2015

# Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines

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# CONTRACTUAL EXCUSE UNDER THE CISG: IMPEDIMENT, HARDSHIP, AND THE EXCUSE DOCTRINES

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## I. INTRODUCTION

This article will examine the law of excuse as espoused in the Convention on Contracts for the International Sale of Goods (CISG).[1] It will examine the relevant case law applying the doctrine of impediment found in CISG Article 79. The question posed in this analysis is whether the word "impediment" relates only to the occurrences of force majeure, impossibility and frustration of purpose events or if it also includes changed circumstances, impracticability and hardship events. For purposes of simplicity, the first set of excuse or exemption doctrines[2] will be analyzed under the heading of "impossibility"[3] and the second set will be discussed under the heading of "hardship".

The key issue to be explored in this article is the distinction between excuse requiring impossibility or frustration of contractual purpose[4] and hardship[5] as it relates to Article 79 of the CISG.[6] These terms and doctrines have often been conflated. This is understandable given the number of such doctrines

[1] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/Conf. 97/18 [hereinafter CISG].

[2] Excuse (more commonly used in the common law) and exemption (more commonly used in the civil law will be used interchangeably throughout this article. They both represent the concept that, in certain circumstances, a breaching party may not be held liable for damages despite breaching a contract.

[3] Although at times references will be made to force majeure; not so much as the civil law of force majeure, but as to the types of occurrences or non-occurrences that have traditionally been the grounds for providing an excuse.

[4] Excuse is a general term that incorporates the numerous doctrines that provide a party an exemption from liability for breach of contract. The phrases of excuse and exemption, as generic terms, will be used interchangeably throughout this article.

[5] Hardship is a form of excuse but is not as strict in its requirements for exemption as is impossibility or force majeure. Hardship sometimes is referred to as "changed circumstances," but all forms of excuse necessarily involve a change of circumstances that alters the balance or equilibrium of a contract to the detriment of one of the parties. *See* Ahmet C. Yildirim, Equilibrium in International Commercial Contracts (2011) (focusing on the concepts of gross disparity and hardship under the UNIDROIT Principles of International Commercial Contracts).

[6] *See* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ARTICLE BY ARTICLE COMMENTARY 1088 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2011) ("The [CISG] is silent on the problem of allocating the risk of severe and unpredictable changes in circumstances, altering the contractual equilibrium fundamentally").

found in various national laws and international law instruments, such as impossibility,[7] impracticability,[8] frustration of purpose,[9] *force majeure* or Act of God,[10] hardship,[11] change of circumstances,[12] and so forth. The question posed is whether the impediment doctrine provides an exemption from liability only for "absolute" excuse (impossibility, *force majeure*) or if it also extends to the more liberal "relative" excuse doctrines (hardship, changed circumstances, impracticability).

Given the vagueness of Article 79's use of the word impediment, its interpretation and application has had to be constructed anew. This has to, of course, be done with all CISG provisions under the autonomous interpretation date.[13]However, the interpretation of the exemption of impediment is an especially difficult task given the context of the numerous excuse doctrines in the various national legal systems, as well as the conflation of different excuse doctrines within national legal systems. French law has the most restrictive

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[7] The seminal case in the common law relating to excuse for impossibility is Paradine v. Jane, [1647] 82 Eng. Rep 897 (K.B.); *see* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 624-32 (3rd ed. 2004) (examining the growth of the excuse of impossibility).

[8] The doctrine of impracticability is ensconced in UCC Article 2-615. *See generally*, Norman R. Prance, *Commercial Impracticability: A Textual and Economic Analysis of Section 2-615 of the Uniform Commercial Code*, 19 IND. L. REV. 457 (1986). The doctrine of impracticability has also been used by analogy in the American common law of contracts; *see* Paula Walter, *Commercial Impracticability in Contracts*, 61 ST. JOHN'S L. REV. 225 (1987).

[9] *See* G. TREITEL, FRUSTRATION AND FORCE MAJEURE (1994) (a comparative analysis of frustration in American and English law).

[10] *See* FORCE MAJEURE AND FRUSTRATION OF CONTRACT 5-10 (Ewan McKendrick ed. 2nd ed. 1995) (providing an analysis of force majeure in French and English law).

[11] *See, e.g.,* KARSTEN KEILHACK, THE HARDSHIP APPROACH IN THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AND ITS EQUIVALENT IN GERMAN LAW OF OBLIGATIONS—A COMPARISON; Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP L. 657 (1992) (providing a comparative analysis of two excuse doctrines).

[12] The notion of "changed circumstances" is common to all of the excuse doctrines. *See* CHENJING JIAO, CHANGE IN PRICE AND CHANGED CIRCUMSTANCES (2013) (providing a comparative analysis of Chinese, English, German, and American contract law); *see also*, RODRIGO M. URIBE, THE EFFECT OF A CHANGE OF CIRCUMSTANCES ON THE BINDING FORCE OF CONTRACTS (2011) (comparative perspectives)

[13] CISG, *supra* note 1, art. 7 (the CISG is to be interpreted using the general principles of the CISG and not to recourse to national laws).

form of excuse recognizing only *force majeure* events that make it impossible to perform; the United Kingdom's law is slightly more liberal, adding the doctrine of frustration of purpose to the impossibility doctrine; and German law incorporates the more common civil law bifurcation of impossibility and hardship doctrines, while also recognizing frustration of purpose, as well as recognizing both physical and economic impossibility.[14] The United States has a tripartite excuse regime involving impossibility, frustration, and impracticability.

Part II briefly examines the law of excuse in the German and American legal systems focusing on the German concept of changed circumstances and the American doctrine of impracticability, while Part III briefly reviews the law of excuse provided in the UNIDROIT's Principles of International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL). The reviews in Parts II and III will set the context for analyzing the case law relating to CISG Article 79 that is undertaken in Part IV.

## II. HARDSHIP IN GERMAN AND AMERICAN LAW

The common law, represented by American law and Germanic civil law, is divided on whether hardship or changed circumstances can provide an excuse or exemption from liability for damages for breach of contract. American excuse law evolved from English common law, which, in its modern form, recognizes objective impossibility (impossibility) and frustration of purpose. Hardship is not grounds for excuse under English common law, but is captured within the American doctrine of impracticability.[15] It is for this reason that American law has been chosen to compare to German law. In contrast, German law's concept of change of circumstances provides relief for cases of objective and subjective impossibility, frustration of purpose, and hardship. The next two sections will briefly examine the law of excuse in the American and German laws of con-

[14] *See* BÜRGERLICHES GESETZBUCH [BGB][Civil Code]. Aug. 18, 1896, REICHSGESETZBLATT [RGBL] 195, §§275, 313 (Ger.) (discussing objective and subjective impossibility, as well as change of circumstances and adaptation of contract).

[15] U.C.C. § 2-615 (1977) and applied, by analogy, in American common law.

tract.

*A. German Notion of Changed Circumstances*

German law, as well as the UNIDROIT Principles of International Commercial Contracts (*PICC*),[16] Principles of European Contract Law (*PECL*),[17] and the Common European Sales Law (CESL),[18] recognize two categories of exemption: impossibility (objective and subjective, as well as frustration of purpose) and hardship.[19] Under the German BGB (*Bürgerliches Gesetzbuch*), in contrast to the common law's strict interpretive methodology, the enforcement of contracts is more teleological or purposive in approach. Thus, the interpretation and enforcement of contracts is also performed through the prism of the purpose or "foundation of the contract."[20] If the purpose of the contract has been defeated or greatly diminished, then that should necessarily impact its interpretation and enforcement. This is one explanation of why German law possesses both excuse and hardship doctrines.[21]

The longstanding German law doctrine of *Störung der Geschäftsgrundlage* (interference with the foundation of the contract),[22] codified in Section 313 of the BGB, allows relief to a

[16] *See generally* International Institute for the Unification of Private Law, Principles of International Commercial Contracts (1994), http://www.unidroit.org/english/principles/contracts/principles1994/1994fulltext-english.pdf. (hereinafter, "PICC").

[17] COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II (Ole Lando & Hugh Beale eds. 2000) & COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, PART III (Ole Lando & Hugh Beale eds. 2003) (hereinafter, "PECL").

[18] COMMON EUROPEAN SALES LAW (CESL) *Proposal for the Regulation of the European Parliament and the Council on a Common European Sales Law*, COM (2011) 635 final (Nov. 10, 2011)*; see generally*, COMMON EUROPEAN SALES LAW (CESL) – COMMENTARY (R. Schulze ed. 2012) (comprehensive commentary on the CESL).

[19] *See* Bank Line Ltd. V. Arthur Capel & Co. [1919] A.C. 435, 459, as cited in McKendrick, *supra* note 9 at 38.

[20] *See* BASIL MARKESINIS, HANNES UNBERATH & ANGUS JOHNSTON, THE GERMAN LAW OF CONTRACT: A COMPARATIVE TREATISE 319-78 (2d ed. 2006).

[21] Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP. L. 657 (1992) (explains the difference between impossibility or force majeure and hardship).

[22] MARKESINIS, *supra* note 19 at 319.

party where there has been a "fundamental" change in circumstances, which would render unfair the enforcement of the contract without the revision of the parties' obligations. BGB 313 not only codifies "hardship," but it also indicates that the preferred form of relief is adaptation or reformation. The rationale here is that unlike impossibility or *force majeure*, performance is still possible and, therefore, an adaptation that preserves the contract and the contractual relationship is the best option.

The notion of "fundamental" change of circumstances is analogous to the notion of a "basic assumption" on which a contract is formed in the area of common law mistake and excuse.[23] In the American doctrines of impracticability and frustration of purpose the occurrence or non-occurrence has to go a "basic assumption" of the contract.[24] The notion of fundamental change of circumstances in the German law as a basis for exemption or adaptation assumes that the change results in a drastic change of contractual equilibrium. This disruption of contractual equilibrium in the German law of hardship can be, at least partially, traced back to the judicial developments in the 1920s. In response to hyperinflation and drastic currency devaluations, the German courts moved beyond the scope of impossibility to "applying the concept of change of fundamental circumstances . . . based on § 242 BGB (principle of good faith)."[25] Fundamental change is also translated as the "collapse of the basis of the contract."[26] This notion of contractual disequilibrium underlies both the German principles of frustration of contract (*Wegfall der Geschäftsgrundlage*) and hardship codified in BGB Section 313.

The "modern" BGB[27] provides broad grounds for termina-

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[23] RESTATEMENT (SECOND) OF CONTRACTS §§152(1) (1981) (mistake); 261-265 (common law frustration and impracticability); UCC § 2-615(a) (impracticability in the sale of goods).

[24]RESTATEMENT (SECOND) OF CONTRACTS §261 (1981) (discharge by supervening impracticability); §265 (discharge by supervening frustration); UCC §2-615 (excuse by failure of presupposed conditions).

[25] Hannes Rösler, *Hardship in German Private Codified Law—In Comparative Perspective to English, French and International Contract Law*, 15 EUROPEAN REV. PRIVATE L. 483, 488 (2007).

[26] *Id.*

[27] The original BGB went into force on January 1, 1900. It was revised and the new BGB went into force on January 1, 2002. The new BGB modernized and simplified the law of contracts, incorporating EU Directives and spe-

tion or adaptation of contracts due to changed circumstances. The BGB provides the most comprehensive and extensive law of excuse found in any national law. Within its dual exemption-adaptation provisions represented by Sections 275 and 313, the areas of impossibility, frustration of purpose, and hardship are duly recognized. Section 275 recognizes objective impossibility (no party may perform the obligation) found in the common law and subjective impossibility (this party is not able to perform), which is rejected in the common law. Section 313 recognizes changes of circumstances that result in a hardship to one of the parties as a ground for adaptation (reformation) of the contract. Section 314 recognizes the right of termination when the hardship is found in the context of a long-term contractual relationship.

BGB Section 275, entitled "Exclusion of duty to perform," provides the remedy of exemption from liability for breach, while Section 313 provides for the adaptation or reformation of the contract due to changed circumstances. BGB Section 275(1) recognizes a liability exemption when performance becomes objectively impossible to perform. BGB 275(2) enunciates a benefit-cost analysis on whether a party should be required to perform: "The obligor may refuse to perform in so far as performance requires expenditure which . . . is manifestly disproportionate to the obligee's interest in performance." In making this determination a court should be guided by the subject matter of the obligation, the principle of good faith,[28] and whether the obligor is responsible for the impediment. But, even when the claiming party "is responsible for the hindrance to performance," this is only weighed as a factor and not as a bar to exemption. The other party may demand compensation in lieu of performance or reimbursement of expense as provided in BGB Section 284.[29] However, such payment is not required if

cialized German laws, such as the regulation of standard terms, making the new BGB once again a truly comprehensive civil code. This comprehensiveness can be found in its law of excuse as codified in BGB §§ 275, 313 & 314.

[28] BGB § 241 (duty of good faith).

[29] BGB § 284 allows the non-breaching party to collect expenses "made in reliance on receiving the performance." See also, BGB §§ 280 (damages); 283 (compensation on exclusion of duty under Section 275); 285 (transfer of replacement or claim for replacement from non-performing party); 311a (hindrance of performance existing prior to conclusion of contract); 324 (release of non-breaching party from counterperformance).

the obligor had no knowledge of the hindrance and was not responsible for its lack of knowledge.[30]

The essence of BGB Section 313 can be found in its title: "Disturbance of foundation of transaction." BGB Section 313(1) states:

> If the circumstances which have become the foundation of the contract have seriously altered after the conclusion of the contract and if the parties would not have concluded the contract, or would have concluded it with different content if they had foreseen this alteration, then adaptation of the contract can be demanded in so far as adherence to the unaltered contract cannot be expected of one party taking into consideration all the circumstances of the individual case and in particular the contractual or statutory division of risk.

Section 313(1) is complimented by the BGB's recognition of the particular role that a disturbance to the contractual foundation or contractual equilibrium in the case of long-term contractual relationships. Section 313(3) and Section 314 ("Termination of long term obligation relationships by notice on substantial ground") allow for the right of termination in such relationships based upon "substantial ground." Section 314(1) states that "substantial ground is present if, taking into consideration all the circumstances of the individual case and balancing the interests of both sides, the continuation of the contractual relationship . . . cannot be expected of the party giving notice" of termination. The issue of contractual disequilibrium or hardship is often more pronounced in long-term contracts and the BGB provides a specific provision (Section 314) that recognizes the uniqueness of long-term contractual relationships, unlike the common law.

The combination of BGB Sections 275, 313, and 314 provides a prism for recognizing and viewing the issues left unanswered in CISG Article 79. These provisions enunciate the issues of exemption and reformation (Sections 275 and 313), force majeure or impossibility (Section 275(1), frustration (Section 313 and 314), hardship (Section 275(2) (subjective impossibility), 313 and 314)), allocation of risk (Section 313(1)), basic assumption of contract (Section 313(1)), role of fault (Section

[30] BGB § 311a (2).

275(2)), role of good faith (Section 275(2)), and impact on remedies of the non-breaching party (Sections 275(4), 313(3) and 314(2-4)).

*B. Doctrine of Impracticability in American Law*

The idea that a party can be relieved of its duty to perform due to hardship caused by an unexpected event is not recognized under the common law doctrine of impossibility because it is still possible for the party to perform, albeit at great additional costs. Even though it may play a role in the common law's frustration of purpose doctrine, generally hardship alone will not sustain such a claim because the purpose of the contract, at least for the non-claiming party, is still in existence. This restrictive characterization of excuse in English law originates in the old common law view that a party was strictly liable on its promises and that exchanged promises or obligations were independent covenants in which a party was required to perform independent of the other party's obligation.[31] In short, whether or not a party was at fault or whether something prevented the performance was of no import—breach was breach! Thus, a lessee of land, who was unable to use the land from 1643 to 1646 due to occupation by an enemy army was still required to make rental payment for those three years because it had made an "independent charge" to pay the rent and had failed to protect itself through the contract.[32]

The doctrine of frustration of purpose was developed to prevent such injustices.[33] However, the doctrine was kept within "very narrow limits." How does this place the doctrine in relationship to an exemption due to hardship caused by a change in circumstances? Not as close as one would suggest given the justice and fairness rationales for the doctrine. Professor Treitel notes that the doctrine does not mean "that the courts can do what they think just whenever a change of circumstances causes hardship to one party."[34] In sum, English common law,

[31] *See* McKendrick, *supra* note 9 at 3.

[32]Paradine v. Jane, (1647) Aleyn 26; [1647] EWHC KB J5, 82 ER 897.

[33] Lord Bingham in J. Lauritzen A.S. v. Wijsmuller B.V., [1990] 1 Lloyd's Rep. 1 (the role of the doctrine is "to give effect to the demands of justice, to achieve a just and reasonable result").

[34] G.H. TREITEL, THE LAW OF CONTRACTS 819-20 (8th ed. 1991), as quoted

unlike German law, does not recognize an excuse based upon a hardship to one of the parties. However, American contract law, which possesses the doctrines of impossibility and frustration of purpose in its common law, also recognizes the doctrine of impracticability as espoused in Section 2-615 of the American Uniform Commercial Code (UCC). The doctrine of impracticability by its very nature implies the recognition of a hardship defense—the contract has been made impracticable by some supervening event.

Prior to the enactment of the American UCC, American common law shared the twin excuses of impossibility and frustration taken from English common law. American and English common law rejected the use of mere hardship as a means to petition for rescission or reformation of contracts. The passage of the UCC in the 1960's ushered in what was anticipated to be a liberalization of excuse to include the concept of hardship. One scholar asserted that the new doctrine of impracticability had ushered in a new era or "new spirit" of contract law in which courts would intervene to correct unexpected contractual imbalances.[35] Empirical evidence indicates that in fact this new spirit of law did not greatly impact the letter of the law as espoused in the earlier excuse doctrines.

An analysis of Section 2-615 begins with its prosaic title: "Excuse by Failure of Proposed Conditions."[36] This unfortunate labeling makes it seem that the doctrine espoused in the Section is not to be found in the law of excuse, but in the law of conditions. In just reading the title, one reading is that the Section pertains to conditions precedent and subsequent. In fact, it can be argued that excuse can be discussed as a special form of

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in Ewan McKendrick, *supra* note 20 at 39.

[35] Richard E. Speidel, *'The New Spirit of Contract,'* 2 J. L. & COMM. 193 (1982); Richard Speidel, *Court Imposed Adjustments under Long-Term Supply Contracts*, 76 NW L. REV. 369 (1981); Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617 (1983).

[36] Documentary History of the Uniform Law for International Sales: The studies, deliberations and decisions that led to the 1908 United Nations Convention with Introductions and Explanations 1, 1 (Honnold, J., ed. Kluwer Law & Tax Publishers, Deventer, 1989). Under the American scheme, found § 2-615 of the Uniform Commercial Code ('UCC'), a seller's failure to deliver by reason of impracticability is *not a breach*. The direct effect of an exemption under Article 79 CISG, in contrast, is to exempt the non-performing party from liability (damages).

implied condition precedent or subsequent. An excuse (occurrence of an unexpected event or unexpected non-occurrence of an expected event) can be framed as a condition precedent—the non-occurrence of an expected event or the non-occurrence of an unexpected event is a condition precedent to the obligation to perform. More appropriately, it can be seen as a condition subsequent, where the non-occurrence of an expected (or promised event) or the occurrence of an unexpected event creates a condition subsequent allowing a party to opt out of the remaining part of the contract.

The criteria for the excuse of impracticability are provided in Section 2-615(a). First, the excusing event (occurrence or non-occurrence) must render the contract impracticable to perform and it must relate to a "basic assumption" of the contract. It fails to provide any guidance as to the types of factors to be used in making the determination of the existence of an impracticable performance or basic assumption. It merely provides a singular example: "good faith" compliance with "foreign or domestic governmental regulation."[37]

Section 2-615(b) establishes a seller's duty in situations where the impracticability does not expunge the seller's total capacity to perform. This would be the case were the amount of goods contracted for by multiple buyers exceeds the seller's inventory of such goods. In this case, the seller "must allocate production and deliveries [among] his customers." It provides a number of allocation methods. First, as implied by the above duty the allocation can be done on a pro rata basis. Second, the allocation can be expanded to include future contracts with "regular customers." Third, the allocation can be done "in any manner fair and reasonable."[38]

A notice obligation is prescribed in Section 2-615(c). It requires the seller to "seasonably" notify the buyer of any expected delay or non-delivery. In the case of allocation, the seller must notify its buyers of the "estimated quota" to be delivered.[39] Section 2-616 provides reciprocal notice provisions to Section 2-615. It provides that upon receiving a notice of allocation, the buyer may by "written notification" to the seller ter-

[37] UCC §2-615(a).
[38] UCC §2-615(b).
[39] UCC §2-615(c).

minate the contract or to take the quota assigned as substituted performance. However, it states that this buyer's option is only available "where the prospective deficiency substantially impairs the whole contract."[40] Thus, impracticability modifies the "perfect tender rule"[41] in that the buyer must accept the goods unless the non-conformity is substantial.[42] The buyer's right of rejection when the goods or tender of the goods "fail in any respect" is replaced by the substantial impairment rule in cases of excuse.

The substantial impairment standard raises the issue of whether an excuse involving some installments in an installment contract relieves liability only relating to the installments or to the contract as a whole. Does the buyer have the right to termination the whole contract if the seller claims excuse as to an installments or a number of installments? Section 2-616(1) expressly references Section 2-612 for the answer. Section 2-612 covers the determination of breach in installment contracts. It is interesting to note that this Section applies even when the installment contract states that each delivery is to be considered as a separate contract.[43]

Section 2-612, like Section 2-616, derogates from the perfect tender rule in that the buyer can only reject a non-conforming installment if the non-conformity "substantially impairs the value of the installment" and seller gives "adequate assurance of its cure."[44] Thus, in cases of excuse that results in a delayed delivery or an allocated quantity, the buyer is still required to accept the delayed delivery or a delivery of a lesser quantity if seller promises to cure. The substantial impairment rule also is used to determine if the buyer may terminate the whole contract. If the non-conformity or non-delivery of one or more installments is determined to substantially impair the whole contract, when the buyer may terminate the whole con-

[40] UCC §2-616(1).

[41] UCC § 2-601.

[42] Thus, when part performance is available and an impracticability is claimed, Section 2-616(1) preempts the application of the perfected tender rule found in §2-703(a) (buyer's right to reject goods "if the goods or the tender of delivery fail in any respect to conform to the contract").

[43] UCC §2-612(1).

[44] UCC §2-612(2).

tract.[45] The above discussion of the buyer's right to reject nonconforming goods is relevant to the issue of whether the delivery of defective goods can be viewed as an impediment under CISG Article 79, to be discussed in the subsequent coverage of CISG case law.[46]

The above discussion shows that impracticability serves other functions than simply as a defense for nonperformance. It provides rights to the seller for delayed performance or to supply an allocated portion of the contracted goods without incurring liability for delay or shortage of quantity. However, the right to supply an allocated quantity is terminated if the buyer fails to provide notice of acceptance of the offered quota. From the buyer's perspective, it places a duty to notify on the buyer if it would like to be tendered the quantity stated in the seller's notice of allocation as a substituted performance. This notice must be provided within a "reasonable time, not exceeding thirty days" after receipt of seller's notice.[47]

UCC Section 2-615 states that it is subject to Section 2-614 (Substituted Performance), which requires a party to tender and the other party to accept a substituted event when "commercially available" in cases where "without fault of either party" when "an agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable."[48] It is important to note that UCC Section 2–615 provides excuse *only for the seller,* and then only with respect to *two aspects* of performance—delay in delivery and nondelivery.

## III. EXCUSE AND HARDSHIP UNDER *PICC* AND *PECL*

The provisions of the *PICC* and *PECL* are aligned on the central issue posed by this article—the possibility of hardship being an exemption under CISG Article 79. The *PICC* and *PECL* both recognize (as does the German BGB) hardship as

[45] UCC §2-612(3).
[46] *Infra* Part V.C. ("Defective Goods as Impediment").
[47] UCC §2-616(2).
[48] UCC §2-614(1).

grounds for contractual adjustment' Like the German BGB, the law of hardship is found in provisions separate from the more absolute excuse provisions (impossibility or frustration of purpose).[49]

*A. PICC*

Like the PECL, the *PICC* sets the notion of hardship as grounds for an exemption within the context to the bindingness of contracts**:** **"**Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship."[50] Thus, the first order rule for any court or tribunal is to enforce a commercial contract as written. It is not the courts role to evaluate the relative values, benefits, and costs being exchanged between the parties to the contract or as changed by subsequent events. So, the fact that a party will suffer heavy losses or lose all benefit[51] from the contract is not a reason to relieve that party of its contractual obligations.

The second order rule is that in exceptional instances the hardship to be borne by one of the parties, due to the change of circumstances during the performance of the contract, is so harsh as to warrant an adjustment or termination of the contract through an exemption of liability for non-performance. Article 6.2.2 (Definition of Hardship) of the *PICC* provides that where "there is hardship when the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished." What distinguishes unexpected gains or losses from a legally recognized hardship is the phrase that an event has "fundamentally altere[d] the equilibrium of the contract." Which begs the question of what is considered to be a "fundamental" alter-

[49] This is also true for the Common European Sales Law (CESL). See COMMENTARY ON COMMON EUROPEAN SALES LAW (Reiner Schulze ed. 2011). The CESL provides for relief for "excused non-performance" (Article 88) and for "Change of circumstances" (Article 89). See *Id.* at 408-25.

[50] PICC, Art.6.2.1 ("Contract to be Observed"), *available at* http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010.

[51] *See Id.* at Comment 1.

ation? Which begs the question of what deviation from equilibrium is to be considered a fundamental alteration?

*B. PECL*

Again, unlike the CISG, the *PECL* recognize both impediment and hardship or changed circumstances. The title to Article 8:108, "Excuse Due to an Impediment" uses both the words "excuse" and "impediment." Its core provision mimics CISG Article 79: "non-performance is excused if it is due to an impediment beyond [a party's] control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences."[52] Unlike the CISG, the temporary suspension remedy is complemented by the following sentence: "[I]f the delay amounts to a fundamental non-performance, the obligee may treat it as such."[53] This expressly states what can only be implied in Article 79; when the length of the suspension reaches the level of a fundamental breach the non-breaching party may declare an avoidance of the contract. However, it does not expressly provide a right of the non-performing party to avoid the contract due to a lengthy suspension.

*PICC* Article 6:111 ("Change of Circumstances") accepts the more modern liberalization of excuse by recognizing hardship as a ground to request an exemption or modification. It first notes that the purpose of the provision is not to re-allocate the risk expressed or implied in the contract by stating that a "party is bound to fulfill its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished."[54] However, when a change of circumstances results in the "performance of the contract becom[ing] *excessively onerous*, the parties are bound to enter into negotia-

[52] PECL, Art. 8:108(1). The *Draft Common Frame of Reference* adopts this provision on Excuse Due to Impediment" in its Article 3:104. See PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) 239 (Christian von Bar, et al. eds. 2009).

[53] PECL, *supra* note, Art. 8:108(2).

[54] *Id*. at 6:111(1).

tions with a view to adapting the contract or terminating it."[55] Interestingly the concept of "onerousness" is not elaborated upon, but it would be akin to the notion of "undue burden" found in the common law. The primary impact of the failure of Article 79 to define impediment and the CISG's lack of an express hardship provision is loss of the parties' duty to re-negotiate in good faith found in the hardship provisions in *PICC* and *PECL*. Such a duty is especially important to prevent waste and disruption of contractual relationships in long distance sales and long-term supply contracts.

Another variance between the change of circumstances principle in *PECL* and impediment in the CISG is that the CISG does not require, as does the *PECL* that "the change of circumstances occurred *after* the time of conclusion of the contract."[56] Under the *PECL*, if the party "should" have known of the existence of the change of circumstances then it was reasonably foreseeable and the party would lose the right to request a negotiation or to demand an exemption. If a reasonable person would not have been aware of the existence of an impediment or change of circumstances, and the party had no actual knowledge of the change, then such things were not foreseeable and the party should be able to request adaptation or an excuse. But, this would not be allowed under the *PECL*.[57] In this way the CISG is superior since whether the impediment appears before or after the time of contract formation the only operative question is whether it was possible (reasonable) for the party to have taken the impediment into account at the conclusion of the contract."[58] It seems that if performance is well enough along it would be efficient to require the parties to negotiate an adaptation or termination whenever the impediment occurred.

The other requirements in order to effectuate the duty to negotiate track the requirement for impediment: "change of circumstances was not one which could reasonably have been tak-

[55] PECL, Art. 6:111(2) (emphasis added).

[56] PECL, Art. 6:111(2)(a).

[57] The requirement that the event occurred subsequent to the contract formation can be understood within the overall area of genuineness of consent where the claim would be that of mistake.

[58] *See* CISG, *supra* note 1, art. 79(1).

en into account at the time of conclusion of the contract and the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear."[59] The remaining issue comes within the old adage that for every right there is a corresponding duty.[60] Hardship triggers the right to demand a negotiation, but what is the threshold of the duty to negotiate in good faith? The summary answer is that it is for the court to decide when the party subject to the hardship brings a claim for adaptation or termination.[61] At that time, the court may assess damages suffered because of a party refusing to negotiate or breaking off negotiations contrary to good faith.

There a number of ways to rationalize the lack of a hardship or change of circumstances provision in the CISG. The one commonly given is that the drafters wanted to confirm the importance of *pacta sunt servanda*—the need to enforce contracts in order to assure the certainty and security of a party's contractual obligations. But, the above analysis shows another possible reason for the omission of a hardship provision in the CISG. The rejection of a general duty of good faith in the drafting of the CISG makes problematic a hardship provision requiring the parties to negotiate in good faith.

## IV. APPLICATION OF EXCUSE UNDER CISG ARTICLE 79: IMPOSSIBILITY AND HARDSHIP

The confusion over the meaning of "impediment" in CISG Article 79 mirrors the fact that national excuse doctrines are also somewhat amorphous in their content and inconsistent in their applications. John Honnold in his seminal work *Uniform Law for International Sales under the 1980 United Nations Convention* **(***Uniform Law*)[62] noted that the numerous national excuse doctrines rest on a "continuum between the difficult and the impossible as to the type of events that justify an exemp-

[59] *See* PECL, *supra* note 17, art. 6:111(2)(b-c).

[60] Wesley H. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L.J. 16 (1913) (for every right there is a reciprocal duty).

[61] *See* PECL, *supra* note 17, art. 6:111(3).

[62] John Honnold, Uniform Law for International Sales under the 1980 United Nations Convention §423 (3rd edition 1999) **(**Uniform Law).

tion from liability for breach.[63] Furthermore given the variety of excuse doctrines found in national laws there a great deal of uncertainty relating to the scope of excuse.[64] Article 79 utilization of the neutral term "impediment" was intended to mask over the differences among the national excuse doctrines and may be best read as lying between the more strict and more liberal national excuse doctrines, which range between strict impossibility to mere hardship.

Honnold foresaw this disconnect between Article 79 and national excuse doctrines as leading to its underutilization as courts would likely to apply the impediment principle through the prism of national excuse doctrines. He concluded that: "Article 79 may be the Convention's least successful part of the half-century of work towards international uniformity."[65] This seems to have come to fruition. As of March 15, 2014, the Pace CISG database listed only 147 cases relating to Article 79,[66] including, 69 arbitration decisions, fifty-one of them coming from the Chinese International Economic and Trade Arbitration Commission (CIETAC) and Russian arbitration panels. More telling is the fact that only 5 common law cases (two involving the same case on appeal) exists, all coming from the United States. Just as important as the number of CISG Article 79 cases is the fact that in only a handful of cases did the court or arbitral panel actually sustain a claim for an impediment. The following review of this case law seeks to uncover the issues addressed and the issues unanswered by the current decisions.

### *A. CISG Article 79*

CISG Article 79 consists of five parts. The first part provides the requirements that must be met in order to sustain a defense or claim of excuse. The claiming party must prove that there was a recognized event or impediment, that the non-performance was due to the impediment, that the impediment

[63] *Id.* §432.1, at 483.

[64] *Id.* For example, under force majeure a physical impossibility must be grounds for the excusing of non-performance, while German law also allows for economic impossibility.

[65] Honnold, *supra* note 62, § 432.1 at 483.

[66] Some of these entries are of the same case at different levels of the trial and appellate court processes.

was "beyond his control" to prevent, that the impediment was not "taken . . . into account at the time of the conclusion of the contract," (non-foreseeability requirement), and that it would not be expected for him "to avoid or overcome it or its consequences."[67] The second part of Article 79 allows in certain instances for a party to claim an impediment due to the actions or non-actions of a third-party: if "due to the failure by a third party" the principal party is unable to perform, then the principle party may claim an impediment if the third party meets the requirements of Article 79(1)."[68] The third part of Article 79 states that the preferred consequence of a claim of impediment is suspension and not termination.[69] The fifth part of the Article states that the exemption only protects the claiming party from liability for damages.[70] Thus, the non-claiming party still retains the rights to avoid the contract and to demand specific performance or substituted performance. The damages exemption is limited by part four the Article which requires the party claiming an impediment to give notice "within a reasonable time" from when she "knew or ought to have known" the existence of the impediment.[71] Failure to do so exposes the claiming party to liability "for damages resulting from such non-receipt [of such notice]."[72] The number of definitional issues these five parts of Article 79 present is formidable and will be explored in the remaining sections of this article.

The following sections attempt to ferret out some of the more important issues that the criteria of Article 79 fails to directly address, most notably the lack of a definition of impediment. Unfortunately, as noted earlier, the scarcity of Article 79 case law makes it necessary to extrapolate some of the answers through conjecture, anecdotal evidence, and through the prism of national excuse and hardship laws. An important example of the external evidence to be used is the CISG Advisory Council Opinion No. 7, "Exemption of Liability for Damages under Ar-

[67] *See* CISG, *supra* note 1, art. 79(1).

[68] *See* CISG, *supra* note 1, art. 79(2).

[69] *See* CISG, *supra* note1, art. 79(3) (states that the excuse or exemption is only "for the period during which the impediment exists.").

[70] *See* CISG, *supra* note 1, art. 79(5).

[71] *See* CISG, *supra* note 1, art. 79(4).

[72] *Id.*

ticle 79 of the CISG"[73] Nonetheless, the primary source for this analysis is the existing CISG case law. In reviewing the case law, the focus will be on the rationales, factors, and criteria the courts and tribunals have used in applying Article 79.

### *B. Is Impossibility or Act of God Always an Impediment under Article 79?*

Under the common law, only objective impossibility is considered grounds for an excuse. Thus, anything within the nonperforming party's sphere of control or allocated risk cannot be a reason to grant an excuse. For example, a strike at the sellers manufacturing plant would be considered as creating a subjective impossibility within the control of the seller to resolve. In contrast, a stevedores strike at the port where the goods have been delivered would be an example of objective impossibility outside the seller's sphere of control.

The distinction between fungible and unique goods found in the common law's use of specific performance as an extraordinary remedy is also a factor in the law of excuse. Destruction of the goods or the manufacturing plant producing the goods would seem to be an event leading to an objective impossibility. In fact, if they were fungible goods available on the open market, then the seller would not be able to claim excuse. This distinction can be traced back to Roman law: "This rule of *genus non perit* means that in case so-called *generic goods* are sold, there can never be a case of absolute impossibility."[74] Thus, in the area of fungible goods, the impossibility excuse, as strictly interpreted in the common law and the French *force majeure*[75] principle denies that "any" performance is impossible to undertake.[76]

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[73] CISG-AC Opinion No. 7, "Exemption of Liability for Damages under Article 79 of the CISG," (12 October 2007), *available at* http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html.

[74] Jan M. Smits, Contract Law: A Comparative Introduction 161 (forthcoming need date)

[75] Code Civil [C.Civ.] art. 1147 & 1148 (Fr.).

[76] The French force majeure principle as applied by the French courts is one of the narrowest national excuse doctrines. For example, "French law has not . . . ventured into the area of frustration." Barry Nichols, "Force Majeure in French Law" in Force Majeure and Frustration of Contract 31 (E. McKendrick ed., 2d. ed. 1995).

Hardship can be seen as a Twentieth century liberalization of impossibility. Professor Farnsworth notes this trend in American contract law:

> [T]here is a visible trend in favor of tolerating excuses. What was once a requirement of impossibility has been watered down to one of impracticability. And relief is granted for "frustration of purpose" if the event, instead of making one's own performance more burdensome, makes the other party's performance nearly worthless.[77]

The generic-unique distinction remains in both civil and common law. And, specific performance is still an ordinary remedial right under the civil law. However, there has been an expansion of the meaning of objective impossibility or, alternatively stated, a narrowing of the meaning of subjective impossibility. In cases, were performance is still possible, a court may grant excuse if it determines that the costs of performance have become disproportionate to the benefits of performance to the other party. Professor Jan Smits refers to this scenario as "relative impossibility."[78]

The concept of relative impossibility, as well as hardship, entails, as most principles do, dealing with definitional problems. At what level of disproportionality does something become relatively impossible to perform? What level of hardship is needed to sustain an "excuse" of hardship? Numerous formula or definitions have been provided by various national laws and international instruments[79]: (1) the German BGB states that the divergence between costs to the performing party and the benefit to the receiving party must be "grossly disproportionate."[80] (2) American *Restatement (Second) of Contracts* notes that performance would lead to "unreasonable difficulty, expense, injury or loss."[81] (3) Polish Civil Code allows relief when "performance would be faced with excessive difficulties or

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[77] E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 25 (1998).

[78] *Supra* note 73, at 162.

[79] See Jürgen Basedow, *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts*, 1 UNIFORM L. REV. 129 (2000).

[80] BGB §275 (2).

[81] RESTATEMENT (SECOND) OF CONTRACTS § 261, cmt. *d*.

threaten one of the parties with substantial loss."[82] (4) *PECL* states that the performance would cause the performing party "unreasonable effort or expense."[83] (5) *PICC* require that the performance to have become "unreasonably burdensome or expensive."[84] This brief review of impossibility and hardship sets the context for the next section's analysis of hardship under CISG Article 79.

*C. Hardship as Excuse: Scope of Article 79*

Professor Honnold charted the evolution of the development of Article 79 from its predecessor instruments and the negotiations of the provisions pertaining to excuse. Honnold notes that the word "impediment" was substituted for the word "circumstances" in order to disallow the granting of an exemption "merely because performance became more difficult or unprofitable."[85] Though the circumstances permitting exemption cannot generally be equated simply with strict notion of *force majeure*", efforts were made to define them narrowly.[86] However, Honnold notes that despite the presumed narrowness of impediment an unexpected general shortage of the supply of an item or raw material would constitute an impediment.[87] Honnold's analysis questions the scope of Article 79. Is impediment limited to the type of events that are more closely associated with impossibility or *force majeure*? Is hardship within the scope of Article 79 or is principle of hardship to be applied under domestic law?

Peter Schlechtriem also noted that a point of contention in the UNCITRAL negotiations was whether only physical impos-

[82] POLISH CIVIL CODE Article 357.

[83] PECL, Article 9:102.

[84]PICC, Article 7.2.2. *See generally*, K. Boele-Woelki, *Principles and Private International Law—The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts*, 4 UNIFORM L. REV. 651 (1996) (general overview of PICC and PECL).

[85] UNIFORM LAW, §432.2, at 483.

[86] Peter Schlechtriem, 100 Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods 100 (1986), available at http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-79.html (analysis of Article 79) (Schlechtriem, Uniform Sales Law).

[87] Uniform Law, at 483-84.

sibility would be the basis for exemption or whether impediment also extended to economic occurrences, such as the "unaffordability" of the performance to one of the parties.[88] However, he notes that, "increased procurement and production costs do not constitute exempting impediments."[89] Schlechtriem rightfully explains that the language of Article 79 is not expressly the language of impossibility.[90] He also provides a practical rationale for granting an exemption for cases of hardship—to prevent the introduction of national variants of excuse into the application of Article 79.[91] Thus, the underlying principles of the CISG[92] are best served by viewing the lack of coverage of hardship in Article 79 as an internal gap and not an external gap to be filled by domestic law.[93]

But just as Honnold and Schlechtriem feared the recognition of hardship as within the scope of Article 79 requiring an autonomous interpretation based upon the general principles of the CISG has been the exception in the case law. For example, a 2001 Dutch case involved the non-delivery of mandarins as a result of an enduring frost, during the relevant period, no other goods were available which met the agreed upon standard of quality.[94] The buyer claimed an Article 79 exemption from its obligation to pay compensation to the seller. The court descended into a homeward trend analysis:

> In the absence of the qualifying criteria in the international private law convention, there are grounds to apply norms of international private legal rules of *lex fori*, which means - under both French and Swiss international private law - the law of the State where the debtor of the 'non-pecuniary performance that is characteristic of the contract' is domiciled. The evidence that the performance of the buyer would have become exorbitant would allow it to contest an action for damages and interest for the non-

[88] Schlechtriem, Uniform Sales Law at 101.

[89] *Id.*

[90] *Id.* at 104.

[91] Id.

[92] *See* CISG *supra* note 1, Article 7.

[93] *See* Ingeborg Schwenzer, Force Majeure and Hardship in International Sales Contracts, 39 VICTORIA UNIV. WELLINGTON L. REV. 709 (2009) (no such gaps).

[94] *See* Rb. 12 July 2001, HA ZA 99-529 (Arg/Neth) (Neth.), translation available at http://cisgw3.law.pace.edu/cases/010712n1.html.

> performance of its contractual obligations (Article 97 of the Swiss Civil Code) the realization of which entails the proof of fault.[95]

The court noted that the failure of the buyer to take into account the disruption of supply by failing to adjust its quality constraints was "contrary to the general rules of good faith enshrined in Article 2 of the Swiss Civil Code as well as in Article 7 of the [CISG]."[96] The court's resort to Swiss and French law and to the issue of "fault" which is not required by Article 79 is the type of chaos that Honnold had alluded to in his analysis of Article 79.[97] Further, the use of the good faith principle allowed the court to avoid dealing with the primary issue of whether the changed circumstances amounted to an impediment.

An earlier Italian court made a firm stand that hardship could not sustain a claim for impediment.[98] In that case, the seller argued that the international market price "rose remarkably and unforeseeably to the point that it upset the balance between the corresponding performances and justified, at least, a price correction."[99] The court reasoned that that the seller could not rely on hardship as a ground for avoidance, since Article 79 did not contemplate such a ground for an exemption. Whether that is the correct interpretation of Article 79 or not, the court rejected the homeward trend analysis described in the previous case by noting that domestic courts could not integrate into CISG provisions the domestic law recognizing a right of avoidance of the contract in case of hardship.[100] It further implied that even though hardship is not a means to an excuse under Article 79 it still was within the scope of Article 79 and, therefore, precluded the use of CISG Article 4 that allows for recourse to domestic law in cases of validity.[101] But, the court failed to address the definitional problem: Why can't the word "impediment" be interpreted or ap-

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[95] Société Romay AG v. SARL Behr France, Cour d'appel [CA][regional court of appeal] Colmar, June 12, 2001, 2001, 1 A 199800359 (Fr.) translation available at http://cisgw3.law.pace.edu/cases/010612f1.html.

[96] *Id.*

[97] *Id.*

[98] *See* Tribunale, 14 gennaio 1993, R.G. 4267/88, 1993 (It.) translation *available at* http://cisgw3.law.pace.edu/cases/930114i3.html.

[99] *Id.*

[100] *Id.*

[101] *See Id.*

plied to include cases of hardship?

The Belgian Supreme Court in the *Scaform International* case supported the view of the Italian court in the above decision.[102] In that case, the lower court decided that since economic hardship was not covered by the CISG, French domestic law could be applied in deciding whether a price increase could be grounds for a hardship exemption. The Supreme Court rejected that the issue of hardship was an external gap in the CISG. It held that the lack of a specific hardship provision in the CISG was not an external gap allowing recourse to domestic law, but was an internal gap within the scope of Article 79.

The availability of substituted goods was stressed in another case where the seller failed to make delivery due the fact that the seller had not received delivery of the goods from its own supplier.[103] The court held that the seller was not exempt from liability, neither under the *force majeure* clause of the contract, nor under Article 79. The court held that a claim for excuse is precluded if replacement goods of an equal or similar quality were available in the market. The failure of the seller's supplier to deliver the goods and the failure of the seller to enter the market to purchase replacement goods was likely due to a rise in the market price for the goods. The court determined that this was an allocated risk that the seller was required to bear. The fact that the market price had risen by threefold did not amount to a sacrificial sale price, as the transaction was [considered] to be highly speculative.[104] This case provides insight into the relationship between allocation of risk were no excuse is to be given and exemption due to hardship. First, it indicates that the hardship must be severe and that a threefold increase in market prices in this case did not reach the threshold of hardship. It also noted the role of the speculative nature of a transaction in determining the allocation of risk and the recognition of a hardship. The greater the speculative nature of a transaction, the firmer the allocation of risks for changed cir-

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[102] *See* Hof van Cassatie [Cass.] [Court of Cessation], June 19, 2009, 2009, C.07.0289.N (Belg.) translation *available at* http://cisgw3.law.pace.edu/cases/090619b1.html [hereinafter "Scaform International case"].

[103] Oberlandesgericht [OLG] [Provincial Court of Appeal] February 28, 1997, 1 U 167/95 (Ger.) translation *available at* http://cisgw3.law.pace.edu/cases/970228g1.html.

[104] *See Id.*

cumstances (market prices) and the lesser the justification for granting an excuse.

### *D. Argument for Hardship as Article 79 Excuse*

In the 2009 *Scaform International case*,[105] the Belgian Supreme Court dealt with the issue of hardship. In this case, the parties had concluded an agreement for the sale of steel tubes. After the conclusion of the contract and before delivery, the price of steel unexpectedly rose by about seventy percent. First, the court decided whether the market price change was reasonably foreseeable. If so, then there could be no claim for hardship or recognition of the dramatic price increase as an impediment under Article 79. The court, instead, held that such a dramatic change of circumstances was not reasonably foreseeable at the time of the conclusion of the contract and that the nature of the price increase placed an undue burden of performance on the seller. However, the determination of undue burden was analyzed through the Civilian notion of contractual equilibrium; the equilibrium between the parties at the time of contract formation had been sufficiently altered to justify the recognition of a hardship.

The second issue the court asked was whether such a hardship could be recognized as an impediment under Article 79. The court structured an argument that the general principles of CISG Article 7, especially the duty of good faith supported the inclusion of hardship within the scope of Article 79. However, this decision can be criticized as placing a civil law perspective on the issue of the scope of impediment instead of making an autonomous interpretation as required under Article 7 principles of the need to consider the international character of the CISG and the importance of uniformity of application. First, the court did not make a convincing argument that the notion of impediment goes beyond impossibility to "mere" hardship. Second, the notion of hardship as espoused by the court was aligned with the Germanic civil law concept of "changed circumstances" and not discussed within a neutral, international perspective. Third, the court references the *PICC*

[105] *See Scaform International case*, *supra* note 100.

to support the argument that hardship can be viewed as an impediment under Article 79. In fact, the court goes further by suggestion that the *PICC* can be directly used to interpret Article 79. This is problematic because the *PICC* contains both an excuse or impossibility provision and a hardship provision, while the CISG possesses the single provision of impediment.

The fourth ground for criticizing the court in the *Scaform International case* is the Court's assertion that: "the party who invokes changed circumstances that fundamentally disturb the contractual balance is entitled to claim the renegotiation of the contract."[106] The duty to re-negotiate in good faith due to changed circumstances is found in numerous Civilian national laws, *PICC*, and the *PECL*, but is unknown in the common law. Furthermore, the right to re-negotiate due to the existence of hardship, and upon the failure of the negotiations to petition a court for relief, is difficult to rationalize under Article 79. Article 79 provides for the sole remedy of "suspension" in cases of impediments. The remedy or right of suspension is more easily attached to the excuses of physical impossibility, and possibly of frustration of purpose.

The *Scaform International case* fails to live up to the mandate of autonomous interpretation of CISG provisions by borrowing concepts of civil law countries—hardship, contractual disequilibrium, and the right-duty of re-negotiation.[107] In contrast, the common law does not recognize the exemption of hardship nor the duty to re-negotiate. American doctrine of impracticability is closer to the Civilian (Germanic) notion of hardship. It should also be noted that impracticability, much as the principles of unconscionability and the duty of good faith, have been applied outside of the UCC by analogy to common law contracts. Even though this may be true the impracticability doctrine is rarely utilized in fact, mere hardship is rarely recognized as an excuse, no duty to re-negotiate is recognized, and the notion of contractual equilibrium is foreign to both the common law and the UCC. It is extremely rare for a court to

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[106] *Id*.

[107] *See, e.g.,* Harry M. Flechtner, The Exemption Provisions of the Sales Convention, Including Comments on the 'Hardship' Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court, 59 BELGRADE L. REV. 84 (2010) (critical of court's decision).

rescind or reform a contract due to the rise of costs or prices, which are generally viewed as express or implied allocated risks that fall to the party who must bear the burden of such changes of circumstances.

In sum, although there are rationales to include hardship within Article 79 impediment, the argument in favor of such an inclusion must be based on CISG interpretive methodology,[108] independent of the frameworks provided by the civil law, common law, or international legal instruments.

## V. CISG JURISPRUDENCE: IMPOSSIBILITY AND FORESEEABILITY

Despite the findings in *Scafom International case*, Article 79 cases have primarily focused on the more traditional excuse of impossibility. In almost all of the cases, the key determinate was whether the court viewed the event or change in circumstances to have been unforeseeable or whether the occurrence or non-occurrence was an allocated risk. In the *Egyptian cotton case*, the court explains the requirements to sustain a claim of impediment: A party claiming an Article 79 impediment "must prove that the failure was due to an unpredictable and inevitable impediment, which lies outside its sphere of control."[109] The concept of sphere of control acts as a surrogate for determining whether there was an express or implied allocation of risk. Thus, whether an event is foreseeable or unforeseeable is irrelevant if the court determines that the risk of the event had been allocated by the contract.

### *A. Sphere of Control*

A theme that runs through a number of CISG cases is the notion that the party claiming an impediment could have and

[108] *See generally* CISG METHODOLOGY (A. Janssen & O. Meyer eds. 2009) (describing the use and application of interpretive methodology); *see also* Larry A. DiMatteo & André Janssen, *Interpretive Uncertainty: Methodological Solutions for Interpreting the CISG*, 2 NETHERLANDS JOURNAL OF COMMERCIAL LAW 52 (2012) (review of interpretive methodologies internal and external to the CISG).

[109] Bundesgericht [BGer] [Federal Supreme Court] Sept. 15, 2000, 4P.75/2000 (Switz.) translation *available at* http://cisgw3.law.pace.edu/cases/000915s1.html [hereinafter "*Egyptian Cotton case*"].

should have protected itself by negotiating an express term. In the *Hammer Mill case*,[110] the seller of customized hammerheads pleaded an impediment based upon the fact that its supplier had failed to supply it the necessary hammerheads. Under Article 79(3), a third-party impediment can be claimed, but here there was no evidence that the supplier's failure to send the goods was due to an impediment that prevented it from doing so as is required under Article 79. Under a sphere of control analysis, as noted above, the court could have simply stated that the risk of non-supply was within the seller's sphere of control and, therefore, was an allocated risk. Instead, the court rejected the seller's defense of impediment because it could have negotiated an express term into the contract to protect itself.[111]

In the *Powdered Milk case*,[112] the powdered milk had been infested by microbiological lipase. Since it could not be proved whether the infestation occurred before the transfer of risk, the court held that the burden of proof rested upon the seller. The seller claimed an Article 79 excuse arguing that it manufactured the milk using state of the art science and technology and, therefore, any lipase was undetectable or un-removable based on current standards and procedures. The court rejected the claim reasoning that, unless the seller could prove otherwise, it was presumed that the infestation occurred within the seller's "sphere of influence."[113]

The existence of a market for fungible goods has also been used as a reason for denying an Article 79 exemption. In the *Warm Rolled Steel Plates case*,[114] a supplier of the seller had

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[110] China International Economic & Trade Arbitration Commission CIETAC (PRC) Arbitration Award China May 2007 CIETAC Arbitration, CIETAC (China International Economic and Trade Arbitration Commission May 2007) (China) translation available at http://cisgw3.law.pace.edu/cases/070500c1.html [hereinafter "Hammer Mill case"].

[111] *See id.*

[112] Bundesgerichtshof [BGH] [Federal Supreme Court] Jan. 9, 2002, VIII ZR 304/00, 2002 (Ger.) translation *available at* http://cisgw3.law.pace.edu/cases/020109g1.html [hereinafter "*Powdered Milk case*"].

[113] *Id.*

[114] China International Economic & Trade Arbitration Commission CIETAC (PRC) Arbitration Award, CIETAC (China International Economic & Trade Arbitration Commission [CIETAC] (PRC) June 17, 1994) (China)

incurred technical problems in its production capacity, which it confirmed by a *force majeure* certificate approved by the Slovak Republic Commerce Union. The seller claimed an exemption by sending the Certificate to the buyer. A CIETAC tribunal held that the contracts between buyer and seller did not specify who would manufacture the goods; thus, although one manufacturer had a production problem, a seller's liability could not be exempted, since, "it could order the goods from other factories."[115]

The sphere of control approach is a method of determining if the duty of a certain part of the performance lies with the seller or the buyer. Once this has been determined, the duty bound party has the burden of proving that the impediment lies *beyond its control*. For example, a party is always deemed to be "in control" of her own business and financial condition. Therefore, "internal 'excuses' connected with business operations (poor quality control, etc.) or financial management would never be held 'beyond' that party's control."[116]

*B. Allocation of Risk*

As discussed in the previous section, if an event or non-event occurs within a party's sphere of control a *force majeure* event would normally be the basis for a claim of exemption. However, numerous CISG cases have asserted that *force majeure* events, such as government intervention or natural disasters, in of themselves are not always grounds for an Article 79 impediment. For example, one arbitral panel reasoned that international trade custom holds the buyer (importer) liable for failing to obtain import approval, since the risk of not obtaining the approval or license at the time of delivery is an allocated risk.[117] From the view of the non-foreseeability requirement, the tribunal held that "the necessity of getting import approval could have been foreseen by the buyer, because

translation *available at* http://cisgw3.law.pace.edu/cases/940617c1.html [hereinafter "*Warm Rolled Steel Plates case*"].

[115] *Id*.

[116] Joseph Lookofsky & Harry Flechtner, Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?, 9 VINDOBONA J. INT'L COM. L. & ARB. 199, 205 (2005).

[117] Semi-automatic weapons case, CIETAC Arbitration proceeding, (Aug. 7, 1993) (China) (http://cisgw3.law.pace.edu/cases/930807c1.html).

the law has been in effect for many years in the United States."[118]

The *Australia cotton case* involved a buyer asking for an Article 79 suspension due to the imposition of an import quota impairing its ability to procure an import license. [119] The buyer also argued that the seller knew or should have known about the quota, and that it was a condition for the performance of the contract. A CIETAC tribunal held that unless stated otherwise, the risk of importation is on the buyer and, generally, cannot be a ground for a claim of impediment or exemption. The tribunal concluded that the inability to obtain an import license was an allocated risk of the buyer-importer.[120] Again, in a Russian Federation arbitration case, the issue of obtaining a license was the basis for a claim of impediment. [121] A buyer claimed an exemption because it could not obtain an official license from the Bank of Russia for payment in the currency stipulated on the contract. The Tribunal rejected this argument by stating that: "the buyer ought to have foreseen that it would need such a license in order to perform the contract."[122]

Another case in a line of CIETAC decisions dealing with the inability of a party to obtain a necessary government license or approval investigated the distinction between government approval and government restrictions; whether a *force majeure* clause expressly precluding a claim of exemption for failure to obtain necessary government approvals or documents prevents a court or arbitral panel from claiming impediment;

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[118] *Id*.

[119]Australia cotton case, CIETAC Arbitration proceeding, (Sept. 17, 2003) (China) (http://cisgw3.law.pace.edu/cases/030917c1.html.).

[120] *See id;*. Alumina case, CIETAC Arbitration proceeding, (June 26, 2003) (China) (http://cisgw3.law.pace.edu/cases/030626c1.html.) (In another CIETAC decision, a buyer alleged that changes in governmental regulations relating to the import of alumina made it impossible for it to perform its contractual duties. The Tribunal noted that the change in regulations did not bar imports of alumina, but enacted new requirements regarding the approval and registration of such imports. Thus, the new regulation did not prevent the buyer from importing the goods. The buyer should have taken delivery of the goods and, subsequently, import could have imported the goods. It held that since the buyer failed to obtain the necessary letters of credit, it had committed a fundamental breach.) .

[121]Russian Federation arbitral proceeding 96/1998, (Nov. 24, 1998) (Russia) (http://cisgw3.law.pace.edu/cases/981124r1.html.).

[122] *Id.*

and the importance of providing satisfactory evidence of an event of impediment.[123]

Regarding the first two propositions, the buyer argued that the *force majeure* clause only referred to the failure to obtain an import license as not rising to the level of a *force majeure* event. Therefore, other types of government bans and restrictions were not precluded by the clause and could be grounds for a claim of impediment. In the alternative, the buyer argued that the *force majeure* clause was inherently unfair since the force majeure limitation only applied to the buyer and not to the seller. The tribunal rejected both of these arguments.

As to the evidentiary burden sufficient to provide adequate notice of an impediment, the tribunal rejected the evidence that the importer had sent to letters from its customers and attorney, which stated that the goods could not be sold in the United States without first obtaining an approval from the EPA, as insufficient. The tribunal held that it was paramount that the buyer-importer also send the official order issued by the U.S. Government. Since "the buyer failed to provide evidence proving that the U.S. Government did issue a banning order, the rejection of the goods [by] buyer's customers [was deemed to be] a normal business risk which should be borne by the buyer."[124] In the end, the tribunal held that the *force majeure* clause "did not deprive the buyer of the right to rely on a *force majeure* exemption under the applicable law" and, therefore, the *force majeure* clause was not unfair.[125]

### *C. Defective Goods as Impediment*

A series of cases dealt with the assertion of whether the delivery of defective goods could support an impediment claim.[126] In the *Indium ingot case*,[127] a buyer insisted that the

[123] Sangunarine case, CIETAC Arbitration proceeding, (May 7, 1997) (China), translation *available at* http://cisgw3.law.pace.edu/cases/970507c2.html.

[124] *Id.*

[125] *See Id.*

[126] *See Id.* (Professor Michael Bridge notes that a hard case for Article 79 is when a seller "is able to tender to the buyer only defective or nonconforming goods." MICHAEL G. BRIDGE, THE INTERNATIONAL SALE OF GOODS 617 (3rd ed. 2013). Bridge notes in such cases if an impediment is granted, the buyer would still have the right to use the price reduction remedy (CISG Article 50)

non-conformity of the goods caused by fraud exempted the buyer from the duty to make a payment. The tribunal determined that the non-conformity was a non-serious lack of conformity and despite the fact that the non-conformity was due to the "economic swindle" (fraud) of the seller's supplier, it did not exempt the buyer from its duties under the contract.[128]

The idea of defective goods as an impediment was raised by John Honnold, who posed the following question: "May a non-negligent seller be excused from liability when he delivers defective goods?"[129] His answer was that under the UCC, the delivery of defective goods could not be grounds for an excuse since the UCC only allowed for excuses in situations involving delayed delivery or non-delivery of goods. The same is true under CISG Article 79. Honnold points that the change of the word "obstacles" to "circumstances" in the earlier versions of the Hague's Uniform Law of International Sales (ULIS) was a broadening of excuse that could capture events like changes in "economic conditions" and for defects in the goods not due to the fault of the seller. However, the drafters of the CISG replaced the word "circumstances" with "impediment". Honnold argues that the change implies that an exemption is only available when there is "a barrier to performance, such as delivery of the goods or transmission of the price rather than an aspect personal to the seller's performance."[130] Therefore, an impediment is confined to occurrences that prevent performance and not for the non-fault delivery of defective goods. A Bulgarian arbitration court held that in the case where a supplier had delivered defective goods to the seller, "it made no difference whether the defect was the fault of the seller or its supplier."[131] Furthermore, although found in some of the CISG case law, there is nothing in Article 79 that requires the find-

since the remedy does not come within the meaning of a damages action prohibited under Article 79.)

[127] Indium ingot case, CIETAC Arbitration proceeding, (May 31, 1999) (China), *available at* http://cisgw3.law.pace.edu/cases/990531c1.html.

[128] *Id.*

[129] UNIFORM LAW at §426.

[130] *Id.*

[131] Arbitration Tribunal of Bulgarian Chamber of Commerce & Industry, Case 26/00, (March 19, 2001), *available at* http://cisgw3.law.pace.edu/cases/010319bu.html.

ing of fault as a factor in determining of the existence of an impediment.

However, a German court in the *Stolen Automobile case* alluded to the fault of the seller relating to the obviously fabricated identification plate of an automobile it sold, which ultimately turned out to be a stolen and was seized by the government.[132] The vehicle registration document showed no inconsistency in the title; however, the vehicle identification number, found on a metal sheet, had been affixed onto the original number by spot welding.[133] The seller claimed an Article 79 impediment arguing that it had no way of knowing that the automobile had been stolen due to the correctness of the registration document. The court rejected the Article 79 claim by noting the seller's failure to explain why it had not noticed the affixed metal plate containing the vehicle identification number, which would have led a reasonable person to question the veracity of the registration document.[134] This may be more than a simple case of fault or negligence. A professional seller of automobiles would have almost certainly verified true ownership given the manipulated identification plate. Thus, this may be a case of fraud and not fault. The court did not address this possibility because it wasn't necessary for its finding in the plaintiff's favor.

On appeal, the Higher Regional Court of Munich noted that both the seller and buyer were both professional automobile dealers with a long-term business relationship. The court then noted the restrictive nature Article 79.[135] It affirmed the lower court's rejection of the defendant's Article 79 claim. In so doing, there was no alluding to the lack of due diligence or fault of the seller. The court simply used the language of Article 79 in finding "that the seller's lack of ability to transfer the property was not due to circumstances beyond its control" and that Article 79 "cannot be used to shift the allocated risks in the

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[132] Stolen automobile case, Appellate Court Dresden, (March 21, 2007) (Germany) (http://cisgw3.law.pace.edu/cases/070321g1.html).

[133] *Id*.

[134] *See Id*.

[135] *See Stolen Car Case*, Appellate Court München, March 5, 2008 (Germany) (Abstract prepared by Ulrich Magnus & Jan Lüsing), *available at* http://cisgw3.law.pace.edu/cases/080305g1.html.

contract"[136] for the passing of defective title.[137]

A German court, in the well-known *Vine Wax case*, noted that the delivery of defective goods could constitute an impediment under Article 79.[138] The court held that, in the given circumstances, the defect had not been beyond the seller's control; despite the on-going business relationship, it was not reasonable for the seller simply to have relied on its supplier's product without tests, because it was a newly developed product. The court further held that, even if the seller had acted only as an intermediary, it was still liable for the lack of conformity of the goods. In such cases, the supplier of the intermediary could not be regarded as a third party according to Article 79(2) of the CISG.

In any event, the court held the exemption under Article 79(1) CISG did not apply, as seller's managing director had cancelled an already given order for the old black vine wax. Instead, he decided to order the hitherto unproven redesigned vine wax and deliver it to its customers. In the given circumstances, a reasonable person in the same position as seller would have had sufficient reason and opportunity to undertake the necessary field trials in order to avoid or at least minimize the risk of plant intolerability. The court rejected seller's argument that in the past it was the manufacturer's responsibility to do the necessary testing. The allocation of the spheres of liability in seller's business relation to the manufacturer firm is irrelevant. Of relevance here, is only the contractual relation of the seller to the buyer. Due to its expertise and specific knowledge, the risks involved in the use of the unproven redesigned vine wax were within the seller's control.[139]

A rare case in which an Article 79 claim was granted involved a buyer claiming an impediment for delayed payment. The court held that since the buyer could not reasonably be expected to pay immediately for defective goods and where the seller refused to retrieve the goods, it was exempted for non-

[136] Id.

[137] *See also* CISG supra note 1, at art. 42 (free of intellectual property claims). (CISG Article 41 places a duty on the seller to provide clear title.)

[138] Vine Wax Case, Appellate Court Zweibrücken, March 31, 1998 (Germany), http://cisgw3.law.pace.edu/cases/980331g1.html.

[139] *Id.*

payment under Article 79. However, this does not seem to be a case where Article 79 impediment was a good fit or necessary.[140] It is possible that the non-conformity was not considered a fundamental breach; but, why couldn't the buyer have utilized the price reduction remedy? If the non-conformity amounted to a fundamental breach, then avoidance and a claim for damages would have been the ordinary course of action. So, it is not clear why the court resorted to Article 79.

*D. Extraordinary Events*

A shortcut or surrogate in determining whether an impediment was foreseeable or un-foreseeable is the characterization of the impediment as an ordinary or extraordinary event. If an event is considered as extraordinary, then it is nearly impossible to determine that it was anything other than unforeseeable. A natural disaster or government intervention would generally be considered an extraordinary event. Such events are the traditional forms of *force majeure*. However, the restrictive interpretation of Article 79 in the case law has shown that even in such cases an Article 79 defense is difficult to obtain.

A German case involved a seller's request for an Article 79 exemption because of a lack of supply of a needed material due to a miners' strike at the company of the seller's supplier. The court distinguished between sub-suppliers or manufacturers and sub-contractors or its own personnel. An impediment can be based upon the former, but not the latter (since, within claiming party's sphere of control), which was the case here. In the former case, where a claim of impediment is possible, the reason for the non-delivery by the supplier has to be based upon an event that is beyond its control. Since the lack of supply was no due to such an event—government shutdown or a mining accident—but was based upon an employer-employee disagreement, the impediment was of a subjective type within the control of the mining company.

An alternative approach is simply to see such a strike as not an extraordinary event. For example, another German court, noted that the supplier's failure to retain a government

[140] *See Shoes Case*, District Court Berlin, September 15, 1994 (Germany), *available at* http://cisgw3.law.pace.edu/cases/940915g1.html.

credit line due to its financial problems was within its control and, therefore, not an extraordinary event.[141] Along the same lines, a CIETAC panel noted the taking into of custody of some ships, making it difficult for the seller to rent a ship to send goods on to the buyer was an insufficient impediment. [142] The arbitration panel held that the difficulty of renting a ship did not render performance impossible and was not a ground for an impediment claim. The shortage of ships was not the type of event that would be considered extraordinary as compared to a dockworker's strike, which prevents the goods from being retrieved for transshipment. Also, it may be assumed that if the seller was willing to pay an additional amount it could have procured a ship.

Natural events like flooding or scarcity of goods due to such natural occurrences would seem to be *force-majeure*-like enough to support claims for impediment. Rainfall in China in 1994 was very high and there were three floods in Hunan Province. Many orange groves were destroyed. The seller argued that its non-performance was caused by unavoidable and uncontrollable events. The CIETAC tribunal rejected the seller's *force majeure* defense. It determined that the natural disaster occurred before the conclusion of the contract. Therefore, the flooding was a foreseeable event: "The seller could have foreseen but did not foresee and could have avoided but failed to avoid; therefore, it has no rights to raise force majeure or to avoid responsibility." Secondly, the seller did not prove the existence of the impediment "during the 'entire' performance of the contract." Furthermore, the contract did not require that the mandarin oranges be from Hunan., Finally the seller did not raise the force majeure defense until two years after the conclusion of the contract. The seller also challenged the buyer's cover by purchasing Spanish oranges. The CISG does not require that substituted goods be identical to the goods stipulated in the contract.[143]

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[141] *Chinese Goods* Case, Hamburg Arbitration proceeding, March 21, 1996 (Germany), *available at* http://cisgw3.law.pace.edu/cases/960321g1.html.

[142] *Rolled wire rod coil case*, CIETAC Arbitration proceeding, April 28, 1995 (China), *available at* http://cisgw3.law.pace.edu/cases/950428c1.html.

[143] *Canned oranges case*, CIETAC Arbitration proceeding, November 30 1997 (China), *available at* http://cisgw3.law.pace.edu/cases/971130c1.html.

Another "flooding case" involved widespread flooding in Henan province and a drastic reduction in the output of crops leading to the imposition of severe governmental transport restrictions on the movement of produce outside of Henan province. In addition, at the port of shipment the government closed the grain and oil markets making it difficult for the seller to purchase grain.[144] The CIETAC panel listed a number of factors that supported the seller's request for an Article 79 exemption: (1) Impediments (flooding transport restrictions, and difficulty of obtaining substituted goods) occurred during the course of the performance; (2) Events were "unconventional and accidental;"[145] (3) Seller could not foresee the occurrence of the events and could not avoid or circumvent the events; (4) Seller had notified the buyer of the occurrence of the events and had asked for an extension of the shipment period.; (5) Seller actively sought a substitute source of the goods. However, in the end, the tribunal held that the argument for exemption based on *force majeure* was not sustained.[146]

Natural disasters are a common basis for excuse, but that has not been the case in the application of Article 79. For example, heavy rainfall in France drastically reduced the production of tomatoes and the scarcity of tomatoes resulted in a steep increase in price. Nonetheless, the court reasoned that since the entire tomato crop had not been destroyed, an Article 79 exemption was not available. The court reasoned that the seller's performance was still possible. Although the rainfall and subsequent reduction in crop constituted an impediment, it was, with additional costs, an impediment that the seller could overcome.[147] It has also been held that a seller in negotiating a contract should factor in adverse weather conditions and lower crop yields.[148] In essence, natural occurrences in some indus-

[144] *Dried sweet potatoes case*, CIETAC Arbitration proceeding, March 14, 1996 (China), *available at* http://cisgw3.law.pace.edu/cases/960314c1.html.

[145] *Id.*

[146] *Id.*

[147] *Tomato concentrate case*, Appellate Court Hamburg, July 4, 1997 (Germany), *available at* http://cisgw3.law.pace.edu/cases/970704g1.html.

[148] *Agristo N.V. v. Macces Agri B.V.*, District Court Maastricht, July 9, 2008 (Netherlands), http://cisgw3.law.pace.edu/cases/080709n1.html (a diligent grower considers possible unfavorable weather conditions when entering into a sales contract; seller, in the instant case, could only allege an impediment if the harvest was below a minimum of crop yield of 90% of the previous

tries are deemed to be foreseeable events and, unless stated otherwise in the contract, are to be considered as allocated risks.

Even though severe increases in the costs of production or increases in market prices are recognized under the German law of changed circumstances, and is, theoretically, within the meaning of the American law of impracticability, the restrictive interpretation of Article 79 has so far failed to support exemptions for such occurrences. The rationale for such strictness in granting excuses in such situations is that it can be argued that cost and price increases, as well as currency fluctuations, are always foreseeable. The best counter-argument of a party claiming an excuse is to show that the increase (or decrease) was so drastic that it was an ahistorical jump that was not foreseeable. A Russian arbitral tribunal boldly asserted that: "no possible change of market conditions" can release the buyer from its duty to accept the goods."[149] Although somewhat draconian as an assertion, the Russian arbitration panel decision is in line with the general CISG approach that favors the buyer's acceptance of even substantially non-conforming goods or delayed delivery as embodied in its principles of fundamental breach[150] and *Nachfrist* notice.[151]

The arbitral panel in the *FeMo Alloy case*[152] considered whether a market increase of two times the contract price, between the contract formation and the time of performance, was an extraordinary event worthy of the granting of an Article 79 exemption?[153] Although performance remained possible, the purpose of the contract was frustrated. This raises the question of whether Article 79 incorporates the excuse for frustration of purpose. The CIETAC tribunal, referencing Chinese law and the CISG, held that impediment does include the "theory of

years' harvests.)

[149] Russia Federation arbitration proceeding 255/1994, June 11, 1997, http://cisgw3.law.pace.edu/cases/970611r1.html.

[150] *See* CISG *supra* note 1, at art. 25.

[151] *See* CISG *supra* note 1, at arts. 47, 48 & 63.

[152] *FeMo alloy case*, CIETAC Arbitration proceeding, May 2, 1996 (China), http://cisgw3.law.pace.edu/cases/960502c1.html.

[153] *Id*. (In fact, the arbitration tribunal only recognized a 30% increase and not the two-time increase alleged by the seller).

frustration of contract."[154] The seller argued that to enforce the contract without adjustment resulted in a grossly unfair or unconscionable outcome. This type of argument follows closely with the notion of disruption of the equilibrium of the contract found in some civil law systems and which was discussed earlier in this article.[155] It can also be arguable that since both parties were on relatively equal footing, no claim for unconscionability under American law would be sustained.[156] No matter how one-sided the contract has subsequently become, this would not be a case of unconscionability since there was no evidence of procedural unconscionability.[157] Since this case involved a merchant-to-merchant transaction, an argument for procedural overreaching is weak and not probative evidence of procedural unconscionability.[158]

The seller further argued that the "principles of fairness and good faith" are ubiquitous in international trade and would be violated if the arbitral panel did not provide an Article 79 excuse. The CIETAC tribunal rejected this line of argument asserting that the "CISG [did] not protect such an unconscionable transaction with unpredictable loss," and that there is no legal basis to incorporate frustration of purpose within the meaning of Article 79's impediment principle. However, the Tribunal acknowledged that a change of circumstances, without reference to frustration of purpose, could be a basis for an impediment claim: "The Tribunal held that the Seller still needed to prove that a fundamental change of the circumstances had occurred." It noted that the seller's failure to obtain a "certificate of force majeure" from a reputable third party,[159] as required under the contract, was evidence that no such force majeure event had occurred.

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[154] *Id.*

[155] *See supra* notes 22-25, 104-05 & accompanying text.

[156] *See* UCC Art. 2-302; RESTATEMENT (SECOND) OF CONTRACTS §208 (1981).

[157]Larry A. DiMatteo & Bruce L. Rich, A Consent Theory of Unconscionability: An Empirical Analysis of Law in Action, 33 FL. ST. U. L. REV. 1067 (2006) (arguing that the case law shows the doctrine of unconscionability as applied is more of a consent doctrine and not a substantive unfairness doctrine).

[158] *Id.*

[159] *Supra* note 150, (*FeMo alloy case.* In this case, the third party certifier was China's International Economic and Trade Arbitration Commission).

*E. Foreseeable but not Foreseen Events*

Professor Davies rightly notes that the words foreseen, foreseeable or foreseeability are not found in Article 79.[160] Instead, Article 79 states that the party claiming an impediment could not have been expected to have "taken . . . [the impediment] into account at the time of the conclusion of the contract." Nonetheless, numerous courts refer to the foreseeability of an event in discussing Article 79. Most potential impediments to performance, such as, poor weather or delayed transportation, as well as more dramatic events, such as, war, hostilities, embargoes and terrorism are "increasingly 'foreseeable' in the modern commercial environment."[161] As such, the non-foreseeability requirement is the most difficult of the requirements to prove under Article 79. Often, the magnitude of the occurrence is more important than the type of the occurrence.[162]

The difference between foreseeable but not foreseen event[163] can be understood as a function of hindsight bias where almost all things can be seen as foreseeable. Alternatively, one can see that intuitive probability estimates, often flawed, could justify that an event was potentially foreseeable, but not foreseen in the negotiating of a contract. The likelihood of the event is so low that both parties assume its non-occurrence and simply do not allocate the risk of such an eventuality, either expressly or implicitly. This is sometimes discussed as the difference between degree and kind.[164] It is foreseeable that currencies fluctuations or the market price of commodities will change during the course of a contract. The party agreeing to pay in a foreign currency or agrees to a fixed

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[160] Martin Davies, *Excuse of Impediment and Its Usefulness*, *in* INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 300 (L. DiMatteo ed., 2014).

[161] Joseph Lookofsky & Harry Flechtner, *Nominating* Manfred Forberich*: The Worst CISG Decision in 25 Years?*, 9 VINDOBONA J. INT'L COM. L. & ARB. 199, 205 (2005), citing, *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*, United States Federal District Court, July 6th, 2004, *available at* http://cisgw3.law.pace.edu/cases/040706u1.html.

[162] *Id*.

[163] *See* Davies, *supra* note 158 at 300-01 ("the *type* of impediment was not only foreseeable, it had been foreseen").

[164] *Id.* at 300 ("kind of change" versus "exact change").

price should take precautions to minimize such risks. If that party fails to do so, then it must bear the burden of that risk. Often such fluctuations are merely a matter of degree; however, where the fluctuations are so drastic to be ahistorical there is a plausible argument for non-foreseeability and against a finding of a risk allocation. A rebuttal argument would be that, if the parties allocated the risk of the fluctuation of degree and the party allocated the risk had taken precautions to protect itself from that risk then it would have also protected itself against the fluctuation of kind.[165] This argument supports the denial of an exemption no matter the nature or degree of the change.

A Comment in the *Restatement (Second) of Contracts* notes that, "[t]he fact that the event was foreseeable, or even foreseen, does not necessarily compel a conclusion that its nonoccurrence was not a basic assumption" of the contract.[166] Under such an analysis an excuse may be provided even though the event was technically foreseeable. The current author's view is that the above analysis is best understood under the law of conditions as opposed to the law of excuse. The nonoccurrence of a foreseeable event that was a basic assumption of the contract is simply a condition subsequent ending the party's duty to continue performance. Alternatively, the Secretariat Commentary's *Guide to CISG* states that:

> All potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future. In other cases it is clear from the context of the contract that one party has obligated himself to perform an act even though certain impediments might arise.[167]

This is a restatement of the previously discussed idea that if a *force majeure*-type of event is judged to be an allocated risk, then its occurrence cannot be grounds for excuse.[168] In the end,

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[165] *Id.* (if an event foreseeable, than it is an allocated risk no mater of the magnitude of the change of circumstances).

[166] RESTATEMENT (SECOND) OF CONTRACTS §261, Comment *b*.

[167] Secretariat Commentary, "Guide to CISG Article 79," Comment 5; UNCITRAL Secretariat, Commentary on the Draft Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/5, 1978, at p. 55.

[168] *Supra* Parts V., B., & D.

the stinginess of the language of Article 79 and the preference for a narrow construction of impediment was forewarned in the Secretariat Commentary has proved prophetic. The case law continues to focus on the parties' responsibilities to negotiate contract terms that will provide protection form foreseeable and unforeseeable events. Read literally, the Commentary challenges the strength of claims for exemptions for traditional *force majeure* events, such as natural disasters, governmental intervention, and war. Under this view, all risks are taken as either allocated expressly or implicitly. The Commentary fails, as does Article 79, to provide guidance as to the type of grounds, if any that support a defense of impediment.

The above analysis and summary is supported by the case law. For example, the *Steel Bars case* again dealt with the issue of whether a "sudden and extremely" large price increase of steel amounted to an impediment.[169] Steel price fluctuations are a common occurrence. An International Chamber of Commerce arbitration panel posed the following question: "[A]t what point does the amount of damage [to] contract performance [become] no longer reasonable [and] exceeds a reasonable entrepreneurial risk?"[170] The tribunal held that the price increase was not only predictable, but it was also within "customary margin[s]."[171] In referring to Article 79, and its ULIS predecessor, it stated that, as would have been the case under CISG Article 79(1), it is appropriate to apply "a strict approach in assessing lack of predictability."[172] The panel applied the following standard for determining whether an Article 79 impediment had occurred: Is the event one in "which a reasonable person in the same situation would have expected 'to take into account' or to avoid or to overcome?"[173] This approach recognizes the complete objectification of the impediment analysis. In determining if an event is one, which a reasonable person should be expected to overcome, the particular burden on the actual party is disregarded. If the inability to overcome a bur-

[169] ICC Arbitration Case No. 6281 of 26 August 1989 (*Steel bars case*), *available at* http://cisgw3.law.pace.edu/cases/896281i1.html.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

den is particular to the contracting party (possibly due to subsequent changes in the party's financial well-being)—than that information is immaterial in determining whether a reasonable person would be expected to overcome the alleged impediment. This approach is understandable because Article 79 fails to incorporate an undue burden requirement.

The foreseeability of the event at the time of contract formation necessarily entails the use of the reasonable person standard, but should the determination of whether the ability to overcome an obstacle ("beyond the control" requirement) be limited to a purely objective analysis? A strong argument in focusing on the subjective characteristics of the claiming party can be made. The change of circumstances may impose an undue burden on a party depending on a party's subjective characters, but not such a burden for another party in that position. The case law, however, takes a purely objective approach, never focusing on the burden of the party claiming impediment, but on the characteristics of the impediment and the ability or attempt to find substituted goods elsewhere. With no undue burden criterion the costs to the claiming party is immaterial. This helps explain the case law, which has rejected mere hardship as grounds for impediment. Although, more creative interpretations could be used to expand the "not expected to overcome" requirement to take into the hardship of the claiming party.

It should bear in mind that the subjective-objective dialectic noted above may partially be bridged by trade usage. Professor Nicholas notes that the use of "contract patterns" may be used in making the non-foreseeability determination.[174] Professor Nicholas notes that a crucial element in Article 79 is whether the party claiming exemption could "reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract" and that patterns of contracting in similar transactions can bear on the "reasonable expectations" of the parties.[175]

Another related issue is the relationship between the foreseeability of the event and whether it is beyond the control of the claiming party. Should the degree of burden imposed by the

[174] UNIFORM LAW §432, at 483.

[175] *Id.*

alleged impediment have to be foreseeable at the time of contract formation? Should something that is foreseeable, often discussed in the nomenclature of express or implied allocations of risks, give way when the burden to overcome such an event becomes unduly burdensome and drastically distorts the contractual imbalance? The answer found in the CISG case law is a resounding negative.[176] Whether an expanded interpretation of Article 79 should be explored, based upon the principles of good faith and commercial reasonableness, has yet to be undertaken given the restrictive interpretation currently in existence. This is unfortunate since the best argument for recognizing a hardship exemption within Article 79 is that the failure of the CISG to expressly address hardship, unlike the *PICC* and *PECL*, is that the issue is an internal gap, which demands a further exploration.

The Polish Supreme Court was faced with a factual scenario that at first glance seemed to be an easy case for impediment since it involved a disastrous drought and the inability to ship from the port designated in the contract. The seller pleaded before the court that its failure to deliver was due to two nature-related events. First, a prolonged dryness (drought) resulted in the destruction of a large quantity of the sunflower seeds harvest in Bulgaria and a subsequent reduction of production. Second, the lowering of the water level of the river Danube due to the lack of rainfall prevented seller from shipping out of its regular river port, which was located on its property. The court held that the low level of the Danube was an impediment "within the control" since it was a foreseeable event that the seller should have taken precautions to avoid since the same event had occurred several years earlier.[177]

In the *Steel Ropes case*,[178] the seller claimed the price for the goods, which were delivered but not paid for. Prior to the

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[176]*See* T.K.M.E. GmbH v. P.K. S.A. (2012) S.C. (Pol.) (*Coke fuel case*) [A/CN.9/SER.C/ABSTRACTS/137], CLOUT abstract no. 1302, *available at* http://cisgw3.law.pace.edu/cases/120208p1.html.

[177] Efetio Lamias [Efet.][Court of Appeals of Lamia] 63/2006 (Greece) (*Sunflower seed case*), *available at* http://cisgw3.law.pace.edu/cases/060001gr.html (Editorial Remarks, Dionysios P. Flambouras).

[178] *Steel ropes case* (Russ.-Bulg.), Arbitration Case No. 11/1996, (Bulg. Chamber of Commerce and Indus. 1998), *available at* http://cisgw3.law.pace.edu/cases/980212bu.html.

seller's last delivery the buyer gave notice that it no longer would accept delivery due to changes in market conditions. Furthermore, the buyer was plagued by distribution and storage problems, as well as, increased costs due to exchange rate fluctuations. The buyer requested a suspension of performance under Article 79. The Bulgarian arbitral tribunal held that all the events alluded to by the buyer as grounds for an exemption were nothing other than ordinary commercial risk: "The [buyer] is not in objective impossibility to accept the delivered goods and the described facts do not represent [a] force majeure [act]."[179] In the end, the arbitral panel viewed the buyer's impediment claim as an attempt to transfer its commercial risks to the seller.[180]

The notion of a foreseeable, but not foreseen event or risk was noted above in Professor Davies assertion of the importance of the absence of the word foreseeable in Article 79. Hence, an event may be foreseeable, but, at the same time, a party may have reasonably not taken account of it in the contract or by other precautionary measures. In the words of Davies, "there is a difference between foreseeing a possibility and taking it into account."[181] The question to be answered is whether foreseeability should be a barrier to a claim of impediment if a reasonable businessperson would not have taken it into account?

## CONCLUSION

If the restrictive or narrow view of Article 79, as espoused in the Secretariat Commentary[182] and sustained by existing case law, remains true, then Article 79 becomes the oddest of odd articles in the CISG.[183] In law and economics nomencla-

[179] *Id.*

[180] *Id.*

[181] Davies, *supra* note 158, at 302.

[182] UNCITRAL Secretariat, *supra* note 165.

[183] Articles 7 statement of general principles not including an explicit duty of good faith in the performance and enforcement of contracts, political reasons aside, is another of these odd provisions. It is only through the implication of good faith, by neglecting a literal meaning of Article 7, has a general duty of good faith been smuggled into the CISG jurisprudence (as an implied general principal, a usage of trade or in the application of the reasonableness standard found throughout the CISG).

ture, the reasonable international businessperson, as depicted in Article 79, is the purest form of rationality. Each exporter and importer is to be modeled as fully sophisticated, working with full information, and with flawless cognitive abilities.[184] This rational businessperson model sees the parties as capable of negotiating complete contracts and as Herculean[185] allocators of all risks whether fully foreseeable (currency fluctuations), somewhat foreseeable but probabilistically irrelevant (Suez Canal closing); and the wholly unforeseeable (the rarest of Acts of God).

The above perfect rational businessperson model, with its resulting foreclosure of almost any claim for exemption, should be rejected. The non-existence of excuse as suggested in the case law is antithetical to the CISG as a model law that should breed civility, trust, and efficiency in international sales transactions. International exporters and importers of goods are just as flawed as their domestic counterparts. Their characteristics fall far short of perfect rationality and include a broad range of actors with relatively dispersed features along the continuums of sophistication, information, and cognition. They work in a real world business environment that is not one of perfect competition; one characterized by power and informational asymmetries where risks are not fully foreseen by both parties and where risk allocations are not always allocated to the most efficient insurer.

Eventually, as the CISG expands its reach, the underlying principle of good faith should encourage a wider use of Article 79, especially when parties overreach, risks are unintentionally misallocated, and where real substantive injustices dictate acts of judicial and arbitral discretion. Article 79 has a long way to go to be interpreted as providing exemptions in cases of hardship. The malleability of phrases, such as "impediment," "foreseeability," and "beyond a party's control" has been used to render Article 79 as the most restrictive excuse doctrine imaginable. However, this malleability can also be the vehicle for the development of more a liberalized excuse doctrine in the fu-

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[184] *See* Catherine Kassedjian, *Competing Approaches to Force Majeure and Hardship*, 25 INT'L REV. L. & ECON. 415, 418 (2005) (international businesspersons *qua* "professionals").

[185] Ronald Dworkin, *Hard Cases*, 88 HARV L. REV. 1057, 1083 (1975).

ture.[186] For example, instead of liberally finding an implied risk allocation based upon the contract, an exemption should be considered when the occurrence or non-occurrence of an event was "tacitly assumed" by both parties.[187] A more liberal interpretation of Article 79, including recognizing exemptions for severe hardship (as supported by the CISG Advisory Council),[188] would be in line with modern contract law, as represented by the UNIDROIT Principles of International Commercial Contracts, Principles of European Contract Law, Common European Sales Law, the Revised German Civil Code (BGB), and the American doctrine of impracticability.

[186] In the words of Professor Ulrich Magnus, "Although not often granted, the CISG's exemption provision is always theoretically applicable." Ulrich Magnus, *Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation*, *in* INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 257, 261 (L. DiMatteo ed., 2014).

[187] Davies, *supra* note 158, at 299.

[188] CISG-AC Opinion No. 7, *Exemption of Liability for Damages under Article 79 of the CISG* (Rapporteur: Alejandro Garro), Opinion 3.1.