is if the event was outside of the limits of probability so that reasonable parties would not allocate their risks.

86 PERILLO, Joseph M. *Force majeure and hardship* … cit., p. 111-113; RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243; JENKINS, Sarah Howard. Exemption for nonperformance: … cit., p. 2.015-2.030; MASKOW, Dietrich. *International sales* … cit., p. 657-669.

If the contract is aleatory, random or hazardous, the risk is deemed to be within the party's sphere, even if it exceeds what was estimated. The PICC grant the parties the autonomy to decide on the contractual terms and amend the requirements for hardship, and parties are expected to detail contingencies that justify hardship and force majeure.[87]

According to art. 6.2.3, there are procedural and substantial effects of hardship. As for the procedural effects, the party has the right to claim the renegotiation of the contract. Differently from the CISG, the PICC demand good faith, constructive renegotiation of the parties to amend the contract, who are responsible for solving the disequilibrium or supplementing the contract. If there is not agreement after a reasonable period of time, any of the parties can demand court's or arbitral tribunal's intervention.[88]

The request to renegotiate the contract shall be done timely, from the moment that hardship occurs, which depends on the circumstances of the case. Even if the request is not done quickly, the disadvantaged party does not lose the right to request the renegotiation, but it may alter the decision whether hardship occurs and the consequences to the contract. A renegotiation request, however, is not acceptable when the contract itself provides for its own automatic adaptation. In this case, the renegotiation would not be forbidden if the clause did not comprise the events that gave rise to hardship.[89]

The PICC highlight the importance of communication, so that the request shall establish the basis for renegotiation, indicating the arguments and grounds of the request for the other party to understand and evaluated whether it is justified or not. An incomplete request is considered extemporaneous, unless the grounds are obvious.[90]

Although the party has the right to demand the renegotiation, the Principles do not impose any duty to renegotiate, but it is suggested that it would be a consequence of the good faith and cooperation duties. The disadvantaged party must honestly believe that there is a hardship situation, and both parties shall behave in a constructive manner, avoiding interruptions and providing all the needed information, otherwise they are responsible for the losses caused. Absent any agreement, both parties can take the case to the courts.[91]

Paragraph four of the article provides for substantive rules for the legal decision. If the court understands there is hardship, it can decide in four different forms:[92]

87 PERILLO, Joseph M. *Force majeure and hardship* … cit., p. 111-113.
88 JENKINS, Sarah Howard. Exemption for nonperformance: … cit., p. 2.015-2.030.
89 UNIDROIT. *UNIDROIT principles* ... cit.
90 UNIDROIT. *UNIDROIT principles* ... cit.
91 PERILLO, Joseph M. *Force majeure and hardship* … cit., p. 111-113; UNIDROIT. *UNIDROIT principles* ... cit.; KESSEDJIAN, Caroline. *Competing approaches* … cit., p. 641-670.
92 RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243; PERILLO, Joseph M. *Force majeure and*

a) Terminate the contract at a specific date and in fixed terms, and the effects on the performances already rendered may be different from those of the general termination rules;

b) Amend or adapt the contract in view of the restitution of the equilibrium (with a great margin of flexibility to the courts to establish terms they understand as fair). The court must look for a fair distribution of the losses, which can involve an adaptation in the price. It will not necessarily mirror the entire loss due to the change in circumstances, taking into account the limit until which the parties undertook the risks in the contract, and the limit until which the non-disadvantage party can profit with this;

c) Determine the parties to resume negotiations so as to reach an agreement as to the amendment of the contract;

d) Confirm the contractual terms, determining it to be performed under its original terms, in case the circumstances allow neither the amendment nor the termination.

The court's decision could lead to problems in some countries, since it consists in the judicial imposition of contractual conditions, besides having impacts in the international trade where the parties' autonomy is of the utmost importance. However, the Working Group decided to defer to the courts the decision in very exceptional cases, adding substantive rules that supply the legal basis for the decisions in search for the original contractual balance.[93]

Another important issue is the possibility of the party arguing the hardship to suspend the performance until the contract is modified. The PICC clearly provide that the negotiation request by itself does not authorize the party to suspend the performance, which is only allowed in extraordinary cases.[94] It derives from the exceptional character of hardship and the risk of abuses.[95]

4.2. Hardship in the PECL

The majority of European States' laws have mechanisms to correct injustices arising from a contractual imbalance caused by supervening events that the parties could

hardship … cit., p. 111-113*;* JENKINS, Sarah Howard. Exemption for nonperformance: … cit., p. 2.015-2.030. UNIDROIT. *UNIDROIT principles* ... cit.

93 MASKOW, Dietrich. *International sales* … cit., p. 657-669.

94 PERILLO, Joseph M. *Force majeure and hardship* … cit., p. 111-113*;* JENKINS, Sarah Howard. Exemption for nonperformance: … p. 2.015-2.030; KESSEDJIAN, Caroline. *Competing approaches* … cit., p. 641-670.

95 UNIDROIT. *UNIDROIT principles* ... cit.

not have reasonably expected. The PECL also adopt this type of mechanisms, through a broad and flexible approach that prevents the consequences of an unpredictable event from being undertaken by only one party.

Similarly to the UNIDROIT Principles, art. 6:111 PECL deals with the change in circumstances in a complete manner. The PECL avoid the use of the term hardship, using the neutral expression "change in circumstances", which exactly describe the purpose of the provision. The definition of the events is clearer than in the UNIDROIT Principles: the event shall fundamentally alter the circumstances of the contract so that it becomes excessively burdensome, either due to an increase in the cost of the performance or by a decrease in the value of the consideration.[96]

Moreover, the change in circumstances must occur after the contract is concluded. If the event existed but was unknown, the rules about mistake apply, differently from the CISG and the PICC. Similarly to the PICC, the change in circumstances should not have been reasonably taken into account, and the affected party cannot have undertaken the risk of the change, expressly or implicitly.

The PECL allow the disadvantaged party to request the renegotiation with the purpose of amending the contract or terminating it. Under the general good faith duty, the disadvantaged party shall initiate the renegotiation under a reasonable period of time, specifying the effect of the change in circumstances in the contract. In case there is no agreement, the contractual amendment can occur through judicial intervention. Although this provision is similar to the PICC, there is an important difference that the court can grant a compensation for damages due to the other party's resistance or bad faith in negotiation.[97]

The courts can then choose between terminating the contract and modifying its terms. Still, with the purpose of preserving the contract, a new negotiation can be imposed and, if it is not fruitful, the court shall decide on the merits in order to reestablish the contractual balance through the distribution of the burden among the parties.[98] The courts can then decide either to reject the amendment (when the remedy is worse than the imbalance, thus creating a new hardship to the other party), to extend the period for performance, to reduce the price or quantity, or to establish a compensatory payment. However, there is a limitation to its power, since it cannot rewrite the contract.[99] At last, it

96 COMMENT and Notes: … cit.
97 KESSEDJIAN, Caroline. *Competing approaches* … cit., p. 641-670; SOUTHERINGTON, Tom. *Impossibility of performance* ... cit.; COMMENT and Notes: … cit.; FLAMBOURAS, Dionysios P. *Comparative remarks* ... cit.
98 COMMENT and Notes: … cit.
99 COMMENT and Notes: … cit.

can terminate the contract, if it is the case, establishing a date for its termination in order not to unfairly prejudice the other party.

4.3. Supplementing the CISG in hardship cases

Considering the absence of an adequate treatment of hardship in the Convention, a relevant discussion consists in knowing if hardship can be solved within CISG itself. In case the CISG is directly applicable, it derogates the potentially applicable domestic rules. On the other hand, if there is a gap within the Convention, it should be supplemented, according to art. 7(2), either by domestic rules, or by general principles of law – in which case some authors (SLATER., 1998, p. 231-262)[100] argue that it would lead to the application of the PECL and PICC.

According to art. 7(1) CISG, while interpreting the Convention, it should be paid regard to its "international character" as well as the need to promote "uniformity in its application" and "observe the good faith in the international trade". Contrasting to the broad wording of art. 7(1), art. 7(2) provides means to fulfill gaps in the Convention, in cases which it governs, but which are not expressly regulated by it.

The first source of supplementation under art. 7(2) would be the general principles in which the Convention is based, which, at a first glance, could be easily solved by applying the UNIDROIT Principles. Although it is impossible to create a conclusive list of general principles, some courts and commentators begin to identify some of them from the Convention's own text. In case this method fails, a domestic law should be applied, according to the international private law, but only as a last resort. As it may look, there are evident problems associated to this application, either from the uncertainties of the international private law rules, either by the chance that significant incongruences occur between the international text and the national law applied.[101]

As stated by Rimke (2000, p. 197-243), it cannot be determined for sure how the problem of radically changed circumstances can be decided based on art. 79, and it is still not clear whether CISG contains a specific provision to deal with these cases.

On the other hand, according to the opinion of CISG's Advisory Council, the alternative of solving the hardship problem within CISG is the most appropriate, since leaving this question to international private law could lead to an enormous diversity of domestic legal concepts potentially applied. Therefore, the interpreter that takes the CISG

[100] According to the author, the term hardship is not expressly included in or excluded from the Convention, so that it may be understood that there is a gap concerning hardship (which could be easily filled by UNIDROIT's provisions).

[101] SLATER, Scott D. *Overcome by Hardship* … cit., p. 231-262.

seriously should try to exhaust all the possible means for the issue to be solved within the Convention.

Garro (2005, p. 1-8) is in favor of a broad interpretation of art. 79, thus derogating the application of the domestic law. Therefore, the guidelines for the interpretation of hardship should be established, as well as the appropriate consequences after its applications.

However, it looks that the Convention does not provide satisfactory guidelines for defining the hardship concept, so that the resort to the supplementation of the Convention is needed for art. 79 to be fully applied. According to Kessedjian (2005, p. 641-670), the CISG does not intend to be complete, so that its drafters wisely provided mechanisms for supplementing it in art. 7(2). Therefore, it seems reasonable to analyze the article as a framework clause that defines general rules for the exoneration, which content can be fulfilled by other norms.

On the other hand, some authors (KESSEDJIAN, 2005, p. 641-670.) state that there is nothing equivalent to hardship in the CISG, so that art. 79 by itself could not provide a solution to the case. Therefore, the drafters would have provided mechanisms for supplementing it on art. 7.

Thus, one of the issues would be defining whether dealing with a hardship case under art. 79 CISG would be appropriate, or if a domestic law allowing for hardship should be applied.[102]

Often, domestic laws have a deep resemblance with CISG, especially its art. 79. Therefore, at a first glance it would be possible to use them to interpret the concept of hardship and to define the consequences of this situation. However, as stated by Nicholas (1984, p. 5-1 to 5-24), there is a great danger in relying on a superficial harmony of domestic laws, which in fact hides a great disagreement between them. Similarly, according to Enderlein and Maskow (1992, p. 258-272), there would be no gap to be fulfilled by a domestic law, besides the huge differences between them and the damage to the unification of the Convention.

According to Honnold (1999, p. 472-495)[103] there is a danger of the tribunals unconsciously associating the Convention to the standards of their domestic rules. This would be inconsistent with the Convention and its purposes, since art. 7(2) allows the application of a domestic law according to the international private rules only as a last

[102] GARRO, Alejandro M. *Comparison between provisions* ... cit.

[103] According to the author, this can be minimized by looking at the differences between the domestic law and CISG. Similarly, Tallon (1987, p. 572-595) points out a concern with the interpretation of the tribunals that their domestic laws would be more modern and appropriate.

resort, i.e., when the issues are not expressly dealt with by the CISG and neither can be solved in conformity with its general principles.

On the other hand, as for the author, this problem would not arise with a comparative law analysis in search for guidelines of the prevailing patterns and modern trends in domestic laws. Therefore, the relevant domestic laws would mirror the usages and problems of the international trade, or national problems comparable to them, besides modernizing traditional and archaic schemes.

However, this proposal seems erroneous. First, domestic rules are not designed to specifically deal with the problems of international commercial contracts. Even if well drafted, their scope is to govern national commercial relations that do not display the same problems of international trade.

Moreover, it seems a little rash to say that there would be a global legal trend that would mirror a modernization. There is no such thing as a global trend, but instead there are several trends around the world, with a *continuum* of solutions between the rigidity of *pacta sunt servanda* until the possibility of amendment of the contract by the courts. Such analysis has the risk of becoming "Eurocentric", basing in more or less homogeneous concepts within central European countries, which would compromise the global uniformity of the interpretation of the Convention.

According to other authors (FLAMBOURAS, 2002; RIMKE, 2000, p. 197-243), the solution would not be through references to domestic legal systems, as it would conflict with the idea of uniformity of art. 7(1) CISG. Moreover, since the history of art. 79 would exclude the possibility of a relevant gap, hardship would not have been expressly excluded, and thus the domestic concept could not be introduced.[104]

Art. 7(1) provides for the need to interpret the Convention in light of its international character and the need to promote uniformity in its application. However, this could only be attained if it was possible to extract from the minds of the enforcers their presuppositions derived from domestic traditions and concepts, thus reading art. 79 in light of the international trade practices and usages.[105]

Another suggestion by Honnold (1999, p. 472-495), which seems more plausible, is to interpret the article based in general sales conditions, model contracts, prepared by representatives of buyers and sellers in the international trade. According to the author, these contractual terms and standards globally recognized and observed by the parties may consist in a usage that the parties implicitly applied to their contract, besides

[104] CISG SECRETARIAT. *Guide to CISG* ... cit., p. 1-8.

[105] HONNOLD, John O. Impediments excusing party from damages ("Force majeure"). In: _____. *Uniform Law for International Sales under the 1980 United Nations Convention*. 3rd ed. Hague: Kluwer Law International, 1999. p. 472-495. p. 472-495.

informing the tribunal about the practical effects of certain interpretations. This could bring to light concepts as "*reasonable expectations*".

Although this proposal is more acceptable, it should be carefully used, since it also risks being "Eurocentric" when basing on model contracts from certain countries or regions. It is undoubtedly important to pay attention to legal practices and trade usages (the so-called *lex mercatoria*), but a more appropriate departing point would be regionally or globally accepted terms, such as the UNIDROIT Principles, the European Principles, besides case law and international doctrine.

4.4. Resort to the European and UNIDROIT Principals as an evidence of the international trade usages and practices

Apart from resorting to domestic rules, an alternative that pleases many authors (FLAMBOURAS, 2002; PERILLO, 1998, p. 111-113*;* PRADO, 2010, p. 1-20) is to use international documents that expressly deal with hardship to supplement the Convention, namely the PECL and the PICC. Considering the danger of applying domestic rules, possible international standards of the international trade seem relevant for defining whether an event is an impediment.[106]

Art. 9(1) of the Convention provides that parties are bound by usages they combined or established. Unless otherwise agreed, they are bound by trade usages that they are aware of or should be, and that are broadly known in the international trade and regularly observed by similar parties.[107] In this sense, it can be questioned whether the UNIDROIT Principles or the European Principles could be used as *soft law*, thus mirroring international trade practices and usages. According to the UNIDROIT Principles' preamble, they can be used to interpret and supplement an international uniform or model law.

According to Kessedjian (2005, p. 641-670) it is difficult for a court to see the UNIDROIT Principles as general principles upon which CISG is based. Formally and strictly speaking, the Convention is previous to the PICC, and these dealt with hardship when it was still unknown to several legal systems. Therefore, they could only be applied if specifically provided by the parties. Although the PICC claim themselves as general principles of law, they do not have the authority to auto claim them as such.

Similarly, according to many commentators[108] and to the case law, the use of the UNIDROIT Principles seems to be forbidden. Although for many judges the

[106] HONNOLD, John O. *Impediments excusing* … cit., p. 472-495.
[107] SOUTHERINGTON, Tom. *Impossibility of performance* … cit.
[108] SOUTHERINGTON, Tom. *Impossibility of performance* … cit.; MASKOW, Dietrich. *International*

hardship rules in the UNIDROIT Principles may be used as means for the interpretation and supplementation of art. 79, according to commentators the article does not have a gap related to hardship situations, since many proposals during the drafting of the Convention were expressly rejected.

For Slater (1998, p. 231-262), the PICC would not represent, in their totality, general principles upon which the CISG is based. Art. 7 would represent a diplomatic compromise between the *civil law* and *common law* perspectives on the fulfillment of gaps, which would be broken by the application of the PICC. Such view would be intellectually dishonest and full of flaws, since there would be many incongruences between CISG's and PICC's provisions. Moreover, it would be contrary to the wording of the Convention, which expressly authorizes the fulfillment of gaps through the resort of national laws, and since the PICC were published after the CISG, at least some of its provision were new and could not constitute general principles upon which the CISG is based.

According to the author, some civil law commentators would stress the notion that the PICC would constitute the reestablishment of law. However, this would not be entirely true, since in several moments the PICC intentionally deviate from existing legal traditions so as to obtain better solutions, despite not generally adopted, as is the case with the hardship provisions.

However, these comments should be criticized. The author seems to simplify the debate as a civil law vs. common law dispute, using it as an argument for not applying the PICC. More than that, it disregards the importance of the PICC as soft law, evidencing international trade practices and usages and part of the so-called *lex mercatoria*. Since the CISG is from the 70's and the PICC from 1994, the later seem to mirror the evolution of the general law principles upon which CISG is based. Therefore, applying them seems positive to an evolution of the Convention and to allow its longevity, as long as it is not contrary to the Convention itself.

On the other hand, some authors (PRADO, 2010, p. 1-20; RIMKE, 2000, p. 197-243) seem to accept the idea of applying the PICC to supplement the Convention. According to Rimke (2000, p. 197-243), art. 7(1) CISG would expressly authorize it. However, the potential use of the PICC must be examined through art. 7(2) – which

sales … cit., p. 657-669. According to Slater (1998, p. 231-262), it cannot be said that the principle is internationally unanimous. It is not found in the CISG, although there were attempts of including it. In 1977, UNCITRAL considered incorporating one article about hardship, but the proposal was rejected. Moreover, during the debates one Argentinean representative objected a proposal that suggested that, instead of the exoneration, the best remedy would be an equal amendment of the contract due to a fundamental change of the contractual basis. This proposal did not receive the support from other representatives and CISG's text does not contain provisions that allow the contractual amendment, so that the hardship is contrary to the spirit of the Convention.

establishes that questions within the scope of the CISG but not expressly solved by it should be decided in accordance to the general principles in which it is based and, as a last resort, to a domestic law. Since CISG does not indicate upon which general principles it is based, it is not easy to decide whether a certain question would be within the scope of the Convention. In this case, the UNIDROIT Principles could, in some cases, be part of the general principles, providing a basis for its supplementation.

Moreover, as stated by PRADO (2010, p. 1-20), art. 79 would not be replaced by the PICC, since the inclusion of hardship within the article is different from the discussion on the effects of its application, so that the adaptation of the contract does not need to be applied. According to the author, however, nothing would prevent a court to apply the art. 79 isolated or combined with the PICC.

Such idea is the most appropriate. The so-called *lex mercatoria* seems to be essential to interpret the Convention, according to its art. 7(1) and (2) and art. 9(1), and is evidence by international treaties, trade usages and practices and standard clauses. For this purpose, the UNIDROIT Principles and the European Principles would be excellent documents, since they mirror the international trade usages and practices as *soft law*.

Since the CISG is applied by local courts, attached to its domestic legal ideas, they have Always the natural predisposition of Reading the Convention under the view of local concepts. However, the international criticisms ill certainly help to avoid such tendency, by clarifying the purpose and the intention of the CISG's wording, under an international standpoint.[109]

5. Conclusion

Nowadays, several different international and national rules deal with the problem of supervening contractual imbalances, mitigating the stiffness of *pacta sunt servanda* and allowing for cases of termination or amendment of the contract, as long as certain conditions are fulfilled. The experience demonstrates that the contracting parties are often not so sophisticated or do not insert clauses that cover the most eventualities as possible, due to the immense transaction costs involved.[110] Therefore, if the risk of changed circumstances is not contractually allocated, the parties to an international commercial contract, or eventually the (judicial or arbitral) courts, will have to decide who should bear the unforeseen burden, based on legal standards internationally applicable.

In the current international trade scenario, the CISG, the UNIDROIT Principles and the European Principles are the most relevant documents concerning

[109] RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243.
[110] COMMENT and Notes: … cit.

commercial contracts. Regarding supervening contractual imbalances, they all display similar features, especially due to the fact that the two latter were designed based on CISG. However, there are fundamental differences as to the handling of the hardship and force majeure phenomena. If, one the one hand, all of the abovementioned documents seem to be unanimous as to the coverage of force majeure situations, providing mechanisms for the exoneration of the disadvantaged party, on the other hand, the solutions related to hardship vary considerably.

The CISG does not expressly deal with the hardship problem (even though it also does not expressly refer to force majeure), treating both problems under the same provision. However, as demonstrated in this paper, the CISG seems to comprise both phenomena under its article 79, avoiding any direct reference to national concepts and developing its own criterion of "impediment out of control". The majority of the commentators also seem to allow changes in circumstances to be impediments in serious cases.[111]

According to Schwenzer (2009, p. 709-725), this approach would be the most appropriate, since establishing the limit between force majeure and hardship is extremely delicate. The majority of the events do not turn the performance impossible, but instead excessively burdensome. Therefore, CISG's remedies system would offer enough flexibility to reach fair results, stimulating the good faith and justice in the international commercial law.

The inclusion of hardship within art. 79 is also essential to regulate situations in which there is a frustration of the purpose of the contract. This is possible since such phenomenon is a type of hardship situation, as explained above. Therefore, a broad interpretation of art. 79 allows the ruling of several imbalance situations which are present in a vast number of legal systems around the world, avoiding the resort to domestic ruling of these situations.

Although these arguments would suffice to justify the inclusion of hardship within the CISG, this view is strengthened by the fact that hardship is expressly provided in other texts that seek the international harmonization of commercial contracts, such as the PICC and the PECL. Both set of principles contain a complete structure of legal tools to deal with changed circumstances, providing rules for exoneration, specific non-performance, damages liability, as well as readjustment and negotiation mechanisms, comprising impossibility, force majeure, frustration and hardship.[112] It is essential to look at these principles as part of an attempt to harmonize the international regulation of commercial contracts, helping in the interpretation of the CISG itself.

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111 RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243.

112 SOUTHERINGTON, Tom. *Impossibility of performance* … cit.

As the general formula of art. 79 CISG leaves a broad margin for judicial interpretation, national courts could associate this provision with similar domestic concepts. Judges may identify their own national laws as more appropriate and better designed, applying them instead of the Convention, which would lead to disastrous results to the uniformity of its interpretation. Although circumstances may vary, they should be uniformly interpreted according to art. 7 CISG, especially having in mind that many events with big international repercussions can affect several international contracts.[113] For this purpose, art. 79 seems to offer an adequate general frame, as long as it is interpreted paying regard to the context of the contract and the international trade usages.[114]

Even if the CISG does not conclusively regulate the hardship situations, the PECL and PICC provide for more modern approaches to the same problems, reestablishing the international law on commercial contracts. Although these principles do not have the binding effect of a treaty, they are cases of "*soft law"* and reflect the evolution of the general principles of law upon which the CISG is based. They are part of the so-called *lex mercatoria,* and shall be considered in the interpretation of the Convention, according to its articles art. 7(1) and (2) and art. 9(1), since they mirror the international trade practices and usages.

On the other hand, such interpretation cannot be contrary to the wording of the Convention itself. Even if the right to renegotiate and to the amendment of the contract would be remedies better designed for the cases under article 79, this provision does not allow their application under the Convention.[115] While in the UNIDROIT Principles the courts can directly alter the contractual term in view of restoring the equilibrium, under the CISG the maximum possible would be to determine the bad faith of a party for not accepting a substitute transaction.

At last, art. 6 CISG provides that the terms agreed by the parties may derogate the Convention. Since the terms related to changed circumstances and hardship are of extreme relevance and high complexity, parties should expressly provide for its consequences under readjustment clauses or even through a reference to the UNIDROIT Principles or European Principles, which are both better suited to deal with hardship cases.[116/117]

113 TALLON, Denis. Art. 79 … cit., p. 572-595.

114 NICHOLAS, Barry. Impracticability and impossibility in the U.N. Convention on Contracts for the International Sale of Goods. In: GALSTON, Nina M.; SMIT, Hans (Ed.). *International sales*: the United Nations Convention on Contracts for the International Sale of Goods. New York: Matthew Bender, 1984. Ch. 5, p. 1-24.

115 RIMKE, Joern. *Force majeure and hardship* … cit., p. 197-243.

116 HONNOLD, John O. *Impediments excusing* … cit., p. 472-495.

117 COMMENT and Notes: … cit.

Especially in Brazil, the upcoming opportunities from the recent ratification of the text of the Convention shall not be wasted, otherwise the country may push away several business transactions and foreign investment essential for the development of its economy. Any relation to national concepts such as "*força maior*" or "*onerosidade excessiva*" should be avoided, on behalf of more legal certainty and the international approach of the Convention.

Due to the scarcity of national papers on this topic, this article provides a brief discussion on the application of the Convention to hardship cases, which leads to many problems in its application around the world and probably will as well in Brazil.

São Paulo, 31 August 2015.

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