MASTER THESIS | MASTER'S THESIS

Titel | Title

Force Majeure and Hardship under the CISG: Scope, Interpretation and Practical Implications

verfasst von | submitted by

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angestrebter akademischer Grad | in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien | Vienna, 2026

Studienkennzahl lt. Studienblatt | Degree programme code as it appears on the student record sheet:	UA 999 082
Universitätslehrgang lt. Studienblatt | Postgraduate programme as it appears on the student record sheet:	Europäisches und Internationales Wirtschaftsrecht [Vollzeit Englisch]
Betreut von | Supervisor:	ao. Univ.-Prof. Mag. Dr. Siegfried Fina

ABSTRACT (ENGLISH)

This thesis examines force majeure and hardship under the United Nations Convention on Contracts for the International Sale of Goods (CISG), with particular focus on Article 79. Although Article 79 provides a mechanism for exemption from liability, it does not expressly refer to force majeure, hardship, renegotiation or contract adaptation. The thesis therefore analyses whether and to what extent Article 79 can respond to situations in which performance is prevented or becomes excessively onerous.

Using a doctrinal legal method, the thesis examines the requirements and legal consequences of Article 79, the distinction between force majeure and hardship, selected case law, CISG Advisory Council Opinions and limited comparative remarks on German law, especially § 313 BGB. The analysis shows that Article 79 functions primarily as a narrow exemption mechanism for classic force majeure situations. Hardship may be accommodated under the CISG only exceptionally, where the change of circumstances satisfies the strict requirements of Article 79.

The thesis concludes that the CISG provides a relatively predictable framework for force majeure, but only a limited and uncertain response to hardship. For this reason, parties to international sales contracts should expressly regulate force majeure and hardship through carefully drafted contractual clauses.

ABSTRACT (DEUTSCH)

Diese Masterarbeit untersucht Force Majeure und Hardship im Rahmen des Übereinkommens der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG), mit einem besonderen Fokus auf Artikel 79 CISG. Obwohl Artikel 79 einen Mechanismus zur Befreiung von der Haftung vorsieht, enthält die Vorschrift keine ausdrückliche Regelung zu Force Majeure, Hardship, Neuverhandlungen oder Vertragsanpassung. Die Arbeit analysiert daher, ob und in welchem Umfang Artikel 79 auf Situationen angewendet werden kann, in denen die Vertragserfüllung verhindert wird oder übermäßig erschwert ist.

Unter Anwendung einer rechtsdogmatischen Methode untersucht die Arbeit die Voraussetzungen und Rechtsfolgen von Artikel 79, die Abgrenzung zwischen Force Majeure und Hardship, ausgewählte Rechtsprechung, Stellungnahmen des CISG Advisory Council sowie begrenzte rechtsvergleichende Hinweise zum deutschen Recht, insbesondere zu § 313 BGB. Die Analyse zeigt, dass Artikel 79 in erster Linie als enger Befreiungsmechanismus für klassische Force-Majeure-Situationen dient. Hardship kann im Rahmen des CISG nur ausnahmsweise berücksichtigt werden, wenn die veränderten Umstände die strengen Voraussetzungen von Artikel 79 erfüllen.

Die Arbeit kommt zu dem Ergebnis, dass das CISG einen relativ vorhersehbaren Rahmen für Force Majeure bietet, jedoch nur eine begrenzte und unsichere Lösung für Hardship. Aus diesem Grund sollten Parteien internationaler Warenkaufverträge Force Majeure und Hardship ausdrücklich durch sorgfältig formulierte Vertragsklauseln regeln.

ABBREVIATIONS

BGB – Bürgerliches Gesetzbuch (German Civil Code)

BGH – Bundesgerichtshof (German Federal Court of Justice)

CISG – United Nations Convention on Contracts for the International Sale of Goods

CISG-AC – CISG Advisory Council

DCFR – Draft Common Frame of Reference

ICC – International Chamber of Commerce

No – Number

PECL – Principles of European Contract Law

UN – United Nations

UNCITRAL – United Nations Commission on International Trade Law

UNIDROIT – International Institute for the Unification of Private Law

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CHAPTER 1 - INTRODUCTION

1.1 Research Background

International commercial contracts are established in a legal and economic context fraught with uncertainty. Parties may agree on price, delivery, payment, and risk allocation when they enter into a contract, but subsequent circumstances may have a significant impact on their ability to comply with their obligations. Wars, sanctions, government restrictions, pandemics, transportation delays, raw material shortages, inflation, and unexpected price rises may all interfere with the contractual connection. In international sales law, this provides a sensitive equilibrium between contractual certainty and fairness. On the one hand, commercial parties require predictable regulations and must generally conform to their agreements. Strict enforcement, on the other hand, may be difficult when performance is impaired or significantly affected by events beyond each party's scope of control.

The United Nations Convention on Contracts for the International Sale of Goods is one of the most important pieces of consistent international sales legislation. It applies to contracts for the international sale of products that meet its conditions and aims to improve legal certainty and uniformity in cross-border trade.[1] Article 79 of the CISG governs the exemption from liability for non-performance due to circumstances beyond the party's control.[2] Although the phrase *"force majeure"* is not implemented, the clause serves a comparable purpose in specifying the conditions under which a party may be relieved from liability for damages.

Although Article 79 creates a few challenging interpretive difficulties, it is very obvious that the rule could be applicable to standard force majeure circumstances, such as legal prohibitions, war, natural disasters, or other external occurrences that preclude execution.[3] The more contentious question is whether Article 79 may additionally include hardship. Hardship differs from force majeure since performance is usually still achievable but becomes

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[1] United Nations Convention on Contracts for the International Sale of Goods (1980) art 1(1).
[2] CISG art 79(1).
[3] Ingeborg Schwenzer, 'Article 79 CISG: Exemption from Liability for Damages' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) 1375, 1378; United Nations Commission on International Trade Law, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2016) 374-376.

excessively onerous due to a fundamental change in circumstances.[4] This distinction is especially relevant since force majeure typically results in exemption from liability, but hardship frequently necessitates a different legal reaction, such as contract renegotiation or adaptation.[5]

The importance of this concern has increased in modern international trade. Recent global disruptions have demonstrated that contractual performance can be influenced not just by physical or legal impossibilities, but also by severe economic imbalances. Supply chain disruptions, sanctions, pandemics, energy crises, and extreme fluctuations in prices have made the distinction between force majeure and hardship increasingly important. As a result, the interpretation of Article 79 is not just theoretical, but also significant in contract formulation and legal practice.

1.2 Problem Statement

The primary research obstacle of this thesis is the narrow and ambiguous phrasing of Article 79 CISG. The clause refers to a "impediment" that is beyond the party's control, although it does not define the phrase specifically. It also does not explicitly include force majeure, hardship, altered circumstances, renegotiation, or judicial adaptation.[6] This generates confusion about the actual extent of the CISG exemption.

Furthermore, this concern is particularly obvious in hardship instances. If a party is physically or legally unable to execute, Article 79 may offer a rather straightforward structure. Nevertheless, if performance remains feasible but has become economically exorbitant, it is unclear if Article 79 applies. According to academic opinions and case law, hardship may be considered under Article 79 in extreme cases.[7] Other perspectives argue that Article 79 should remain a small exemption clause and not be expanded into a broader hardship or adaptation mechanism.[8]

This ambiguity has practical implications. If hardship has been excluded from the CISG, parties may be left without recourse, even in the event of significant economic damage.

[4] CISG Advisory Council Opinion No 7, *Exemption of Liability for Damages under Article 79 of the CISG* (Rapporteur Alejandro M Garro, adopted 12 October 2007) op 3.1 and comments paras 26-31; CISG Advisory Council Opinion No 20, *Hardship under the CISG* (Rapporteur Edgardo Muñoz, adopted 2-5 February 2020) rules 2 and 4.
[5] CISG art 79(5); Schwenzer (n 3) 1371-1372; CISG-AC Opinion No 20 (n 4) rules 11-13.
[6] Schwenzer (n 3) 1370-1372.
[7] CISG-AC Opinion No 7 (n 4) op 3.1; CISG-AC Opinion No 20 (n 4) rules 2 and 4.
[8] Schwenzer (n 3) 1370, 1375; CISG-AC Opinion No 20 (n 4) rules 11-13.

If hardship is too broadly defined, the regularity of international sales contracts may be endangered. The fundamental issue is to assess whether Article 79 may accommodate hardship while maintaining the legal certainty and uniformity that the CISG is intended to encourage.

1.3 Research Questions

This thesis addresses the following research questions:

1. How is force majeure regulated under Article 79 of the CISG?
2. To what extent can hardship be accommodated within the CISG framework?
3. How has international case law interpreted Article 79 in situations of unforeseen circumstances?
4. What are the practical implications of these interpretations for international commercial contracts?

1.4 Methodology

The thesis utilizes a doctrinal legal methodology. It examines the content, structure, and purpose of Article 79 CISG, as well as related articles like Articles 7 and 6 CISG. Article 7 supervises the interpretation of the Convention and gap-filling, whereas Article 6 empowers parties to omit or modify CISG elements through contractual drafting.[9]

The thesis additionally relies on academic commentary and secondary literature, including leading CISG commentaries and scholarship on force majeure, hardship, and contract adaptation. Schlechtriem and Schwenzer's remark on Article 79, CISG Advisory Council Opinion No. 7 on liability exemption, and CISG Advisory Council Opinion No. 20 on hardship under the CISG are all treated with particular attention.

In addition, the paper analyses selected case law and arbitral procedures according to Article 79. The case law chapter does not attempt to provide an exhaustive list of all decisions, but rather focuses on cases that demonstrate the main interpretative tendencies such as the restrictive approach to market risks and procurement difficulties, as opposed to the more flexible approach and specific arbitral developments. Finally, the thesis includes some comparative observations on German law, which provides a legislative framework for contract adaptation in the event of transaction disruption. It is not meant to provide a comprehensive

[9] CISG arts 6, 7; Pascal Hachem, 'Article 7 CISG: Interpretation of Convention and Gap-Filling' in Schwenzer and Schroeter (eds), *Schlechtriem & Schwenzer* (n 3) 137; Pascal Hachem, 'Article 6 CISG' in Schwenzer and Schroeter (eds), *Schlechtriem & Schwenzer* (n 3) 116, 120.

review of German contract law, but rather to assist in understanding the meaning of Article 79 and the practical relevance of specified hardship clauses.

CHAPTER 2 – CONCEPTUAL FRAMEWORK

Before stepping into Article 79 CISG and the contentious topic of hardship under the Convention, it is important to define force majeure and hardship. Although both concepts respond to unforeseen circumstances influencing contractual performance, they do not operate in the same manner. Force majeure generally refers to situations that prevent performance, whereas hardship refers to circumstances that make performance extremely difficult but not impossible.[10] This distinction is critical since Article 79 CISG is commonly interpreted as an exemption mechanism, but hardship frequently necessitates a different form of legal response, such as renegotiation or adaptation.[11]

2.1 Force Majeure

Force majeure is usually regarded as a legal mechanism that may exempt a party from liability if an unusual occurrence beyond that party's control prevents the execution of contractual obligations. The notion is closely related to the more extensive concept of an excuse for non-performance, which occurs in many forms throughout legal systems. Although the terms and doctrinal foundation differ, the main role of force majeure is to address situations in which strict enforcement of the contract would be inappropriate because performance has been prevented by an external and exceptional event.[12]

Externality, unpredictability, and unavoidability are common characteristics of force majeure. In practical terms, the event must usually be beyond either party's control, could not have been reasonably anticipated at the time of contracting, and could not have been prevented or overcome.[13] War, natural disasters, epidemics, governmental restrictions, sanctions, labor disturbances, and other exceptional occurrences that significantly impair contractual

[10] Larry A DiMatteo, 'Excuse: Force Majeure and Hardship' in Larry A DiMatteo and others (eds), *International Sales Law: Contract, Principles & Practice* (2nd edn, Nomos 2021) 692-693, 716; Tai-Heng Cheng and Jennifer Lim, 'Force Majeure and Hardship' in Michael J Moser and Chiann Bao (eds), *Managing "Belt and Road" Business Disputes: A Case Study of Legal Problems and Solutions* (Kluwer Law International 2021) 196-197.
[11] DiMatteo (n 10) 716; Cheng and Lim (n 10) 201-202; Schwenzer (n 3) 1370-1371.
[12] DiMatteo (n 10) 692-693.
[13] Cheng and Lim (n 10) 196-197.

performance are common instances.[14] However, the actual scope of force majeure is significantly dependent on the prevailing legal system and, in many situations, the contract's language.

In common law jurisdictions, force majeure is not considered as an autonomous doctrine originating by operation of law. Rather, it is largely a contractual instrument. This implies that a party can only rely on force majeure if the contract includes a section outlining the relevant events and consequences.[15] In contrast, in many civil law systems, force majeure may apply as a statutory or general concept even in the absence of a specific contractual agreement. This distinction is significant because it demonstrates that force majeure is not a standardized concept among legal systems. Furthermore, in international commercial contracts, parties frequently incorporate precise force majeure clauses to minimize confusion and to describe the circumstances, notice requirements, and remedies that will apply if performance is disrupted.[16]

The consequences of force majeure might also differ. In certain cases, the affected party may be excused from performing for the duration of the event. On the other hand, in some cases, the contract may provide for an extension of time, suspension of responsibilities, cost allocation, or termination if the impediment exceeds a specified period.[17] Therefore, force majeure does not always lead to the same legal result. Its effect is determined by the legal framework and the contractual language used by the parties.

For the purposes of this thesis, force majeure will be defined in a functional sense. It relates to cases in which an external and extraordinary occurrence precludes or significantly impedes performance, and may justify a waiver of duty. This concept is especially crucial to the CISG. The phrase "force majeure" is not used in the Convention, but Article 79 offers a method for exempting a party from obligation if non-performance is caused by an impediment beyond its control. Schwenzer considers Article 79 as a necessary constraint on the CISG's strict liability approach, but cautions that exemptions are only accessible under certain conditions.[18] The CISG approach will subsequently be thoroughly examined in Chapter 3.

2.2 Hardship

[14] Cheng and Lim (n 10) 197-198.
[15] ibid 196.
[16] ibid 196-197.
[17] ibid 201-202.
[18] Schwenzer (n 3) 1370.

Hardship is fundamentally distinct from force majeure. It does not generally refer to a circumstance in which performance has become impossible. Instead, hardship occurs when performance is still achievable but has become unreasonably onerous due to a fundamental change in circumstances following the completion of the contract.[19] Some instances of such conditions include significant increases in performance costs, currency changes, raw material shortages, or other events that disrupt the contract's economic equilibrium.

Understanding hardship begins with the notion of *pacta sunt servanda*, which states that obligations must be honored.[20] This concept is essential for contractual clarity and commercial dependability. Contracts allow parties to allocate risks, arrange future transactions, and rely on agreed-upon commitments.[21] However, strict application of *pacta sunt servanda* may result in unjust outcomes if unanticipated circumstances fundamentally alter the ground on which the contract was signed. In such cases, the remedial principle of *clausula rebus sic stantibus* becomes applicable.[22] This concept expresses the idea that contractual duties may be reconsidered if the conditions at the time of contracting have fundamentally altered.[23]

Hardship therefore operates at the point where strict enforcement of the original bargain conflicts with fairness. It does not deny the binding force of contracts as a general rule. Rather, it functions as an exceptional corrective mechanism. If the supervening event falls within the risks assumed by the affected party, hardship should not provide relief. Otherwise, it could undermine legal certainty and encourage parties to escape bad bargains.[24] However, where the risk was not allocated and the change of circumstances is exceptional, unforeseeable and seriously disrupts the contractual equilibrium, hardship may justify legal intervention.

The usual legal consequences of hardship differ from those of force majeure. Since performance remains possible, the appropriate remedy is not necessarily exemption from liability or termination of the contract. Instead, hardship often leads to renegotiation, adaptation of the contract, or, in some systems, termination if adaptation is not possible.[25] This is why

[19] DiMatteo (n 10) 716.
[20] The principle of *pacta sunt servanda* means that contracts must be kept or performed. See Velimir Živković, 'Hardship in French, English and German Law' (2012) 3 *Strani pravni život* 240, 240.
[21] Živković (n 20) 240
[22] *Clausula rebus sic stantibus* refers to the idea that a contract may be affected where circumstances have fundamentally changed after its conclusion. See Živković (n 20) 240-241.
[23] Živković (n 20) 240-241.
[24] DiMatteo (n 10) 716; Ahmad Hussein Alsharqawi, Nabeel Mahdi Althabhawi and Haniff Ahamat, 'Hardship in International Commercial Contracts: A Comparative Analysis of the Rules of Non-Legislative Codification' (2025) 5 *SDGs Review* e04125, 15-16.
[25] DiMatteo (n 10) 716; Alsharqawi, Althabhawi and Ahamat (n 24) 27-29.

hardship is especially relevant in long-term international commercial contracts, where the risk of significant economic changes is greater than in short-term transactions.[26]

Modern international soft-law instruments have expressly addressed hardship. The UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law and the Draft Common Frame of Reference all contain rules dealing with changed circumstances, although they differ in the consequences they attach to hardship.[27] These documents are not as legally enforceable as national legislation or the CISG, but they are important aspects of reference in international commercial law because they represent attempts to achieve a compromise between contractual certainty and fairness in the face of extreme disruption.

For the purposes of this thesis, hardship will be defined as a situation in which performance is still objectively achievable but has become unduly onerous as a result to an unexpected and fundamental change in circumstances that disrupts the contractual equilibrium. This term is significant because it distinguishes between hardship and ordinary commercial risk. A simple decrease in profit, market inconvenience, or foreseeable price volatility should not be sufficient. The barrier must remain high to provide legal certainty and the binding effect of international sales contracts.

2.3 Distinction between Force Majeure and Hardship

The distinction between force majeure and hardship is central to the present thesis. Both concepts deal with supervening circumstances, but they address to different types of contractual disruption. Force majeure is generally associated with impossibility or prevention of performance. Hardship, by contrast, is associated with excessive onerousness and a fundamental alteration of contractual equilibrium.[28]

In force majeure situations, the central question is whether an external event has prevented the party from performing. The focus is therefore on the impediment and its causal effect on performance. If performance has become legally or physically impossible, or if it has been prevented by a qualifying event, exemption from liability may be justified. This explains

[26] Alsharqawi, Althabhawi and Ahamat (n 24) 1, 15-16.
[27] UNIDROIT Principles of International Commercial Contracts 2016 arts 6.2.2-6.2.3; Principles of European Contract Law art 6:111; Draft Common Frame of Reference art III.-1:110; Alsharqawi, Althabhawi and Ahamat (n 22) 9-10, 27-29.
[28] DiMatteo (n 10) 716; Alsharqawi, Althabhawi and Ahamat (n 24) 9.

why force majeure is often connected to events such as export bans, natural disasters, war, or governmental measures that make performance impossible or legally prohibited.[29]

Whereas, in hardship, the central question is different. It is not whether the party is able to perform, but whether requiring performance according to the original contract would impose an excessive and unfair burden. The contract can still be performed, but the economic balance has changed so dramatically that the original allocation of obligations no longer reflects the assumptions on which the parties contracted.[30] This is why hardship is often connected with price increases, currency crises, scarcity of materials or other economic disruptions.

Legal consequences also differ. Force majeure usually results in exclusion from liability, suspension of performance, extension of time, or termination if the obstruction persists. Hardship, on the other hand, is more likely to result in renegotiation or adaptation, because the goal is frequently to retain the contract rather than excuse non-performance entirely.[31] This divergence is especially important under CISG. Article 79 CISG offers an exemption from liability, but it does not specifically provide judicial adaptation of the contract. As a result, the question of whether hardship may be accommodated within Article 79 is more than simply terminological since it involves the character of the remedy provided under the Convention.

A further distinction concerns risk allocation. In both force majeure and hardship, the affected party must show that the event was not a risk assumed under the contract. However, the assessment is often stricter in hardship cases because commercial parties are generally expected to bear ordinary market risks.[32] If every increase in costs or reduction in profitability were treated as hardship, the stability of international sales contracts would be undermined. For this reason, hardship must be reserved for exceptional cases where the change of circumstances goes beyond normal commercial risk.

The contrast between force majeure and hardship serves as the conceptual framework for the remainder of the argument. Chapter 3 addresses Article 79 of the CISG, which governs force majeure circumstances. Moreover, Chapter 4 then examines whether hardship, while not specifically regulated, may nonetheless be accommodated within the CISG framework.

2.4 Historical Development

[29] Cheng and Lim (n 10) 197-199.
[30] DiMatteo (n 10) 716; Alsharqawi, Althabhawi and Ahamat (n 24) 15-16.
[31] DiMatteo (n 10) 716; Cheng and Lim (n 10) 201-202.
[32] DiMatteo (n 10) 716; Alsharqawi, Althabhawi and Ahamat (n 24) 28-29.

The conflict between contractual stability and changing circumstances has long historical origins. The notion of *pacta sunt servanda* has long been recognized as a foundation of contract law. It expresses the belief that parties are obliged by their promises and that contracts must be fulfilled even if doing so becomes inconvenient or less profitable.[33] Without this notion, commercial transactions would become unpredictable, and parties would be unable to prepare for future economic activity with confidence.

At the same time, legal systems have long understood that strong contract enforcement might be challenging in unusual circumstances. The doctrine of *rebus sic stantibus* arose as a response to the strict application of *pacta sunt servanda.* Its underlying principle is that a contract is formed based on certain conditions and presumptions, if those circumstances fundamentally alter, the law may need to create a mechanism for relief.[34] This does not imply that every change in circumstances necessitates action. Rather, the theory has usually been interpreted narrowly as an exception to the norm of contractual binding force.

The evolution of hardship in modern contract law shows the same tension. On the one hand, commercial law emphasizes certainty, predictability, and respect for party autonomy. On the other hand, international contracts may be subject to unusual circumstances that the parties may not properly anticipate or assign in advance.[35] This is especially true in long-term contracts, when the passage of time raises the risk of economic, political, or regulatory upheaval. As a result, modern legal mechanisms have grown increasingly interested to control hardship in a more systematic manner.

International soft-law instruments are very useful in this context. The UNIDROIT Principles, PECL, and DCFR all address changing situations, although in different ways. The UNIDROIT Principles and PECL place a greater focus on renegotiation and equitable adjustment, but the DCFR imposes harder modification requirements.[36] These tools demonstrate that hardship has become a significant problem in international commercial law, even if binding agreements do not directly address it.

This historical and comparative background is essential for the CISG analysis, since it was created to establish standard regulations for international sales, but it lacks an express hardship clause. Article 79 addresses the exemption from liability for non-performance caused

[33] Živković (n 20) 240; Vernon Valentine Palmer, 'Excused Performances: Force Majeure, Impracticability, and Frustration of Contracts' (2022) 70 *American Journal of Comparative Law* i70, i71.
[34] Živković (n 20) 240-241; Palmer (n 33) i71.
[35] Palmer (n 33) i70-i71; DiMatteo (n 10) 692-693.
[36] UNIDROIT Principles 2016 arts 6.2.2-6.2.3; PECL art 6:111; DCFR art III.-1:110; Alsharqawi, Althabhawi and Ahamat (n 24) 9-10, 27-29.

by an impediment outside the party's control. Whether this clause can also deal with hardship is determined by its interpretation and the function of Article 7 CISG in encouraging uniformity, good faith, and gap-filling. Hachem notes that Article 7 comprises two rules, namely Article 7(1) addresses independent interpretation of the CISG, while Article 7(2) addresses gap-filling.[37] The next chapters will examine whether the CISG framework is sufficiently adaptable to respond to hardship without breaching legal certainty.

CHAPTER 3 - FORCE MAJEURE UNDER THE CISG

Article 79 CISG is the central provision governing exemption from liability for non-performance under the Convention. Although the CISG does not expressly use the term “force majeure”, Article 79 performs a comparable function by identifying the circumstances in which a party may avoid liability for a failure to perform. The provision is therefore the appropriate starting point for analysing force majeure-type situations under the CISG. At the same time, its wording is deliberately neutral and does not simply reproduce domestic concepts such as force majeure, frustration, impossibility, impracticability or *Wegfall der Geschäftsgrundlage*.[38] This neutrality encourages uniformity, but it also explains why Article 79 has generated significant debate in the literature and case law.

According to Schwenzer, Article 79 governs the exemption from duty to pay damages where non-performance is due to an unexpected impediment outside the promisor's control. She further explains that Article 79 serves as an essential constraint on the CISG's strict accountability system, but that exception should only be considered under extremely specific circumstances.[39] This is significant because Article 79 should not be interpreted as a general fairness clause. It is a restricted exemption regulation.

3.1 Structure of Article 79

Article 79(1) CISG provides that a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the

[37] Hachem, ‘Article 7 CISG’ (n 9) 137.
[38] Yasutoshi Ishida, ‘CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness’ (2018) 30 *Pace International Law Review* 331, 356.
[39] Schwenzer (n 3) 1370.

conclusion of the contract, or to avoid or overcome the impediment or its consequences.[40] As a result, the provision imposes a set of cumulative obligations. First, there has to be an impediment. Second, the impediment must be beyond the control of the party invoking Article 79. Third, impediment could not have been reasonably foreseen at the time of contracting. Fourth, the party must not have had a reasonable ability to avoid or overcome the impediment or its effects.[41] Schwenzer characterizes requirements as a barrier beyond control, unforeseeable, unavoidable, and leading to non-performance.[42]

This structure indicates that Article 79 is not a general fairness clause. It does not exclude a party from obligation simply because performance has become challenging, less lucrative, or commercially unattractive. The party relying on Article 79 has to overcome a high threshold. Article 79(1), particularly the phrase "if he proves," lays the responsibility on the non-performing party to provide proof of each condition.[43] This approach reflects the exemption's unusual nature while still protecting the premise that contractual commitments under the CISG ought to usually be honored.

Paragraph (2) deals with cases where non-performance is caused by a third person engaged to perform all or part of the contract. In such cases, the party relying on Article 79 must show not only that it satisfies the requirements of Article 79(1), but also that the third person would have been exempt under the same standard.[44] Paragraph (3) limits the exemption to the period during which the impediment exists. Paragraph (4) imposes a notice requirement on the non-performing party. Lastly, paragraph (5) clarifies that Article 79 does not prevent either party from exercising any right other than the right to claim damages.[45] Schwenzer also emphasises that Article 79(5) restricts the exemption to claims for damages.[46]

This internal structure is crucial since Article 79 does not instantly end the contract or remove all remedies. Its major function is to remove liability for damages in cases where the requirements are satisfied.[47] Other rights, such as avoidance or other remedies under the Convention, may still apply depending on the circumstances. Article 79 can therefore be considered as a restricted exemption mechanism rather than a comprehensive concept of contractual discharge.

[40] CISG art 79(1).
[41] UNCITRAL Digest (n 3) 374.
[42] Schwenzer (n 3) 1374, 1377.
[43] CISG art 79(1); UNCITRAL Digest (n 3) 379.
[44] CISG art 79(2).
[45] CISG art 79(3)-(5).
[46] Schwenzer (n 3) 1371.
[47] CISG-AC Opinion No 7 (n 4) op 1.

3.2 Interpretation of "Impediment"

The concept of "impediment" is the core of Article 79. The Convention does not define the term, and this has left courts and commentators with considerable interpretative difficulty. However, the choice of the neutral term "impediment" was significant. It avoids direct reliance on domestic doctrines such as force majeure, impossibility, frustration, impracticability or hardship, thereby preserving the international character of the CISG.[48] The term is broad enough to cover different kinds of impediments, but its scope is narrowed by the further requirements of Article 79(1).

Schwenzer explains that the term "impediment" should ensure a narrow and objective understanding of the grounds for exemption. Only objective circumstances that prevent performance and are external to the promisor can be considered impediments within the meaning of Article 79.[49] This confirms that Article 79 does not cover every difficulty affecting performance. The impediment must be external to the affected party's sphere of control.

An impediment may be physical, legal or practical. Physical impediments may include natural disasters, war, destruction of goods, severe transport disruption or other events that prevent performance. Legal impediments may include export or import prohibitions, sanctions, exchange controls or governmental measures that make performance unlawful or impossible.[50] In principle, such events are more likely to fall outside the affected party's control than ordinary commercial difficulties. Nevertheless, the existence of an external event is not sufficient on its own. The party must also prove that the event caused the non-performance and that it could not reasonably have been foreseen, avoided or overcome.[51]

More challenging question is whether economic developments, such as price rises or market disruptions, might be a barrier. Case law and opinion often adopt a restricted stance. Ordinary market fluctuations, increased procurement costs, a shortage of money, a loss of profitability, or a worsening of the market are usually included in the partie's commercial risk assumptions.[52] Schwenzer's analysis supports the limited approach, stating that the separation between the promisor's domain of risk and external barriers should be based on contractual risk distribution, trade practices, and usages.[53] A seller, for example, normally bears the risk that

[48] Ishida (n 38) 356.
[49] Schwenzer (n 3) 1375.
[50] UNCITRAL Digest (n 3) 374-376.
[51] CISG art 79(1); UNCITRAL Digest (n 3) 378-379.
[52] DiMatteo (n 10) 699-700.
[53] Schwenzer (n 3) 1375.

the cost of acquiring or producing the goods will increase after the conclusion of the contract, while a buyer normally bears the risk that the market value of the goods will decrease.[54]

This limited approach is supported by the desire for legal certainty. International sales contracts may encompass price risks, supply risks, and market risks. If regular economic developments were sufficient to constitute the impediment, Article 79 would undercut the parties' agreed-upon risk allocation. This is not to imply that economic circumstances are never significant. In certain situations, a change in circumstances may be so extreme that it raises the question of whether performance has become overly onerous to the point of exceeding typical commercial risk. This problem bridges the gap between force majeure and hardship and will be addressed individually in Chapter 4.

3.3 Requirements for Exemption

3.3.1 Beyond Control

The first requirement is that the impediment must be beyond the control of the party invoking Article 79. This element distinguishes external impediments from internal problems within the party's own sphere of risk. A party cannot normally depend on Article 79 when non-performance is caused by its own financial difficulties, internal organisational issues, poor manufacturing, failure of ordinary suppliers, or inadequate planning and preparation.[55] Schwenzer explains that only an impediment outside the promisor's sphere of control can lead to exemption. Circumstances originating in the promisor's own sphere do not exempt the promisor.[56]

The CISG Advisory Council has said that a seller is not usually exempt if individuals within its sphere of risk fail to perform. This encompasses both the seller's own employees and those contracted to supply raw materials or semi-manufactured items.[57] The same principle applies to the buyer's own people and those hired to carry out its contractual responsibilities. This method prohibits parties from transferring routine procurement or organizational risks to the other party.

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[54] Christoph Brunner, 'Rules on Force Majeure as Illustrated in Recent Case Law' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World* (ICC Dossier No 17, ICC Institute of World Business Law 2018) 82, 89-90.

[55] CISG-AC Opinion No 7 (n 4) op 2.2(a).

[56] Schwenzer (n 3) 1374-1375, 1379.

[57] CISG-AC Opinion No 7 (n 4) op 2.2(a).

Article 79(2) introduces a stricter rule for certain third-party situations. Where a party has engaged a third person to perform the whole or part of the contract, exemption requires that both the contracting party and the third person satisfy the Article 79(1) requirements.[58] The Advisory Council explains that this makes exemption more difficult because the party must prove that the impediment affected both levels of performance.[59] This represents a policy in which a party that decides to arrange performance through third parties should not be able to avoid liability simply by pointing to their failure.

The "beyond control" requirement is so closely related to risk allocation. It inquires if the occurrence falls within the affected party's scope of responsibility or is really external. War, natural disasters, governmental restrictions, and certain punishments are all instances of events that private commercial parties may have no influence over. Supplier failure, lack of liquidity, and internal manufacturing problems usually come within the party's risk.[60]

3.3.2 Unforeseeability

The second requirement is that the impediment could not reasonably have been taken into account at the time of the conclusion of the contract.[61] This requirement focuses on the moment of contracting. If the relevant risk was known or reasonably foreseeable at that time, the affected party will usually be expected either to allocate the risk expressly in the contract or to bear it.

Unforeseeability is measured objectively. According to Schwenzer, the most important test is whether a reasonable person in the situation of the promisor, given the actual circumstances at the time of contract completion and taking trade practices into consideration, should have anticipated the impediment's original or later existence.[62] If the impediment was foreseeable at the time of contracting and the promisor expressed no concerns about it, the promisor is deemed to have accepted the risk that performance would be delayed or prevented by the impediment.[63]

This is particularly important in international trade, where parties may be expected to consider political, regulatory, transport and market risks depending on the nature of the

[58] CISG art 79(2).
[59] CISG-AC Opinion No 7 (n 4) comments paras 16-20.
[60] UNCITRAL Digest (n 3) 375-376; DiMatteo (n 10) 698-700; Schwenzer (n 3) 1379.
[61] CISG art 79(1).
[62] Schwenzer (n 3) 1376.
[63] ibid.

transaction. For instance, where sanctions, export restrictions or supply shortages were already foreseeable at the time of contracting, reliance on Article 79 becomes more difficult.

Furthermore, the provision also prohibits Article 79 from being used as a strategy to avoid bad bargains. If a party enters into a contract despite evident market instability or being aware of supply issues, it cannot later argue that the resultant difficulties were unexpected. In such cases, the risk may be seen as undertaken by that party. This approach promotes business certainty by encouraging parties to utilize clear force majeure or hardship provisions when they want to share predictable risks differently.

3.3.3 Unavoidability and Overcoming the Impediment

The third requirement is that the party could not reasonably have avoided or overcome the impediment or its consequences.[64] This means that the occurrence of an external and unforeseeable event does not automatically justify exemption. The affected party must additionally argue that reasonable actions could not have prevented the non-performance or mitigated its consequences.

The above requirement introduces the concept of commercial reasonableness. Where such choices exist, the party may be expected to look for other suppliers, alternative transportation routes, substitute performance, or take other reasonable precautions. The UNCITRAL Digest states that tribunals have assessed whether a party may fairly overcome an obstruction by providing a commercially viable replacement performance.[65] According to Schwenzer, international trade requires strict adherence to avoiding or overcoming impediments. A party may be obliged to examine alternate transport or supply options, even if these result in higher costs.[66]

However, the obligation to overcome the impediment is not unlimited. Article 79 does not require a party to take measures that are commercially unreasonable, disproportionate or impossible. The standard remains one of reasonableness, not absolute sacrifice. Schwenzer states that exemption may only be considered where the ultimate “limit of sacrifice” has been exceeded.[67] The challenge is identifying where regular commercial load stops and impossible or extreme difficulty starts. The subject in question is especially significant in times of price increases, raw material shortages, or changes in economic circumstances.

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[64] CISG art 79(1).
[65] UNCITRAL Digest (n 3) 378.
[66] Schwenzer (n 3) 1376-1377.
[67] ibid 1377.

3.4 Burden of Proof

The burden of proof lies on the party invoking Article 79. This follows directly from the wording of Article 79(1), which states that a party is not liable "if he proves" that the failure was due to a qualifying impediment.[68] The affected party must therefore prove the existence of the impediment, its external character, its unforeseeability, the impossibility of avoiding or overcoming it, and the connection between the impediment and the failure to perform.

Consequently, it is not sufficient to prove that a disruptive incident happened. The party must associate this event with its specific failure to perform. According to the UNCITRAL Digest, any inability to execute must be "due to" the impediment.[69] Schwenzer distinguishes causation as a distinct criteria, stating that exemptions need an unexpected and insurmountable impediment to be the sole cause for failing to execute.[70] This causality criteria has been utilized to reject exemption in cases where the alleged hindrance did not genuinely cause the non-performance or where the party would have failed to comply regardless of the alleged occurrence.

The burden of proof also requires the affected party to provide evidence of reasonable efforts to avoid or overcome the impediment. For instance, if alternative sources of supply existed, or if performance could have been rendered by other means, the party must explain why those alternatives were unavailable or unreasonable.[71] This makes Article 79 particularly difficult to rely on in cases involving procurement problems, supplier failure or financial difficulties.

The strict burden of proof operates with an important purpose. It prevents Article 79 from becoming a universal justification for commercial difficulty or inadequate business planning. At the same time, it assures that true situations of external and unavoidable obstructions might still result in an exemption. The provision aims to find a balance between fairness to the non-performing party and the necessity to preserve the other party's contractual expectations.

3.5 Legal Consequences

The principal legal consequence of Article 79 is exemption from liability for damages. The CISG Advisory Council states that Article 79 exempts a party from liability to pay

[68] CISG art 79(1).
[69] UNCITRAL Digest (n 3) 378-379.
[70] Schwenzer (n 3) 1377.
[71] UNCITRAL Digest (n 3) 378; Schwenzer (n 3) 1376-1377.

damages for failing to perform any of its obligations, including the seller's obligation to deliver conforming goods.[72] This interpretation is consistent with Article 79(5), which preserves rights other than the right to claim damages.[73] Schwenzer likewise explains that Article 79(5) restricts the sphere of application of the exemption to claims for damages.[74]

Article 79(3) provides that the exemption has effect only for the period during which the impediment exists.[75] This is especially important in circumstances of temporary restrictions. If performance is impeded for a short amount of time, the exemption may not always apply when the restriction is removed. Once the barrier is removed, the party may be asked to act again, unless further remedies or consequences emerge under the Convention.

Article 79(4) imposes a notice obligation. The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received within a reasonable time after the non-performing party knew or ought to have known of the impediment, that party is liable for damages resulting from the non-receipt of the notice.[76] The notice requirement protects the other party by allowing it to react, mitigate losses, arrange substitute transactions or reassess its contractual position.

Article 79(5) is particularly significant. It provides that nothing in Article 79 prevents either party from exercising any right other than to claim damages under the Convention.[77] As a result, even if a party is exempt of damages, alternative remedies may remain accessible. This distinguishes between an exemption from damages and a complete discharge of all contractual consequences. It also illustrates why Article 79 must be considered alongside the CISG's larger remedial structure.

3.6 Relationship with Other CISG Remedies

Article 79 does not operate in isolation, therefore, it must be read within the wider CISG remedial system. The preservation of other remedies under Article 79(5) means that exemption from damages does not automatically deprive the other party of all legal rights. Depending on the circumstances, the other party may still rely on remedies such as avoidance, reduction of price, or other rights available under the Convention.[78]

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[72] CISG-AC Opinion No 7 (n 4) op 1.
[73] CISG art 79(5).
[74] Schwenzer (n 3) 1371.
[75] CISG art 79(3).
[76] CISG art 79(4).
[77] CISG 79(5).
[78] CISG art 79(5); Ishida (n 38) 338-339.

The relationship between Article 79 and specific performance is more controversial. Some commentators and courts have taken the view that Article 79 only releases the debtor from damages claims, leaving obligations to perform unaffected.[79] Others have criticised this position as conceptually difficult, especially where performance is genuinely prevented by a qualifying impediment. Moreover, it is argued that it may be unreasonable to compel performance while an Article 79 impediment continues, particularly where damages are unavailable and enforcement would be inconsistent with the logic of exemption.[80]

This controversy demonstrates the limitations of Article 79. The clause clearly addresses accountability for damages, but it does not give a comprehensive and thorough response to every corrective consequence of the prevailing obstacles. When temporary obstacles are removed, performance may resume. In circumstances of persistent obstacles, avoidance may become significant if the avoidance standards are achieved.[81]

The remedy of avoidance is especially significant since it is the most severe punishment to a breach under the CISG. Magnus views avoidance as the "hardest sword" accessible to a party since it dissolves the contract unilaterally and has serious ramifications for both parties.[82] However, Article 79 does not automatically induce avoidance. It depends on the CISG's specific standards, including whether the infringement is fundamental or if other relevant elements are present.

The crucial argument is that Article 79 establishes a restricted exception mechanism. It may relieve a party of damages if strict requirements are satisfied, but it does not provide a broad power to amend the contract or automatically terminate it. This difference is significant in the hardship. Namely, if Article 79 is primarily concerned with the exemption from damages, hardship instances raise the question of whether the CISG may permit renegotiation or modification through Article 79, Article 7, or general Convention principles. This question will be discussed in the following chapter.

CHAPTER 4 - HARDSHIP UNDER THE CISG

[79] Ishida (n 38) 337-338.
[80] ibid 337-338.
[81] CISG art 79(3), (5).
[82] Ulrich Magnus, 'The Remedy of Avoidance of Contract under CISG - General Remarks and Special Cases' (2005-2006) 25 *Journal of Law and Commerce* 423, 423.

The preceding chapter demonstrated that Article 79 of the CISG provides a structured but restricted exemption procedure for non-performance due to an impediment beyond the affected party's control. The more difficult question is whether the same rule can also cover hardship. Unlike classic force majeure, hardship does not always render performance impossible. Rather, it refers to instances in which performance is still feasible but becomes unduly onerous as a result of an unexpected and fundamental change in conditions. This raises a conceptual issue under the CISG because Article 79 does not clearly mention hardship, renegotiation, or contract adaptation.

4.1 The Absence of an Express Hardship Rule in the CISG

The CISG does not have a distinct hardship clause. Article 79 governs exemption from liability for failing to comply, although it makes no explicit reference of hardship, new circumstances, economic imbalance, renegotiation, or judicial adaptation.[83] This absence is notable since several recent instruments of international contract law specifically address hardship. The UNIDROIT Principles and PECL include provisions for altered circumstances, but ICC model clauses distinguish between force majeure and hardship in contractual writing.[84]

Schwenzer's commentary on Article 79 emphasizes the significance of this divergence. She argues that many legal systems and universal contract law initiatives include distinct hardship clauses that may necessitate contract adaptation or the start of fresh discussions in cases where performance has become more difficult or the value of performance has reduced.[85] By contrast, the CISG does not contain such a separate hardship rule. This shows that the CISG's default response to predicting events is narrower than legal systems or instruments that expressly provide for contract adaptation.

The lack of an express hardship clause causes ambiguity. If performance is impossible due to an external event, Article 79 may provide a clear basis for exemption, assuming that its standards are satisfied. Conversely, if performance is still achievable but has become significantly more costly or economically demanding, the solution is less evident. Article 79 uses the term "impediment" but does not specify whether an economic impediment qualifies.[86]

[83] CISG art 79.
[84] UNIDROIT Principles 2016 arts 6.2.2-6.2.3; PECL art 6:111; DCFR art III.-1:110; International Chamber of Commerce, *ICC Force Majeure and Hardship Clauses 2020* (ICC 2020); CISG-AC Opinion No 20 (n 4) comments paras 0.4-0.5; Alsharqawi, Althabhawi and Ahamat (n 24) 9-10, 27-29.
[85] Schwenzer (n 3) 1372.
[86] CISG art 79(1); CISG-AC Opinion No 20 (n 4) rule 4.

This has resulted in two opposing concerns. On the one hand, completely disregarding hardship may result in unfair outcomes in unusual circumstances when a party is obligated to comply with a contract that has fundamentally changed from the bargain initially reached. However, extending hardship excessively may undermine contractual clarity and the partie's agreed-upon risk allocation.[87] International sales contracts sometimes include market fluctuations, currency risks, transportation charges, and supply chain interruptions. If such risks are too easily seen as hardship, Article 79 will become a universal escape route for bad bargains.

CISG-AC Opinion No 20 attempts to address this uncertainty by stating that the CISG governs cases of hardship.[88] It defines hardship as a situation in which a change in circumstances outside a party's control makes performance extremely difficult, provided that the party could not reasonably have anticipated, avoided, or overcome the change or its effects.[89] Opinion No 20 indicates that under the CISG, there is no responsibility to rewrite the contract, and a court or arbitral tribunal cannot adapt or cancel the contract due to hardship.[90] This view demonstrates the limited scope of the CISG's response, as hardship may be acknowledged as a form of impediment, but since the Convention does not establish a remedial framework comparable to that found in domestic hardship doctrines or soft-law instruments.

The absence of an express hardship provision is therefore the starting point of the debate under the CISG. While this absence does not necessarily imply that hardship is excluded, it indicates that the Convention contains no specific mechanism dealing with such situations. Any solution must therefore be derived through the interpretation of Article 79, the general principles of the Convention, or gap-filling under Article 7(2), which makes hardship one of the most contested issues in the application of Article 79.

4.2 Competing Views on Hardship under Article 79

The doctrinal debate on hardship under the CISG is divided into two major approaches. The first approach contends that hardship may, under extraordinary situations, fall under Article 79. The second approach contends that hardship is not adequately addressed by Article 79 and should not be added by interpretation since it would weaken legal clarity and surpass the Convention's remedial structure. This controversy is more than simply addressing

[87] DiMatteo (n 10) 701-703.
[88] CISG-AC Opinion No 20 (n 4) rule 2.
[89] CISG-AC Opinion No 20 (n 4) rule 4.
[90] CISG-AC Opinion No 20 (n 4) rules 11-13.

terminology. As DiMatteo notes, the essential question is whether the phrase "impediment" in Article 79 refers just to ordinary excuse events such as force majeure, impossibility, and frustration, or whether it also encompasses changes in circumstances, impracticability, and hardship.[91]

In this context, the first view relies on the breadth of the word “impediment”. Article 79 does not require that performance be completely impossible. CISG-AC Opinion No 7 clearly adopts this view, declaring that a change in circumstances making performance overly onerous may qualify as a "impediment" under Article 79(1).[92] It further maintains that the wording of Article 79 does not connect "impediment" with an incident that renders performance impossible.[93] According to this view, the most important concern is not whether performance is physically impossible, but whether the changing circumstances meet the cumulative conditions of Article 79, which include externality, unforeseeability, unavoidability, and causality.

This approach is supported by the notion that a strict impossibility condition would be too limited for current international trade. Economic disruptions can occasionally be so extreme that performance becomes economically unreasonable in ways that outweigh ordinary commercial risk. In such cases, recognizing hardship as clearly outside the scope of Article 79 may result in unfair enactments. Ishida similarly argues that Article 79 should not be limited to final impossibility, and that performance does not have to become totally impossible for a party to claim exemption.[94]

The second perspective is more restrictive. It contends that Article 79 was mainly meant as an exception clause rather than a hardship regulation. Schwenzer's interpretation supports this limited starting point by describing Article 79 as a necessary constraint on the CISG's strict responsibility principle, but only under extremely specific circumstances.[95] She further emphasizes that the phrase "impediment" is intended to provide a restricted and impartial view of the grounds for exemption.[96] According to this viewpoint, common price rises, market declines, and procurement issues are all commercial risks for the concerned party.

The restricted approach is based on legal certainty and party autonomy. International sales relationships necessitate steady risk allocation. Sellers and purchasers frequently transfer

[91] Larry A DiMatteo, ‘Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines’ (2015) 27 *Pace International Law Review* 258, 258-259.
[92] CISG-AC Opinion No 7 (n 4) op 3.1.
[93] CISG-AC Opinion No 7 (n 4) op 3.1.
[94] Ishida (n 38) 355-356.
[95] Schwenzer (n 3) 1370.
[96] ibid 1375.

risks using pricing terms, delivery terms, force majeure clauses, hardship clauses, insurance, and hedging. If courts might alter this distribution whenever performance became more demanding, the CISG's predictability would be compromised.[97] Furthermore, Article 79(5) protects rights other than damages and does not provide a broad power of adaptation. This shows that the Convention's remedial framework is not intended to act as a comprehensive hardship regime.[98]

The involvement of CISG-AC perspectives complicates the discussion even further. Opinion No. 7 and Opinion No. 20 both support the potential of hardship under Article 79, although they are not binding sources of law. DiMatteo questions the use of CISG-AC opinions as authoritative sources, arguing that they should be treated as commentary rather than binding interpretive devices.[99] Nonetheless, the opinions remain valuable academic sources since they reflect extensive attempts by renowned CISG experts to elucidate an unresolved subject.

The more accurate perspective is that hardship is neither totally eliminated nor fully included. Rather, hardship may be tolerated under the CISG only in rare circumstances and within the scope of Article 79. This indicates that typical business difficulty is inadequate, but a significant, unexpected, and unavoidable change of circumstances may be considered an obstruction. The challenging question is not only whether hardship may be recognized, but also what legal implications will result from such identification.

4.3 Hardship as a Possible "Impediment" under Article 79

The interpretation of hardship under Article 79 is substantially determined by the definition of "impediment". As mentioned in Chapter 3, the word was chosen for its neutrality and avoidance of direct absorption of domestic doctrines such as force majeure, frustration, impossibility, impracticability, or *Wegfall der Geschäftsgrundlage*.[100] This neutrality gives the provider flexibility, but it also introduces confusion.

According to Schwenzer, only objective conditions that prohibit performance and are beyond the promisor's control can be considered barriers under Article 79.[101] This argues for a restricted approach to economic suffering. Ordinary price rises, financial incapacity, loss of profit, or procurement issues are normally the obligor's responsibility. The promisor's normal

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97 DiMatteo (n 10) 701-703.
98 CISG art 79(5); Ishida (n 38) 336-338.
99 DiMatteo (n 10) 703-704.
100 Ishida (n 38) 356.
101 Schwenzer (n 3) 1375.

domain of risk encompasses, among other things, financial capacity, procurement risk, and hazards related to its own organization.[102]

According to CISG-AC Opinion No. 20, the CISG governs cases of hardship, which occur when a change in circumstances beyond a party's control makes performance excessively onerous, provided that the party could not reasonably have taken the change into account, avoided, or overcome it or its consequences.[103] This term essentially adheres to the framework of Article 79(1). It considers hardship to be a potential hindrance rather than a separate philosophy. Such hardship may occur when the expense of performance has increased, or the value of the performance has decreased.[104]

This interpretation has the advantage of maintaining the CISG's internal consistency. Rather than importing a domestic hardship concept, it interprets economic impediment using the same conditions as other Article 79 barriers. The impacted party must nevertheless demonstrate that the change in circumstances was beyond their control, unforeseen, and unavoidable. This keeps hardship from becoming a general excuse for ordinary market risks.

However, the limitations of this strategy should be emphasized. Based on Opinion No. 20, a party is still obligated to execute its commitments even if they have become more onerous, unless there is hardship.[105] It also identifies several factors to consider when determining whether hardship exists, such as whether either party assumed the risk, whether the contract is speculative, whether previous market fluctuations occurred, the duration of the contract, whether the seller obtained the goods from its own supplier, and whether either party hedged against market changes.[106] These considerations demonstrate that hardship must remain exceptional.

The interpretation of hardship under Article 79 necessitates a difference between ordinary and extreme economic distress. A moderate price rise, loss of profit, or normal market fluctuations should not be considered. In contrast, a dramatic and unexpected shift that significantly affects the contractual equilibrium may qualify if it cannot be reasonably avoided or overcome. This is consistent with CISG-AC Opinion No. 7, which acknowledges that an unusual change of circumstances may fall under Article 79, but also points out that other court judgments have rejected unfavorable market trends as inadequate.[107] Schwenzer and Muñoz

[102] Schwenzer (n 3) 1375, 1379.
[103] CISG-AC Opinion No 20 (n 4) rules 2 and 4.
[104] CISG-AC Opinion No 20 (n 4) rule 5.
[105] CISG-AC Opinion No 20 (n 4) rule 3.
[106] CISG-AC Opinion No 20 (n 4) rule 7.
[107] CISG-AC Opinion No 7 (n 4) comments paras 28-31.

emphasize the need of maintaining a high barrier for hardship, stating that even significant price rises do not automatically qualify for exemptions.[108]

One outstanding question is the effect of acknowledging hardship under Article 79. If hardship is an impediment, Article 79 expressly prohibits responsibility for damages. However, Article 79 does not specifically authorize renegotiation, judicial adaptation, or court-ordered termination. Opinion No. 20 takes a firm position that, under the CISG, there is no responsibility to renegotiate, no power of court or tribunal adaptation, and no authority for a court or tribunal to terminate the contract in the event of hardship.[109] This indicates that the CISG may acknowledge hardship as a defence, but only within the remedial scope of Article 79.

Ishida suggests a more flexible approach. He contends that courts can modify contracts under the CISG using a "reasonable expectation test," particularly where an unanticipated increase in the cost of performance fundamentally alters the contractual equilibrium.[110] This method aims to retain the CISG framework while allowing for a more appropriate reaction to hardship. However, it is contentious since Article 79 does not clearly grant the power of adaptation, and Article 79(5) protects remedies rather than providing new ones.

As a result, the most plausible reading is a cautious one. Hardship may be considered an obstruction under Article 79 in extraordinary circumstances, although the CISG does not have a fully defined hardship system. It exempts from damages if the Article 79 standards are satisfied, but it does not explicitly authorize courts to rewrite the contract. This constraint explains why parties requesting renegotiation or adaptation should include clear hardship provisions.

4.4 Hardship and General Principles of the CISG

The hardship argument is not exclusive to Article 79. It also addresses Article 7 CISG and the broad concepts that underpin the Convention. Article 7(1) demands that the CISG be interpreted with consideration to its international nature, the need to promote uniformity, and the principle of good faith in international trade.[111] Article 7(2) outlines a procedure for

[108] Ingeborg Schwenzer and Edgardo Muñoz, ‘Duty to Renegotiate and Contract Adaptation in Case of Hardship’ (2019) 24 *Uniform Law Review* 149, 154-155.
[109] CISG-AC Opinion No 20 (n 4) rules 11-13.
[110] Ishida (n 38) 359-381.
[111] CISG art 7(1).

addressing the matters covered by the Convention but not explicitly addressed in it.[112] These rules are important to the case that hardship may be handled within the CISG framework.

Hachem emphasizes that Article 7 contains two criteria that, while straightforward in concept, may be difficult to apply. Article 7(1) tries to secure an autonomous interpretation of the CISG and its broad principles, devoid of domestic biases, whereas Article 7(2) addresses gap-filling.[113] This distinction is especially important for hardship because the CISG does not clearly include a hardship clause, yet the problem may still be claimed to be within the Convention's scope.

The CISG recognizes the need of good faith but limits its scope. Hachem underlines that Article 7(1) does not extend to the interpretation of the parties' declarations or contracts, and it does not impose a general responsibility on the parties to act in good faith.[114] Rather, the CISG's requirements must be construed in a way that promotes good faith in international trade. [115] Magnus argues that Article 7(1) cites good faith as part of the interpretation of the Convention as a standard international law text, but does not clearly impose a universal good faith requirement on the parties comparable to the UNIDROIT Principles.[116]

This difference is essential. It indicates that good faith cannot be utilized to impose a wide obligation to renegotiate or adjust the contract. However, it may still have an impact on the interpretation of CISG provisions and promote a cooperative understanding of the partie's duties. Article 7 may therefore assist in understanding hardship within the CISG framework, but it should not be used to rewrite Article 79 as a fully functional hardship mechanism.

Schwenzer and Muñoz contend that while the CISG does not specifically provide for renegotiation or court-ordered adaptation in hardship cases, it might be read as an internal vacuum to be addressed by general principles under Article 7(2).[117] They list various elements that may support the right to renegotiation, such as good faith, rationality, collaboration, favor contractus, and loss mitigation.[118] According to this viewpoint, hardship is managed not by importing domestic laws instantly, but by extracting a remedy from concepts that already underpin the CISG.

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[112] CISG art 7(2).
[113] Hachem, 'Article 7 CISG' (n 9) 137.
[114] ibid.
[115] ibid.
[116] Ulrich Magnus, 'Comparative Editorial Remarks on the Provisions Regarding Good Faith in CISG Article 7(1) and the UNIDROIT Principles Article 1.7' in John Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (CUP 2007) 45.
[117] Schwenzer and Muñoz (n 108) 183.
[118] ibid 183-184.

This argument is compelling since it retains the CISG's multinational nature. If hardship was resolved directly through domestic law, the same CISG contract may be treated differently depending on the forum and applicable private international law. The aforementioned would undermine uniformity. Therefore, internal gap-filling prioritizes a Convention-based solution, which aligns with Article 7(1).[119]

However, the argument has limitations. The CISG does not include an express responsibility to renegotiate. Opinion No. 20 specifically rejects such a requirement under the CISG.[120] It also opposes court or arbitral adaption and termination in hardship cases.[121] This creates a contradiction between academic arguments based on general principles and the more constrained remedial approach of the Advisory Council in Opinion No. 20.

A balanced perspective should acknowledge the interpretive significance of good faith, reasonableness, along with cooperation without exaggerating its remedial implications. These concepts may support a limited interpretation of hardship as an Article 79 impediment in rare circumstances. They may also support the assumption that parties communicate and act fairly when a significant interruption occurs. Nevertheless, they do not explicitly authorize a court to impose a new contractual price or rewrite the partie's agreement based only on the CISG.

As a result, general principles can assist to explain why hardship should not be explicitly excluded from the CISG framework. They cannot, however, completely turn Article 79 into a comprehensive adaptation mechanism. This difference is critical for ensuring fairness and legal certainty.

4.5 Gap-Filling under Article 7(2)

Article 7(2) CISG establishes the Convention's gap-filling process. Questions involving subjects controlled by the CISG but not specifically decided in it must be resolved in accordance with the broad principles upon which the Convention is founded. If such standards are lacking, the matter must be resolved in accordance with the law applicable under the norms of private international law.[122]

The first step is to evaluate if hardship is covered by the CISG. If hardship is defined as an impediment to liability for non-performance, it is covered under Article 79. This is the approach followed by CISG-AC Opinion No. 20, which holds that the CISG applies in

[119] CISG art 7(1)-(2); Schwenzer and Muñoz (n 108) 183-184.
[120] CISG-AC Opinion No 20 (n 4) rule 11.
[121] CISG-AC Opinion No 20 (n 4) rules 12-13.
[122] CISG art 7(2).

circumstances of hardship.[123] If this is recognized, domestic law should not be enforced immediately. Instead, the interpreter must first determine whether the problem may be handled using the Convention's broad principles.

Hachem's interpretation of Article 7 provides support to this perspective. Article 7(2) was added because the Convention called for provisions addressing gap-filling, regardless of the fact that the matter was contentious throughout the writing process.[124] It requires the interpreter to first look for for broad principles on which the CISG is based, and then, if such principles are absent, to refer to the appropriate domestic legislation.[125] This phase is important because rapid reliance to domestic hardship principles would undermine the CISG's uniform implementation.

The second step is to determine if the CISG has important general concepts. As previously noted, researchers have identified good faith, rationality, cooperation, *favor contractus*, and mitigation as plausible principles for renegotiation or adaptation.[126] These criteria may support a Convention-based reaction to hardship, particularly if severe performance requirements would be incompatible with the contract's underlying balance. At the same time, these concepts must be utilized with caution because they do not specify hardship norms.

The third step addresses the boundaries of internal gap filling. Article 7(2) cannot be utilized to establish a total hardship regime that violates the content and structure of Article 79. The Convention specifically excludes damages and protects alternative remedies, although it does not expressly allow for adaptation.[127] This implies that, even if hardship is covered by the CISG, the possible consequences are restricted unless the parties agree otherwise.

If no general principle can determine a specific question, Article 7(2) allows for reference to the applicable private international law. However, this technique may result in less homogeneity. A court following German law, for example, might reach a different conclusion than a court applying English law or another home system. This is precisely why the hardship discussion is so significant because the more the issue is considered as CISG-related, the more consistency is maintained and the more it is addressed to domestic legislation, the more diverse conclusions are probable.[128]

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[123] CISG-AC Opinion No 20 (n 4) rule 2.
[124] Hachem, 'Article 7 CISG' (n 9) 136-137.
[125] CISG art 7(2); Hachem, 'Article 7 CISG' (n 9) 137.
[126] *Favor contractus* refers to the preference for preserving the contract where possible. See Magnus (n 82) 423-424; Schwenzer and Muñoz (n 108) 183-184.
[127] CISG art 79(5); CISG-AC Opinion No 20 (n 4) rules 9 and 12.
[128] CISG art 7(2); Hachem, 'Article 7 CISG' (n 9) 136–137; Schwenzer and Muñoz (n 108) 183-184.

The most effective approach is to address hardship as dictated by the CISG, but only to a limited extent. Article 79 may give an exemption from damages in extraordinary hardship instances, provided that all conditions are met. Article 7 may help to interpret the provision and identify general principles. Nevertheless, if the proposed remedy is renegotiation, adaption, or termination, the Convention provides no clear method unless the parties incorporate such a language in their contract.[129]

This result solves the thesis' second research question. The CISG construction is capable of accepting hardship to a limited extent. The CISG does not include a comprehensive hardship regime equivalent to certain domestic laws or the UNIDROIT Principles. However, it may be considered an obstruction under Article 79 in extreme situations. The practical effect is that parties should not depend only on Article 79 to regulate hardship. They should create specific hardship clauses outlining the threshold, notification requirements, renegotiation procedure, and repercussions of a failed renegotiation.[130]

CHAPTER 5 - CASE LAW ANALYSIS

The actual scope of the Convention's exemption for non-performance depends on how Article 79 CISG is interpreted in international case law. Although Article 79 outlines broad grounds for exemption, its abstract language has compelled courts and arbitral tribunals to define terms like impediment, foreseeability, control, and the ability to avoid or overcome the impediment. The case law therefore becomes critical to determining how force majeure circumstances and hardship claims work in practice.

This chapter does not attempt to provide a list of all decisions involving Article 79. Rather, it examines specific instances and case-law trends that are especially pertinent to the difference between ordinary commercial risk and extraordinary barriers. The analysis indicates that courts have often used a narrow reading of Article 79, particularly in situations involving price increases, procurement difficulties, market downturns, and financial loss. This restricted tendency is consistent with Schwenzer's opinion that Article 79 is a limited exemption from liability for damages and should not be viewed as a broad remedial mechanism for unfavorable

[129] CISG arts 7(1)-(2), 79(1), 79(5); Schwenzer (n 3) 1371-1372; CISG-AC Opinion No 20 (n 4) rules 2, 4 and 11-13

[130] CISG arts 6, 79(1), 79(5); CISG-AC Opinion No 20 (n 4) rules 2, 4 and 11-13; UNIDROIT Principles 2016 arts 6.2.2-6.2.3; Hachem, ‘Article 6 CISG’ (n 9) 116, 120.

contractual developments.[131] However, the Belgian Supreme Court's decision in *Scafom International BV v Lorraine Tubes SAS* and certain arbitral developments indicate that hardship is not entirely excluded from the CISG framework.

5.1 General Tendencies in the Interpretation of Article 79 CISG

International case law under Article 79 illustrates that the provision is interpreted carefully. According to the UNCITRAL Digest, Article 79 exempts a party from liability only where several cumulative conditions are satisfied. The non-performance must result from an impediment beyond the party's control, the impediment must not have been reasonably foreseeable at the time of contracting, and the party must not have been able to avoid or overcome the impediment or its consequences.[132] Schwenzer characterizes Article 79(1) as an impediment beyond control, unforeseeable, unavoidable, and the cause of non-performance.[133] These requirements set a high threshold for exemption.

The cases show that courts and tribunals generally do not treat Article 79 as a broad fairness provision. A party cannot rely on the provision merely because performance has become more difficult, more expensive or less profitable. The emphasis is instead placed on the allocation of contractual and commercial risks. If the asserted impediment is within the affected party's scope of control or within the risks customarily taken in international trade, exemption is usually rejected.[134] This is consistent with Schwenzer's analysis, which states that the difference between the promisor's sphere of risk and external impediments must be made largely through contractual risk distribution, trade practices, and usages.[135]

This restrictive tendency is particularly visible in cases concerning market risks. Price increases, fluctuations in demand, deterioration of market conditions and procurement difficulties are generally not sufficient to justify exemption.[136] The rationale is that international sales contracts necessarily involve commercial risks, and parties are expected to allocate such risks by contract if they do not wish to bear them. Article 79 is therefore reserved for exceptional circumstances rather than ordinary commercial risks.

At the same time, case law is not entirely uniform. The decision in *Scafom International BV v Lorraine Tubes SAS* is often regarded as the leading example of a more flexible approach

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[131] Schwenzer (n 3) 1370.
[132] UNCITRAL Digest (n 3) 374.
[133] Schwenzer (n 3) 1374, 1377.
[134] UNCITRAL Digest (n 3) 374-375.
[135] Schwenzer (n 3) 1375.
[136] UNCITRAL Digest (n 3) 374 n 4; CISG-AC Opinion No 7 (n 4) comments para 31.

because it accepted, at least in principle, that changed circumstances amounting to hardship may fall within Article 79.[137] This does not mean that hardship is broadly accepted in all CISG cases. Rather, it demonstrates that the distinction between force majeure, hardship, and commercial risk is one of the most contentious concerns under Article 79.

5.2 Restrictive Interpretation of Article 79: Market Risks, Procurement Difficulties and Price Increases

5.2.1 Price Increase and Commercial Risk: *Nuova Fucinati SpA v Fondmetall International AB*

An important early decision in the hardship debate is *Nuova Fucinati SpA v Fondmetall International AB*, decided by the Tribunale Civile di Monza in 1993.[138] The dispute concerned a contract for the delivery of metal. The seller failed to deliver part of the agreed quantity and argued that the international market price had risen so rapidly and unexpectedly that the equilibrium of the partie's performances had been fundamentally altered.[139]

The court ultimately found that the CISG was not applicable to the dispute. For that reason, its statements on Article 79 were not part of the binding reasoning necessary for the decision. CISG-AC Opinion No 7 specifically notes that the court's discussion of Article 79 and impediments short of impossibility was *dicta*.[140] Nevertheless, the case remains relevant because it is often discussed in connection with the question whether economic hardship can be treated as an impediment under Article 79.

The relevance of *Nuova Fucinati* resides in its limited approach to pricing rises. The seller's primary argument was that a significant increase in market price should warrant an exemption from the original contractual terms. The court rejected this argument as a basis for price adjustment.[141] This underscores the courts' overall unwillingness to consider market price rises as adequate grounds for exemption or adaptation under Article 79.

However, the case should be handled with caution. *Nuova Fucinati* cannot be considered definitive authority on Article 79 because the CISG was found to be inapplicable. Its usefulness is somewhat illustrative, since it demonstrates an early court reluctance to use

[137] *Scafom International BV v Lorraine Tubes SAS* (Hof van Cassatie, Belgium, 19 June 2009) C.07.0289.N; UNCITRAL Digest (n 3) 374.
[138] *Nuova Fucinati SpA v Fondmetall International AB* (Tribunale Civile di Monza, Italy, 14 January 1993) CLOUT Case No 54.
[139] CISG-AC Opinion No 7 (n 4) comments para 42.
[140] *Obiter dicta* are judicial remarks that are not essential to the decision and therefore do not form part of the binding ratio of the case. See Bryan A Garner (ed), *Black's Law Dictionary* (11th edn, Thomson Reuters 2019) 'obiter dictum'; CISG-AC Opinion No 7 (n 4) comments para 42.
[141] DiMatteo (n 10) 701.

Article 79 as a tool for revising economically unfavorable contracts. For the purposes of this thesis, the case supports the idea that ordinary increases in prices and market fluctuations are still considered business risk unless they reach an extraordinary level.

5.2.2 Procurement Difficulties and the Sphere of Commercial Risk

A second set of situations involves procurement issues and supplier failure. These instances are significant because they demonstrate that a party cannot simply rely on Article 79 when an obstruction occurs inside its own supply chain. The UNCITRAL Digest cites rulings stating that a seller may be free from failure to supply only if appropriate items are no longer accessible on the market.[142] This implies that simple difficulty or higher expense in getting replacement items is typically insufficient.

This approach is in line with the sphere-of-risk analysis. A seller who agrees to supply items usually carries the risk of organizing manufacturing, procurement and delivery, unless the contract states otherwise. If the items may still be purchased from another source or using another economically reasonable channel, the seller is often obligated to perform. The fact that performance would be less lucrative or result in financial loss does not always constitute an obstruction.[143] Schwenzer considers procurement risk to be within the promisor's ordinary area of risk, indicating that exemption under Article 79 is often not applicable.[144]

CISG-AC Opinion No 7 supports this restrictive approach in relation to third person. It states that a seller is generally not exempt under Article 79 where those within its sphere of risk fail to perform, including the seller's own personnel and persons engaged to provide raw materials or semi-manufactured goods.[145] The same principle applies to the buyer in relation to persons engaged to perform the buyer's obligations.[146] Schwenzer also explains that circumstances originating in the promisor's own sphere, including organisational failures and risks connected with its own business, normally remain attributable to the promisor.[147]

The significance of this approach is that Article 79 does not transfer common organizational and procurement risks to the opposing party. In international sales, parties usually rely on suppliers, carriers, and subcontractors. If every supplier failure could warrant an exception, Article 79 would drastically reduce the dependability of sales contracts. The case

[142] UNCITRAL Digest (n 3) 374 n 4.
[143] Brunner (n 54) 89-91.
[144] Schwenzer (n 3) 1375, 1379.
[145] CISG-AC Opinion No 7 (n 4) op 2.2(a).
[146] CISG-AC Opinion No 7 (n 4) op 2.2(a).
[147] Schwenzer (n 3) 1379.

law consequently maintains a clear separation between external obstacles and internal performance threats.

This does not exclude exemption in all third-party situations. Article 79(2) provides a specific rule for cases where non-performance is caused by a third person engaged to perform all or part of the contract.[148] However, the rule is strict, both the contracting party and the third person must satisfy the requirements of Article 79(1).[149] This makes exemption difficult and reinforces the idea that the party organising performance through third persons generally bears the risk of that organisational structure.

5.2.3 Foreseeability as a Limiting Criterion

Foreseeability is one of the most important limiting criteria in the application of Article 79. The provision requires that the impediment could not reasonably have been taken into account at the time of the conclusion of the contract.[150] This requirement prevents parties from relying on risks that were known, foreseeable or commercially assumable at the time of contracting.

In international trade, foreseeability must be assessed in context. The parties may be expected to take account of risks associated with the type of goods, the relevant market, the duration of the contract, the political situation, transport routes and regulatory environment. Schwenzer explains that the decisive test is whether a reasonable person in the position of the promisor, under the actual circumstances at the time of contracting and taking trade practices into account, ought to have foreseen the impediment's initial or subsequent existence.[151] If the impediment was foreseeable and the promisor made no reservation, the promisor is understood to have assumed the risk that performance may be delayed or prevented.[152]

CISG-AC Opinion No 20 reflects this contextual approach in hardship cases. It states that, in determining whether hardship exists, regard should be had to factors such as whether the risk was assumed by either party, whether the contract is speculative, whether there were previous market fluctuations, the duration of the contract, and whether the parties hedged against market changes.[153] This criteria demonstrate that foreseeability is not an abstract test. It is based on the transaction's economic and contractual background.

[148] CISG art 79(2).
[149] CISG art 79(2); CISG-AC Opinion No 7 (n 4) op 2.3.
[150] CISG art 79(1).
[151]Schwenzer (n 3) 1376.
[152] ibid.
[153] CISG-AC Opinion No 20 (n 4) rule 7.

Foreseeability is especially significant in the context of price increases. A substantial price rise does not always make it unpredictable. The important question is whether the kind and extent of the rise could reasonably have been considered when contracting. This is why hardship arguments are challenging in turbulent markets. Furthermore, commercial parties are often expected to incur standard market risks, including some degree of price volatility.[154]

Therefore, both force majeure and hardship claims are limited by foreseeability. It guarantees that Article 79 does not become a way for parties to avoid risks that they should have anticipated or explicitly apportioned. At the same time, it allows for rare scenarios in which the change in circumstances exceeds the reasonable expectations of commercial parties.[155]

5.3 Hardship-Oriented Interpretation of Article 79

5.3.1 Economic Hardship under Article 79: Scafom International BV v Lorraine Tubes SAS

The most significant case concerning hardship under the CISG is the Belgian Supreme Court decision in *Scafom International BV v Lorraine Tubes SAS*.[156] The dispute arose from a contract for the sale of steel tubes. After the contract was concluded, the price of steel increased significantly. The seller argued that the increase fundamentally altered the economic balance of the contract and sought relief from the original contractual terms.[157]

The Belgian Supreme Court accepted that changed circumstances may, in principle, constitute an impediment under Article 79 where they make performance excessively onerous.[158] This is important because it rejects a strictly impossibility-based reading of Article 79. The decision suggests that the term "impediment" may include economic hardship where the burden of performance becomes exceptional and disproportionate.

The decision is consistent with CISG-AC Opinion No 7, which states that a change of circumstances that could not reasonably have been taken into account and that makes performance excessively onerous may qualify as an impediment under Article 79.[159] It is also consistent with the broader view that Article 79 should not be limited to situations of absolute impossibility.[160]

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[154] Schwenzer (n 3) 1376; DiMatteo (n 10) 699-700; CISG-AC Opinion No 20 (n 4) rule 7.
[155] CISG art 79(1); Schwenzer (n 3) 1376-1377; CISG-AC Opinion No 20 (n 4) rules 4 and 7.
[156]*Scafom International BV v Lorraine Tubes SAS* (n 137).
[157] Ishida (n 38) 373.
[158] UNCITRAL Digest (n 3) 374.
[159] CISG-AC Opinion No 7 (n 4) op 3.1.
[160] Ishida (n 38) 355-356.

However, *Scafom* should not be read too broadly. The case does not establish that every substantial price increase constitutes hardship. Ishida discusses the steel-price scenario and emphasises that, even where a price increase is beyond the seller's control, the decisive question remains whether the increase could reasonably have been taken into account at the time of contracting.[161] This confirms that Article 79 still requires a strict and contextual assessment. Schwenzer and Muñoz also treat *Scafom* as an important decision, but they caution that the reasoning is not sufficiently detailed to provide a clear threshold for hardship.[162]

A further controversial aspect of *Scafom* concerns remedies. The Belgian Supreme Court linked hardship to Article 7(2) CISG and general principles, including the possibility of renegotiation.[163] This reasoning has been influential, but it remains debated. Moreover, Hachem's commentary on Article 7 is relevant here because Article 7(2) first requires gap-filling through the Convention's own general principles, and only in the absence of such principles allows recourse to the applicable domestic law.[164] This supports the idea that hardship should not immediately be resolved through domestic doctrines, but it does not automatically create a full adaptation remedy either.

CISG-AC Opinion No 20 later adopted a more cautious position by recognising that hardship is governed by the CISG, while also stating that the CISG does not impose a duty to renegotiate and does not authorise a court or tribunal to adapt or terminate the contract in case of hardship.[165] This position is important because it prevents *Scafom* from being treated as proof of a broad CISG hardship regime.

The better reading version of Scafom appears to be limited. It establishes that hardship is not explicitly excluded from Article 79. However, it also demonstrates that the impediment must remain high, and the remedial options are unknown. The case is best seen as an extraordinary development under Article 79, rather than proof of a universal right to price adaptation.

5.3.2 Arbitral Openness to Hardship: ICC Case 16369 of 2011

A further example of a more flexible approach is ICC Case 16369 of 2011, discussed by Brunner.[166] The dispute concerned a contract between a Swiss buyer and a Kosovo seller

[161] Ishida (n 38) 373-374.
[162] Schwenzer and Muñoz (n 108) 154-155.
[163] UNCITRAL Digest (n 3) 382 n 112.
[164] Hachem, 'Article 7 CISG' (n 9) 137.
[165] CISG-AC Opinion No 20 (n 4) rules 2, 11-13.
[166] Brunner (n 54) 92-93.

for the supply of a commodity. The contract provided for several deliveries and contained a price formula. After the contract was concluded, the price of the commodity collapsed, making the contract price extremely low and even negative for certain deliveries.[167]

The seller failed to deliver, and the buyer was unable to perform an onward sale contract. The arbitral tribunal rejected the seller's reliance on the contractual force majeure clause. Brunner explains that the catch-all language in the clause was interpreted narrowly and in light of the enumerated force majeure events.[168] This confirms that even in arbitration, force majeure clauses are not automatically applied broadly.

The tribunal then considered Article 79 CISG in light of the UNIDROIT Principles on hardship. According to Brunner, the tribunal essentially interpreted or supplemented Article 79 by reference to Articles 6.2.1 to 6.2.3 of the UNIDROIT Principles.[169] This makes the case important because it illustrates how arbitral tribunals may be more willing than courts to use international soft-law instruments in hardship situations.

The relevance of ICC Case 16369 is twofold. First, it demonstrates that hardship claims may be more appealing in arbitration, particularly in cases when the contract's economic balance has collapsed dramatically. Second, it exhibits the actual use of soft law in international business conflicts. The UNIDROIT Principles may impact the interpretation of Article 79 or complement the legal analysis when the tribunal deems it appropriate.

However, the case should be treated with carefully, since arbitral awards do not establish binding precedent. Their thinking may be guided by the applicable legislation, the parties' contract, the tribunal's mission, and the facts. ICC Case 16369 does not demonstrate that Article 79 normally permits adaptation or hardship relief. Rather, it demonstrates that arbitral procedure may be more adaptable than court practice in extreme instances.

For the purpose of this thesis, ICC Case 16369 encourages a thoughtful conclusion. Hardship may enter the CISG analysis in unusual circumstances, particularly when the contractual equilibrium has been significantly disrupted. Nonetheless, because the legal foundation for adaptation is uncertain, parties should clearly address hardship in their contracts.

5.4 Restrictive and Flexible Approaches Compared

The case law reveals two principal approaches to Article 79. The first and dominant approach is restrictive. It treats Article 79 as an exceptional exemption provision and refuses

[167] Brunner (n 54) 92.
[168] ibid 92-93.
[169] ibid 93.

to relieve parties from ordinary commercial risks. This approach is visible in decisions concerning price increases, market deterioration, procurement difficulties and supplier failure.[170] It is also supported by Schwenzer's interpretation of Article 79 as a narrow exception to the CISG's strict liability principle and by CISG-AC Opinion No 7 in relation to the sphere of risk and third-party performance.[171]

The second approach is more flexible. It accepts that economic hardship may, in exceptional circumstances, fall within Article 79. *Scafom* is the leading judicial example of this approach, while ICC Case 16369 shows that arbitral tribunals may be open to supplementing Article 79 with international soft-law principles.[172] This approach responds to fairness concerns, especially where performance remains possible but has become radically different from the original bargain.

The difference between the two approaches lies partly in the interpretation of "impediment". The restrictive approach tends to associate impediment with objective impediments to performance and with circumstances external to the promisor's sphere of control.[173] The flexible approach treats impediment as capable of including extraordinary economic disruption.[174] The larger interpretation is appealing in extreme hardship instances, but it also risks undermining legal certainty if adopted too broadly.

The approaches also differ in relation to remedies. The restrictive approach fits more easily with the wording of Article 79, which exempts from liability for damages but does not expressly authorise adaptation.[175] The flexible approach raises the further question whether Article 7(2), good faith, reasonableness or international soft-law principles can justify renegotiation or adaptation.[176] This remains controversial.

For a balanced interpretation, the limited approach should serve as the starting point. Article 79 should not be utilized to protect parties from ordinary market risks. However, the flexible approach should not be disregarded outright. Exceptional hardship may be considered an obstruction if the change in circumstances is beyond the party's control, unexpected, and impossible to avoid or overcome. Even presently, the CISG's remedial repercussions are restricted unless the parties specifically agree to renegotiation, adaptation, or termination processes.

170 UNCITRAL Digest (n 3) 374 n 4; DiMatteo (n 10) 701.
171 Schwenzer (n 3) 1370; CISG-AC Opinion No 7 (n 4) op 2.2(a), op 2.3.
172 *Scafom International BV v Lorraine Tubes SAS* (n 137); Brunner (n 54) 92-93.
173 Schwenzer (n 3) 1375.
174 CISG-AC Opinion No 7 (n 4) op 3.1; Ishida (n 38) 355-356.
175 CISG art 79(5).
176 UNCITRAL Digest (n 3) 382 n 112; Schwenzer and Muñoz (n 108) 154-155.

5.5 Emerging Trends and Remaining Uncertainty

The overall trend in case law is one of cautious development. Courts continue to interpret Article 79 restrictively, especially where the alleged impediment consists of market fluctuation, procurement difficulty or financial disadvantage. This protects legal certainty and respects the principle that commercial parties bear ordinary business risks.[177]

At the same time, hardship has become an unavoidable issue in the interpretation of Article 79. *Scafom* demonstrates that changed circumstances may, in principle, qualify as an impediment where performance becomes excessively onerous.[178] CISG-AC Opinion No 20 further confirms that hardship is governed by the CISG, although it limits the consequences available under the Convention.[179] This confirms that hardship is part of the CISG debate, even if its consequences remain narrow.

Arbitral practice may contribute to this development. ICC Case 16369 suggests that tribunals may be more willing to consider UNIDROIT hardship rules when Article 79 alone does not provide a fully satisfactory solution.[180] Nevertheless, such arbitral openness does not eliminate uncertainty. It may increase flexibility, but it may also reduce predictability if different tribunals adopt different approaches.

As a result, the case law points to a cautious conclusion. Article 79 essentially serves as a restricted exception clause. This is not a universal hardship provision. Nevertheless, in extreme instances, hardship may be considered an obstruction. The practical effect is that parties should not depend entirely on Article 79. They should create express force majeure and hardship clauses outlining the relevant circumstances, thresholds, notice responsibilities, renegotiation duties, adaption procedures, and termination rights.

This finding provides a straightforward response to the third research question. International case law has construed Article 79 primarily restrictively, albeit not universally. The dominant approach safeguards legal clarity and commercial risk allocation, whereas a more flexible line of authority, led by Scafom and mirrored in specific arbitral practice, permits hardship to join the CISG framework only in extraordinary instances.

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177 UNCITRAL Digest (n 3) 374 n 4; Brunner (n 54) 89-91.
178 UNCITRAL Digest (n 3) 374; *Scafom International BV v Lorraine Tubes SAS* (n 137).
179 CISG-AC Opinion No 20 (n 4) rules 2, 11-13.
180 Brunner (n 54) 92-93.

CHAPTER 6 - COMPARATIVE REMARKS: THE APPLICATION OF THE CISG IN GERMANY AND CONTRACT ADAPTATION UNDER § 313 BGB

Previous chapters demonstrated that Article 79 CISG is primarily an exemption mechanism, and that hardship can potentially be handled within the CISG only to a limited degree. A comparison with German law is important since German domestic law has a defined method for contract adaptation in the event of a disrupted contractual foundation. This comparison does not imply that German law supersedes the CISG when the Convention applies.

6.1 The Application of the CISG in the German Legal Context

In transactions involving Germany, the first question is not whether German domestic contract law applies, but whether the CISG rules the agreement. According to Article 1(1) of the CISG, the Convention applies to contracts of sale of products between parties with places of business in different States when those States are Contracting States or when the standards of private international law require the application of a Contracting State's law.[181] Therefore, when a German company executes an international sales contract with a party from another Contracting State, the CISG may apply directly provided the conditions of Article 1 are satisfied.

The CISG does not encompass all contractual matters. Consequently, the Convention is limited to the creation of the contract of sale and the rights and responsibilities of the seller and buyer deriving from such a contract, according to Article 4 of the CISG. Unless otherwise stated, it has no bearing on the contract's legality or any of its stipulations, or the contract's effect on property in the products sold.[182] This limitation is important because domestic law may still be applicable to concerns outside the scope of the Convention. However, when it comes to the exemption from liability for non-performance under a CISG-governed international sales contract, Article 79 is the key provision.

Article 6 CISG is especially significant since it establishes party autonomy under the Convention. Hachem notes that Article 6 allows the parties to determine whether to exclude the CISG or adjust it to their own circumstances. It mirrors the Convention's "opting-out"

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[181] CISG art 1(1).
[182] CISG art 4.

approach, in which the CISG applies by default unless the parties agree otherwise.[183] In other words, simply because German domestic law is involved in the transaction does not mean that it immediately replaces CISG. If the CISG applies and has not been excluded, the examination must begin with the Convention.

Hachem further explains that Article 6 operates on two levels, namely conflict of laws and substantive law.[184] At the substantive level, parties may deviate from particular CISG provisions, adjust their impact, amend or improve them through contractual clauses.[185] This is relevant to hardship because parties may incorporate force majeure or hardship provisions that establish events, thresholds, renegotiation requirements, adaption procedures, or termination rights.

To exclude the CISG, all parties must agree, as unilateral derogation is insufficient.[186] This emphasizes the value of proper writing. Parties seeking to apply German domestic law, including section 313 BGB, shall clearly exclude the CISG. A simple link to Germany, or even the choice of German law without an explicit exclusion of the CISG, may not be sufficient to eliminate the Convention if its other requirements of applicability are fulfilled.

This difference is necessary for the present thesis. Where the CISG is applicable, domestic concepts such as *Wegfall der Geschäftsgrundlage* do not automatically improve or replace Article 79. According to CISG-AC Opinion No. 7, the German notion of *Wegfall der Geschäftsgrundlage* is not applicable when the CISG "fills the field" in this area.[187] Therefore, section 313 BGB is applicable merely as a comparison model, not as an automatic solution to CISG contracts.

6.2 Contract Adaptation under German Law: § 313 BGB

German law addresses hardship through the doctrine of disturbance of the basis of the transaction, codified in § 313 BGB. Historically, this doctrine developed through case law under the label *Wegfall der Geschäftsgrundlage*, particularly in response to economic disruptions and inflation after the First World War.[188] It was later codified in the 2002 reform of the German Civil Code as section 313 BGB, under the title *Störung der Geschäftsgrundlage*.[189]

[183] Hachem, 'Article 6 CISG' (n 9) 116.
[184] ibid 119-120.
[185] ibid 120.
[186] ibid 121.
[187] CISG-AC Opinion No 7 (n 4) comments para 31.
[188] Živković (n 20) 253-255.
[189] ibid 253-254.

Section 313(1) BGB provides that if circumstances that became the basis of a contract have seriously changed after the contract was concluded, and the parties would not have concluded the contract or would have concluded it with different content had they foreseen the change, adaptation of the contract may be demanded to the extent that, taking account of all circumstances of the specific case, especially contractual or statutory risk allocation, one party cannot reasonably be required to uphold the contract without alteration.[190]

This provision contains several elements. Firstly, there must be a serious change of circumstances after the conclusion of the contract. Secondly, those circumstances must have formed the basis of the transaction. Thirdly, the parties would not have concluded the contract, or would have concluded it differently, had they foreseen the change. Fourthly, it must be unreasonable to hold one party to the unchanged contract. Finally, the court must consider risk allocation.[191]

The focus on risk allocation is crucial. Section 313 BGB does not allow a party to avoid every adverse agreement. It inquires if the relevant risk was assigned to one party by contract, statute, or the nature of the transaction.[192] This makes the German method adaptable, but not unlimited. Relief can be granted only where the disruption exceeds the danger that the affected party can fairly expect to bear.

Section 313(2) BGB extends the rule to cases where material assumptions that became the basis of the contract later turn out to be incorrect.[193] Section 313(3) BGB then provides that if adaptation is not possible or cannot reasonably be imposed on one party, the disadvantaged party may rescind the contract; in the case of continuing obligations, termination replaces rescission.[194] The structure of section 313 therefore shows a clear remedial hierarchy. Adaptation is the primary remedy, while termination is subsidiary.

German literature confirms this adaptation-oriented character. Živković explains that German law provides codified powers to adapt or terminate a contract that has become excessively difficult to perform or pointless for one party.[195] He also emphasises that the codification complemented earlier case law and that case law remains important for explaining the application of hardship provisions.[196] Similarly, DiMatteo notes that German law recognises hardship or change of circumstances through *Wegfall der*

[190] Bürgerliches Gesetzbuch (German Civil Code) s 313(1).
[191] BGB s 313(1).
[192] BGB s 313(1).
[193] BGB s 313(2).
[194] BGB s 313(3).
[195] Živković (n 20) 253.
[196] ibid 253-254.

Geschäftsgrundlage or *Störung der Geschäftsgrundlage*, now embodied in section 313 BGB.[197]

The case-law background also shows that German law uses the doctrine cautiously. Živković discusses the development of the doctrine from early inflation cases to later decisions in which courts stressed that the doctrine should be applied only where necessary to avoid intolerable results incompatible with law and justice.[198] For example, he refers to the *1953 BGH drill-hammer case*, where the buyer purchased drill hammers intended for export to East Germany, but the export became impossible because of the Berlin blockade. The seller knew of the buyer's purpose, although it was not expressly part of the contract.[199] The BGH applied the doctrine and adapted the contract so that the buyer had to pay only one quarter of the amount due.[200]

This exemplifies the essential aspect of the German approach, that the court might intervene to preserve or amend the contractual relationship rather than simply exempting a party from damages. At the same time, German law does not classify all economic developments as hardship. According to DiMatteo, variations in currency rates or inflation do not automatically qualify for relief under section 313 BGB because they are considered assigned risks.[201] Živković emphasizes that the current German method prioritizes realistic risk allocation above equitable considerations.[202] Although section 313 BGB is adaptable, it is not a universal instrument for resolving commercially unfavorable contracts.

6.3 Comparison with Article 79 CISG

Comparing section 313 BGB and Article 79 CISG indicates significant differences in legal function. German law is adaptation-oriented, whereas Article 79 CISG is primarily exemption-oriented. Moreover, section 313 BGB expressly allows adaptation of the contract where the basis of the transaction has been seriously disturbed and it would be unreasonable to hold one party to the unchanged contract.[203] By contrast, Article 79 CISG provides that a party is not liable for failure to perform if the failure was due to an impediment beyond its control and the other cumulative requirements are satisfied.[204]

[197] DiMatteo (n 10) 707-708.
[198] Živković (n 20) 255-256.
[199] BGH, 16 January 1953, BGHZ 7, 212; Živković (n 20) 253-255.
[200] Živković (n 20) 255-256.
[201] DiMatteo (n 10) 708.
[202] Živković (n 20) 256-257.
[203] BGB s 313(1).
[204] CISG art 79(1).

This difference is especially important in hardship cases. Under section 313 BGB, the central question is whether the circumstances forming the basis of the contract have seriously changed and whether maintaining the contract unchanged would be unreasonable. The legal response is directed first toward preserving the contract through adaptation.[205] Under Article 79 CISG, the central question is whether non-performance was caused by an impediment beyond the party's control, which was unforeseeable and could not reasonably be avoided or overcome.[206] The primary legal consequence is exemption from liability for damages, not adjustment of the contractual terms.

Schwenzer's commentary confirms this difference. She explains that Article 79 governs exemption from liability to pay damages where non-performance is caused by an unforeseeable impediment beyond the promisor's control, and that the provision functions as a necessary but narrow limitation on the CISG's strict liability approach.[207] She also notes that, in contrast to the CISG, many legal systems and uniform contract law projects contain separate hardship provisions that may require contract adaptation or renewed negotiations where performance has become more difficult or where the value of performance has decreased.[208] This demonstrates that Article 79 and section 313 BGB operate with different remedial logics.

The contrast can also be seen in the structure of the remedies. Section 313(1) BGB expressly provides that adaptation may be demanded.[209] Section 313(3) BGB allows rescission or termination only where adaptation is not possible or cannot reasonably be required.[210] In other words, German law treats adaptation as the central remedy and termination as a secondary response. Article 79 CISG does not follow this structure. Article 79(5) provides that nothing in Article 79 prevents either party from exercising any right other than to claim damages.[211] This confirms that Article 79 mainly removes damages liability but does not itself establish an adaptation mechanism.

CISG-AC Opinion No 20 further confirms this difference. It states that the CISG governs cases of hardship, but also provides that there is no duty to renegotiate the contract in case of hardship, no adaptation by a court or arbitral tribunal, and no termination by a court or arbitral tribunal on the ground of hardship under the CISG.[212] This perspective is significantly

[205] BGB s 313(1), (3).
[206] CISG art 79(1).
[207] Schwenzer (n 3) 1370.
[208] ibid 1372.
[209] BGB s 313(1).
[210] BGB s 313(3).
[211] CISG art 79(5).
[212] CISG-AC Opinion No 20 (n 4) rules 2, 11-13.

narrower than § 313 BGB. It implies that, even if hardship is recognized within the CISG framework, the Convention does not offer the same remedial options as German domestic law.

The German model therefore offers a clearer legal route for contract adaptation. It provides a statutory basis, identifies the relevant threshold, incorporates risk allocation into the analysis, and expressly allows adaptation before termination. Article 79 CISG, by contrast, leaves several questions unresolved. It does not expressly mention hardship, does not define economic impediment, and does not clearly empower courts or tribunals to adapt the contract.[213] This explains why the hardship debate under the CISG remains controversial.

However, the German approach has disadvantages in terms of international sales law. Its flexibility is based on a fact-based evaluation of reasonableness and risk allocation. This may result in more equitable decisions in unusual circumstances, but it may also impair predictability. The CISG's more stringent approach safeguards legal certainty and uniformity by restricting remedy to narrowly specified circumstances of impediment. This is especially crucial in international trade, because partners from various legal systems require unambiguous rules.

The relationship between the CISG and domestic hardship doctrines is therefore delicate. If courts too readily apply domestic doctrines such as section 313 BGB to CISG contracts, uniformity may be undermined. CISG-AC Opinion No 7 argues that, if the CISG applies, it naturally pre-empts other potentially applicable domestic hardship rules, and that it is preferable to resolve hardship problems within the “four corners” of the Convention rather than through diverse domestic doctrines.[214] This supports the concept that section 313 BGB should be incorporated into this thesis only as a comparative measure, not as a direct addition to Article 79, unless applicable conflict rules and Article 7(2) require recourse to domestic law.

Article 7 CISG is also applicable at this point. According to Hachem, Article 7(2) requires that matters controlled by the CISG but not specifically settled in it be managed first in accordance with the fundamental principles on which the Convention is founded, and only in the absence of such principles through the use of relevant domestic law.[215] If hardship is addressed under the CISG, the interpreter shall not immediately refer to section 313 BGB. The first step should be to determine if Article 79, Article 7, and the fundamental principles of the CISG offer an internal solution.

[213] Ishida (n 38) 333-334, 356.
[214] CISG-AC Opinion No 7 (n 4) comments paras 34-35.
[215] CISG art 7(2); Hachem, ‘Article 7 CISG’ (n 9) 137.

The comparison further clarifies the practical implications of contract drafting. German law has a legislative fallback mechanism for adaption, whereas the CISG does not. Parties bound by the CISG should not assume that a court or arbitral tribunal will modify the contract in difficult circumstances. If they wish to renegotiate, alter prices, adapt, or terminate in the event of significant economic instability, they should incorporate specific hardship clauses. Article 6 CISG provides the conceptual basis for this by allowing parties to deviate from or modify the impact of the Convention's provisions.[216]

Consequently, German law demonstrates a more adaptable approach to hardship. Section 313 BGB establishes a systematic method for adaptation of contracts in cases when the transaction's foundation has been substantially disrupted. Article 79 CISG, on the other hand, continues to serve largely as a mechanism for damage exemption. Accordingly, CISG does not have a broad remedial structure like section 313 BGB, although it can accommodate hardship in certain circumstances. This comparison confirms the thesis's primary argument that Article 79 is acceptable for conventional force majeure scenarios, but less applicable for hardship unless the parties clearly specify the effects of altered conditions in their contract.

CHAPTER 7 - PRACTICAL IMPLICATIONS

The preceding chapters indicated that Article 79 CISG provides a limited exemption mechanism for non-performance due to an impediment outside the party's control. They also demonstrated that hardship can only be addressed in exceptional cases under the CISG, and that the Convention does not provide a clear process for renegotiation or judicial adaptation. This has significant practical implications for multinational business arrangements. Parties cannot equally be certain that Article 79 will protect them from all unforeseen occurrences, or that a court or arbitral tribunal will adapt the contract if execution becomes economically burdensome. As the previous analysis has shown, risk distribution and careful contract drafting are essential.

The COVID-19 pandemic is an excellent practical illustration of these difficulties. Government restrictions, export and import prohibitions, company closures, and supply chain disruptions all have a significant impact on international trade. Such circumstances may, in principle, be considered impediments beyond a party's control under Article 79 CISG.

[216] CISG art 6; Hachem, 'Article 6 CISG' (n 9) 120.

However, exemption is not automatic. The affected party must nonetheless demonstrate that the impediment was unexpected at the time of contracting, could not reasonably be avoided or overcome, and caused the failure to perform. COVID-19 demonstrates both the utility and limitations of Article 79. While the rule might be applicable to genuine performance failures, many pandemic-related disputes included delays, increased costs, market instability, or supply-chain challenges rather than complete impossibility. As a result, the pandemic emphasizes the practical need of specific force majeure and hardship provisions that govern notice, suspension, renegotiation, adaption, and the allocation of extraordinary risks.[217]

7.1 Risk Allocation in International Sales Contracts

International sales contracts are vulnerable to a variety of risks, including transportation interruption, war, sanctions, export or import restrictions, pandemics, supply chain failure, raw material shortages, currency changes, and unexpected price increases. Article 79 CISG may grant relief in some of these cases, but only if the strict requirements are fulfilled. The party using Article 79 must demonstrate impediments beyond its control, unforeseeability and incapability to prevent or overcome the impediment, and causation.[218] According to Schwenzer, Article 79 only applies under particular circumstances and distinguishes between external barriers and the promisor's area of responsibility based on contractual risk allocation.[219]

As a result, risk allocation is important. If a risk is within the affected party's contractual or commercial domain, Article 79 normally does not allow an exception. Procurement difficulties, financial incapacity, ordinary supplier failure, market degradation, and pricing changes are typically viewed as business risks rather than qualifying barriers.[220] The practical consequence is that parties should not depend on Article 79 as a blanket safety net. They should decide ahead of time which risks will be absorbed by the seller and which by the buyer, as well as which risks will result in suspension, renegotiation, price adjustment, or termination.

The case law confirms this point. Courts and tribunals have generally rejected Article 79 claims where the alleged impediment consisted of market changes, procurement difficulties

[217] André Janssen and Christian Johannes Wahnschaffe, 'COVID-19 and International Sale Contracts: Unprecedented Grounds for Exemption or Business as Usual?' (2020) 25(4) *Uniform Law Review* 466, 466-495; Ş Esra Kiraz and Esra Yıldız Üstün, 'COVID-19 and Force Majeure Clauses: An Examination of Arbitral Tribunal's Awards' (2020) 25(4) *Uniform Law Review* 437, 437-465; CISG art 79(1), (4)-(5).
[218] CISG art 79(1); UNCITRAL Digest (n 3) 374.
[219] Schwenzer (n 3) 1370, 1375.
[220] Schwenzer (n 3) 1375, 1379; DiMatteo (n 10) 699-701.

or increased costs.[221] This restrictive approach promotes legal certainty, but it may produce harsh results where performance remains possible but becomes economically extreme. The decision in *Scafom* shows that hardship may be recognised in exceptional circumstances, but it does not provide a sufficiently predictable general rule.[222] Therefore, parties should use contractual clauses to allocate risk more precisely than the CISG default rules do.

7.2 Drafting Force Majeure Clauses

A force majeure clause should define the events that may excuse non-performance or delay. Since the CISG does not use the term "force majeure", parties should not assume that the concept will be interpreted uniformly across legal systems. A well-drafted clause should specify whether events such as war, armed conflict, terrorism, natural disasters, epidemics, governmental restrictions, sanctions, export or import bans, strikes, cyberattacks, transport disruptions or supply-chain interruptions are covered.[223]

However, simply listing events is not enough. The clause should also define the required effect of the event. For instance, the parties should clarify whether performance must be impossible, prevented, substantially hindered, delayed, or merely made more burdensome. This is important since Article 79 focuses on an "impediment" causing failure to perform, and Schwenzer emphasises that only objective circumstances external to the promisor can qualify as impediments.[224] If the parties desire to cover different circumstances, they should state it explicitly in the contract.

A force majeure clause should also regulate notice. Article 79(4) CISG requires the party who fails to perform to give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received within a reasonable time, the non-performing party is liable for damages resulting from non-receipt.[225] Contractual clauses may clarify this obligation by specifying the time limit, form of notification, information to be provided, and whether updates are necessary while the event is ongoing.

The clause should also address consequences. It should specify whether the affected party is entitled to suspension of performance, extension of time, exemption from damages, partial performance, substitute performance, or termination after a defined period. Article 79(3) provides that exemption has effect only for the period during which the impediment exists,

[221] UNCITRAL Digest (n 3) 374 n 4; DiMatteo (n 10) 701.
[222] *Scafom International BV v Lorraine Tubes SAS* (n 137); UNCITRAL Digest (n 3) 374.
[223] Cheng and Lim (n 10) 197-199.
[224] Schwenzer (n 3) 1375.
[225] CISG art 79(4).

while Article 79(5) preserves rights other than damages.[226] As a result, contractual drafting should clarify what occurs throughout and after the impediment.

Finally, the clause should address mitigation and overcoming the impediment. Article 79 requires that the party could not reasonably have avoided or overcome the impediment or its consequences.[227] Schwenzer explains that, in international trade, this requirement is strict and may require consideration of alternative transport or supply routes, even if they involve increased costs.[228] A contract can reduce uncertainty by specifying what mitigation efforts are expected and when an alternative becomes commercially unreasonable.

7.3 Drafting Hardship Clauses

Hardship clauses are especially significant because Article 79 CISG does not explicitly address hardship, renegotiation, or adaptation. CISG-AC Opinion No 20 acknowledges that the CISG regulates hardship, but it also declares that the CISG does not impose an obligation to renegotiate, does not authorize court or arbitral adaptation, and does not provide a court or arbitral tribunal to terminate the contract on the basis of hardship.[229] This implies that parties desiring such remedies must construct them contractually.

A hardship clause should first define what constitutes hardship. The provision should state if hardship necessitates a fundamental change in the contractual equilibrium, an excessive increase in the cost of performance, an important decrease in the value of performance, or a specific percentage increase in costs. The clause should also clarify that it excludes ordinary market fluctuations, normal price movements, and predictable risks. This is consistent with the restrictive approach under Article 79 and with CISG-AC Opinion No 20, which requires consideration of risk allocation, market fluctuations, speculative contracts, contract duration and hedging.[230]

Secondly, a hardship clause should regulate renegotiation. It should specify when a party may request renegotiation, what information must be provided, how long the renegotiation period lasts, and whether performance must continue during negotiations. Without such a clause, there is no clear duty to renegotiate under the CISG according to

[226] CISG art 79(3), (5).
[227] CISG art 79(1).
[228] Schwenzer (n 3) 1376-1377.
[229] CISG-AC Opinion No 20 (n 4) rules 2, 11-13.
[230] CISG-AC Opinion No 20 (n 4) rule 7.

Opinion No 20.[231] As a consequence, straightforward language is required if the parties want renegotiation to be a legal requirement rather than simply a commercial option.

Thirdly, the provision should specify the consequences if renegotiations fail. The parties may provide for expert determination, mediation, arbitration, court adaptation, price adjustment, suspension, termination, or another agreed mechanism. This is important because the CISG itself does not clearly empower courts or tribunals to adapt the contract in hardship cases.[232] A well-drafted clause can therefore fill the remedial gap left by Article 79.

Article 6 CISG supports this contractual freedom. It allows the parties to exclude the application of the Convention or derogate from or vary the effect of its provisions.[233] Hachem explains that Article 6 reflects the CISG's party autonomy and permits parties to adapt the Convention to their particular circumstances.[234] This means that parties can use hardship clauses to create a more flexible regime than the CISG default position.

7.4 Implications from Case Law

The case law analysed in Chapter 5 shows that Article 79 is applied cautiously. Decisions concerning market risks, procurement difficulties and price increases demonstrate that courts are reluctant to exempt a party merely because performance has become more expensive or less profitable.[235] The aforementioned presents an apparent practical implication that parties should not expect that cost increases or supply-chain challenges will always qualify as impediments.

The *Scafom* decision provides a more flexible example, but it should not be treated as a general rule. It shows that hardship may, in principle, be considered under Article 79 where performance becomes excessively onerous.[236] However, the judgment does not provide a precise threshold for hardship, and later commentary remains cautious about its implications. Schwenzer and Muñoz note that *Scafom* is significant, but that its reasoning does not completely resolve the threshold for hardship or the consequences of recognition.[237]

Arbitral practice may be more open to hardship, as illustrated by ICC Case 16369 of 2011, where the tribunal considered Article 79 CISG in light of the UNIDROIT Principles on

[231] CISG-AC Opinion No 20 (n 4) rule 11.
[232] CISG-AC Opinion No 20 (n 4) rules 12-13.
[233] CISG art 6.
[234] Hachem, 'Article 6 CISG' (n 9) 116, 120.
[235] UNCITRAL Digest (n 3) 374 n 4; Brunner (n 54) 89-91.
[236] *Scafom International BV v Lorraine Tubes SAS* (n 137); UNCITRAL Digest (n 3) 374.
[237] Schwenzer and Muñoz (n 108) 154-155.

hardship.[238] However, arbitral awards do not create binding precedent and often depend on the wording of the contract, the applicable law and the tribunal's approach. Therefore, arbitral openness to hardship does not remove the need for clear contractual drafting.

The practical message from case law is therefore twofold. First, Article 79 offers a narrow and uncertain route for relief in hardship situations. Secondly, courts and tribunals pay close attention to risk allocation. Parties should therefore draft contracts in a way that makes risk allocation explicit rather than leaving it to uncertain judicial interpretation.

7.5 Implications for Legal Practice

For legal practitioners, the primary implication is that force majeure and hardship should be treated as separate drafting concerns. Force majeure provisions should include situations that prevent, delay, or legally prohibit execution. Hardship provisions should address economic impact as well as contract preservation or adjustment. Combining both concepts in a single ambiguous paragraph may cause confusion, particularly under the CISG, since Article 79 does not specifically distinguish between force majeure and hardship.

Furthermore, practitioners should refrain from using broad general phrases. A phrase that simply refers to "events beyond the partie's control" may not address the main problems, such as whether increased costs are included, if performance must be impossible, whether there is an obligation to renegotiate, whether a tribunal may adjust the price, and whether termination is permitted. Specific drafting is especially crucial in unpredictable areas including commodities, energy, construction materials, international transportation, and long-term supply contracts.

Another aspect concerns regulating laws and the exclusion of the CISG. As an illustration, if the parties decide to use German law, the CISG may nonetheless apply to an international sale of goods unless specifically prohibited. Article 6 allows for exclusion or exemption, but nonetheless, Hachem emphasizes that exclusion needs consent and that the CISG normally applies by default unless excluded.[239] Parties shall expressly choose whether to utilize domestic German hardship legislation (e.g., § 313 BGB) instead of the CISG. On the other hand, if they want the CISG to apply while simultaneously requesting hardship remedies, they should include an unambiguous hardship clause. Finally, lawyers should ensure that the clause is functional. It should contain definitions, notification requirements, evidentiary

[238] Brunner (n 54) 92-93.
[239] CISG art 6; Hachem, 'Article 6 CISG' (n 9) 116, 121.

obligations, mitigation responsibilities, time restrictions, renegotiation methods, interim performance rules, and the consequences of a failed renegotiation. Without such details, a hardship clause may become a point of contention.

Overall, the practical importance of Article 79 CISG stems not only from the potential of exemption, but also from its limitations. The clause may provide an appropriate solution to common force majeure circumstances, particularly when performance is disrupted by an external, unforeseen, and unavoidable impediment. However, it provides a less guaranteed option in which performance is still achievable but has become economically demanding. As a result, parties to international sales contracts should not depend primarily on Article 79 in difficult circumstances. Instead, they should employ the contractual flexibility granted by Article 6 CISG to predetermine how extraordinary interruptions may effect their commercial relationship. Clear force majeure and hardship clauses assist in maintaining the CISG's predictability while allowing the parties the flexibility that Article 79 does not expressly provide.

CHAPTER 8 – CONCLUSION

This thesis observed the scope, interpretation, and practical implications of force majeure and hardship under the CISG, with a special emphasis on Article 79. The examination began with the distinction between force majeure and hardship. Force majeure generally refers to external occurrences that impede performance, whereas hardship refers to instances in which performance is still feasible but becomes exceedingly difficult due to a fundamental change in conditions. This distinction is essential since Article 79 CISG is primarily intended as an exemption mechanism, whereas hardship frequently necessitates a more flexible legal response, such as renegotiation or contract adaptation.

The first research question concerned the regulation of force majeure under Article 79 of the CISG. The thesis demonstrated that Article 79 does not employ the phrase "force majeure," but it nevertheless has a comparable purpose. It exempts a party from liability for damages if non-performance is caused by an impediment beyond that party's control, as long as the impediment could not have been reasonably anticipated at the time of contracting and could not have been avoided or overcome. The standards are cumulative and strict. Article 79, therefore, does not function as a universal fairness clause. It is a restrictive exemption provision that only protects parties in rare circumstances of exogenous, unexpected, and unavoidable obstructions.

Another question addressed in this research was the degree to which hardship may be accommodated within the CISG framework. The analysis showed that hardship is one of the most contentious concerns under Article 79. The CISG absences a clear hardship clause and does not specifically provide for renegotiation or judicial adaptation. Nonetheless, CISG-AC Opinion No. 20 and certain research indicate that hardship may be controlled by the CISG and, under extraordinary circumstances, qualify as an impediment under Article 79. As a result, the best perspective is one of caution. Hardship should not be absolutely precluded, however, it should be recognized only when the change in circumstances is unusual, unexpected, beyond the affected party's control, and difficult to prevent or overcome within reasonable limitations.

At the same time, the thesis asserts that simply acknowledging hardship as a potential impediment is not an indication that the CISG contains a comprehensive hardship regime. Article 79 principally protects the person who has been harmed against damages. It does not explicitly impose a responsibility to renegotiate, nor does it expressly authorize courts or arbitral tribunals to alter or revoke the contract on the grounds of hardship. Article 7 CISG may assist with interpretation and gap filling, but it should not be exploited to turn Article 79 into a wide adaptation mechanism. This result maintains a balance between fairness and legal certainty.

The third research question inquired about how international case law has interpreted Article 79 in the context of unanticipated events. The case law demonstrates a generally restricted perspective. Courts and tribunals have usually dismissed Article 79 claims based on regular market risks, price rises, procurement issues, supplier failure, or financial loss. This indicates that commercial parties are expected to assume conventional company risks unless they have specified otherwise in their contract. The examination of *Nuova Fucinati* and other restricted rulings supports up this perspective.

However, the case law is not completely uniform. The Belgian Supreme Court's ruling in *Scafom International BV v Lorraine Tubes SAS* is the most significant hardship-related development. It acknowledged that altered circumstances might, in principle, constitute an impediment under Article 79 if performance becomes excessively demanding. Certain arbitral decisions, such as ICC Case 16369 of 2011, demonstrate an openness to hardship reasoning and the effect of international soft-law instruments such as the UNIDROIT Principles. Nonetheless, these developments remain exceptional and uncertain. They do not establish a universal CISG guideline concerning contract adaptation.

The fourth research question emphasis focused on the practical implications of these interpretations in international commercial contracts. The analysis concluded that parties should not depend entirely on Article 79 to minimize the consequences of severe disruption. Article 79 may be effective in traditional force majeure situations, but it is less clear in hardship cases. Its strict standards, limited corrective implications, and ambiguous relationship with adaptability contribute to making it an unsatisfactory default mechanism for many current international sales contracts.

The comparative statements about German legislation support this argument. German law, under section 313 BGB, offers a systematic method for contract adaptation where the foundation of the transaction is substantially disrupted. This methodology differs from Article 79 CISG, which remains essentially exemption-oriented. The analysis shows that the CISG does not have the same remedial options as German domestic law. Domestic principles, such as section 313 BGB, may not always apply where the CISG regulates the transaction. Assuming the CISG applies, the analysis must first adhere to the Convention's own framework.

The practical implication is that contract writing is essential. Parties should use the power granted by Article 6 CISG to explicitly specify force majeure and hardship clauses. On one hand, force majeure clauses should identify the covered events, notification responsibilities, mitigation duties, and legal consequences. On the other hand, hardship clauses should establish the hardship degree, the responsibility to renegotiate, the renegotiation mechanism, and the consequences of a failed renegotiation, such as adaptation or termination. Clear drafting may maintain the CISG's predictability while allowing parties the autonomy that Article 79 does not expressly provide.

Consequently, Article 79 CISG is appropriate for ordinary force majeure circumstances, but less appropriate for hardship. It has a restricted and relatively predictable exemption mechanism, but it fails to provide a complete solution to economic disruption. Hardship may be permitted under the CISG only in extraordinary circumstances and within strict restrictions. As an outcome, the most compelling conclusion is that Article 79 should not be enlarged into a comprehensive hardship doctrine. Instead, parties should address hardship explicitly in their contracts. This method maintains the CISG's consistency and predictability while acknowledging the practical requirement for variable risk distribution in international commerce.

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