

## Annex 1 CISG AC Opinion No. 20

### Case Law on the CISG and Hardship

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#### I. Introduction

1. Opinion No. 20 reviewed *seven* State court decisions and *three* arbitral awards where the application of the CISG to hardship scenarios has been considered up to this date. In one case, an Italian court considered that article 79 did not govern hardship situations and applied, instead, Italian domestic law.<sup>1</sup> In eight cases, the judge or arbitrator decided that hardship was a type of impediment governed by Article 79 CISG. In one case, the Respondent raised the question and the Arbitral Tribunal neither rejected it nor expressly accepted it.<sup>2</sup> However, we found no uniform answer with regards to the level of economic impediment required under the CISG or the remedies available when the required standard was reached.
2. Only in one out of the eight cases where the CISG was found applicable, a court found that the requirements in Article 79 CISG were met.<sup>3</sup> In a case involving a 70% increase in the price of the goods (steel), the Belgium *Cour de Cassation* held that such change of circumstances amounted to economic impediment under Article 79 CISG.
3. In seven out of those eight cases where the CISG was found applicable, the aggrieved party was held not exempted under Article 79 CISG. In three of those cases the Court or Arbitral Tribunal considered that the events leading to an alteration in the value of commodities (steel and polyurethane) were part of the risk assumed by the buyer, thus failing to meet the

<sup>1</sup> Tribunale Civile di Monza, 14 January 1993, CISG-online Case No. 540.

<sup>2</sup> Separate Award, SCC Arbitration No. V2014/078/080, 31 May 2017, CISG-online Case No. 4683, para. 2572; also paras. 2669. and 2722.

<sup>3</sup> Hof van Cassatie, 19 June 2009, CISG-online Case No. 1963.

requirement of *unforeseeability* in Article 79 CISG.<sup>4</sup> In the other four cases, the threshold of value alteration in the performance of the contract was found insufficient to reach the level of economic impediment under Article 79 CISG because: 1) an increase of 100% in the price of frozen raspberries was not enough,<sup>5</sup> 2) a decrease of 50% in the selling price of cases made from polyurethane foam was held not to amount to a state of “necessity”,<sup>6</sup> 3) a tripling in the market price of iron-molybdenum was held not to exceed the limit of sacrifice triggering the application of Article 79 CISG,<sup>7</sup> 4) an excess of one or two times in the market price of the goods (Ferro Molybdenum (FeMo) Alloy) did not support a claim that the purpose of the contract has been frustrated and.<sup>8</sup>

4. In the only reported decision in which a party was exempted to perform its obligations was a case decided by the Belgina *Cour de Cassation*. Given a 70% increase in the purchase price of steel, the Court ordered the parties to renegotiate the price relying on the provisions on hardship in Article 6.2.3 of the UNIDROIT PICC, which the Court considered to reflect one of the principles upon which the CISG is based (Article 7(2) CISG).<sup>9</sup>
5. In four cases in which the party alleging hardship under article 79 CISG was not exempted, the adjudicator, nevertheless, suggested that the available remedy would have been the release of the obligor’s obligation to pay damages and perform the contract.<sup>10</sup>

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<sup>4</sup> France Cass civ 1ère, 30 June 2004, CISG–online Case No. 870 (Goods involved: cases made from polyurethane foam); *Rechtbank van Koophandel, Tongeren*, 25 January 2005, No 1960, CISG-online Case No. 1106 (Goods involved: steel); Bulgarian Chamber of Commerce and Industry, 12 February 1998, CISG-online Case No. 436 (Goods involved: steel rope).

<sup>5</sup> *Rechtbank van Koophandel, Hasselt*, 2 May 1995, CISG-online Case No. 371.

<sup>6</sup> Cour d'Appel de Colmar, 12 Jun 2001, CISG-online Case No. 694.

<sup>7</sup> *Oberlandesgericht Hamburg*, 28 February 1997, No 167, CISG-online Case No. 261.

<sup>8</sup> CIETAC, 2 May 1996, CISG–online Case No. 1067 (based on frustration).

<sup>9</sup> Granting a right to renegotiate the contract to a seller for a 70% price increase in steel after the conclusion of the contract, Hof van Cassatie, 19 June 2009, CISG-online Case No. 1963.

<sup>10</sup> *Oberlandesgericht Hamburg*, 28 February 1997, No 167, CISG-online Case No. 261; Cour d'Appel de Colmar, 12 Jun 2001, CISG-online Case No. 694; France Cass civ 1ère, 30 June 2004, CISG–online Case No. 870; CIETAC, 2 May 1996, CISG–online Case No. 1067 (based on frustration).

## II. Summary chart

CISG Application	No. Cases	Ruling	No. Cases	Ground for denial	No. Cases	Threshold required	Remedy granted or suggested
The CISG does not apply to hardship	1	N/A	N/A	N/A	N/A	N/A	N/A
The CISG applies to hardship	9	Hardship was found	1	N/A	N/A	+70%	Renegotiation
		No hardship was found	8	Because the unforeseeability requirement and threshold were <i>not</i> met	1	Limit of sacrificed	Renegotiation and Damages & specific performance exemption
				Because the unforeseeability requirement was <i>not</i> met	3	N/A	
				Because the threshold of hardship was <i>not</i> met	4	+100%	Damages & specific performance exemption
+50%							
+300%							
+200%							

## III. Excerpts of decisions (next page)

	CISG-online Number/Country/Arbitration	Court	Date	Parties / Country	Relevant Part of Decision	Hardship Not Dealt by CISG/ govern by domestic law Art. 7(2) CISG	Harship Governed by 79 CISG	Relevant threshold	Avoidance is not available as a remedy per se (a fundamental breach needs to be proven)	Remedies as in article 79 CISG (damages & specific performance exemption)	Obligation to renegotiate derived from CISG principles / specific CISG provisions (internal gap 7(2))	Remedy of contract adaptation by adjudicator resulting from CISG principles / specific CISG provisions (internal gap 7(2))	Obligation to renegotiate derived from CISG principles / reflected in UNIDROIT PICCs (internal gap 7(2))	Remedy of contract adaptation by adjudicator resulting from CISG principles / reflected in UNIDROIT PICCs (internal gap 7(2))	Obligation to renegotiate as usage (9 CISG) reflected in UNIDROIT or others	Remedy of contract adaptation by adjudicator resulting from usages (9 CISG) reflected in UNIDROIT PICCs	Available at
	CISG-online 371 / Case No. AR 1849/94	Rechtbank van Koophandel, Hasselt, in Belgium	02 may 1995	Vital Berry Marketing NV : Seller - Chile Dira-Frost NV: Buyer - Belgium	Exemption for non-performance - Article 79 CISG - Sharp drop in market price - No force majeure Abstract translation in English Unavailable		1	No reached: A price increase or decrease of n 100 % would not suffice and									<a href="http://cisgw3.law">http://cisgw3.law</a>
	CISG-online 540 / Case No. R.G. 4267/88	Tribunale Civile di Monza, in Italy (applicable law: Italy's CC)	14 January 1993	Nuova Fucinati Spa: Seller - Italy Fondmetal International A.B.: Buyer - Sweden	"This provision [Art. 79], however, governs a different case - release from a duty made impossible by a supervening impediment not ascribable to a party, according to a rule similar to Article 1463 of the Civil Code. Article 61, et seq., of the Convention governs the seller's remedies for breach of contract by the buyer, providing in particular for the remedy of avoidance ("dissolution" in the terminology of our Civil Code) for breach of contract. [...] Under the Convention the remedy of dissolution is associated with breach, whereas the excessive onerousness doctrine does not fit within the structure of the Convention when invoked either as a defense or as a reason to avoid (rectius: dissolve) the contract. [...] Dissolution of the contract for supervening excessive onerousness affects neither the validity of the contract nor the property in the goods (except indirectly, by removing the obligation to deliver and thus affecting the transfer of title by preventing the identification of particular goods to the contract). [i.e., dissolution for excessive onerousness is a matter within the scope of the Convention]. Because the Convention is "special" law [i.e., one that applies to specific types of transactions] we must conclude that, if it were applicable to the case, it would preempt the general law of Article 1467 et seq. of the Civil Code. [...] Thus, because the special law [i.e., the Convention] does not apply, the parties' choice of Italian law leads to the application of the general law, Article 1467 et seq. of the Civil Code. As a result, the remedy of dissolution for supervening excessive onerousness is available, both as a defense and a claim. [...]The [seller] based its claim on the ground that, between February 3, 1988 (the date on which the contract was formed) and April (the delivery date, according to [seller's] argument) the international market price of ironchrome advanced 43.71%, rising from Lire 1,496 per Kg/chrome (equal to US\$ 0.545 per lb./chrome as estimated in the contract) to Lire 2,150. These facts, even though documented, do not justify the legal conclusions that the alleging party seeks to establish."	1	43.71% is not enough										<a href="http://cisgw3.law">http://cisgw3.law</a>





				is clear that a limited stock did not give [Seller] the right to stop all deliveries. [...] Conclusion: Art. 79 CISG cannot be invoked by [Seller], given that the circumstances it relies on could and should have been reasonably foreseen, and could have been perfectly inserted by it in the agreements between the parties.														
Arbitrations	CISG-online 436 / Case No. 11/1996	Bulgarian Chamber of Commerce and Industry	12 february 1998	Seller - Russia	"The principle objection of the [buyer] is that the [seller] breached their contract. The [buyer] asserts that after the conclusion of the contract, he asked the [seller] to stop delivering goods but the [seller] did not. The motives for the [buyer]'s request were: market conditions became worse, the [buyer] had problems with the distribution and the storage of the goods, the USA dollar quotation had increased, and the construction business had been in depression. [...] The listed circumstances that caused the [buyer]'s desire to have delivery suspended do not correspond to the requirements outlined in Article 79 of the CISG. The [buyer] is not in objective impossibility to accept the delivered goods and the described facts do not represent force majeure (acts of God, acts of third person, etc.). Such consequences are not unexpected. In the contract and in the CISG are provided special activities that had to be fulfilled in cases like this. The [buyer] did not undertake such actions. Consequently, it cannot be accepted that these impediments are a good reason for the [buyer] to ask the [seller] to stop the deliveries."	1	Undetermined in light of foreseeability of price fluctuations in the contract at stake											<a href="http://cisgw3.la">http://cisgw3.la</a>
				Buyer - Bulgaria														
	CISG-online 1067, Case No. CISG/1996/21	CIETAC (China International Economic & Trade Arbitration Commission)	02 may 1996	Seller - China	"[Seller] does not deny that it did not deliver the goods under Contracts 922 and 9221 within the time of shipment stipulated in the contracts. However, [Seller] emphasizes that in the two or three months from the time when the parties signed the contract to the expiration of time of shipment, the international market price of the goods soared, exceeding one or two times the contract price. When the price was soaring and domestic sources were scarce, the purpose of the contract was frustrated. [...] The Arbitration Tribunal holds that there is no legal basis to support frustration of purpose theory as asserted by [Seller]. [...] Although [Buyer] agreed to alter the price and the time of shipment, [Seller] neither delivered the goods, nor did it provide any justifiable reason except claiming the market price soared. Under such circumstances, the Arbitration	1	A price increase or decrease of more than 100 % or 200% would not suffice											<a href="http://cisgw3.la">http://cisgw3.la</a>
Buyer - United States																		

			States	Tribunal cannot support [Seller]'s assertion that it could not foresee the damage when signing the contract, and that it is unfair for [Seller] to indemnify all of the damages."													
Separate Award, SCC Arbitration No. V2014/078/080, CISG online no. 4683	Stockolm Chamber of Commerce	31 May 2017.	Naftogaz (Ukraine) vs. Gazprom (Russia)	<p>NOT THE ARBITRAL TRIBUNAL'S DECISION BUT THE RESPONDENT'S ARGUMENTS THAT THE TRIBUNAL DID NOT ADDRESS "CISG Advisory Council's Opinion No. 7 which suggests that CISG should, as far as possible, be applied in preference to national law doctrines of hardship" (para. 2554). "What would happen if the parties' renegotiations fail to arrive at a solution? The CISG Advisory Council suggests that CISG Article 79(5) may be relied upon "to open up the possibility for a court or arbitral tribunal to determine what is owed to each other, thus "adapting" the terms of the contract to the changed circumstances". Again, though, this is different from the remedy under section 36 of the Swedish Contracts Act. This would not give the Tribunal free hands to adjust a term of the contract. On the contrary, it would merely allow the Tribunal "to determine what is owed to each other": it would not be an adjustment of the contract terms as such".</p> <p>"Moreover, there is particular reason to be restrictive about the remedy of adjustment in an international context such as this. As noted above, CISG does not provide for any remedy of adjustment in the event of hardship (para. 2609). "the parties knew of and took account of the fact that there was likely to be a transition to market prices. They also knew of and took account of the fact that there would likely be a decoupling of gas market and oil product prices at some stage during the term of the Contract, i.e. at some stage between 2009 and 2019". "The risk that the oil-indexed price formula would, at some stage during the 11 year term of the Contract, give rise to prices that were either too high or too low, was a risk that the parties consciously took into account at the time when they entered into the Contract." (2584-2597)</p>	1 (CISG AC OP No. 7)					1 (CISG AC OP No. 7)							<a href="http://naftogaz.com">http://naftogaz.com</a>