Hardship and the application of CISG

Feasibility analysis of controversial issues

Jiamin Gu

Supervisor: Prof. Niklas Arvidsson

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LUND UNIVERSITY

SCHOOL OF ECONOMICS AND MANAGEMENT

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Abstract

The absence of provisions on hardship under the United Nations Convention for the International Sale of Goods ("CISG") and the general recognition of the principle of hardship in private international law lead to some problems to maintain the legislative purpose of the Convention as the "lingua franca" of international trade. In order to make the application of the Convention not only on the surface of the text, but also to implement the uniformity of the law, it is necessary to discuss the controversial question about the application of CISG exemption clause under the hardship situation. This article will introduce the scope of CISG exemption clause and the meaning of "hardship", and provide a feasibility analysis of covering hardship under the function of CISG exemption clause. In addition, there will be extended discussion to the debates of the UNIDROIT Principles for International Commercial Contracts (PICC) 's gap filling function and the current COVID status where hardship situations raise frequently.

Key words: Hardship, CISG, PICC, Exemption Clause

Abbreviations

CISG	The United Nations Convention on Contracts for the International sale of goods
UNIDROIT	The Unification of Private Laws
PICC	The UNIDROIT Principles for International Commercial Contracts
UNCITRAL	The United Nations Commission on International Trade Law
ULIS	The Uniform Law on the International Sale of Goods
ULS	The Uniform Law on the Formation of Contracts for the International Sale of Goods
ICC	The International Chamber of Commerce
WHO	The World Health Organization
PHEIC	Public Health Emergency of International Concern

1. Introduction

1.1 Background

The United Nations Convention on Contracts for the International Sale of Goods ("CISG")[1] was developed by the United Nations Commission on International Trade Law ("UNCITRAL") at the Vienna Diplomatic Conference in 1980. It is one of the most effective outcomes of the international private law unification effort and can be regarded as a "lingua franca" of international sales.[2] The aim was and still is to promote uniformity in international trade norms and facilitate cross-border transactions.

CISG does not contain a specific clause for the so called situation "hardship" and the issue of whether hardship can be excused by CISG Article 79 is highly controversial. The uniform text alone does not necessarily bring uniform law. The ultimate goal of uniform law should not be the mere reflected from the unification of legal text, but should be implemented in the process of operation. Therefore, concerning such ambiguous issues, it is vital to underline the centralized interpretation and application of the Convention.

1.2 Aim and research question

The purpose of this thesis is to dig into the question of hardship and the application of CISG. Subject to the application of CISG as the governing law of the contract, it is a controversial issue that whether article 79 of CISG can be applied to exempt the parties from liability under the hardship circumstance. Although this problem is in great controversy, this thesis provides a feasibility analysis, so that it can provide some convenience for the current international contract disputes in the COVID period. And when a hardship situation occurs, the

[1] U.N. Convention on Contracts for the International Sale of Goods [CISG], opened for signature Apr. 10, 1980, S. TREATY DOC. No. 98-9 (1983); Annex I, U.N. DOC.A/Conf. 97/18 (1980).

[2] Peter Schlechtriem, Keynote Address, in Pace International Law Review ed., Review of the Convention on Contracts for the International Sale of Goods (CISG) 2003-2004. European Law Publishers,2005. pp. 84-85.

rights of contract renegotiation, or for the court to terminate or make adjustment to the contract maintain blank state so far in CISG. This thesis thus try to answer whether the UNIDROIT Principles for International Commercial Contracts ("PICC")[3] can function as a gap-filler in such specific need. To fulfill the purpose, this thesis will attempt to answer the following questions, but not necessarily in the same order:

(1) Which are the constituent elements of article 79 of CISG

(2) What is meant by "hardship"?

(3) Does hardship fall into the scope of article 79 of CISG?

(4) If requests such as re-negotiation, contract adjustment or termination raise under hardship, is it possible for contract governed by CISG to seek a relief approach from PICC?

1.3 Materials and method

The study will be conducted using the methods of legal dogmatics and qualitative empirical research. This means different resources will be used on providing understanding on the mentioned issues. International legal instruments and relevant doctrine, in this thesis mainly be the related legal provisions in CISG and PICC will be analyzed. In addition to this, cases with relevance to the topic will be presented. These points towards different issues that are explored and explained through the use of scholarly literature and academic journal articles. Besides, comments and views from scholars will be used to show the complexity and potential ramifications of the topic in the study and debate of the thesis subject.

1.4 Structure

To fully grasp the research topic, this thesis will be developed according to several key sections. It starts by explaining the drafting background of CISG and the exemption clause stated in Article 79. Article 79, the exemption clause of CISG, provides several prerequisites for an "impediment" for contractual parties to exempt themselves from liability. The first part analyzes the exemption clause's structure in detail. For the reason that there is no specific provision for hardship in

[3] 2017. UNIDROIT Principles of International Commercial Contracts. Rome: UNIDROIT.

CISG, here refers to PICC to fully describe the component elements of hardship in the following chapter. Chapter 4 focuses on a relevant case analysis, Scafom International v. Lorraine Tubes S.A.S., as the first case to adopt the application of CISG Article 79 for hardship. Following is the discussion about whether the exemption clause of CISG can be applied under hardship, and whether PICC can be used to fill the gap of CISG on the legal effects of hardship. Then comes to the current global pandemic situation, where hardship situation arises frequently, the final part makes some suggestions on how to minimize the contractual risk by forming specific terms during the COVID-19 period.

2. The “impediment” exemption clause in Article 79 of CISG

2.1 The drafting background

International trade can be interpreted as a general reference to all sales and transactions across national borders, covering a wide range. Cross-border sale of goods is the cornerstone of the birth and development of international trade, and is still an essential component of international trade now. Therefore, the legal norms related to the international sale of goods are also an essential part of international trade law.

Globalization has brought about the development of international free trade. Still, at the same time, the historical differences in trade culture between different countries and regions, the varying level of capabilities of national legislation, and the inconsistency of domestic legal norms have led to disputes arising from time to time in the international sale of goods, many questions that arise from the interpretation and application of the law are also waiting to be resolved. To better accommodate these practical issues, the harmonization of rules for the international sale of goods started being taking into the agenda, and those efforts continue to this day. The law regulating the international sale of products covers a wide variety of topics, and it can be found in the form of international agreements, general principles, and commercial practices, as well as in various private law systems in different countries. The birth of the United “CISG” in 1980 was the tangible product of the unification process of the international sale of goods after a long period of international integration attempts and compromises.

In the development of international sales law, efforts began to harmonize and unify legal norms starting with the set up of the International Institute for the Unification of Private Laws (“UNIDROIT”) in 1926 in Rome. In 1930, UNIDROIT resolved to appoint a committee of experts to draft law on the

international sale of goods.[4] The committee was composed of members representing the four major legal systems: English, German, French, and Scandinavian. In 1935, the Commission finished its work on the Uniform International Trade Law and submitted the draft to a number of states for comments. The second draft was therefore finished in 1939, but the outbreak of the Second World War forced the work to be carried out during the war.[5]

Following the Seventh Hague Conference on Private International Law in 1951, UNIDROIT called a conference to discuss the proposed Uniform Law on the International Sale of Goods after the Second World War. In April 1964, 28 countries reconvened, with representatives from Western and Eastern European countries and the United States of America participating. The Conference adopted two conventions, one was the Uniform Law on the International Sale of Goods[6] ("ULIS"), which came into effect on 18th August 1972, and the other one is the Uniform Law on the Formation of Contracts for the International Sale of Goods[7] ("ULS"), which came into force on 23th August 1972. The two conventions were not widely adopted, particularly since most countries sew them dominated by countries of Western European civil law. In addition, there were also arguments, such as cumbersome content and complicated concepts, resulting in many reservations to these two conventions, and in the end, only a limited number of states actually joined.[8]

Simultaneously, UNCITRAL, which was established in 1966 with the aim of developing a global harmonization of civil and commercial law, has continued to work on unifying private rule and international codification of civil and commercial law. UNCITRAL brought together civil law and common law systems, called for the participation of members from both systems, resulting in the integration of views on particular legal issues. In 1969, UNCITRAL proposed

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[4] Huber, P. and Mullis, A., 2007. The CISG: A new textbook for students and practitioners. Munchen: Sellier, p2.

[5] Joseph M. Perillo, Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review, 63 Fordham L. Rev. 281 (1994), p282.

[6] Convention Relating to a Uniform Law on the International Sale of Goods, done July 1, 1964, annex, Uniform Law on the International Sale of Goods, 834 U.N.T.S. 109,123.

[7] Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, done 1 July, 1964.

[8] Sarcevic, P. and Volken, P., 2001. The international sale of goods revisited. Boston: Kluwer Law International, p.12.

to further establish a uniform international sales law based on the two above-mentioned conventions of 1972[9] with the purpose of having it accepted by all countries in the world. In 1978, the Committee concluded the draft by fusion of the two conventions, and in March 1980 adopted the CISG by 62 countries at the Vienna Diplomatic Conference. The Convention did not enter into force until 1988 because the number of countries did not meet the target at that time. As of 2020, the number of states being parties to the Convention has grown to 94[10], covering the vast majority of countries currently active in international trade.

The most interesting characteristic of the CISG is that it is founded on the original international law of the sale of goods, which bridges national borders and can be incorporated in various countries with diverse legal systems. The ensuing challenge is the uniform interpretation and implementation of CISG, which can help to optimize its internationalism and inclusiveness while at the same time reducing barriers to international trade.

2.2 Overview of the exemption clause

International trade is not always in a stable and secure state. The impact of unpredictable and insurmountable factors on international sales of goods often brings more difficult or even impossible for the contracting parties to fulfill their obligations as planned. In the international trade environment, contract parties can invoke the CISG exclusion clause to exclude themselves from liability, defend their legitimate rights and interests in extreme events. As it relates to international commercial cooperation, international dispute settlement, and freedom of international trade, the interpretation and invocation of this clause have a vital role in international sale of goods.

Before discussing the constituent elements of Article 79(1), it should first be clarified that, according to Article 79(5), the exemption clause of Article 79(1) is merely an exemption from liability and does not affect the exercise of the parties' other rights under the Convention, nor does it relieve the parties from the claim of

[9] Farnsworth, E. Allan. "Uncitral-Why? What? How? When?" The American Journal of Comparative Law, vol. 20, no. 2, 1972, pp. 314–322. JSTOR, www.jstor.org/stable/838986. p1.

[10] En.wikipedia.org. 2021. United Nations Convention on Contracts for the International Sale of Goods - Wikipedia. [online] Available at: <https://en.wikipedia.org/wiki/United_Nations_Convention_on_Contracts_for_the_International_Sale_of_Goods> [Accessed 14 April 2021].

other liabilities or remedies. On this point, some scholars have argued that the claim to the performance of a specific contractual obligation is barred during the period in which the "impediment" leading to the hardship situation exists; in other words, another party is not entitled to demand performance of the disadvantage party's obligation under the specific contractual provisions.[11] This is a good spot for discussion, but will not be covered in detail here.

According to Article 79(1), there are two main elements of the party's exemption from liability, one is that the party is unable to perform its obligations under the contract due to "an impediment beyond his control", and the second is that the party "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences". Both of them are cumulative and necessary in order for an exemption to arise. At the same time, there must be causation between the impediment and the consequence. In addition, Article 79(3) and (4) also set other requirements for the application of the exemption.

2.3 The elements of the exemption clause

2.3.1 The concept of impediment

Article 79 of the CISG provides an exemption from liability, and it follows from paragraph (1) of the article that a party is exempt from liability for damages if it fails to perform its obligations because of an "impediment" that meets the conditions required by the article. The term differs from the terminology commonly used in national legal systems. In such systems terms such as "force majeure", "hardship of performance","change of circumstances", and "contractual frustration" are used. These terms have not been adopted into the text of the CISG. This is considered to be a way to avoid the Convention being influenced by domestic trade concepts and to preclude courts from interpreting the Convention in accordance with domestic law.

It was a lengthy and contentious procedure for the expression "impediment" to be established in Article 79 of the CISG. Throughout the beginning, the phrase "obstacle" was used in the 1964 CISG draft published by the Hague Conference

[11] Yasutoshi Ishida, CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness?Full of Sound And Fury, but Signifying Something, 30 Pace Int'l L. Rev. 331 (2018), p381.

and demanded that the failure to perform must be triggered by an “obstacle”. However, there were concerns raised by a German civil law organization that this requirement may only be linked to secondary and external incidents and ignoring the seller's incompetent behavior or his own obligation to provide care, and also exclude cases in which the burden of performance is exacerbated by drastic changes in economic conditions. The expression “obstacle” was then, in subsequent Article 74(1) of the ULIS, replaced with “circumstances”.[12] As regards terminology, “circumstances” will involve expense modifications and other drastic economic changes in comparison with “obstacle”. Next, UNCITRAL replaced the term "circumstance" used in Article 74(1) with “impediment”.[13] Though different from the previous draft's term “obstacle”, both emphasize objective circumstances that hinder performance, such as barriers to the shipment and payment of goods, rather than the “defective performance” caused by the subjective influence of the parties. In addition, the Commission’s use of “impediments” instead of “circumstances” also responds to prior concerns about the ULIS Art.74 that the term “circumstances” might lead some parties to excuse themselves simply by arguing that performance had grown more challenging or unprofitable to continue.[14] However, even if the word “impediment” is used instead, Article 79(1) of CISG still leaves room for the failure to perform caused by economic disruption or disorder. Such economic reasons may also constitute an “impediment” to performance and thus fall under the conditions of the clause as an exemption parallel to the “non-economic impediment” to performance. This economic variation is known as “hardship”, and it is this situation that has led to some new challenges in the application and interpretation of the exemption clause. For example, in the national practice of applying the CISG, courts and tribunals have had to deal with the issue of whether (and, if so, when) Article 79(1) of the Convention can be invoked to exclude liability in the context of economic hardship.

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[12] Larry A. DiMatteo, Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines, 27 Pace Int'l L. Rev. 258 (2015). Available at: http://digitalcommons.pace.edu/pilr/vol27/iss1/5, p290.

[13] Ibid.

[14] Nortonrosefulbright.com. 2021. Force majeure/hardship clauses and frustration in English law contracts amid COVID-19. [online] Available at: <https://www.nortonrosefulbright.com/en/knowledge/publications/b54cf723/force-majeure-hardship-clauses-and-frustration-in-english-law-contracts-amid-covid-19> [Accessed 16 April 2021].

2.3.2 The impediment beyond control

How to interpret “an impediment beyond his control” is a challenge put in front of courts as well as arbitral tribunals. While in some cases, whether the parties are successful in exonerating themselves from liability under Article 79 or the courts refuse to grant an exoneration, there are instances where the courts do not interpret the “impediment” requirement in the provision but simply announce that an impediment exists, leaving the interpretation for the elements of “impediment” unclear.

In Digest of Case Law on the United Nations Convention on CISG, there refers to a decision language suggested to define “impediment” as “an unmanageable risk or a totally exceptional event”.[15] Regarding the scope of uncontrollable impediments, it has been argued that, in general, there are three main categories: first, natural disasters and the most general risky accidents such as fires, floods, earthquakes, tsunamis, plagues. The second is government restrictions, legal barriers and major changes in society, such as government bans, law changes, wars. Third, obstacles that have an impact on certain specific contracts, for instance shortage or unavailability of supplies.[16] In any case, the purpose of Article 79 of the CISG shows that the occurrence of such an event does not in itself constitute an impediment. Whether an occurrence can be considered an impediment depends on its specific characteristics. For example, if a seller fails to take minimum safety measures against fire and its property is destroyed by fire, the seller is not relieved of liability for delivery. If the seller had taken appropriate measures, the fire would have been within the seller's control and could have been avoided. On the other hand, liabilities and risks that fall within the scope of the contract do not constitute an impediment under Article 79 CISG. Thus, business risks, liquidation or bankruptcy, production failures[17], raw materials supply failures, strikes[18], sharp price increases of raw materials and so on, do not exempt the contracting parties from their performing obligations.

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[15] 2016. UNCITRAL digest of case law on the United Nations Convention on contracts for the International Sale of Goods. p.375.

[16] Li, W., 2009. Commentary on the United Nations Convention on Contracts for the International Sale of Goods. Beijing: Law Press, p 256.

[17] Enderlein, F. and Maskow, D., 1992. International sales law. New York: Oceana Publ, pp.322-323.

[18] In the case of a strike at a supplier, the seller of the contract is relieved of its obligations, but only if the seller is unable to obtain the raw materials from other sources.

Besides, the Convention puts a focus on the factual essence of "impediment", while removing the effect of the parties' subjective aspects. To put it another way, the parties can only depend on the objective circumstances of the occurrence of "impediment beyond his control" that result in the failure to perform obligations, not on the no absence of subjective faults as a basis for exemption.[19] For that impediment also has the requirement that it should be an external cause, the impediment should not be caused by the party's own behaviors and meanwhile outside the party's control.

2.3.3 Unpredictable

Another constraint on the impediment is unpredictability, which is stated as "he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract". Requiring the parties to take into consideration all "impediments" that existed "at the time of the conclusion of the contract" would be unrealistic. The language in Article 79 emphasizes the need for the party seeking exemption to provide reasonable proof that potential "impediments" were not expected. The court must then make a subjective decision based on the "reasonable person standard"[20] on a case-by-case perspective, taking into consideration the evidence offered by parties.

The cases that have not been found excused include the following conditions: first, where the relevant facts existed at the time of the conclusion of the contract and the parties should reasonably have known of their existence; second, where there were specific commercial risks that could have been foreseen by a reasonable person[21]; and third, where the possibility of changes in the market price of the goods[22], should have been taken into consideration by the parties.

2.3.4 Unavoidable

Unpredictable impediments are only excused if the non-performing party can prove that it could neither have avoided nor taken reasonable steps to overcome

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[19] Op.cit 15, p257.

[20] INGEBORG SCHWENZER, SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 54-55, p1134 (Ingeborg Schwenzered., 4th ed. 2016).

[21] Damages for Breach of Contract. [online] Available at:<https://www.law.nyu.edu/sites/default/files/ECM_PRO_063763.pdf> [Accessed 14 April 2021].

[22] CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

them. The avoidance or overcoming highlights more on the impediment's implications rather than the impediment itself. When a party is in a state of diminished capacity, but not totally incapable of full performance, a claim for exemption for non-performance will generally not be upheld because the impediment still has the possibility to be resolved. And in some cases, "commercially reasonable substitute"[23] can be applied to seek for alternative perform methods, thus keep the contract under a non-default status.

2.3.5 Causation

Unpredictable and unavoidable impediment should be the only reason for the non-performance, and the fact that the non-performing party must prove. Even if the "impediment" in the case satisfies all the prerequisites of Article 79(1), the party needs to establish that the impediment is to blame for its failure to perform. For example, if the store claims that he will not deliver the goods at the beginning, and the goods are later lost in the seller's warehouse as a result of a contingency, the seller is not relieved of liability for damages for non-delivery.

2.3.6 Exemption period

Article 79(3) limits the length of the period of exclusion, the disappearance of a temporary impediment represents the beginning of recovering performance by the impeded party. A permanent exclusion of liability can only apply to a permanent impediment, or where the temporary impediment shakes the foundation of the contract. The dispute over paragraph (3) also constitutes one aspect of the question of whether hardship can be included under Article 79, as "hardship" is equivalent to a "temporary impediment" that may make it unconscionable for a party to continue to perform.[24]

2.3.7 Notification obligations

The duty of notice is imposed at Article 79(4) out of the principle of good faith in international trade.[25] No matter whether the impediment is permanent or temporary, the failure of performance should be noticed to another party in a

[23] Op.cit 15, p.378.

[24] Schwenzer, I., 2008. Force Majeure and Hardship in International Sales Contracts. Victoria University of Wellington Law Review, 39(4), pp.717-725.

[25] SALEEM, S., 2016. FORMATION OF CONTRACT FOR THE INTERNATIONAL SALES OF GOODS. Master. NEAR EAST UNIVERSITY, p42.

reasonable time, in order to give the other party enough time to take appropriate efficient actions to avoid further extension of damages caused by the impediment.

3. Hardship Provisions in PICC

3.1 Introduction

In general, there are three main types of application of PICC according to the cases in UNILEX. The first option is as a contractual incorporation clause. As currently, many countries hold that parties can not choose non-domestic law as the applicable law. Which means the parties' choice of non-domestic or supranational law (such as PICC) can not constitute a valid choice of governing law for conflict of laws purposes; they can only constitute an incorporation clause, and such clauses are binding only if they are in line with mandatory rules of applicable law. The second is as a basis for the interpretation of international uniform substantive law, this will be analyzed in the next chapter. Thirdly, be chosen by the parties as the governing law. Judicial practice in some countries allows the parties to choose the PICC as the applicable law. The Swiss Supreme Court once stated in its decisions that, even if not all non-domestic or supranational laws can be the applicable law, at least rules such as PICC, which have been developed by independent academic groups and are widely recognized, can be chosen by the parties as the applicable law of the contract.

The definition, consequences, and adjustment of hardship are set forth in detail in PICC. The PICC was drafted and published in order to explain the general principles of contract law, and in doing so to reflect the features of different legal systems, thus create a legal document on contract law that can be widely applied in international trade. The PICC was first published in 1994, with supplements published in 2004, 2010 and 2016, respectively. Although the PICC uses a civil law code format, its basic principles originate from the common law contract doctrine, and it can be said that it is a blend of civil law and common law systems.[26] Its choice not to unify international commercial law in the form of uniform legislation, but still falls within the scope of international practice, makes it a legal guide of a normative nature though it is not an international

[26] William Tetley, Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified), 60 La. L. Rev. (2000), pp.681-684.

convention.[27] Compared with CISG, this set of general rules has a wider scope of application and has played an increasingly vital role in the operation of international commercial practice in recent years. On this basis, it is a good choice to use the provisions of the PICC to analyze the elements and consequences of hardship situations.

In general, once a contract is concluded, it binds the parties, they must perform their obligations in accordance with the contract, which is the principle of "*Pacta sunt servanda*" ("agreements must be kept") in contract law. Even if a party's burden of performance is unduly increased, he should still perform his obligations under the contract because he has undertaken to bear the risk of an increased burden of performance at the time of entering into the contract.[28] The hardship exception to the "*Pacta sunt servanda*" principle can only be claimed if there is a fundamental change in the balance of the contract.

3.2 The elements of hardship

The definition of hardship is set forth in Article 6.2.2 of the PICC.[29] According to the definition of the PICC, we can conclude that a "hardship" has the following elements:

3.2.1 Objective element: events fundamentally alters the equilibrium of the contract

Article 6.2.1 of the PICC sets forth the general principle of "*pacta sunt servanda*". It states that: "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." From this article, it can be seen that, as a main rule, changes in the "circumstances" on which a contract depends do not affect the obligations of the parties. Even if the "circumstance" that occurs increase the cost of performance for either party or reduce the value received by

[27] UNIDROIT, FAO and IFAD. 2015. UNIDROIT/FAO/IFAD Legal Guide on Contract Farming. Rome.

[28] Schwenzer, I., 2008. Force Majeure and Hardship in International Sales Contracts. Victoria University of Wellington Law Review, 39(4), pp.710-711.

[29] PICC, Article 6.2.2."There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party. "

either party after performance, obviously it still does not constitute "hardship".[30] Only if the "circumstance" causes a fundamental alteration in the cost of performance or fluctuation in the value of performance for the parties, and this alternation breaks the contractual equilibrium maintained between the parties, can the "circumstance" be considered a "hardship".[31] While to which circumstances and what extent can the equilibrium of the contract be considered having a "fundamental alteration", this question needs the courts to analyze on a case-by-case basis.

In practice, "fundamental alteration" has two different ways of expression[32], and we can use these two ways of expression to determine whether the alteration has reached the standard of "fundamental". The first manifestation is the increase in the cost of performance of a party, and it is a significant increase, which may be due to the multiplication of the price of raw materials in the process of producing, or due to changes in laws and regulations that cause an increase in production costs and production processes, or take another example like the service industry to demonstrate a sharp rise in the cost of human resources.[33] The second way of expression is that the value obtained from the acceptance of the performance decreases in a slippery slope relative to the recipient party, to the extent that even no value can be obtained from the other party's performance at all.[34] It is critical to note that this value should be an objective value and not based on the subjective perception of the parties. This dramatic decline may be resulted from drastic changes in the economic conditions of the market, such as the effect of inflation and deflation on the price of the contract, or to the effect of a governmental ban, such as a prohibition of the export of specific goods which affects their delivery under the contract.[35]

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[30] Note of the UNIDROIT secretariat on the UNIDROIT principles if the international commercial contracts and the COVID-19 health crisis. UNIDROIT 2020-PICC and COVID-19. UNIDROIT, pp.17-18.

[31] PICC, Article 6.2.2.

[32] Op.cit 3, p.219.

[33] Ibid.

[34] Ibid.

[35] Zhang, Y., 2012. UNIDROIT principles of international commercial contracts 2010. Beijing: China Commerce and Trade Press, pp.450-470.

3.2.2 Time element: the event occurs after the conclusion of the contract and before the completion of performance

The time limitation means that, a hardship event must occur after the conclusion of the contract; or the event occurs before or at the time of the contract, but the parties become aware of it after conclusion. In addition, the contractual obligation must still be in a state of performance at this time. This is because if the disadvantaged party was conscious of the situation before the conclusion, it is deemed to have considered the situation as a matter of contract issue and accepted it as part of the content terms, so that the party can not invoke hardship to avoid performance or adverse effect. The reason for requiring that the contract remain in a state of performance is that if the contractual obligation has already been performed at the time of the situation, there is naturally no question of contractual performance

3.2.3 Subjective element: the risk must not have been foreseen by the adversely affected party

In terms of the subjective aspect of the parties, it is somewhat similar to the "unpredictable" element of the CISG exemption clause and the "unforeseeable" principle in civil law systems, which requires that the parties be exempted from liability on the basis of the "unforeseeable" principle, in another word, the parties are not liable for unforeseeable damages.[36] When in economic hardship, if the parties have comprehensive information at the moment of establishment of the contract, the effects of the bad situation can be fairly taken into account and assessed, then naturally the situation can not be regarded as a hardship. In the case of economic hardship, if the parties had clear knowledge of the situation at the time of contract formation, then they could reasonably consider and assess the impact of the situation, and naturally, the situation cannot be treated as a hardship situation. For example, if, when signing a crude oil sales contract with company B (in country F), company A (in country E) knows that country F is in a tense regional situation and that war may break out at any time, then in the event that war actually occurs, even if the price of crude oil increases as a result of the war,

[36] Tikriti, A., 2021. Foreseeability and Proximate Cause in a Personal Injury Case. [online] www.alllaw.com. Available at: <https://www.alllaw.com/articles/nolo/personal-injury/foreseeability-proximate-cause.html> [Accessed 28 April 2021].

A can not apply the hardship provisions in the PICC to adjust the contract price because A has reasonable foreknowledge of the likelihood of war, so it is presumed that A reasonably foresaw the increase in the price of crude oil caused by the later war.[37]

The difference between the PICC "hardship" and the CISG "impediment" exemption is that the circumstances under which a contract exists are progressively changing. It may not be sufficiently hardship at the outset, but the eventual outcome of the change may have a fundamental impact on the contract.[38] Therefore, there is a special case where the situation is already in its process to occur before the contract is concluded and there is an unforeseen and drastic change, then this situation can also constitute as hardship. For example, a situation in which the currency of the country of one of the parties is already in a tendency to depreciate before the conclusion of the contract, but the currency is devalued by as much as 80% as a result of a sudden economic emergency after the contract is concluded, may constitute an economic hardship.

3.2.4 Degree element: the event is beyond control of the adversely affected party

Hardship requiring a situation to be "beyond control" is largely consistent with the CISG requirement for an "impediment beyond control" in that they both emphasize the objective nature of the occurrence of the event or impediment, [40]which is not depend on the will of the parties. It is essential to note that the hardship requirement also emphasizes that the event can not be controlled by the "party in a disadvantageous position" because if that party could easily turn the situation around and eliminate its adverse effect on itself and then perform its obligations, then there would be no need for it to invoke hardship clauses.[41]

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[37] Op.cit 3, p.217.

[38] Ibid, p.220.

[40] LEAF. 2021. CAN YOU APPLY HARDSHIP OR FORCE MAJEURE DURING THE CORONAVIRUS CRISIS?. [online] Available at: <https://www.legal500.com/developments/thought-leadership/can-you-apply-hardship-or-force-majeure-during-the-coronavirus-crisis/> [Accessed 27 April 2021].

[41] Ibanet.org. 2021. IBA - Roundtable: Contract Enforceability in the Age of Covid-19. [online] Available at: <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=5d5d0e3f-fc77-48a5-9ebc-77c011052a73> [Accessed 28 April 2021].

3.2.5 Basic element: the disadvantaged party has not assumed the risks

In international commercial contracts, it is a regular practice for parties to add risk-sharing clauses to apportion the risk borne by both parties with respect to matters that may arise.[42] Or in contracts of a speculative nature, some clauses that do not expressly share the risk of both parties but can be treated as so if one party has agreed to assume a certain risk, such as agreed to pay for war risk or civil unrest insurance.[43] In such a contract, even if there is a sharp change of situations, or even if the risk that arises later is much higher than the degree foreseen by the parties, the parties cannot invoke hardship to avoid assuming such risk, because the parties have shared the risk beforehand.

3.3 Effects and adjustment rules of hardship

After determining that the occurrence of an event constitutes a hardship situation, it is necessary to make adjustments to the consequences arising from that situation. As the effects of the occurrence of hardship, situation will inevitably lead to difficulties in performance by one of the parties and thus have a negative impact on the contract. In this case, the parties commonly would like to adjust the contract to achieve the desired achievements, it is necessary to introduce subsequent rules to adjust the hardship situation depending on the circumstances. According to PICC Article 6.2.3, there are procedural and substantive provisions for the effects of hardship situations.[44] The procedural aspects include renegotiation and access to the courts, while the substantive aspects[45] refer to the principles and obligations to be followed by the parties in renegotiation and by the courts in dealing with hardship situations.

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[42] Khaled Ashmawi, Laith A Hadidi, Sadi Assaf, Firas M Tuffaha & Khalaf AlOfi | (2018) Risk assessment and allocation in the contract for public works used in Saudi Arabia construction industry, Cogent Engineering, 5:1, 1490148,pp.8-9.

[43] Cmu.edu. 2021. Project Management for Construction: Construction Pricing and Contracting. [online] Available at: <https://www.cmu.edu/cee/projects/PMbook/08_Construction_Pricing_and_Conctracting.html> [Accessed 28 April 2021].

[44] PICC, Article 6.2.3."(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium."

[45] Keilhack, K., 2003. The hardship approach in the UNIDROIT principles of international commercial contracts and its equivalent in German law of obligations - a comparison. Munchen: GRIN Verlag, pp.3-4.

The English scholar Schmitthoff, who was part of the group appointed by UNIDROIT to provide guidance to the PICC, systematically discusses “hardship clauses” and “intervener clauses” in long-term contracts, arguing that a contract must include not only a hardship clause, but also a clause that adjusts the contract and provides for sanctions if the parties fail to reach a renegotiation.

Specifically, Schmitthoff argued that there were specific criteria for determining the consequences of hardship, in another word, the extent to which the effects of hardship should be adjusted by subsequent rules. He proposed three criteria: subjective method, which respected the parties' choice of whether to adjust the contract; objective method, which left it to a third party to determine whether adjustment was necessary; and mixed method, which was a combination of subjective and objective methods.[46] The method adopted by the PICC is the objective method, it is for the court to determine whether there exists economic hardship situations and to adjust the contract if it is reasonable to do so.

Under Schmitthoff’s theoretical framework, the rules for adjustment after the occurrence of hardship include the notice rule and the intervener rule. The notice rule requires the disadvantaged party to inform the other party of its intention to invoke the hardship clause within a certain period after the occurrence of the hardship. The PICC provides for a corresponding notice rule and limit the time for notice by requiring the adverse party to inform “without undue delay” of its intention to renegotiate and to clarity the reasonable motivation.[47] This “without undue delay” requirement is not absolute and may be extended depending on the circumstances of the situation. It is essential to note that even if the other party agrees to the request to renegotiate, the adverse party does not have the right to call a halt to the performance of its contractual obligations throughout the negotiation process, which is also in the interest of balancing the interests of both parties.[48]

As for intervention, in cases where the parties have renegotiated but have not reached a substantive outcome, Schmitthoff suggested that either party can use sanctions such as litigation, arbitration, or third-party mediation to facilitate the

[46] Clive M. Schmitthoff, Hardship and Intervener Clauses, Journal of Business Law, Vol.1, No.1, 82(1980).

[47] See PICC, article 6.2.3, paragraph 1.

[48] According to comment 4 of PICC Article 6.2.3, in extraordinary circumstances, there also exists the possibility of suspension of performance.

settlement process. Otherwise, the disadvantaged party will face the lack of legal remedy and resulting in a less effective function than the hardship clauses should be. The PICC provides for only one intervention, which is litigation, in order to clarify that judicial remedies for the parties are not unavailable, but that the parties may still agree to other alternative dispute resolution methods, such as arbitration or mediation in the contract. Specifically, the PICC provides that the court, upon finding that "hardship" exists in a case, has the power to make two types of decisions within a reasonable range[49]: one is to terminate the contract, another is to adjust the contract for the purpose of restoring the balance of contractual interests.

In summary, the rules governing hardship under the PICC are consistent with several important aspects of the Schmitthoff's theory and have developed its own system based on the theory as the cornerstone, including the adoption of objective criteria for determining "hardship", the application of lawsuit as a remedy of last resort, and denial of the parties' right to unilaterally terminate the contract. While respecting the parties' prior agreements, it also ensures the mandatory application of subsequent remedies.

[49] See PICC, article 6.2.3, paragraph 4.

4. Case on the Application of the CISG Exemption Clause for Hardship

The Belgian case Scafom International v. Lorraine Tubes S.A.S. is the first case in the history of international commercial justice to uphold the application of the CISG exemption clause to hardship and is of great guidance to the issues under study in this thesis, so it will be the focus of the analysis here.

4.1 Factual details

In the Belgian case Scafom International v. Lorraine Tubes S.A.S., the buyer, a Dutch company, Scafom International, and the seller, a French company, SA Exma (later changed to Lorraine Tubes S.A.S.), entered into a series of contracts for the sale of steel pipes. After the contracts were signed and before delivery, the price of steel unexpectedly increased by about 70%. Moreover, the parties did not set a clause for price adjustment. Based on this situation, the seller wanted to renegotiate to increase the price, however, the buyer firmly refused to negotiate and persisted on delivery at the contract price. The increase in the price of steel in this case constituted economic "hardship".

1. Tongeren Commercial Court: rejected seller's request to adjust the contract price

In the first instance, the seller argued that the increase in steel prices had changed the contract circumstances and requested an adjustment of the contract price for such changes. However, the court of first instance rejected the seller's claim on the grounds that the "*theory of imprévision"* and CISG could not be applied simultaneously. In its decision, the court mentioned that in some cases, the performance of the contract is greatly impeded, and although such impediment is not force majeure, it still makes the performance impossible. In such cases, the question to be resolved is whether the parties can adjust the contract on the basis of the *theory of imprévision*. The court stated that the application of Article 79

CISG was incompatible with the French theory *imprévision*, since neither Article 79 CISG nor any other provision in it expressly provided for the solution of this problem, and thus rejected the seller's request to adjust the content of the contract. However, the court of first instance did not further examine which law should be applied in light of general international principles or international private law, and whether the adjustments to the contract price are blocked by the rules.

2. The Appeal Court: applied French law to decide on the payment of damages by the buyer

The interim judgment of the Appeal Court determined the application of French law to the case as a prerequisite. Then in the process of final decision by the Appeal Court, The seller admitted that the *theory of imprévision* was not an independent source of adjustment of contractual terms in French private law in its defense, but under the principle of good faith, the parties have renegotiating right when unforeseen changes in economy would make further performance unreasonable. Simultaneous, the buyer denied any breach of contract and set out its reasons for refusing to adjust the price. The Court of Appeal held that, in accordance with French law and the requirements of the principle of good faith, the parties may renegotiate the terms if unforeseen circumstances cause a significant imbalance in the contractual obligations. Taking into account the specific market situation and the conduct of the parties, the Court of Appeals ultimately decided that the parties renegotiated the terms of the contract and upheld the seller's claim for damages.

3. The Supreme Court: determined the buyer to renegotiate according to CISG

The Supreme Court agreed with the Court of Appeals on the facts of the case and upheld the decision of the Court of Appeals.

The Supreme Court held that, in accordance with the Article 79 of CISG, the difficulty caused by the price increase impede the contract's success, which constituted the “impediment” in this clause. The sole dependence of Article 79 led

to the avoidance of the contract, Article 79(1) thus had an impact equivalent to that of force majeure, which led to the contract being avoided.[50]

Furthermore, according to the Article 7(1) and (2) of CISG, in order to fill the gaps in the CISG in a uniform manner, the general principles applicable to international trade law should be sought. According to general principles in international trade law, in particular the PICC, if a party invokes a hardship clause and the hardship situation fundamentally affects the balance of the contract, he is entitled to have the contract renegotiated. Therefore, the Supreme Court ruled that the buyer must renegotiate the contract terms.

4.2 Analysis

The court of first instance correctly determined that the contract was subject to the jurisdiction of CISG, and the court was correct in finding that the matter fell within the scope of the *theory of imprévision*. From the first instance court's decision, it can be concluded that the issue of "hardship" falls within the scope of CISG 's jurisdiction, but its mistake was to stop looking for applicable law after finding that CISG did not explicitly provide solution for such situations, and directly concluded that the contract cannot be adjusted.

On appeal, the court identified the dramatic change in the price of the contractual raw materials as an unforeseeable change in market conditions, and further affirmed the Court of First Instance's view of CISG: there is no explicit provision in CISG for the issue in this case. However, the Court of Appeal found that CISG was not mutually exclusive, on the basis of Article 7(2) of CISG, the issue should be resolved in accordance with the applicable law determined by the rules of private international law, which in this case is French law. In its decision, the Court of Appeal upheld the seller's request for renegotiation on the basis of the good faith principle, ruled that the buyer was in breach of contract and that the seller could therefore not perform obligations.The decision to give priority to the application of domestic law in the circumstances of the case is contrary to Articles 4 and 7 of the CISG, where Article 4 specifies the rights and obligations of the

[50] AHMAD TAJUDIN, A., 2014. Scafom International BV v. Lorraine Tubes S.A.S.: a case review of changing circumstances under the United Nations Convention on International Sale of Goods (CISG) of 1980. Juridical Tribune, (Volume 4, Issue 2), p.215.

buyer and seller[51], and Article 7 provides for a uniformly applicable method of interpretation.[52] From the articles above, it is clear that the draftsmen would like to set up a standardized system of contracts concluded within a jurisdiction of the CISG and the rights and responsibilities arising out of these contracts, which means that a more uniform interpretation[53] should be preferred.

The Supreme Court ultimately upheld the decision of the intermediate court, but based on a completely different legal analysis. The economic changes in this case resulted in a significant imbalance between the parties' rights and interests, and that such economic hardship was sufficient to constitute an "impediment" of the CISG exemption clause, Article 79(1) of the Convention was applicable here. At the same time, the Supreme Court recognized that the CISG does not contain a solution for the court to compel the adjustment of the contract, which constitutes an omission in the provision on economic hardship of CISG. The Supreme Court also noted, based on the interpretation requirements of Article 7(2) of CISG, that general principles should prevail over domestic law in their application and that the exhaustive ordinance of hardship in the PICC is a general principle upon which CISG can rely. According to the specific provisions of PICC, a party affected by hardship is entitled to claim for readjustment of the rights and obligations of the contract, and the Supreme Court has upheld the appeal court's decision that the seller is entitled to renegotiate based on the above logical analysis.

4.3 Comments

In the Scafom International v. Lorraine Tubes S.A.S. case, the Supreme Court conducted a legal reasoning and analysis for the application of the CISG Article 79 in the event of hardship, based on the adjustment rules of the UNIDROIT principles. The court ruled that the parties were required to renegotiate the contract and adjust the price in accordance with the hardship clause in the PICC. This decision of the Belgian Supreme Court is in line with the CISG Advisory Council Opinion No. 7. Article 3.1 of the council opinion mentions that: "A

[51] See PICC Article 4.

[52] See PICC Article 7.

[53] Alexander S. Komarov, Internationality, uniformity and observance of good faith as criteria in interpretation of CISG: some remarks on Article 7(1). p.75.

change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ('hardship'), may qualify as an 'impediment' under Article 79(1). The language of Article 79 does not expressly equate the term 'impediment' with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79." [54]And Article 3.2 indicates that "in a situation of hardship under Article 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based." [55]

However, on the question of the PICC 's role as a gap-filler, the Belgian Supreme Court sought to find principles that could be applied to CISG, and it can be noted as stated by the Court that "to fill the gaps in a uniform manner, adhesion should be sought with the general principles which govern the law of international trade." It then deduced that the PICC can be applied as such a principle and support the claim for adjustment of contract price. Back to the expression in Article 7(2) of CISG, the gap-filling provision, uses the expression "general principles on which CISG is based" to settle the questions which do not have clear regulations in CISG. If compare the formulation of the Belgian Supreme Court and Article 7(2) of CISG, here can find differences. The CISG Code as a whole provides the foundation for the Convention's "general principles", which means the "general principles on which CISG is based" raise from the inner spirit of CISG. While "general principles governing international trade law" come from sources other than the inner spirit of the Convention, such as national rules governing cross-border transactions, it has externalities compared with the former. As PICC is a resource outside CISG itself, it seems like covering the gap of CISG by PICC goes beyond the scope of the CISG legislation intent.

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[54] CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, article 3.1.Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007.

[55] Ibid, article 3.2.

5. The Application of CISG 79 under Hardship

5.1 Whether hardship fall under the scope of CISG 79

As previously mentioned, CISG only sets exemption rules for impediment beyond control in Article 79, leaves it blank for specific provisions applicable to hardship issues. PICC Article 6.2.2 sets forth the definition of hardship, and Article 6.2.3 provides remedies for such situations. Besides, PICC Article 7.1.7 provides for exemptions for impediment beyond control, this is the rule set for force majeure, which is almost identical to the formulation of CISG article 79. As in the Belgian case, where the price of steel changed dramatically, the performance of the contract was greatly impeded in certain circumstances. Although the event did not meet the high standard of force majeure, it still made the performance of the contract impossible. Question raises here, if such economic hardship arises during the performance of the contract between the parties who agreed to apply the CISG, can the exemption clause of Article 79 be applied?

5.1.1 Opponent viewpoints

The argument against the applicability of the hardship exemption in Article 79 of CISG is supported by two main points: one is the history of the drafting of the Convention, another is the terminology "impediment" used in Article 79.

Looking back at the drafting history of the Convention, the Norwegian delegation proposed at the Vienna Conference to expand the scope of the exclusion of liability for "impediments beyond control" in Article 79, raised a suggestion to include *the theory of imprévision* in to the article's scope. However, this proposal was rejected by other delegations. The final result was the repeal of this proposal on the grounds that *the theory of imprévision* represented a lower standard of exemption, which meant an exemption could be applied merely because the continued performance of the contract became difficult, thus raising the confusion of whether the parties were still required to obey the basic obligations under the Convention. Some scholars have cited this drafting history to demonstrate that the

same hardship standard of the merely risen difficulties of performance is expressly excluded in Article 79.[56]

Some scholars have also analyzed the reasons for the exclusion of hardship in the light of the word "impediment" in Article 79 and concluded that the exclusion clause takes the same position as the force majeure in French civil law, the exemption can only be for failure to perform, but not for excessive burden of performance. The reasons are as follows. First, ULIS, "as a predecessor to CISG, used the term "circumstances" in Article 74.[57] Instead of succeeding the term "circumstances" in ULIS, the nomenclature "impediments" is reused by CISG, this is a change that indicates "hardship" is not included in the scope of CISG. Moreover, during the review of the draft, it was suggested giving the right to change the content or even to terminate the contract if special events occur after the conclusion of the contract, which make the continuation of the contract extremely difficult or risky for one of the party. The rejection of this proposal reaffirmed the Convention's exclusion of hardship. Secondly, Article 79 clearly stipulates the legal consequences of impediment, it simply exempts the liability for damages, and does not include the adjustment of the content of the contract or even more complicated treatment. This is different from the purpose of maintaining the transaction and restoring the balance of the transaction in the hardship provisions of various countries, and therefore the application of hardship under Article 79 should be opposed. Third, during the discussion of the exemption clause in the draft convention in 1980, Norway representative Rognlien suggested adding provision after paragraph 3 to regulate situations where there is a drastic change in circumstances[58], while this suggestion was rejected, representing the Convention's avoidance of introducing rules relating to change of circumstances in Article 79, and may also serve as evidence that Article 79 does not cover hardship.

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[56] I. Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford University Press, 2010, Art 79, para 39.

[57] Article 74 of ULIS:"Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended."

[58] John Honnold eds., Documentary history of the uniform law for international sales, Kluwer law and taxation publishers, 1989, p.602.

5.1.2 Proponent viewpoints

Some affirmative viewers of the application of hardship have refuted the above negative view based on drafting history and terminology from the same arguments.

As to the conclusion that hardship is excluded simply because the rejection of Norwegian delegation's proposal, some scholars have argued that this history alone does not constitute a basis for excluding hardship from Article 79 for the following reasons: First, hardship is still fundamentally different from *the theory of imprévision*, which requires that the circumstances that make contract performance more difficult are due to unforeseen and drastic changes in the economic environment, while the changes must shake the very foundation of the contract. Secondly, the current international trade environment is often in turmoil, and the situation of "difficulty in performance" is more common than that of "impossibility of performance", if only the party who fails to perform can claim exemption, it will make the party who has difficulty in performance face the situation of insufficient remedy. Thirdly, the interpretation of including hardship in Article 79 is more reasonable for the application of CISG in international sale of goods, and is consistent with its purpose of promoting the order and efficiency of international trade.[59]

In terms of terminology, scholar John O. Honnold argues that the Article 79(1) of CISG does not exclude the impossibility of perform caused by economic disruption, provided that such economic disruption causes an impediment to performance. It should be noted, however, that the application of Article 79 to unforeseeable economic hardship is subject to the general principles of its application: first, the scope of the exclusion is limited to the part of the impediment to performance; second, only if such general economic hardship and disorder impedes performance to a degree comparable to other types of exclusion can such economic hardship be deemed to constitute an impediment of performance.[60] Since economic difficulty is a form of hardship, the scholar's opinion can also be interpreted to mean that if the "hardship" meets the elements of Article 79, it can also be applied under Article 79. Though have not become a

[59] T. Jiayun, Analyze on whether CISG Art. 79 contains hardship, Economic and Social Development, Guangxi Academy of Social Sciences, 2016(04), p74.

[60] John O. Honnold, Uniform law for international sales under the 1980 United Nations Convention, Kluwer Law International BV, 2009, p472-495.

consensus in the academic community, some scholars have also suggested that such extreme and unforeseen changes in the economic situation constitute "uncontrollable impediment" as described in Article 79, they are exempt from liability.[61]

5.1.3 Analysis

Based on the above, my conclusion is that Article 79 does not completely block the possibility of applying the special circumstance of hardship. Extreme economic hardship can be a cause for exclusion under Article 79, both in court cases and in academic opinion.

This conclusion essentially rests upon the following analysis. First, according to the CISG Advisory Committee's opinion, the word "impediment" is not explicitly defined in the formulation of the exemption clause of Article 79 as "an event which renders performance absolutely impossible". If a party finds itself in a hardship situation, it can invoke such a situation as a cause of exclusion under Article 79.[62]

Secondly, although the Article 79 can be invoked in cases of hardship, the occurrence of economic hardship has to be judged on a case-by-case basis. Adverse changes in general economic conditions and market conditions are considered normal business risks, which the parties have a duty to anticipate and which are assumed or controlled by the parties, and therefore cannot be disclaimed. In the Digest, several courts have explicitly stated that market fluctuations and other cost elements that affect the financial repercussions of the contract should be borne by the parties.[63] Accordingly, one court rejected a buyer's claim for exoneration following a sharp drop in market price, arguing that such price fluctuations were foreseeable and that the resulting losses should be treated as part of the normal risks of commercial activity.[64] However, the scope of

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[61] Op.cit 16, p372.

[62] CISG Advisory Council Opinion No.7, Exemption of Liability for Damages under Article 79 of the CISG, 3.1,CISG Database http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html.

[63] See UNCITRAL digest of case law on the United Nations Convention on the International Sale of Goods, pp376-377. See Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

[64] See UNCITRAL digest of case law on the United Nations Convention on the International Sale of Goods, p377. See Hasselt, Belgium, 2 May 1995.

the cost paid by the parties for the performance of their obligations should be limited to a certain extent, the parties should not be allowed to pay the price indefinitely. In other words, the parties should not bear more than the normal range of commercial risks, acquisition risks, and payments for the performance of the contract than a reasonable person would have foreseen. Beyond this range, it forms an extremely adverse economic change.[65] If such an extremely unfavorable market change constitutes hardship, meets the definition of an "impediment beyond control", and at the same time satisfies the other elements of Article 79, then naturally one can invoke Article 79 to excuse oneself from liability for non-performance.

5.2 Gap filling function of PICC

5.2.1 Academic viewpoints

By restating and continuously updating the law of international contracts, the PICC has resulted in a wide-ranging body of rules governing international commercial contracts. Although the PICC is a soft law, it has had a profound impact on international commercial contracts and the domestic law systems of many countries. Articles 6.2.1 to 6.2.3 on "hardship" are innovative provisions of PICC, which give the disadvantaged party the right to request a re-negotiation of the contract in view of the practical needs. This provision fully reflects its function as a "model law" for general principles of private international law[66], the International Chamber of Commerce ("ICC") has modeled its hardship provisions[67] following those of PICC. As in the Belgium case, the supreme court referred to PICC as a part of CISG to provide relief and the right to renegotiate, for the reason that there was no certain solution in CISG. But the reality is that such approach is highly controversial.

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[65] Op.cit 16, p372.

[66] 'Model Law On Factoring: UNIDROIT'S Approach To Receivables Financing - Trade Finance Global' (Trade Finance Global, 2021) <https://www.tradefinanceglobal.com/posts/model-law-on-factoring-unidroits-approach-to-receivables-financing/> accessed 8 May 2021.

[67] ICC Hardship Clause: "1. A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that: a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that b) it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow to overcome the consequences of the event."

There is disagreement to whether the PICC can be used to interpret or supplement the CISG. Some academic opinions argue that the PICC can not be used to interpret documents enacted before it[68], as the chronological order makes them irrelevant. CISG is an international legal document enacted before the PICC, so there is no possibility that the former can be interpreted on the basis of the latter. Also other arguments about the two documents' applied within different scope, as CISG is for contracts of sale of goods, while PICC encompasses international commercial contracts in a broader sense than CISG.[69]

The academic views in favor of this function mostly start from the "general principles" in CISG Article 7(2), the PICC, as a general principle of international commercial contracts, belongs to the general principles on which the CISG is based[70], and affirms that the general principles of private international law have the function to fill the gaps within CISG.[71]

5.2.2 Judicial practice

Viewing the field of practice, the PICC has been used to fill the gaps on specific CISG issues, both in national court decisions and in arbitral tribunal decisions. For example, Article 7.4.9 of PICC on interest rates has been used to fill the gaps in Article 78 of CISG.[72] Article 6.1.6 on the place of performance has been used to supplement the statement in Article 57(1) of CISG.[73] Even in some cases, the PICC has been applied as a "principle of international trade practice". In one case of the ICC Arbitration Court, the PICC's provisions on hardship and its effects were applied as an international trade practice.[74] According to UNILEX, a browsable database produced by UNIDROIT, there are 31 decisions that apply

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[68] Catherine Kessedjian, 'Competing Approaches to Force Majeure and Hardship', International Review of Law and Economics,2005(25), pp415-420.

[69] Lovro Klepac, The availability of a hardship defense under the UN Convention for Contracts on the Interpretation Sale of Goods(CISG), Central European University. P41.

[70] A. M. Garro, Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG, 69 Tul. L. Rev. 1149(1994).

[71] Michael Joachim Bonell, UNIDROIT Principles of International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods- Alternatives or Complementary Instruments? (2000) 2000 Business Law International, pp91-98.

[72] ICC International Court of Arbitration, Paris 8817, UNILEX. <http://www.unilex.info/case.cfm?id=659> accessed 10 May 2021.

[73] SCEA GAEC Des Beauches Bernard Bruno v. Société Teso Ten Elsen GmbH & COKG, UNILEX.

<http://www.unilex.info/principles/case/638> accessed 10 May 2021.

[74] ICC International Court of Arbitration 10021, UNILEX. <http://www.unilex.info/case.cfm?id=832> accessed 10 May 2021.

PICC to the interpretation of CISG.[75] In many previous cases, the PICC has been recognized as a general principle underlying CISG. In the Netherlands, one arbitration institute had held that PICC is a principle within Article 7(2) of CISG[76], another stated that PICC "would allow the court or arbitral tribunal to get a 'feeling' of what CISG attempts to achieve."[77] Through these specific cases, some would agree that PICC can be used as a gap-filler in certain circumstances, but whether the hardship clause in PICC is a binding principle when applying CISG is still too controversial to suggest.

5.2.3 Analysis

In my view, in order to ensure that the international character of the CISG is not disturbed, the matters of hardship involved in a specific case should first be interpreted independently, and then the application of those matters should be resolved in accordance with the general principles on which the CISG is based. In cases where the general principles can resolve the matter, the rules of domestic law should not be invoked.

PICC forms detailed provisions on hardship, which have elevated the definition of hardship, contractual imbalance and the obligation to renegotiate to the level of an international general principle. The gap-filler role played in specific circumstance does not mean it can serve as a general principle for the whole, especially in the issue about the interpretation of the exemption clause in Article 79 in relation to hardship. Filling in with external principles such as PICC does not seem to be a satisfactory solution, and that route is accomplished on the basis of an expanded interpretation of the general principles on which CISG is based. The PICC was developed later than the CISG in terms of time, and there are differences in the scope of application of the two statutes. The CISG and its predecessor, the ULIS, clearly had different approaches to the issue of hardship, and the redesign of CISG 79 is clearly seeking a stricter basis for exemption than its predecessor, the ULIS. In light of this, the PICC 's adjustment rules on hardship can hardly be considered

[75] Y. Liu, L.L.He, Discussion On the Application of PICC in International Commercial Arbitration. Chinese yearbook of private international law and comparative law,2018,22(01),p68.

[76] See UNCITRAL digest of case law on the United Nations Convention on the International Sale of Goods, p46. Netherlands Arbitration Institute, the Netherlands, 10 February 2005, available on the Internet at www.cisg.law.pace.edu.

[77] See UNCITRAL digest of case law on the United Nations Convention on the International Sale of Goods, p46. See Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex.

to constitute a general principle of the CISG. Therefore, it seems far-fetched to consider the PICC's adjustment rules as an expression of the general principles on which the CISG is based. That is to say, the requests to renegotiation, contractual adjustment for regaining balance and the termination of contract go far away beyond the application and interpretation of CISG.

5.3 Identification standard for determining hardship into impediment

5.3.1 Official perspectives

The application of hardship under CISG 79 should also follow certain standard, because the price fluctuations caused by hardship due to changes in the economic situation vary greatly, thus specific standard should be determined to better solve the application problem.

Article 6.2.2 of PICC only identifies two types of hardship, either where meets a significant increase in the cost of performance, and where the value obtained from performance decreases in a slippery slope, both of which must meet the standard of a "fundamental alteration on the equilibrium of the contract". The 1999 edition of PICC recommended in the comments of Article 6.2.2 to set 50% as a standard for the "fundamental alteration"[78], while this recommendation was finally deleted.[79] Some scholars accept or at least do not oppose this rule, others review the relevant jurisprudence and point out that in some cases where a 50% economic change has occurred, the decisions have not made an award granting relief, and some further point out that, at least for domestic contracts, a 50% economic change is definitely too low, especially for countries with unstable political and economic situations. After this 50% standard being banned in the latter edition of PICC, no alternative rules were provided, as a result, the assessment of price changes was left entirely to the judges and arbitrators. Based on the official comments above, we can only conclude that a cost or value change of less than 50% can not be considered as a "fundamental alteration", but this does not mean that a cost or value change of more than 50% will necessarily be considered a

[78] See International Institute for the Unification of Private Law Principles of International Commercial Contracts (UNIDROIT, Rome, 2004) Art.6.2.3 [Principle of International Commercial Contracts]

[79] Op.cit 28, p716.

"fundamental change". It is obvious that we need a "threshold" for such changes to provide more precise guidance for practice.

5.3.2 Academic perspectives

Swiss scholar Christoph Brunner, after analyzing cases from both common law and civil law courts and tribunals, suggests that the threshold should be set between 80% and 100% (excluding any profit margin), or between 100% and 125% (including profit margin).[80] As for determining whether the cost or change in value in a specific case meets the threshold, it is recommended that the actual cost be compared to the estimated cost after the event has occurred. According to Brunner's theory, if the debtor bears a greater risk of performing the contract, the limit should be increased by 80-100%, and conversely, if the debtor bears a lesser risk, the corresponding limit should be reduced.[81] Despite the perfect structure of Brunner's expression in response to his position, it remains to be checked whether his proposed threshold helps to set a standard in international commercial practice.

Professor Schwenzer of Germany, as editor of the 1980 PICC Review, in his study of recent case law and doctrine noted that even a 100% increase in cost or value is usually not sufficient to relieve the contracting parties from their obligations under Article 79 CISG.[82] Therefore, Professor Schwenzer suggested that the margin of variation in economic should be set between 150-200%.[83]

5.3.3 Suggestions

The resolution of hardship in judicial practice depends on a large extent case by case, the courts and arbitral tribunals still make a determination whether a specific situation constitutes a "hardship" in light of the evidence. In such cases, the parties should carefully consider the price variation provisions at the time of contracting and provide for a redefinition of the precise parameters and mechanisms for price adjustments to address unexpected market fluctuations. Moreover, a specific standard should be set for the determination of to what extent will economic hardship reach the height of the constituent elements of impediment. In order to facilitate the identification of such economic hardship

[80] C. Brunner, Force majeure and hardship under general contract principles: exemption for non-performance in international arbitration, Vol. 18. Kluwer Law International BV, 2009, p432.

[81] Ibid, p433.

[82] Op.cit 28, p716.

[83] Op.cit 28, p717.

situations in judicial practice, specific criteria or threshold should be set, the "extreme economic fluctuations" in the market must reach a certain magnitude before the court can recognize it as "hardship" situation, so that the parties can receive the appropriate remedies.

Considering the great variation in price changes between different international trades in real cases, it is not possible to establish a universally applicable and extremely precise range of changes, but it is more feasible to establish a minimum threshold of 100% according to the suggestions of scholars and modern trade status. That is, if the fluctuation in cost or value does not reach 100%, then it can not be considered to have "fundamentally" changed the equilibrium of the contract. Simultaneous, the circumstances surrounding the contract should be fully considered, including but not limited to, the duration and purpose of the contract, the level of risk assumed, and the experience, economic condition, financial capacity of the parties to the contract. In addition, it should be examined whether and to what extent the events that have occurred have increased the burden on a party to perform, not only the adverse party but also the counter party should be assessed. In determining further requirements, the elements of foreseeability, likelihood of controlling the event, and assumption of risk likewise need to be satisfied in order to constitute the application of exemption clause.

6. Hardship During COVID-19 Period

6.1 Background

In international trade, sale and purchase contracts to which CISG applies are inevitably exposed to commercial risks, contingencies and force majeure in the trade. In the global economic community, the "domino effect" of an unforeseen event triggering the disruption of any intermediate link in the global supply chain may have different effects on enterprises in different countries.[84] Natural disasters, pandemics and various events can cause difficulties or failures of performance and give rise to disputes over international commercial contracts, thus involving "hardship" and the application of CISG exemption clauses.

On January 31, 2020, the World Health Organization ("WHO") announced that the outbreak of coronavirus infection was recognized as a Public Health Emergency of International Concern ("PHEIC"). On March 11, Tedros, the Director-General of the World Health Organization, announced on the opening remarks at the media briefing on COVID-19 that "COVID-19 can be characterized as a pandemic".[85] Under these circumstances, Article 18 of the WHO International Health Regulations (2005) allows States Parties to take a wide range of temporary and permanent measures against person, baggage, cargo, containers, conveyances, goods and postal parcels.[86] Despite WHO's call for countries to refrain from taking restrictive measures on trade, in the context of the severe global epidemic, governments have taken restrictive measures of varying degrees in terms of trade control measures, export bans on medical supplies, temporary control measures on entry and exit, transportation measures and so

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[84] Harapko S <https://www.ey.com/en_gl/supply-chain/how-covid-19-impacted-supply-chains-and-what-comes-next> accessed 11 May 2021.

[85] 'WHO Director-General's Opening Remarks At The Media Briefing On COVID-19 - 11 March 2020' (Who.int, 2021)<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 11 May 2021.

[86] International Health Regulations (2005) ,third edition, World Health Organization,Article 18.

on.[87] The pandemic and the restrictive measures of various countries have had different degrees of impact on the production capacity, cargo transportation, and ability to fulfill contracts of enterprises engaged in international trade. Many enterprises are utterly helpless to fulfill their contractual obligations such as delivery and transportation due to the sudden situation of plant shutdown, supply shortage, transportation stoppage and even port closure under the influence of the pandemic. Although vaccine efforts are currently in order, the future situation regarding the coronavirus is still inconclusive, considering the powerful danger and uncertainty of the mutated virus.

6.2 Analysis of COVID-19 and hardship

If the contract applies to the CISG, does the pandemic meet the constituent elements of its exemption clause? This requires an analysis using the constituent elements of Article 79.

First, the "uncontrollable" element. The governments of various countries have taken different preventive and restrictive measures due to the virus outbreak, and the suspension of work and production by companies due to the need to comply with national laws and regulations is beyond the control of the contracting parties. Therefore, if an enterprise's ability to perform the contract is affected by the suspension of work or production, it can be deemed to meet the "beyond control" requirement.

Secondly, with regard to the "unpredictable" element, the outbreak and rapid epidemic of COVID-19 was indeed sudden, and the virus was unknown to the medical field. For parties who have signed a contract for the sale and purchase of goods before the outbreak of the pandemic, there is no reasonable approaches for them to predict the outbreak of the pandemic and its effects after the outbreak, so it can be said that the COVID-19 pandemic satisfies the unpredictability requirement. For the stage after the outbreak of the virus, if the parties have clearly known that the pandemic may have a significant impact on the performance of the contract, while they still choose to sign a contract or change the contract to continue performance, such situation will not satisfy. However, for

[87] Cai M, and Luo J, 'Influence Of COVID-19 On Manufacturing Industry And Corresponding Countermeasures From Supply Chain Perspective' (2020) 25 Journal of Shanghai Jiaotong University (Science). p410.

parties who also contract after the outbreak of the epidemic, with the continuous development and escalation of the bad real-time trending, the impact on the performance of the contract has exceeded the parties' knowledge to the impact of the pandemic at the time of contracting, the requirement of unpredictability can be satisfied at this time.

Finally, with respect to the “unavoidable”, after the outbreak of coronavirus, governments around the world have taken a series of measures to prevent the spread of the disease. These measures included controls on goods import, tightened anti-epidemic checks on people entering the country, and different levels of traffic restrictions on various areas and countries. For companies, their ability to perform in the current situation is more or less affected by the temporary regulation mechanisms enacted by governments. The seriousness of the effect on the capacity of an enterprise under the pandemic is therefore needed to be analyzed case by case to decide if it is “unavoidable”. An enterprise that is only marginally affected in the transportation of goods may not meet the characteristics. In the case of an enterprise whose manufacture and transportation of goods are severely impaired, and its contractual capacity is severely restricted, may satisfy the requirement of unavoidable.

Where such conflicts resulting from the pandemic are taken to court or arbitral tribunals, there may be problems in invoking the CISG to claim exemption from liability, since situations such as sharp increases in production costs and disruptions in the transportation of goods caused by the pandemic do not constitute “force majeure”, but in fact constitute hardship due to economic changes. It would be more beneficial if enterprises can apply Article 79 of the CISG as one of the legal remedies, thus can mitigate the loss in this special and dangerous period and make international trade more conducive to long-term growth.

6.3 Suggestions for contract parties

6.3.1 Set clear exclusion clauses

Before a contract is formally signed, it is prudent to consider the various circumstances which could affect the contract's performance, distinguishing these various circumstances as general business risks, contingencies that cause

difficulties in performance, and force majeure that renders the contract impossible to perform, and to include risk-sharing clauses, hardship clauses, and exclusion clauses in the contract respectively.

A clear exclusion clause in the contract helps the contracting parties to better cope with the relevant details in order to increase the likelihood of being relieved of performance to minimize damages when a particular occurrence arises. First, due to the ambiguity on CISG exclusion clause, it is recommended that the parties adopt an enumerated and accurate definition of the events that they believe should be excluded from liability in as much detail as possible, and describe the basic characteristics of the events in general terms in the clause to minimize the ambiguity of the language and the room for possible disputes. Second, the parties should also clarify the scope of the exclusion, including what specific contractual obligations will have the effect of exclusion. Third, it should also set up the obligations attached to the parties' invocation of the exclusion clause, such as the obligation of notice, the obligation of proof, the obligation of third parties, the obligation of remedy, and further specify the specific mechanism to provide convenience and efficiency when a specific event occurs.

6.3.2 Integrate a hardship clause

Even if the contract contains an exemption clause, it is not sufficient in international sale of goods, especially in some long-term contracts. After the occurrence of an unexpected event constituting hardship, the parties often expect to make appropriate changes to the original provisions, readjust the contractual rights and obligations to restore the balance of rights and interests of both parties again, achieving the purpose of making the contract continue to be performed, rather than releasing the contract. Therefore, for parties engaged in international trade of goods, if their contracts are based on CISG or the parties do not exclude the application of CISG, even though there is a possibility that hardship may fall into the 79 exemption clause in the trial, but there is no international consensus on the application of CISG to hardship. In order to have the flexibility to adjust the contract, it is recommended to add a hardship clause to the contract.

In the drafting of the hardship clause, the value of PICC as a model law should be fully appreciated, as its definition system is well establishment, which helps guarantee the fairness. Moreover, by referring to the PICC provisions to formulate

hardship clause, it can avoid some national courts applying the inherent concepts of their domestic laws to arbitrarily interpret the terms reached by the parties, the stability of the rights and obligations and the predictability of the outcome for the parties can be enhanced. In cases where a hardship clause is established in advance in the contract, a party encountering a hardship situation is given the right to renegotiate, potentially preventing the possible unfair consequences.

6.3.3 Clarify the standard for "unpredictable" in the clauses above

Both in the exemption clause and in the hardship clause, certain criteria are set for the events that may lead to the application of the clauses. The element of "unpredictable" is an essential prerequisite both for the exemption clause and hardship clause, it requests the parties can not reasonably have contemplated the occurrence of the event at the time of the conclusion of contract. But how to meet this "unpredictable" standard, in practice is a more abstract problem. Therefore, in order to avoid disputes, it would be better for the parties to specify the specific demands of the "unpredictable" standard in the two clauses mentioned above.

Moreover, the allocation of the burden of proof for "unpredictable" should also be stipulated in the contract terms, in order to provide specific methods for the parties to prove that they did not have the means to foresee the situation. To such task, a combination of subjective and objective standards to be used in the method of proof serves better. More specifically saying, from the subjective aspect, the burden of proof should of course fall on the shoulders of the party in breach of contract, the party have to collect evidence to defend itself and receive relief. On the other hand, objectively, contract parties can set a third party in their contract to perform the role of an evaluator for unusual events, to determine whether the situation meets the "unpredictable" standard or not. This equally qualified and reasonable third party should be located in a similar business environment with the contractual parties, and have the same business status, social background, professional knowledge.

7. Conclusion

CISG, as a collection of international sales norms and the most successful uniform law on international sales, applies to contracts for the sale of goods concluded between transnational parties and regulates the global trade in goods. Although CISG is the result of the efforts of international organizations and scholars from different countries and legal systems in the movement of unification of international trade law, the CISG itself has not achieved complete normative unification.For the reason that the movement of unification of international trade law was driven by international political forces, CISG was inevitably the product of compromise. Nevertheless, CISG was established with the greatest convergence to a uniform document of international law, as a uniform substantive law regulating international sales contract relations, which is directly applicable without translation into domestic rules. Although the provisions and regimes set forth in CISG are not entirely satisfactory to all countries of different legal systems, at this stage they have reached a point where they provide a workable, practical document of international substantive law. Moreover, CISG does not only reduce the obstacles in the international sale of goods, but also reduce the misunderstanding between the buyer and seller regarding the respective interpretation of various matters in the transactions.[88] The ultimate purpose of CISG is to replace the application of national laws between the parties to a sales contract in different countries, thus play the role of a uniform law.[89]

Due to the omission of some important issues in CISG, its function has not been maximized. From the above analysis, in the case where the parties to an international commercial contract apply CISG, if there is an economic change or market movement that is extremely unfavorable to a party and constitutes an "impediment", the parties can invoke such economic hardship as a defense for exclusion under Article 79. For the purpose of uniform application of hardship in

[88] J. O. Honnold, The Sales Convention: From Idea to Practice, JL & Com. 17, 181(1997).

[89] Hackney Philip, Is the United Nations Convention on the International Sale of Goods Achieving Uniformity, 61 La. L. Rev. 473(2000).

judicial practice, it is recommended to set a minimum threshold of at least 100% fluctuation in the cost and value for the identification of economic hardship. While if requests such as re-negotiation, contract adjustment or termination raise under hardship, it remains impossible for contract governed by CISG to seek a relief approach from PICC as regarding it as a general principle or gap-filler to CISG.

The last thing to note is that the parties to the international sale of goods should also pay attention to the setting of exemption clauses as well as hardship clauses when concluding commercial contracts, and clarify the scope and standards of application to reduce the possibility of future disputes, especially during this special period of critical pandemic.

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