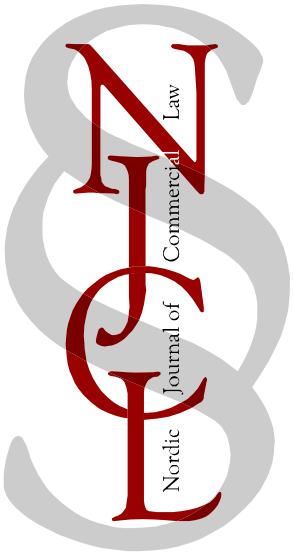

Changed circumstances and Hardship in the International Sale of Goods

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I. INTRODUCTION

The purpose of a contract is to establish the contracting parties' rights and responsibilities under the contract. Both parties' interest, at least at the time of entering into the contract, is to see that the contract is performed as agreed. It is essential that the parties to a contract are familiar with the contents of the contract and possible non-mandatory regulations that might complement the contract.

A failure to perform a contract often results in liability for damages. Whether a party is liable for a breach of contract is largely dependent on how strict the liability is under the contract, i.e. which prerequisites must be fulfilled in order for liability to arise. In the United Nations Convention on Contracts for the International Sale of Goods (hereinafter the "CISG" or the "Convention") a party is liable for all events in its control. In other words a party is liable unless the event causing the breach of contract is beyond its control.

After the conclusion of a contract but before the contract is performed a party's situation may change due to changed circumstances, especially when the contract is to be performed over a long period of time or in a more distant future. In accordance with what could be called the foundation of contract law, pacta sunt servanda, changed circumstances are of no relevance with regard to a party's rights and responsibilities under the contract. A breach of contract results in liability. It cannot, however, be regarded as reasonable that a party would always be required to perform the contract regardless of what happens with the surrounding circumstances. Such a legal state would be too harsh. Hence, it is important that a contract in exceptional cases can be adapted to changed circumstances. However, also situations where all contracts would automatically be entered into with a precondition that circumstances do not change or where contracts due to even slight changes would be adapted or avoided would be fatal for international trade. This would admittedly result in a flexible legal state but at the same time the contract as a legal transaction would lose its importance.

The doctrine of pacta sunt servanda needs, thus, exceptions that can be applied in special circumstances. Most national legal orders contain such provisions. Some provisions allow a deviation from what has been agreed on only in cases of impossibility, other provisions allow a deviation also when the performance of a contract has become much more onerous but not impossible. Such provisions provide some flexibility to legal relations that can be regarded as appropriate and should not be in conflict with the general concept of justice.

This Article discusses a breaching party's exemption from liability under the CISG due to changed circumstances. The Article contemplates the relationship between the doctrine of hardship and an exemption from liability under the CISG. Under the CISG a party is responsible for all events in its control and a party's liability is independent of its negligence. However, a party shall not be liable for a failure to perform the contract if the failure was due to an impediment beyond its

control. It is important to discuss what can be regarded as an "impediment beyond control", as the Article concentrates on a party's possibility for an exemption in situations where a performance has become more expensive than expected and the equilibrium of the contract has been altered due to changed circumstances and a performance in the new situation would be something totally different than at the time of the conclusion of the contract. The latter can be referred to as a situation of hardship.

II. HARDSHIP

There is no explicit rule in the CISG for situations of hardship. Hence, the question whether situations of hardship are governed by the CISG (and how) shall be considered by means of the provision on exemptions in Article 79.

As the CISG does not include a provision on hardship, no definition on what is understood by the term hardship can be found in the CISG. The UNIDROIT Principles of International Commercial Contracts (the "UNIDROIT Principles") Article 6.2.2 defines hardship in the following way:

"There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party."

Hardship is in this paper understood in accordance with the definition of hardship in the UNIDROIT Principles. Hence, there is hardship when an external event fundamentally alters the balance of the performances under the contract and an unreasonable burden is placed on one of the parties. The performance of the contract becomes excessively onerous due to changed circumstances for one of the parties who is thus faced with hardship. The burden is often economic.[1] In case of hardship it is not impossible to perform the contract, only excessively more onerous than at the time of contracting.

In accordance with the UNIDROIT Principles and the Principles of European Contract Law (the "PECL"), a party faced with hardship is not automatically released from its obligations under the contract. A normal effect of hardship is that the disadvantaged party is entitled to renegotiations and adaption of the contract with a view to restoring its equilibrium. The last alternative is termination of the contract.

[1] Flambouras 2001, p. 282.

III. CHANGED CIRCUMSTANCES AND CISG ARTICLE 79

1. Background

Even before the CISG there has been a will to draft an international convention for the sale of goods. Work that began in the 1920's resulted in 1964 in two conventions, the Convention relating to a Uniform Law on the International Sale of Goods ("ULIS") and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULF"). These two conventions did not succeed and were ratified by only 9 states.[2]

Shortly after the drafting of ULIS and ULF a new working group was appointed in order to draft the text for a new Convention. The wording of the new Convention would be based on the already existing conventions, ULIS and ULF. The result of the working group was a draft for a new convention that was ready in 1978. A Diplomat Conference, in which representatives from 62 states and 8 international organisations participated, was held in Vienna in 1980. After 10 states had ratified the CISG, the Convention came into force on 1 January 1988.[3] Thereby, the CISG is a result of more than 50 years' work.[4]

2. Remedies Under the CISG – An Overview

When a contracting party fails to perform its obligations under the contract, the non-breaching party may resort to different remedies under the CISG. The main remedies are the right to require performance, the right to declare the contract avoided, reduction of price and compensation for damages.

Avoidance of a contract is possible only if the breach amounts to a fundamental breach of contract or when the party in breach does not perform within an additional period of time. When a reduction of price comes to question, the price may be reduced in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. Damages have on the other hand a dual role as a remedy. Damages can namely be claimed as a separate remedy or in combination with other remedies.

In the following chapters a breaching party's possibility to an exemption from damages is examined. It must be noted that the CISG as a point of departure only provides for an exemption from damages. The other remedies are still possible even if their effect might suffer from the fact that damages no longer can be claimed.

3. Exemptions

CISG Article 79 and CISG Article 80 provide for situations in which a party is exempt from the strict liability that is otherwise applicable under the Convention. Article 79 provides exemptions

[2] The states that ratified ULIS and ULF are Belgium, Gambia, Israel, Italy, Luxembourg, the Netherlands, San Marino, Great Britain and West-Germany.
[3] Ramberg, Herre 2004, p. 47.
[4] Bonell 2000, p. 90.

from damages and Article 80 expresses a general principle according to which "a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission". As Article 80 is included in the section regarding exemptions and directly in connection with Article 79 on exemption from damages, Article 80 is regarded only as a complement to Article 79 and not as an independent provision that could also be applied in other situations than regarding damages resulting from a breach of contract.[5] Article 80 will not be discussed in this Article.

During the drafting of Article 79 it was regarded as vital to create an independent expression for the ground on which an exemption from damages could be claimed. The explanation was that a ground for exemption that would derive from a national law would be influenced by the meaning that the expression (e.g. Wegfall der Geschäftsgrundlage, force majeure, imprévision, frustration, impracticability) has in national law and by the legal praxis in the country in question.[6]

CISG Article 79 is the counterpart of ULIS Article 74. ULIS was regarded as making an exemption due to changed circumstances too easily possible[7], wherefore the drafters of the CISG consciously rejected the regulation in ULIS.[8] However, in the interpretation of CISG Article 79 guidance is often taken from ULIS Article 74. The argument is that the interpretation of CISG Article 79 must be stricter than the interpretation of ULIS Article 74, as the drafters' intent was to create a more rigid rule for exemptions under the CISG.

4. Exemption from Damages

As stated above, a party's exemption from damages due to a breach of contract is governed by CISG Article 79. According to Article 79(1):

"A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."

The Article states four different conditions that all must be fulfilled in order to make an exemption possible:

1) An impediment, 2) beyond control, 3) that could not reasonably have been taken into account at the time of the conclusion of the contract and 4) the consequences of which could not have been avoided or overcome.

These conditions are the traditional elements of force majeure and it seems that Article 79 is primarily intended for that type of situations.[9] However, Article 79 contains several wordings that leave room for interpretation or require an evaluation of reasonableness and it is not always clear how the Article should be applied to an actual case.

[5] Tallon 1987, p. 596-600, Honnold 1999, p. 495 and Ramberg, Herre 2004, p. 565.
[6] Ramberg, Herre 2004, p. 565-566.
[7] Rimke 2000, p. 211.
[8] Ramberg, Herre 2004, p. 568.
[9] Tallon 1987, p. 578.

Tallon has noted that the interpretation of Article 79 becomes even harder as the French and English versions of the Convention, which both are authentic, seem to be somewhat different. Where the English version states "impediment beyond his control", the French version states "un empêchement independent de sa volonté", which Tallon translates as "independent of his will". According to Tallon, the more objective English version is preferred instead of the more subjective French version.[10] It is possible that this difference in the wording of the CISG defers from the fact that the national English doctrine of frustration can be seen as more objective than the French doctrine of imprévision. However, the also authentic Spanish version ("un impedimento ajeno a su voluntad") seems to be in line with the French version. Ramberg and Herre note that the French and Spanish versions of the Convention seem to refer to what is subjectively possible to avoid. The scholars are, however, of the opinion that this has probably not been the intention and thereby give their support to the English wording.[11]

Even if Article 79 is one of the longer articles in the Convention and has been the object of extensive preparations, the Article is unsatisfactory in many ways. This does not, however, cause as many practical problems as one could imagine as most standard agreements and other agreements contain force majeure clauses and even hardship clauses that deal with questions that otherwise would fall under Article 79.[12] It must be kept in mind that the CISG is non-mandatory and Article 6 allows the parties to exclude the application of the Convention and to derogate from or vary the effect of any of its provisions.

The burden to prove that all the prerequisites of Article 79 are fulfilled lies with the party claiming relief.[13] In the following the prerequisites of Article 79 will be examined in more detail.

4.1. Impediment

The term "impediment" that is used in the CISG has not been defined in the Convention or elsewhere. In ULIS the word "circumstances" was used instead of "impediment". By replacing "circumstances" with "impediment" the drafters of the Convention wanted to take distance from ULIS as well as underline the objective nature of the impediment and a narrow interpretation of the term. It is important to keep this in mind in the interpretation of Article 79.[14]

What constitutes then an impediment under Article 79? It is clear that something which makes the performance objectively impossible can constitute an impediment.[15] A party cannot be asked to perform what is impossible (impossibilium nulla obligatio est). Hence, the fact that the sold item is destroyed constitutes an impediment in the sale of specific goods. Also events such as war, civil war, acts of terrorism and export or import bans as well as natural catastrophes can constitute impediments within the meaning of Article 79.[16] It is impossible and also inexpedient to make an exhaustive list of events that can constitute an impediment. The evaluation must be done in casu. It is also important to note that no event can constitute an impediment only due to its nature, but

[10] Tallon 1987, p. 579.
[11] Ramberg, Herre 2004, p. 566.
[12] Hudson 1991, p. 176.
[13] Lookofsky 1996, p. 102.
[14] Stoll, Gruber 2005, p. 812, Tallon 1987, p. 579 and Ramberg, Herre 2004, p. 568.
[15] Gomard, Rechnagel 1990, p. 222.
[16] Government decree 1986:198, p. 37.

the event in question must also in fact prevent the contracted performance. For example, a war does not constitute an impediment if the agreed performance is still completely possible.

Events such as war, mutiny and government bans are typical situations of force majeure. The question whether also an event which does not make the performance of a contract impossible can constitute an impediment under Article 79(1) is more interesting. The question is whether an event that only makes the performance significantly more difficult can constitute a relevant impediment?

An important type of situation where the performance of a contract due to changed circumstances has become significantly more difficult or burdensome is when fulfilment in the new situation would become much more expensive than the agreed performance, i.e. when a significant rise in costs create what can be called an economic impediment for performance. All trade is associated with risks and the hardship provisions in both the UNIDROIT Principles and the PECL stress that even if performance becomes more onerous for a party, the party is still obligated to perform.[17] This must be seen as a wanted legal status and marks the balance between the principles of pacta sunt servanda and rebus sic stantibus. The strong starting point under the UNIDROIT Principles and the PECL is that events causing price increases or other objectively avoidable impediments are irrelevant. The same can be assumed to apply under the CISG.

UNILEX d. 02.05.1995 (Belgium, Rechtbank van Koophandel, Hasselt). A Chilean seller concluded a contract with a Belgian buyer for the delivery of frozen raspberries. The contract provided that the buyer should pay through letter of credit. Failing the required opening of the letter of credit, the seller did not proceed to ship the goods. The buyer asked for a delay in the delivery and requested the company which had acted as mediator to negotiate with the seller for a lower price, alleging a significant drop in the world market price for the purchased goods. The seller refused to accept a reduced price, declared the contract avoided and commenced an action to recover damages.

The Court held that the significant drop in the market price of the purchased goods after the conclusion of the contract did not constitute a case of force majeure exempting the buyer for non-performance under Article 79 CISG. Fluctuations of prices are foreseeable events in international trade and far from rendering the performance impossible they result in an economic loss well included in the normal risk of commercial activities.

Also note **UNILEX d. 12.06.2001** below.

But is the situation different if changed circumstances have caused such increases in price that are completely outside the preconditions of the agreement and a performance in the new situation would be something completely different than what the parties have agreed upon? The question whether economic difficulties (in the Nordic countries also known as economic force majeure) in exceptional cases could constitute an impediment has been discussed. Schlechtriem asserts that the general view during the preliminary UNCITRAL discussions was that both physical and economic impossibility could exempt an obligor. He notes, however, that economic difficulties only under very narrow conditions can constitute an impediment and that increased procurement

[17] UNIDROIT Principles Article 6.2.1. and the PECL Article 6:111.

and production costs alone do not constitute exempting impediments.[18] Also Honnold is of the opinion that impossibility cannot be the prerequisite of an impediment, which seems to indicate that also events that make performance excessively more difficult could constitute relevant impediments for performance.

4.2. Beyond control

To show that a relevant impediment has occurred is not enough for being granted an exemption under Article 79. The party claiming an exemption must also prove that the impediment is beyond its control.

Article 79 is based on the thought that a party is responsible for all events that normally are within its control and on which the party normally can make an impact. This is the case even if the party in a particular case could not affect the occurrence of the impediment. Hence, a party's actual possibility to control events is irrelevant. What matters is what kind of events a party normally can control.[19] An event constituting an impediment beyond control must be of a type that is uncontrollable.[20]

Only events outside a party's sphere of control can be regarded as relevant grounds for an exemption. No event within a party's sphere of control, such as events relating to a party's person or a party's employees, can exempt a party from its contractual liability.[21] The content of Article 79 can be described as a strict responsibility with exception for impediments beyond control.[22] Also assistants used in order to fulfil a contract are within a party's sphere of control and a so called double force majeure is required in order for an exemption to be possible.[23]

4.3. Unforeseeability

For an exemption to be possible under CISG Article 79, the impediment beyond control must be unforeseeable. Hence, a party is obligated to compensate for damages even if these are the result of an impediment beyond control, if the party reasonably could be expected to have taken the impediment into account at the time of the conclusion of the contract. The question of unforeseeability requires an evaluation of reasonability.[24]

Article 79 refers to the words "could not reasonably" to the standard of bonus pater familias or "the reasonable person". According to Tallon, this is a person "halfway between the inveterate pessimist who foresees all sorts of disasters and the resolute optimist who never anticipates the least misfortune".[25] Reoccurring events such as flu epidemics and rain periods are foreseeable and cannot be referred to in order for a party to be exempt. Nor can an import prohibition, which can constitute an impediment beyond control, qualify as a ground for an exemption if a reasonable

[18] Schlechtriem 1986, p. 102.
[19] Government decree 1986:198, p. 37.
[20] Ramberg, Herre 2004, p. 569.
[21] Stoll, Gruber 2005, p. 815-817.
[22] Sandvik 2004, p. 102.
[23] CISG Article 79(2).
[24] Ramberg, Herre 2004, p. 571.
[25] Tallon 1987, p. 580-581.

person in the same situation could have foreseen the prohibition at the time of the conclusion of the contract.[26] If an event is foreseeable, the defaulting party is considered as having assumed the risk of its realization.[27]

According to Lookofsky, the fulfilment of the unforeseeability element is the hardest one to prove, as virtually all potential impediments to performance are foreseeable to some extent. Lookofsky also purports that even dramatic price increases are foreseeable, which suggests that an exemption rarely could be available in that type of situations. Those who sell goods on a long-term basis are in the business of assuming that kind of risk.[28] Stoll and Gruber point out, however, that since virtually all events are theoretically foreseeable it would be wrong to interpret Article 79 purely empirically. Instead, the scholars argue that the question of foreseeability is one about what a party reasonably could foresee. Thereby the scholars give their support to the view that also this element of Article 79 requires an evaluation of reasonability. The scholars argue that Article 79 expresses an allocation of risk for the completion of the contract. According to this, the notion of unforeseeability ought to be understood in the following way: Should a party under conditions prevailing at the time of the conclusion of the contract and taking into account the trade usage within a particular branch have foreseen that an impediment exists or that an impediment will occur?[29]

4.4. Avoidance

Even if all elements discussed above are fulfilled, an exemption under Article 79 still requires that the breaching party could not have avoided or overcome the impediment or its consequences. Hence, a party is required to take active appropriate measures in order to avoid the impediment or the consequences of the impediment.[30]

Tallon describes the meaning of the term "avoid" by "taking all the necessary steps to prevent the occurrence of the impediment" and the meaning of the term "overcome" by taking all the necessary steps to preclude the consequences of the impediment". Also here reference is made to the reasonable person, i.e. how a person with the same knowledge and expertise would have acted in a similar situation. The evaluation of what is possible to overcome can create difficulties. It is one thing to determine what is objectively impossible to overcome and another thing to determine where the line should be drawn to economic impossibility. How extensive economic sacrifices is a party obligated to make? A ship carrying an object sinks to the bottom of the sea. The object can be retrieved in good condition but at a great cost. Is a seller obliged to retrieve the object and fulfil the contract? The result can hardly be the same regardless of the object's value. Naturally, also here a case by case analysis is required.[31]

In November 1956 the Suez Canal was closed due to military actions between Israel and Egypt. Export companies had entered into contracts with a CIF clause before the closing of the canal but the delivery was to take place after the canal had been closed. On the day of delivery the only

[26] Ramberg, Herre 2004, p. 571.
[27] Tallon 1987, p. 580.
[28] Lookofsky 1996, p. 103.
[29] Stoll, Gruber 2005, p. 817.
[30] Ramberg, Herre 2004, p. 572.
[31] Tallon 1987, p. 581.

possible route was the considerably longer route around the Cape of Good Hope. Delivery was possible but was much more difficult and expensive for the seller. British courts applied the doctrine of frustration and found that the impediment was not such to exempt the sellers.[32] Also under the CISG a seller is obliged to transport goods in a significantly more expensive way in order to overcome the impediment, even if this would result in a loss for the seller.[33]

Most impediments can be overcome in one way or the other. The question is how extensive economic sacrifices a party is obliged to face in order to overcome an impediment. This limit, which a party is not obligated to exceed in order to fulfil a contract, is often referred to as the sacrifice limit or sacrifice threshold.[34] It is impossible to decide on a general level where this limit of sacrifice lies. That is a question of reasonability and must naturally be decided on a case-by-case basis.[35] However, the evaluation ought to be strict and only in exceptional cases allow for an exemption. The conclusion is that an exemption under the CISG should be possible if the occurrence is such that it would fall under the Nordic concept of economic force majeure or the American concept of commercial impracticability.[36] Tallon is of the opinion that even if the CISG seems to provide for a more flexible view on changed circumstances than the traditional concept of force majeure, the CISG is nevertheless stricter than the concepts of frustration and commercial impracticability.[37]

An important aspect also in this evaluation is which measures one could reasonably expect a party to take in order to overcome an impediment. A party must take measures that are customary or which similar persons in a similar situation would take. An exemption is possible only when stricter measures would be required.[38] In the evaluation of the sacrifice limit only efforts within reasonable economic limits can be taken into account. Nearly all impediments can be avoided, but all means are not economically possible and a party cannot be obliged to perform miracles. The reasonable person test is of importance also in this evaluation.[39]

It can be noted that also the time of the occurrence of the impediment can be of significance for a party's possibility to overcome the impediment. An impediment occurring close to the agreed delivery date can be harder to overcome than an impediment occurring earlier. The point of time can even be of importance in the assessment whether an impediment has occurred at all.[40]

At times a party can be obliged to deliver a commercially feasible substitute which fulfils an intended purpose as well as the product agreed upon in order to overcome the impediment.[41] In case **UNILEX d. 28.2.1997 (Oberlandesgericht Frankfurt)** the court held that "in case of replaceable goods, the seller could only be exempted from its liability when it is impossible to find on the market goods of similar quality, a circumstance that in the case at hand had not been

[32] Darcy, Murray, Cleave 2000, p. 113.
[33] Stoll, Gruber 2005, p. 817.
[34] Nystén-Haarala 1998, p. 183-184, Lookokfsky 1996, p. 103 and Runesson 1996, p. 268.
[35] Runesson 1996, p. 268.
[36] Sandvik 2004, p. 89. A case often referred to concerning commercial impracticability is "Florida Power and Light Co. V. Westinghouse Electric Corp.). In this case Westinghouse pleaded commercial impracticability as the price of Uranium had increased by 600%. Westinghouse refused to deliver, as the fulfilment of the contract would have resulted in losses of 2.5 billion dollars for Westinghouse. The court held that "Westinghouse did not meet its burden of establishing that it is entitled to excuse".
[37] Tallon 1987, p. 592.
[38] Enderlein, Maskow 1992, p. 324.
[39] Zeller 2005, p. 182.
[40] Wilhelmsson, Sevón, Koskelo 1999, p. 64.
[41] Stoll, Gruber 2005, p. 818.

proved by the seller". However, a buyer is not obliged to accept a substitute even if it was very similar to the agreed goods. This can result in a situation where a seller is liable even if the seller offers the buyer a substitute almost identical with the agreed goods but which the buyer rejects without reason. Hence, also a seller's obligation to offer a commercially feasible substitute can be criticised.[42]

IV. HARDSHIP AND CISG ARTICLE 79

1. Alternatives in the CISG for a Solution on Situations of Hardship

The CISG takes a traditional perspective on the fulfilment of contractual obligations. Naturally, the main principle is the traditional doctrine of "pacta sunt servanda", i.e. a contract shall be fulfilled as the parties have agreed. The only Article in the CISG that regulates changed circumstances is Article 79. Hence, all situations of hardship must be evaluated on the basis of Article 79 or be treated as a breach of contract. The CISG does not seem to have any provision that would allow a different solution than the ones mentioned above. No provisions are found for the type of situations that are between a clear breach of contract and impossibility. Such provisions can be found in many national jurisdictions and international principles.[43]

In the absence of an explicit hardship provision it is of great importance to find an answer to the question whether article 79 governs hardship, as the other alternative seems to be full liability for the party suffering hardship. A third alternative could, however, be that there is a gap concerning hardship in the CISG, which then in accordance with CISG article 7(2) would be settled in conformity with the general principles on which the CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Such a solution could allow for an adaption of the contract due to changed circumstances.

When looking for an answer to the question whether Article 79 regulates hardship, the first step is to define what is understood by the question. It is possible that the CISG regulates hardship in a way that non-performance or a faulty performance due to hardship always shall be regarded as a breach of contract. This solution would mean that a contractual imbalance caused by changed circumstances could not be regarded as an insurmountable impediment. Furthermore, Article 79 could be interpreted to allow an exemption from liability for non-performance in case of hardship. In the latter case it would be of importance to decide what can be regarded as an impediment within the meaning of Article 79 and what can be expected from a party to overcome the impediment.

It is also essential to discuss what happens when the impediment ceases to exist. Even if economic impediments can be relevant impediments under CISG Article 79 and even if a party could not be expected to overcome too heavy economic burdens, it is unsettled what happens when the original impediment does not exist anymore but instead the circumstances, e.g. the situation on the market, has changed so dramatically during the time the impediment has existed that a performance in the new situation would be something totally different than what the parties have agreed upon. Can the dramatic change on the market then be a relevant impediment under

[42] Tallon 1987, p. 58 and 586.
[43] Zeller 2005, p. 170.

Article 79 and exempt the party suffering hardship from liability or is a party obliged to perform in such situation in order to avoid liability? Is it possible to complete Article 79 with the general principles of the Convention and in that way allow for an adaption of the contract in cases of changed circumstances?

The alternative solutions when a party is struck by hardship and the CISG is the governing law seem to be the following:

1. Hardship is a question governed by the CISG so that the CISG in the case of hardship does not allow for any kind of deviation from what has been contracted. A breach of contract due to hardship results in full liability for damages.
2. Hardship is regulated by Article 79 so that an exemption from liability in case of hardship is possible during the time the impediment exists. After the impediment has ceased to exist a party is obligated to fulfil the contract. (This is, however, not a question of actual hardship in the way hardship is defined in this article, but a question of an economic impediment for performance.)
3. Hardship is regulated by Article 79 so that an exemption from damages, and possibly even the obligation to perform, is possible even after the impediment has ceased to exist.
4. Hardship is a question governed by the CISG, but not expressly settled in it, wherefore the question shall be settled in conformity with the general principles on which the CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

In the following the questions and alternatives presented above will be discussed. The questions will not be discussed separately, as the discussion concerning one question also concerns the others. The discussion will begin with a further examination of the interplay between the requirements of an impediment and a party's obligation to overcome the impediment. The aim is to find a solution on the question whether relevant economic impediments exist and whether these can be regarded as unavoidable. Next the discussion shifts to problems concerning impediments that exist during a long period of time and the possibility of taking changed circumstances into account under Article 79.

2. Does Article 79 Apply to Hardship?

2.1. An Impediment and the Obligation to Overcome it

On the basis of what has been stated above it is clear that Article 79 contains many words and concepts that can be interpreted in different ways. The question whether situations of hardship are governed by Article 79 is one of the most difficult and most discussed questions concerning the Article. Courts have a significant role in the application and interpretation of the article. An answer to whether an actual case fills all the requirements set forth by Article 79 always requires consideration on many points.[44]

It is material to establish what can be regarded as an impediment and what kinds of impediments a party must overcome. It has been stated above that a relevant impediment does not require a

[44] Tallon 1987, p. 584.

situation of absolute impossibility. Hence, it is clear that also economic impediments can be relevant impediments under Article 79. The question of the relevance of an impediment shall, however, be discussed in connection with what a party should overcome, as economic impediments are always possible to overcome.

Lando states that Article 79 governs both situations of absolute impossibility and situations where performance has become so burdensome that it would not be reasonable to expect performance.[45] Lando's view is supported by other scholars. Gomard and Rechnagel state that a party shall do all that is possible and reasonable in order to overcome an impediment.[46] Routamo and Ramberg point out that absolute impossibility cannot be a requirement for exemption but that the question is what a party reasonably can overcome. As an example the scholars state that it cannot be regarded as reasonable to require a party to save a plane that lays 100 meters below sea level.[47] Such an impediment would be possible to overcome but the scholars regard such an operation as unreasonably expensive.

In the evaluation of what constitutes an impediment that cannot be overcome, the main question is where the limit of sacrifice shall be drawn, i.e. what a party reasonably can be expected to undertake in order to overcome the impediment. The wording of Article 79 does not suggest that a party would be obliged to take on extraordinary responsibilities in order to perform. On the contrary, if the word "reasonably" in Article 79 also regards the obligation to overcome the impediment, Article 79 only obligates a party to make a reasonable effort to perform. According to Article 7[48], stating how the CISG shall be interpreted, regard is to be had to the observance of good faith in international trade when the meaning of the word "reasonable" is sought.[49] The answer to the question on the sacrifice limit shall be sought in an objective risk analysis.[50]

2.2. Long-Term Impediments

Above, the question whether economic difficulties can constitute a ground for exemption under Article 79 has been discussed. The conclusion is that also economic difficulties can constitute an impediment and that the most challenging question on this part is where the limit of sacrifice shall be drawn. Regarding hardship, however, it is more important to find an answer to the question whether the exemption can continue after the impediment has ceased to exist, i.e., is it possible for the effect of the impediment to continue to exist after the impediment has disappeared? Can changed circumstances as such be a relevant impediment? This is of great importance regarding Article 79(1), but also regarding the question of the right to specific performance. The question is controversial.

The time that a party is exempt from liability is stated in Article 79(3):

[45] Lando 1987, p. 299.
[46] Gomard, Rechnagel 1990, p. 223.
[47] Routamo, Ramberg 1997, p. 219.
[48] Article 7: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."
[49] Krüger 1999, point 5.1.
[50] Sandvik 2004, p. 86.

"The exemption provided by this article has effect for the period during which the impediment exists."

It is clear under Article 79(3) that an impediment is of relevance during the time the impediment exists. Hence, measures to perform must as a general rule commence as soon as the impediment has ceased to exist.[51] A party is not liable for its breach of contract if it performs the contract immediately after the impediment has ceased, even if this would be two years too late. The meaning of Article 79(3) can be described with the following example[52]:

Because of a fire which destroyed Seller's plant, Seller was unable to deliver the goods under the contract at the time performance was due. He was exempted from damages under paragraph (1) until the plant was rebuilt. Seller's plant was rebuilt in two years. Although a two-year delay in delivery constituted a fundamental breach which would have justified Buyer in declaring the avoidance of the contract, he did not do so. When Seller's plant was rebuilt, Seller was obligated to deliver the goods to Buyer and, unless he decided to declare the contract avoided because of fundamental breach, Buyer was obligated to take delivery and to pay the contract price.

With regard to situations of hardship it is of great interest whether a party is always obligated to perform after the impediment has ceased to exist. During long-term impediments the preconditions for performance may have changed radically in comparison with performance on the agreed point of time.[53] During the work on the Convention two Norwegian proposals were made for a new third paragraph. The Norwegian delegates were of the opinion that it was not desirable that the exemption ended at the same time as the impediment ceased to exist, as circumstances might change during long-term impediments in such manner that it would be unreasonable to demand performance in the new circumstances.[54] The first Norwegian proposal to Article 79(3) stated:

"Where the impediment is temporary, the exemption provided by this article has effect for the period during which the impediment exists. Nevertheless, the party who fails to perform is permanently exempted to the extent that, after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold him liable."

The obligation to perform after a long-term impediment, during which circumstances have changed radically, ceases to exist was discussed in length during UNCITRAL. It was unclear if and how the Convention applied to situations of hardship. The delegate from Great Britain stated, giving his support to the Norwegian proposal, that it was unclear whether the question of permanent exemption should be decided under national law or not. The Swedish delegate, on the contrary, opposed the Norwegian proposal, among others, on the ground that it was impossible to cover all possible aspects.[55]

The Norwegian delegates also had a second alternative for a new third paragraph in case the first proposal would not be accepted. The delegates proposed that the word "only" that was included

[51] Ramberg, Herre 2004, p. 575.
[52] Secretariat Commentary to article 79. It must be noted that the example is from the time before the word "only" was deleted from the wording of article 79(3).
[53] Ramberg, Herre 2004, p. 577.
[54] Honnold 1989, p. 602.
[55] Honnold 1989, p. 349-350.

in the original proposition would be omitted. The original proposition stated that "the exemption provided by this Article has effect only for the period during which the impediment exists". The first Norwegian proposal was supported by the delegates from many countries but was rejected after voting. Some delegates were of the opinion that the proposal would introduce the French doctrine of "imprévision" to the Convention. The Argentinean delegate was on the other hand of the opinion that the result of radically changed circumstances should not be an exemption from liability, but a fair adaptation of the contract. It is interesting that adaptation is the primary result of hardship under the UNIDROIT Principles and the PECL. The second Norwegian proposal was accepted and the word "only" was omitted from the text of Article 79(3).[56]

During the UNCITRAL phase and the Diplomatic Conference proposals were made to expand the regulation of exemptions to situations where changed circumstances have created hardship. During the UNCITRAL phase an actual Article to govern hardship was considered. The proposed Article stated:

"If, as a result of special events which occurred after the conclusion of the contract and which could not have been foreseen by the parties, the performance of its stipulations results in excessive difficulties or threatens either party with considerable damage, any party so affected has the right to claim an adequate amendment of the contract or its termination."

As support for the proposition it was stated that the problem of unforeseeable changed circumstances is one of the most important problems for the contracting parties and that an article providing for the amendment or termination of the contract therefore should be included. A provision of this kind would also prevent a party from benefiting from "gifts from above" on the other party's expense.[57] The proposed provision was not accepted. Also this proposition was regarded as having too great an effect on the parties' obligation to perform. The CISG does not contain any provision that would allow for an amendment of the contract or renegotiations in situations of hardship.

Scholars do not agree on the meaning of the deletion of the word "only". Tallon does not seem to regard this as significant, whereas e.g. Honnold gives more attention to this. Honnold states that the purpose of the deletion of the word "only" was designed to avoid any impression that paragraph 79(3) laid down a rigid rule requiring contract relations to resume on the original basis no matter how long the interruption or how great the changes in circumstances.[58] Honnold also states that the rejection of the first Norwegian proposal does not mean that Article 79 could not be applied when economic circumstances have changed greatly due to a radical change in circumstances. Thus, a change in economic circumstances can, according to Honnold, result in an exemption from liability also after the impediment has ceased to exist. The rejection of the Norwegian proposals shows, according to Honnold, that Article 79 governs the question of economic hardship.[59]

Schlechtriem's view supports the one of Honnold. Schlechtriem states that "it is imperative to treat radically changed circumstances as "impediments" under Article 79 in exceptional cases in

[56] Honnold 1989, p. 602-603.
[57] Honnold 1989, p. 350. The proposed provision on hardship has great similarities with the provision on hardship in the UNIDROIT Principles.
[58] Honnold 1999, p. 489-490.
[59] Honnold 1989A, p. 442-443.

order to avoid the danger that courts will find a gap in the Convention and invoke domestic laws and their widely divergent solutions".[60] According to Schlechtriem, changed circumstances as such can constitute relevant impediments. Schlechtriem states that the deletion of the word "only" makes clear that it is possible that a new impediment occurs in the form of changed circumstances after the original impediment has ceased to exist.[61] Schlechtriem argues his view that the Convention governs hardship with the Convention's aim to promote uniformity in the contracting states.

Also Nicholas emphasizes the deletion of the word "only". He argues that the deletion was made with the intent to allow for an exemption even after the impediment has ceased to exist. Nicholas states that Article 79(3), which has the wording "the exemption provided by this article has effect for the period during which the impediment exists", should be read as:[62]

"The exemption has effect for the period during which the impediment exists and may have permanent effect if after the impediment has ceased to exist the circumstances have so radically changed that it would be manifestly unreasonable to hold the non-performing party liable."

Nicholas admits that this interpretation might be regarded as the most meaningful deletion of one word ever. Nicolas also argues that it is hard to imagine that a court would interpret the Article in such manner without being familiar with the travaux préparatoires. In my opinion the suggested interpretation would be hard to reach even if one were familiar with the travaux préparatoires.

According to the above views, a permanent exemption is possible when circumstances have changed in such a manner during the existence of the original impediment that the changed circumstances shall be regarded as a new impediment justifying a continued, permanent exemption.

Kritzer is, on the other hand, of the opinion that the CISG does not provide for an exemption based on radically changed circumstances.[63] Jenkins argues that Article 79 expresses a traditional view of pacta sunt servanda and does not govern hardship but only situations where performance has become impossible due to changed circumstances.[64] Flambouras states that the majority's view is that hardship is not covered under the CISG. According to him, the CISG does not adopt the doctrine of clausula rebus sic stantibus and that events such as a sudden increase in the price of raw materials or a dramatic devaluation of currency will not allow the seller to avoid liability for non-delivery of the goods or to require renegotiation of the contract terms.[65] Sandvik states that the question is solved so that the CISG does not allow for the consideration of changed circumstances after the impediment has ceased to exist unless the parties have otherwise agreed.[66]

An acceptance of the first Norwegian proposal would without doubt have made the interpretation of Article 79 more comprehensible. To interpret the second Norwegian proposal as having the

[60] Schlechtriem 1986, p. 192 note 422a. Also Sandvik 2004, p. 93 note 66, who is of the opinion that Schlechtriem thus commits the same act as he himself has apprehensions for, *i.e.* lets national law influence the interpretation of the Convention. Sandvik regards Schlechtriem's interpretation as being close to the German doctrine of "*Wegfall der Geschäftsgrundlage*".
[61] Schlechtriem 1986, p. 102 note 423.
[62] Nicholas 1984, p. 17-18.
[63] Kritzer 1989, p. 509.
[64] Jenkins 1998, p. 2024.
[65] Flambouras 2001, p. 277.
[66] Sandvik 2004, p. 96.

same content as the first Norwegian proposal seems like a dangerous attempt at forcing a certain meaning into the provision. It is in the author's view hard to comprehend how such an interpretation would be possible. Neither the first Norwegian proposal nor an explicit article on hardship was accepted. Furthermore, when the first Norwegian proposal was rejected an explicit fear was expressed for introducing the théorie de l´imprévision or the doctrine of frustration into the Convention. Is it possible that the rejection of the proposed provisions means that the Convention nevertheless contains the content of the proposed provisions and thereby provisions similar to the doctrines that the drafters expressly did not want to include? Would an opposite interpretation not be more logical? Since the proposed provisions were not accepted, the drafters did not want to include such provisions or their meaning into the Convention.

It is important to note that the first Norwegian proposal was rejected largely due to a fear of introducing a doctrine of changed circumstances into the Convention. No actual statements were made concerning the second Norwegian proposal. Hence, it is hard to see that the drafters of the Convention would have intended that the contents of the first Norwegian proposal would have been accepted in the words of the second proposal.

On the other hand, the deletion of the word "only" should be given some effect. Otherwise a vote concerning a meaningless word with no effect on the interpretation of the provision has been taken at the Diplomat Conference. This alternative does not seem logical either. The bottom line is that the meaning of the second Norwegian proposal simply cannot be established with the help of the travaux préparatoires and legal literature. It is unfortunate that there is no clarifying case law concerning the question.

With regard to the fact that many of the legal scholars who seem to be of the opinion that the deletion of the word "only" is meaningful participated in the drafting of the Convention themselves, one would believe that the deletion actually is of great significance. These persons ought to have the best understanding of the meaning of different decisions. On the other hand, these scholars have not been able to argue their interpretation in an unambiguous way. It is fully possible that these scholars express their personal view on how the Convention should be interpreted regardless of the objective meaning of the change in Article 79(3). It must be noted that the persons who later have expressed their support for taking changed circumstances into account are mainly the same persons who voted in favour of the first Norwegian proposal.

2.3. Exemption from Damages and the Obligation to Perform

Article 79(5) states that "nothing in this article prevents either party from exercising any right other than to claim damages under this Convention". Hence, it appears that Article 79 only applies on a party's liability in damages. The party exempt from damages still seems to be obligated to perform the contract if this is required by the other party. Also the right to avoid the contract, the right to price reduction and the right to claim interest remain.

What does this mean with regard to situations of hardship? Typical solutions on situations of hardship are adaption or termination of the parties' obligations. If the obligation to perform remains, a party that is exempt from liability nevertheless is obliged to perform the contract, even though the obligation to perform is somewhat thinned by the fact that liability in damages does not exist as a remedy anymore. This arrangement has been criticized. Scholars are worried that the

exemption from damages becomes only illusionary if the non-breaching party nevertheless is entitled to claim specific performance. Furthermore, it has been pointed out that the right to claim a specific performance is illogical if the performance has become impossible.[67]

It is vital, however, to notice the importance of CISG Article 28 in this context. According to Article 28 "if, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention". For example, under Finnish law the problem is thus solved, as the Finnish Sale of Goods Act contains in its section 23 a provision stating that the seller is not obliged to perform if a relevant impediment exists or if it were unreasonable to demand performance. Further, the Finnish Act on Contracts contains a provision allowing for adaption of contracts in this type of situations.

However, the problem still remains at least partly. It is clear that CISG Article 28 makes the otherwise rigid rule on specific performance softer.[68] In practice Article 28 means that a claim for specific performance often is without effect. However, the problem remains at least in theory. Honnold argues that it would be inconsistent with the basic provision that a party is not liable when performance is barred by an impediment, to read Article 79(5) as to say that a party who is entitled to an exemption from damages could nevertheless be required to perform. Furthermore, Honnold argues that in many cases an action to require performance would call for an impossibility and that there is no indication that the legislators intended such an absurd result.[69] Liu reasons that it would be contrary to good faith and the intention of the parties if a party could be demanded to perform even if it is exempt from damages.[70]

On the other hand, some scholars argue that the above presented interpretation is prevented by considering an exemption from specific performance as contrary to the Convention's principles of a party's responsibility for everything in its control. This controversy with the Convention's principles would further prevent a national court from exempting a party from its obligation to perform.[71] However, case law suggests the opposite. In UNILEX d. 11 December 1998 the court held that the principle of good faith laid down in CISG Article 7(1) precludes the possibility of taking into account any impediments to perform. According to the court, the matter should be settled, under CISG Article 7(2), in conformity with the law otherwise applicable to the contract by virtue of the rules of private international law.[72] The court seems to have been of the opinion that the question of exemption from specific performance is a question governed by the CISG, but not expressly settled by it, and that there are no general principles in the CISG that could solve the question.

A West-German proposal was made during the work on the Convention according to which a party exempt from liability for damages also would be exempt from his obligation to perform. The proposal was, however, rejected. The reasons for the rejection were several. For instance, the drafters were worried that an acceptance of the proposal would also result in that other

[67] Among others Tallon 1987, p. 589 and Sandvik 2004, p. 38.
[68] Honnold 1999, p. 227.
[69] Honnold 1999, p. 494-495.
[70] Liu 2005 A, point 8.6.
[71] Sandvik 2004, p. 38-39 and 92.
[72] UNILEX d. 11 December 1998 (Italy, Corte di Apello di Milano).

obligations, such as the obligation to pay interest, would be abandoned.[73] The general opinion during the work on the Convention was that impossible performances would not be demanded in the future and in any case not be adjudicated by courts.[74]

An acceptance of the West-German proposal would without doubt have clarified the situation. An interpretation of Article 79(5) as also allowing an exemption from the obligation to perform can be regarded as expedient. However, if such an interpretation was the drafters' purpose, the wording of Article 79(5) has failed miserably. If courts interpret the Article in such a manner, a party's legal safety can be endangered, as such an interpretation is hard to be reached on the basis of the wording of Article 79(5).

In a situation of hardship specific performance is not impossible. Hence, the possibility to claim specific performance even when the party in breach is exempt from liability in damages is of greater importance in situations of hardship than in situations of impossibility. Presuming that Article 79(3) is interpreted as allowing for an exemption even after the impediment has ceased to exist but circumstances have changed radically during its existence, and presuming that Article 79(5) is interpreted as preventing a claim for specific performance when a party is exempt from liability; a party suffering hardship could in exceptional cases be exempt from both damages and the obligation to perform. If the interpretation in the case referred to above is correct, the question of specific performance is one that shall be solved in accordance with national law. For example, under German law, a party could then be exempt from his obligation to perform.[75] If, on the other hand, Article 79(3) is interpreted as not allowing for a continued exemption after the impediment has ceased to exist, Article 79(5) is of lesser importance and a party is naturally obliged to perform when the impediment ceases to exist. The problems concerning Article 79(5) are thus in connection with long lasting and permanent impediments.

3. Gap filling – Is there a Gap in the CISG Concerning Hardship?

The question whether hardship is governed by Article 79 is of great importance. If the CISG neither regulates hardship in Article 79 nor as a breach of contract (in situations of non-performance), the result is that there is a gap in the CISG concerning hardship and that other provision then can be applied. These situations are referred to as gap filling, i.e. a gap in the CISG is filled with the Convention's general principles or with national law. The provision on gap filling is found in CISG Article 7(2):

"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

As the situation concerning hardship is unclear, a theoretically easy solution could be found by solving the problem with the help of Article 7(2). If one finds that hardship is governed by the CISG but not expressly settled in the Convention, the problem shall be solved in accordance with the CISG's general principles. Some of these principles are spelled out in the Convention, such as

[73] Schlechtriem 1986, p. 102-103.
[74] Kritzer 1989, p. 103.
[75] Schlechtriem 1986, p. 103.

the principle of good faith in the interpretation of the Convention. However, most general principles have to be extracted from articles governing specific questions, e.g. the reference to a "reasonable person" that can be found in several articles[76] and the principle of favour contractus.[77] The Convention's general principles shall be found in the Convention itself or in internationally accepted general principles. Resort to national principles is not possible.[78]

Scholars often argue that international principles such as the PECL or the UNIDROIT Principles could be used to complement the CISG and to fill possible gaps in the CISG. How international principles could fill a gap in the CISG seems to remain somewhat unclear. According to Article 7(2), questions concerning matters governed by the CISG which are not expressly settled in it are to be settled in conformity with the general principles on which the CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Where do international principles fit in this system? If the contracting parties have agreed that e.g. the UNIDROIT principles shall fill possible gaps in the CISG, the principles would be applicable[79], but this would require that the parties have so agreed. The principles are then part of the contract between the parties. Bonell argues that help and guidance in finding the Convention's general principles could be sought in the UNIDROIT Principles. He points out that the only requirement for applying a provision in the UNIDROIT Principles is that the provision is an expression of a general principle in the CISG.[80]

Is there a gap in the CISG concerning hardship?

Schlechtriem has expressed that he takes a liberal view on finding gaps in the Convention.[81] He states that a gap could be found in the CISG concerning hardship and that the gap could be filled with the Convention's general principles.[82] He argues that the principle of good faith and fair dealing then presumes that both parties try to adapt the contract to unpredictable and unforeseen changed circumstances.[83] This argumentation contains, however, several problems. Firstly, Schlechtriem assumes that the principle of good faith and fair dealing is one of the principles that the Convention is based on, even though article 7(1), which expressly refers to good faith and fair dealing, only concerns the interpretation of the Convention. Secondly, even if this principle were one that the Convention is based on, there is no indication that the principle would include an obligation for the parties to adapt the contract to changed circumstances. What this principle is regarded to contain is largely dependent on the interpreter and the interpreter's legal background.

Further, Schlechtriem argues that the provision in Article 50 concerning price reduction could be read as including a general principle allowing for an adaption of the contract in situations of hardship, i.e. in situations of changed circumstances after the impediment has ceased to exist. The provision on price reduction can according to Schlechtriem be read as an adaption of the contract

[76] E.g. articles 8, 25, 35 and 79.
[77] E.g. articles 19, 25, 49 and 71.
[78] Bonell 1987, p. 80-82.
[79] As an example for a contract provision concerning this, Bonell (Bonell 2000, p 97) has suggested "This contract shall be governed by the CISG, and with respect to matters not covered in this Convention, by the UNIDROIT Principles of International Commercial Contracts".
[80] Bonell 2000, p. 97.
[81] Even though he has also stated that changed circumstances should in exceptional cases be treated as impediments under article 79 in order to prevent finding a gap in the Convention.
[82] This is a very interesting interpretation by Schlechtriem as he has also been of the opinion that the CISG governs hardship, i.e. the opposite (as referred to above).
[83] Transcript of a Workshop on the Sales Convention, p. 236.

after the balance between the contractual obligations has been disturbed. The non-conformity in the performance (Article 50) also causes an imbalance between the contractual obligations. The price reduction amends this imbalance, i.e. the relationship between performance and counter-performance.[84] Also this argumentation can be criticized. Sandvik points out that this reasoning allows for the adaption of contracts in accordance with the German doctrine of "Wegfall der Geschäftsgrundlage", according to which a contract shall be adapted if it were unreasonable to claim performance in accordance with the original contract.[85] Schlechtriem's argumentation can thus be considered as influenced by national law, which he himself stresses that must be avoided.

With reference to Schlechtriem's above presented theory regarding a general principle on adaption, the hardship provisions in the UNIDROIT Principles could be seen as an expression of the general principle of adaption in the CISG and, hence, as applicable presuming that the CISG contains a gap concerning hardship. This argumentation would build on Schlechtriem's theory of a general principle on adaption and Bonell's theory that provision in the UNIDROIT Principles can be applied if they express a general principle of the CISG, even if the parties have not agreed on the application of the Principles. Such theories are, however, far fetched and in my view not possible in practice.

Also Slater argues that the CISG contains a gap concerning hardship. He states that "although there is no consensus on the issue, many courts and scholars believe that the term "impediment" as contained in Article 79 does not extend so far as to encompass hardship". He also argues that the legislative history of the Convention supports this view. Slater argues that a glance at the text of Article 79 reveals that the term "hardship" is not expressly included in its language. Nor is hardship explicitly excluded from the CISG's coverage. It is according to Slater, therefore, plausible to contend that the Convention has a marked gap concerning hardship and that this gap can easily be filled by the detailed hardship provisions of the UNIDROIT Principles.[86]

Slater concludes, however, that the above presented arguments are not durable. He states that despite some wishful thinking on the part of commentators in civil law nations, the UNIDROIT Principles are not general principles on which the CISG is based. There is thus a discrepancy between the above presented view of Bonell and that of Slater.

The question whether the CISG governs hardship remains unsettled. Slater argues that the general principle favouring performance of contracts where feasible suggests that no hardship remedy is available for contracts governed by the CISG, as performance is feasible in these instances. If, however, a tribunal considering the issue fails to ascertain this general principle, it must, under Article 7(2), look to the domestic law applicable via conflict of laws rules. This course presents a much greater likelihood of relief for a party facing hardship since many nations provide some remedy for this predicament.[87]

[84] Transcript of a Workshop on the Sales Convention, p. 235-236. Schlechtriem points out, however, that according to his view the question of hardship was during the work on the Convention considered as one covered in the Convention, wherefore the existence of a gap could be questioned.
[85] Sandvik 2004, p. 93.
[86] Slater 1998, p. 253-254.
[87] Slater 1998, p. 260.

Since the situation is unsettled there is a risk that courts find a gap concerning hardship in the CISG and apply national law instead of the CISG.[88] The temptation is even bigger as many national laws contain rules on the effect of hardship on the trade of goods. Even if courts do not find a gap in the CISG, they have a natural tendency to interpret Article 79 in the light of their national law. It has been stated that "article 79 is a chameleon-like example of superficial harmony" and that it is possible to interpret the Article so that it suits the interpreters' background the best.[89] One of the problems seems to be that there is no actual case law concerning the question that would set aside the national solutions.[90] Krüger emphasizes that Article 79 must be read as an independent rule free from national contract laws. In particular where national laws have created doctrines such as "imprévision", "Wegfall der Geschäftsgrundlage" and "bristende forutsetninger".[91]

In countries where different rules exist side by side for situations of impossibility and situations of changed circumstances, it might be natural to interpret Article 79 as only concerning impossibility. In that case the question of changed circumstances would be solved in accordance with the general principle of "good faith".[92] Tallon regards such a solution as unacceptable. He points out that the principle of "good faith" cannot be used to set aside explicit provisions of the Convention. Furthermore, uniformity would be endangered if this principle was the ground for a doctrine of changed circumstances. Another risk is that it is held that the question of changed circumstances has not been expressly solved in the Convention and that the solution cannot be found in the Convention's general principles, opening a door for the application of national laws. Tallon is of the opinion that the Convention has opted for a unitary conception of an exemption and has thus, even if this choice may be criticized, set aside the theory of changed circumstances and thus solved the question whether changed circumstances are governed under Article 79.

An Italian court has ruled that the effect of hardship is not governed by the Convention. In other words, economic impediments for performance cannot under the CISG be a ground for an exemption after the impediment has ceased to exist. The court also held that the CISG does not contain a gap with regard to hardship:

UNILEX d. 14 January 1993 (Italy, Tribunale Civile di Monza). An Italian seller and a Swedish buyer concluded in February 1988 a contract for the sale of 1,000 metric tons of metal (ferrochrome). The seller did not deliver the goods. The seller claimed avoidance of the contract for hardship ('eccessiva onerosità sopravvenuta') since the price of the goods had increased between the time of the conclusion of the contract and the time fixed for delivering by approximately 30%.

The court held that CISG did not apply. In the court's opinion, even if CISG had applied, the seller could not have relied on hardship as a ground for avoidance, as CISG does not contemplate this as a remedy either in Article 79 or elsewhere. A domestic court could not integrate into CISG provisions of domestic law granting avoidance for hardship, as hardship is not a matter which is expressly excluded from the scope of the Convention by Article 4 CISG.

[88] Tallon 1987, p. 591-592.
[89] Rimke 2000, p. 218.
[90] In the UNILEX database 19 cases concerning article 79 are found, but only 3 concern hardship.
[91] Krüger 1999, chapter 4.
[92] Compare this with the doctrine of "Wegfall der Geschäftsgrundlage" in Germany that builds on the principle of good faith ("Treu und Glauben").

In case **UNILEX d. 14 May 1993 (Germany, Landgericht Aachen)** the court held that "the application of CISG precluded the recourse to domestic law regarding mistake as to the quality of the goods and regarding 'Wegfall der Geschäftsgrundlage', being these matters exhaustively covered by CISG".

In **UNILEX d. 12 June 2001 (France, Cour d'Appel de Colmar)** a Swiss seller and a French buyer concluded a framework agreement whereby the former undertook to supply a certain quantity of goods to the latter. Under the contract the goods had to be delivered over a period of eight years depending on the needs of the final customer to whom the goods had to be resold. Faced with the final customer's decision to reduce the repurchase price, the buyer refused to take delivery of most of the goods.

The Court held the buyer liable for breach of contract under CISG (Article 61 CISG). In reaching this conclusion, the Court rejected the buyer's argument that its decision not to take delivery of goods was caused by an event beyond its control and unpredictable at the time of conclusion of the contract (Article 79 CISG). Not only was the reduction of the repurchase price by the final customer predictable at the time of conclusion of the contract, but it was up to the buyer, who was aware of entering into a long-term business relationship, to provide for mechanisms of renegotiation for the case of changes of circumstances (i.e. by including a hardship clause in the contract).

It must, however, be noted that the tribunals have not made a clear distinction between the obligation to overcome the impediment and the possibility for a continued exemption due to changed circumstances after the impediment has ceased to exist. The cases referred to above could as well be regarded as concerning the questions of the intensity of the impediment and the limit of sacrifice.[93]

The solution regarding the question whether Article 79 governs economic impediments and hardship could with the above arguments in short be the following: Also economic impediments can in exceptional cases be regarded as relevant impediments. Regarding the obligation to overcome the impediment and its consequences the evaluation shall be made in casu, but the evaluation is strict towards an exemption from liability. The question is how extensive economic sacrifices can be required of a party in order to overcome the impediment. After the impediment has ceased to exist a party is, with the risk of being liable in damages, obligated to perform unless the other party has not avoided the contract. An extended exemption is thus not possible in my view after the impediment has ceased to exist.

V. CONCLUSIONS

There is a danger that a presentation on changed circumstances and hardship in the international sale of goods is only a list of different scholars' vague thoughts on the topic and that the reader does not get a clear picture of the writer's own interpretation. It is easy to state that the situation is unclear, but this is of no avail to anyone, especially not when a solution shall be found in a practical situation. It is apparent that the flexible terms of Article 79 will always leave considerable room for judicial appraisal and different views can well be argued. Personally the author is of the

[93] Sandvik 2004, p. 96.

opinion that hardship is governed by the Convention and that a gap allowing for the application of national laws cannot be found. The Convention cannot be complemented by e.g. the UNIDROIT Principles that otherwise are intended to complement the CISG, unless the parties have so agreed.

An interpretation of Article 79(3) as allowing for an exemption after the impediment has ceased to exist is in my view unacceptable. The fact that the first Norwegian proposal that would have allowed this was rejected cannot mean that the content of this proposal was accepted in the words of the second proposal. Especially as this has not been expressed in any way during the work on the Convention and as the wording of the accepted Article 79(3) in no way suggests such an interpretation. Even though the legislative history can be of guidance in the interpretation of the Article, the most important question is not which alternatives were discussed during the work on the Convention, but the wording and meaning of the final version of the text.

Different arguments concerning the relationship between hardship and Article 79 have been presented above. There are several arguments for the view that the CISG governs hardship and even includes a possibility to adapt the contract, as well as for the view that the CISG does not govern hardship at all and that the question should be solved with the help of national law. These two alternatives can be regarded as opposites. It is noteworthy that both views have gained wide support and that even one and the same scholar has supported both alternatives. That the same scholar expresses support for both views could mean that the scholar has changed position or that he regards both alternatives as possible, but it is more likely that the scholar's arguments shall be regarded as alternative ways to interpret Article 79 and that these interpretations shall be regarded as openers for a wider discussion.

The large number of different arguments, all of which can be considered as more or less justifiable, makes it much more difficult to clarify the content of Article 79. In many cases scholars' arguments are so vague that they very well can be interpreted to fit different situations and to mean different things.

It is evident that many scholars have an urge to either find a gap in the CISG concerning hardship or an urge to interpret Article 79 so that the article governs hardship and makes a permanent exemption possible. Such an urge is understandable and is most probably a result of the fact that one of these solutions would be hoped-for and appropriate. The author's own interpretation, in other words the notion that the CISG governs hardship but does not allow for a permanent exemption, is not well-suited in practice as this interpretation results in an inflexible system that only allows an exemption in cases of impossibility. This is an inappropriate interpretation for tradesmen whose contract is governed by the CISG and also unsuitable for modern international trade. Provisions that allow for an exemption only in cases of impossibility can neither be regarded as modern nor functional. Such provisions do not reflect the principles of loyalty or favour contractus.

The fact that the above presented interpretation is not desirable to all parts does not mean that it is wrong. The problem is that the Convention has on this part been drafted in a manner that leaves room for enhancement. The interpretation of the Article cannot be entirely dependent on which solution would be the best solution for international trade or a desirable solution on the problem of changed circumstances. Such a target-oriented interpretation, in which the Article is interpreted so that a pre-determined target is reached, is unacceptable.

It must be ascertained and accepted that the Convention contains a weak spot concerning the relationship between hardship and Article 79. This is, however, not a problem as long as it is realized.

An express goal in the Convention is according to Article 7(1) its uniform application. The interpretation of Article 79 could be done with an aim to interpret the Article so that a uniform application of the Convention is best reached. An interpretation that reaches this goal could appropriately be considered successful and purposeful.

An interpretation of Article 79 resulting in a gap in the CISG concerning hardship would not promote this goal. In that case the question of hardship would be settled in conformity with the general principles on which the Convention is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Both alternatives would result in a great range of solutions. If the question could be settled in accordance with the Convention's general principles, the guidance received from the general principles would in any case be vague and make several different solutions possible.

Also an application of national laws would result in inconsistency. Undeniably the application of the Convention would then be uniform, i.e. the Convention contains a gap concerning hardship that shall be filled with national law, but the solutions on the question of hardship would be divergent and entirely dependent on which law happens to be applicable by virtue of the rules of private international law.

Neither would an interpretation of Article 79 allowing for a permanent exemption from liability, and possibly also from specific performance, support a uniform application of the Convention. In that case Article 79 would constitute an extremely vague provision for changed circumstances, the interpretation of which would likely be influenced by rules on changed circumstances in the interpreters' own national law.

The presented interpretation can, however, be regarded as supporting the goal of a uniform application relatively well, wherefore the interpretation can be regarded as successful. That Article 79 governs hardship but does not consider changed circumstances as an impediment, means that the question has been settled in a uniform manner. Another question is, however, as stated above, that this solution is not hoped-for with regard to practical situations and the strive for flexibility in contractual relations.

As more or less all questions concerning hardship and Article 79 are unsettled and as the views differ greatly, the interpretation of Article 79 in a practical case is far from certain. Hence, it is recommendable that the contracting parties agree on the procedure if faced with hardship and do not leave questions of hardship to be settled under Article 79. The contracting parties can in their sales contract agree on a suitable manner of proceedings in case of hardship, or by reference to the UNIDROIT Principles or the PECL transfer the question of hardship to one of these principles containing clear and functional provisions on the matter.

One of the big problems concerning hardship and Article 79 is that still, 18 years after the CISG came into force, there is no broad case law concerning the question. Especially regarding Article 79, which often is referred to as the most unsuccessful part of half a century's work, clarifying case law would be of avail.

The fact that an explicit provision on hardship has been included into more recent regulations implies that there is a need for such a provision. There must be an explicit provision on hardship in order to find a desirable solution on the problem of changed circumstances, unless a general clause on adaption (as in Nordic law) exists. Regarding the CISG, one of the problems might have been the large number of drafting states and the problem to reach uniformity among the drafters.

It is uncertain what to expect on the question of hardship and Article 79 in the future. One can only hope for more case law that would clear the situation. It is also possible that the UNIDROIT Principles, containing an explicit hardship clause, will become more important in the future. Both the UNIDROIT Principles and the PECL contain solutions on the problems of changed circumstances and hardship in the international sale of goods that can be regarded as adequate for the needs of modern contract law.

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