

Annex 2 CISG AC Opinion No. 20

Scholarly writings on the CISG and Hardship

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I. Introduction

1. The CISG AC Opinion No. 20 examines a sample of seventeen works from scholars dealing with the issue of hardship under the CISG. Four publications, mainly from the early years of the Convention, reject the application of Article 79 CISG to hardship scenarios.¹ In the rest of the contributions, thirteen scholars agree that hardship is a type of impediment governed by Article 79 CISG.² Out of these works, only two proposed a threshold for hardship, by

¹ Gillette and Walt, *The Un Convention on Contracts for the International Sale of Goods* at 312, 13. ; Bernard Audit, *La vente internationale de marchandises. Convention des Nations Unies du 11 avril 1980*, Paris, LGDJ, at 174,75 cited by Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 216, fn. 1100.; B. Nicholas, [Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods](http://cisgw3.law.pace.edu/cisg/biblio/nicholas1.html), in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* § 5.02, at 5-4 (Parker School of Foreign and Comparative Law, Columbia University, ed. Nina M. Galston & Hans Smit, 1984), available at <<http://cisgw3.law.pace.edu/cisg/biblio/nicholas1.html>>; Tallon, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987), para. 3.1.2., available at: <http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html>

² Atamer, 'Article 79', at 1088, 89 para. 79.; Bridge, *The International Sale of Goods* at 618, para. 12.71.; Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 213.; CISG AC Opinion No. 7, *Exemption of Liability for Damages Under Article 79 of the CISG* (Rapporteur: Professor Alejandro Garro) 12 Oct 2007; Franco Ferrari and Marco Torsello, *International Sales Law - Cisg* (In a Nutshell: West Academic Publisher, 2014) at 326, 27.; Harry M. Flechtner, 'The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court', *Belgrade Law Review*, 59/3 (2011) at 93.; Harry M. Flechtner, 'Uniformity and Politics: Interpreting and Filling Gaps in the Cisg', in Peter Mankowski and Wolfgang Wurmnest (ed.), *Festschrift Für Ulrich Magnus. Zum 70. Geburtstag* (Sellier European Law Publishers 2014) at 200, 01.;; John O. Honnold and Harry M. Flechtner, *Uniform Law for International Sales* (The Hague: Kluwer Law International, 2009) at 627, para. 432.2, Schwenzer, 'Article 79', at 1142, para. 31. ; Yasutoshi Ishida, 'Cisg Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness - Full of Sound and Fury, but Signifying Something', *Pace International Law Review*, 30/2 (2018) at 364-68.; Joseph Lookofsky, *Understanding the Cisg* (Fourth Worldwide Edition edn., Law & Business: Wolters Kluwer, 2012) at 150, para. 6.32 ; Schlechtriem and Butler, *Un Law on International Sales* at 203, para. 91.; Peter Schlechtriem, 'Transcript of a Workshop on the Sales Convention: Leading Cisg Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More by Harry M. Flechtner', *Journal of Law & Commerce*, 18 (1999) at 236, 37.; Schwenzer, Hachem, and Kee, *Global Sales and Contract Law* at 670, para. 45.98.

giving a percentage number to the of value alteration amounting, in their opinion, to economic impediments under Article 79 CISG: O first author suggests at least 100% increase or decrease in performance value;³ A second author, who in principle agrees with the first, points out that in speculative transactions a party may have to accept even a 300% increase or decrease in its performance value.⁴ The CISG AC Opinion No. 7 refrains from setting a fixed percentage and provides the concept of “limit of sacrifice” beyond which the obligor cannot be reasonably expected to perform.⁵ A third author concurs that the threshold of hardship cannot be fixed with one formula and the meaning of “limit of sacrifice” has to be left at the discretion of courts.⁶ A fourth proposes to apply a “reasonable expectation test”, where the threshold for hardship is reached under Article 79 CISG if the failing party must bear huge costs totally disproportionate to the value of its obligation and will suffer a financial loss that is significantly greater than the risk of loss that a “reasonable person” could be expected to assume at the time of contract formation.⁷

2. In case of hardship under Article 79, the fourteen authors who advocate for the application of the CISG, see damages exemption as the remedy for this type of impediment. However, the CISG-AC Opinion No. 7 infers a duty to renegotiate the contract from the good faith principle in Article 7(1) CISG,⁸ and states that the remedy of contract adaptation by Courts may be possible under the CISG, without providing any further reasoning.⁹ Two authors also advocate for the same remedy of court adaptation by application of principles upon which

³ Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* at 431-35.

⁴ Schwenger, 'Article 79', at 1143, para. 31.

⁵ CISG AC Opinion No. 7, *Exemption of Liability for Damages Under Article 79 of the CISG* (Rapporteur: Professor Alejandro Garro) 12 Oct 2007, Rule 3.1. Comment paras. 35, 37 & 38.

⁶ Atamer, 'Article 79', at 1090, para. 82.

⁷ Ishida, 'Cisg Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness - Full of Sound and Fury, but Signifying Something', (at 364, 67, 68.

⁸ CISG AC Opinion No. 7, *Exemption of Liability for Damages Under Article 79 of the CISG* (Rapporteur: Professor Alejandro Garro) 12 Oct 2007, Rule 3.2. Comment para. 40

⁹ CISG AC Opinion No. 7, *Exemption of Liability for Damages Under Article 79 of the CISG* (Rapporteur: Professor Alejandro Garro) 12 Oct 2007, Rule 3.2. Comment para. 40.: “Even if one were not ready to stretch the principle of good faith buried in CISG Article 7(1) in order to find a balance of the performances,[47] 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”. With footnote to Professor Schlechtriem statements in Schlechtriem, 'Transcript of a Workshop on the Sales Convention: Leading Cism Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More by Harry M. Flechtner', (at 236, 37.

the CISG is based (Article 7(2) CISG along with the suggested principle of adaptation reflected in Article 50 CISG).¹⁰ Two others have proposed to apply Art. 6.2.3(4) UNIDROIT PICC as an international usage in the sense of Article 9(2) CISG.¹¹ Three scholars have expressly opposed the view that a duty to renegotiate should be imposed on the parties involved in a hardship scenario under the CISG.¹² Three scholars also find that there is no room for the remedy of contract adaptation by a court or arbitral tribunal based on principles of the CISG.¹³

II. Summary Chart

CISG Application	Authors	Threshold required	Authors	Primary Remedy	Authors	Other remedies	Authors
The CISG does not apply to hardship situations	4	N/A	N/A	N/A	N/A	N/A	N/A
The CISG applies to hardship situations	14	+100%	Brunner	Damages, exemption	14	Renegotiation	CISG-AC
			Schwenzer			Adaptation	CISG-AC
		+300%	Schwenzer			Adaptation Art. 7(2) & 50 CISG	Schlechtriem
		Limit of Sacrifice	CISG-AC			Ishida	
			Atamer			Adaptation Art. 9(2)	Atamer
		Ashida					

¹⁰ Ishida, 'Cisg Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness - Full of Sound and Fury, but Signifying Something', (at 378-80.; Schlechtriem, 'Transcript of a Workshop on the Sales Convention: Leading Cisg Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More by Harry M. Flechtner', (at 236, 37.

¹¹ Atamer, 'Article 79', at 1091, para. 86.; Schlechtriem and Butler, *Un Law on International Sales* at 204, para. 91.

¹² Bridge, *The International Sale of Goods* at 618, para. 12.71.; Ferrari and Torsello, *International Sales Law - Cig* at 328, 30.; Ishida, 'Cisg Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness - Full of Sound and Fury, but Signifying Something', (at 372.

¹³ Bridge, *The International Sale of Goods* at 618, para. 12.71.; Flechtner, 'The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court', (at 93, 99.; Flechtner, 'Uniformity and Politics: Interpreting and Filling Gaps in the Cig', at 201.; Schlechtriem and Butler, *Un Law on International Sales* at 204, para. 91.: either Schlechtriem changed its view or it is Petra Butler who wrote this position.

		Reason. Expect. Test				CISG & 6.2.3(4) UNIDROIT PICC	Schlechtriem & Butler
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III. Excerpts of scholarship writings (next page)

	Data	Relevant Part	Hardship Not Dealt by CISG/ govern by domestic law 7(2)	Harship Governed by 79 CISG	Threshold proposed	Remedies as in article 79 CISG (damages exemption)	Remedies as in Art 79 CISG (specific performance exemption)	Avoidance is available in hardship cases	Obligation to renegotiate derived from CISG 7(1), duty to interpret the	Obligation to renegotiate derived from CISG principles / specific CISG provisions	Obligation to renegotiate derived from CISG principles / reflected in UNIDROIT PICCs	Remedy of contract adaptation by adjudicator resulting from CISG principles / specific	Remedy of contract adaptation by adjudicator resulting from CISG principles / reflected in	Obligation to renegotiate as usage (9 CISG) reflected in UNIDROIT	Remedy of contract adaptation by adjudicator resulting from usages (9 CISG) reflected in
	<p>Atamer, Yesim M. (2011), 'Article 79', in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds.), UN Convention on Contracts for the International Sale of Goods - Commentary (München: Hart Publishing).</p>	<p>at 1088, 89, para. 79: "Scholarly opinion is divided on this. While some put forward that the Convention excludes a concept of hardship, the majority seems to be in favour of reading it into the CISG."</p> <p>at 1090, para. 82: "What exactly 'extremely onerous' or 'limit of sacrifice' means, cannot be fixed with one formula and has to be left to the discretion of the courts."</p> <p>at 1091, para. 86: "the easiest way to solve the problem is to include Art. 6.2.3 (4) PICC into the contract by means of Art. 9(2) CISG."</p>		1	Cannot be fixed by a formula and has to be left to the court	1	1								1
	<p>Bernard Audit, La vente internationale de marchandises. Convention des Nations Unies du 11 avril 1980, Paris, LGDJ, at 174, 175 cited by Brunner, Force Majeure and Hardship under General Contract</p>	<p>"At the diplomatic conference in Vienna, a Norwegian proposal was raised that paragraph 3 should be supplemented by providing that if a temporary impediment to performance ceased and the circumstances had radically changed to such an extent that it would clearly be unreasonable to continue to hold the obligor to his obligation, it should be released from that obligation. The proposal, however, was rejected. There was special apprehension that this proposal intended to introduce the concept of 'impediment' into the CISG, which was</p>	1												

<p>Principles: Exemption for Non-Performance in International Arbitration, at 216, fn 1100.</p>	<p>impresion into the CISG, which was believed to release the obligor as soon as performance is made materially more difficult. The above legislative history has been interpreted by some commentators as a decision against the recognition of the concept of changed circumstances or hardship in whatever form. "</p>														
<p>Bridge, Michel G. (2013), The International Sale of Goods (Third edn.; Oxford: Oxford University Press).</p>	<p>at 618, para. 12.71:"The Unidroit Principles of International Commercial Contracts provide, in what is called a case of 'hardship', for the parties to renegotiate the terms of the contract where the equilibrium of the contract has been fundamentally altered. The disadvantaged party is entitled to request renegotiation, failing which a court may either 'adapt' the contract or allow for its termination on terms. The highest Belgian court has adopted the same approach in a CISG case, purportedly under the Convention, without giving adequate reasons. Indeed, there is no cogent reason, or indeed any reason, for a court to find a power of this sort in the CISG. It amounts to an unwarranted interference in a contract freely concluded, despite the CISG being firmly based on the autonomy of the contracting parties."</p>		1								Not possible				
	<p>at 213: "Economic 'unreasonableness' or 'unaffordability' of performance may also constitute an impediment to performance under the force majeure excuse. This follows both from an interpretation of Article 79 CISG and from practical considerations. The prevailing view by now accepts that the force</p>														

	<p>Rule 3.2, para. 40: The next issue to tackle is to ascertain the contours of the remedial guidelines that may be followed to grant the most appropriate remedy or relief after hardship has been found to exist. One may infer from the obligation to interpret the Convention in good faith a duty imposed upon the parties to renegotiate the terms of the contract with a view to restore a balance of the performances. In case negotiations fail, there are no guidelines under the Convention for a court or arbitrator to "adjust," or "revise" the terms of the contract so as to restore the balance of the performances. Even if one were not ready to stretch the principle of good faith buried in CISG Article 7(1) in order to find a balance of the performances, 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.</p>													
<p>Ferrari, Franco and Torsello, Marco (2014), International Sales Law - CISG (in a nutshell: West Academic Publisher).</p>	<p>at 326-327: "the prevailing view of commentators today is that hardship is (somehow), governed by the CISG, mainly on the grounds that the CISG does not equate the term "impediment" only with an event that makes performance absolutely impossible".</p>		1						Not possible				Not possible	
<p>Flechtner, Harry M. (2011), 'The Exemption Provisions of the Sales Convention including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court', Belgrade Law Review, 59 (3).</p>	<p>at 93: " I believe that the legal effect of post-contract developments that render a party's performance more difficult, including more expensive, is fully addressed in the Convention's exemption provisions. The Convention's provisions, in my view, preempt national domestic law on the question. The fact that the CISG articles governing exemption do not authorize a tribunal to impose modified contract terms not agreed to by the parties does not create a "gap" in the Convention; it merely reflects the Convention's rejection of the adaptation remedy, as reflected in the travaux preparatoires. "</p> <p>at 99: "Please understand -- my objection is not that adaptation for hardship is not part of U.S. domestic law; my objection is that it is not part of the Convention, and is "found" by</p>													

	the Cassation Court within the Convention by a process that violates the express terms of Article 7(2) and runs counter to the implications of the Convention's drafting history"		1		1							Not possible		Not possible	
Flechtner, Harry M. (2014), 'Uniformity and Politics: Interpreting and Filling Gaps in the CISG', in Peter Mankowski and Wolfgang Wurmnest (ed.), Festschrift für Ulrich Magnus. zum 70. Geburtstag (Sellier European Law Publishers).	at 200 - 201: ". I (like most tribunals and other commentators) believe that Article 79 (unlike traditional force majeure doctrine) does not require the impediment to have rendered performance impossible; the standard is something more akin to very- extremely more difficult / expensive " at 201: "In indisputable contrast to "hardship" doctrine, however, Article 79 does not authorize judges or arbitrators to modify the terms of a contract as a response to a qualifying "impediment": Article 79(1) specifies that, when its requirements for relief are met, the party facing the impediment is "exempt from liability," and Article 79(5) makes clear that this means the party is not liable in damages for failing to perform its duties. Nothing in Article 79 permits judicial imposition of "adjusted"														
Gillette, Clayton P. and Walt, Steven D. (2016), The UN Convention on Contracts for the International Sale of Goods (New York:	at 312: "All these considerations lead us to conclude that hardship should be excluded from the scope of impediments under Article 79, and indeed from the CISG itself"	1													
Honnold, John O. and Flechtner, Harry M. (2009), Uniform Law for International Sales (The Hague: Kluwer Law International).	at 627, para. 432.2: "the language of Article 79(1) seems to leave room for exemptions based on economic dislocations that constitute an 'impediment' to performance comparable to non-economic barriers that excuse failure of performance."		1												
Ishida, Yasutoshi (2018), 'CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of	at 364, 367,68: "This author believes that the "reasonable expectation test" concerning overcoming an impediment can play the same role as the standard of extreme onerousness (i.e., whether a failing party could reasonably be expected to have overcome the impediment). [...]Rescuing the painting may be technically possible, but Seller must bear huge costs totally disproportionate to the price of the painting, and will suffer a financial loss that is significantly greater than		1	Reasonable expectation								waste of time	Possible under the reasonable expectation	Waste of time	Possible under the reasonable

	Reasonableness - Full of Sound And Fury, but Signifying Something', Pace International Law Review, 30 (2).	at 372: "Unlike the UNIDROIT Principles, the CISG has no provision that authorizes a judge to adapt the contract. However, such adaptation should be possible through the interpretation of the "reasonable expectation test" of Article 79."			expectati on test						test	time	expectation test
		at 372: "It is impracticable and even a waste of time to order the parties to renegotiate, because it is likely that they had already negotiated extensively before going to court."											
	Lookofsky, Joseph (2012), Understanding the CISG (Fourth Worldwide Edition edn., Law & Business: Wolters	at 150, para. 6.32: ""Granted, at some (extreme point), we might reach what jurists in some systems called 'sacrifice threshold' - a point in the economic force majeure borderline where a court or arbitral miteht	1										
	Nicholas, Barry, Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods, in International Sales: The United Nations Convention on Contracts for the International Sale of Goods (Parker School of Foreign and Comparative Law, Columbia University, ed. Nina M. Galston & Hans Smit, 1984)	Section 5.03, p. 5-17: "Seller can, of course, argue that the increase in costs is an impediment which exempts him from liability for non-performance in December 1982, but this is unlikely to help him. In the first place, it is very improbable that a court will allow an increase in costs by itself to be an impediment (as opposed to an increase in costs resulting from another impediment, in this case the fire). And in the second place, as we shall see, Buyer may in any case be able to claim specific performance. A proposal was indeed made at Vienna [38] to add to paragraph (3) a provision that the non-performing party (Seller in our example) should be permanently exempted if at the end of the period of temporary exemption circumstances had "so radically changed that it would be manifestly unreasonable to hold him liable." The proposal was, however, rejected (as similar proposals had been rejected at earlier stages in the drafting of the Convention), apparently out of a reluctance to embark on the problems of frustration or imprévision."	1										
Schlechtriem, Peter and Butler, Petra (2009), UN Law on International Sales (Berlin: Springer).	at 203, para. 291: "An impediment under Article 79(1) CISG is not only, as the change of wording from 'circumstances' (Article 74 ULIS) to 'impediments' in Article 79(1) CISG might suggest, an economic event which prevents the performance in its entirety, buy also one which makes the performance economically prohibitive." p.204, para. 291: "[the] possibility to adjust the contrat is not possible by bay of gap-filling under the CISG. I. A solution would	1							1	Not possible	Not possible	1	

	<p>...ing under the CISG. [...] A solution would be to take account of, especially Article 6.2.3 of the UNIDROIT Principles, as a trade usage under Article 9(2) CISG, as far as the requirements of Article 9(2) are met."</p>														
<p>Schlechtriem, Peter (1999), 'Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More by Harry M. Flechtner', Journal of Law & Commerce, 18.</p>	<p>at, 236, 237 SCHLECHTRIEM: I would say Article 7(2) because my argument is based on the idea that there is a gap in the Convention. That could be disputed, of course, because at the time of the drafting of the Convention the hardship problem was regarded as covered by Article 79. That's my impression.</p> <p>REITZ: And adaptation of the contract was not included as part of the Convention at that time?</p> <p>SCHLECHTRIEM: Correct.</p> <p>SONO: Would you find adaptation to be part of the Convention now?</p> <p>SCHLECHTRIEM: I would be liberal in finding gaps, then finding general principles of the Convention, and then filling the gaps by rules derived from the principles.</p> <p>HONNOLD: May I add a footnote to the argument I was making earlier in support of your views against a Convention rule on culpa in contrahendo? I mentioned that I thought there wasn't enough of a springboard in the Convention for such a rule. I would now add the suggestion that, in this setting, there is not enough of a springboard to create the kind of uniformity that the Convention was designed to produce. It's an area that is too amorphous to think that a few lawyers' views would produce [page 236] a basis for the kind of uniform rule that a world-wide body of people -- 53 countries now -- would be obliged to follow.</p> <p>SCHLECHTRIEM: Yes, it is a bit forward</p>	<p>1</p>									<p>1</p>				
<p>Schwenzer, Ingeborg (2016), 'Article 79', in Ingeborg Schwenzer (ed.), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International</p>	<p>at 1142, para. 31: "According to the new prevailing opinion, so-called economic impossibility, ie a change of economic circumstances which is of such gravity that the procurement or fabrication of the goods would cause the seller to incur unreasonable costs in relation to the contracting price, can justify exemption under Article 79.</p> <p>at 1143 para. 31: "In cases of speculative</p>	<p>1</p>		<p>Evan a tripled market price may have to be accepted in speculativ</p>											

Sale of Goods (4th edn.; London: OUP).	transactions, a party may have to accept even a tripled market price."			transac tions										
Schwenzer, Ingeborg, Hachem, Pascal, and Kee, Christopher (2011), Global Sales and Contract Law (London: OUP).	at 670, para. 45.98: "It has been argued that the CISG similarly permits an initial imbalance hardship, to the extent that hardship is found encompassed with Article 79 CISG. [...] A consistent construction of both impediment and hardship under Article 79 CISG is itself a further policy reason in para 3.1.2." This solution is unacceptable.		1											
Tallon, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987), para. 3.1.2, available at: http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html	The principle of good faith must not be used to bypass explicit provisions of the Convention. Article 79 adopts an intermediate solution which ensures both contractual justice and the security of transactions. Furthermore, the notion of good faith is practically of no avail to the judge. If it were to be regarded as the legal basis of the theory of imprévision in international sales, harmony would be jeopardized and the aim of the Convention,	1												