

ARTICLES

NOT RUNNING WILD WITH THE CISG*

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I. GENERAL INTRODUCTION

In determining the boundaries of supranational legislation some courts adopt an *expansionist* (dynamic) line. To take a well-known regional example, the European Court of Justice (ECJ) has long been engaged in an exercise in expansionist interpretation, thus broadening the scope of European Union legislation at the expense of the political discretion of EU Member States.¹ Though surely seeking to advance what it sees as the Union's best interests, the ECJ sometimes "runs amok,"² actively extending regional rules in ways

* Editor's Note: Foreign source citations are based upon the author's recommendations.

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1. See generally Karen Alter & Laurence Heffler, *Nature or Nurture? Judicial Law Making in the European Court of Justice and the Andean Tribunal of Justice*, DUKE LAW SCHOOL PUBLIC LAW & LEGAL THEORY PAPER NO. 258, NORTHWESTERN PUBLIC LAW RESEARCH PAPER SERIES NO. 09-16 (2009), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1424423>; HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING (1986); for a contrary view see Mauro Cappelletti, *Is the European Court of Justice Running Wild?*, 12 EUR. L. REV. 3 (1987).

2. See Alter & Heffler, *supra* note 1, at 2 (concerns that international judges may run amok).

that constrain national sovereignty beyond what the Members had originally intended.³ Or, as one of my Copenhagen colleagues once put it: the ECJ is “running wild.”⁴

Among other things, the ECJ interprets the scope of European Union *private law*,⁵ and the ECJ sometimes runs wild with that.⁶ But since the focus of my present investigation is *international private law*:⁷ the United Nations Convention on Contracts for the International Sales of Goods (CISG),⁸ I can only focus on the kind(s) of treaty interpretation undertaken by *national courts*.⁹

These national courts have the “final word” by default, simply because no supranational court has the authority to interpret that Convention: neither the meaning of its individual provisions, nor the treaty’s overall scope. Although that saves us from top-down expansionist domination, the retention of judicial sovereignty by the many Contracting States is not without its own downside. Indeed, the activity of the CISG court-collective has been aptly likened to an orchestra without a conductor,¹⁰ and the resulting discord seems amplified by the strains of an increasingly diverse academic choir.¹¹

3. *See id.*

4. *See* RASMUSSEN, *supra* note 1, at 44, 46, 64, 81, 101, 102, 142, 178, 303, 402, 420, 513, 520, 524 (with numerous concrete examples); *but see* Cappelletti, *supra* note 1.

5. Thus aiding and abetting EU legislation (directives and regulations) ultimately aimed at the wholesale “federalization” of EU private law. *See generally* Joseph Lookofsky, *The State of the Union in Contract and Tort*, 41 AM. J. COMP. L. 89 (1993), available at <http://www.jstor.org/stable/840508>; Joseph Lookofsky, *The Harmonization of Private and Commercial Law: “Towards a European Civil Code,”* INT’L ASPECTS, STOCKHOLM INST. FOR SCANDINAVIAN L. 111 (2000), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky14.html>.

6. *See generally* Joseph Lookofsky, *Desperately Seeking Subsidiarity: Danish Private Law in Scandinavian, European, and Global Context*, 19 DUKE J. COMP. & INT’L L. 161 (2008), available at <http://www.law.duke.edu/shell/cite.pl?19+Duke+J.+Comp.+&+Int%27+L.+161>.

7. I consciously avoid using the phrase “private international law” (in American parlance: “conflict of laws”) since that phrase designates a different area of “international” law. *See, e.g.*, JOSEPH LOOKOFSKY & KETILBJØRN HERTZ, *EU-PIL: EUROPEAN UNION PRIVATE INTERNATIONAL LAW IN CONTRACT AND TORT* (1st ed. 2009).

8. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) [hereinafter CISG], available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

9. *See generally infra* Part II.

10. *See, e.g.*, Peter Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof*, 50 YEARS OF THE BUNDESGERICHTSHOF A CELEBRATION ANTHOLOGY FROM THE ACADEMIC COMMUNITY, available at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html>.

11. *Accord* Clair Germain, *The United Nations Convention on Contracts for the International Sale of Goods: Guide to Research and Literature*, REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 117 (1996), available at <http://library2.lawschool.cornell.edu/oldsite/2007/guides/cisg/> (each country produces unique body of case law interpreting the Convention; scholars from around the world profusely comment on it; books on the topic sell well, so publishers are

Although I have not counted heads, it seems to me that *most* national courts have thus far preferred *narrow* CISG treaty interpretation.¹² This contrasts with the *expansive* preference of *most* CISG academics, that which our German colleagues sometimes obliquely refer to as the “prevailing [collective] opinion.”¹³ In the eyes of this academic majority, the real evil-doers are the non-expansionists, including those who advocate a greater degree of rule-competition along the borderline between the CISG and domestic law.¹⁴

In attaching an arguably pejorative epithet to the broader brand of CISG interpretation (which its advocates prefer to dub “dynamic”),¹⁵ I should emphasize that some commentators, myself included, prefer an issue-by-issue approach.¹⁶ So, perhaps inevitably, some of my CISG views have been judged

eager to capitalize).

12. See, e.g., cases cited in CA 7833/06 Pamesa Ceramica v. Yisrael Mendelson Ltd., [2009] IsrLR 27, available at <http://cisgw3.law.pace.edu/cases/090317i5.html>. See also Joseph Lookofsky, *CISG Case Commentary on Preemption in Geneva Pharmaceuticals and Stawski*, REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 115 (2003), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky8.html>.

13. See, e.g., Schwenger, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 431 (Peter Schlechtriem & Ingeborg Schwenger eds., 2d 2005) (citing Honnold’s 3rd edition to document what Professor Schwenger describes as the “preponderant view” in England and the USA: that non-conformity “remedies under the CISG are exclusive remedies”). But the source cited by Professor Schwenger hardly provides support for that expansionist proposition. See JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 262–63, ¶ 240 (3d ed. 1999) (discussing, in relation to a concrete example, the buyer’s rights resulting from innocent representation). Regarding competition between contract and tort under English domestic law, see Part III *infra*. Regarding the (truly) “prevailing view” in the USA, see Pamesa Ceramica v. Yisrael Mendelson Ltd., *supra* note 12, 62 (“extensive and consistent American case law has, since the beginning of the twenty-first century, adopted a ‘liberal’ line that permits claims based on extra-contractual causes of actions”).

14. The academic minority sometimes takes majority-flak for promoting anti-expansionist objectives. See, e.g., CISG Advisory Council Opinion No. 6, Calculation of Damages under CISG Article 74, Comment 5.2 (2006), available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=148> (criticizing the substance/procedure distinction in relation to attorney’s fees as “outdated and unproductive”). But see Joseph Lookofsky & Harry Flechtner, *Zapata Retold: Attorneys’ Fees Are (Still) Not Governed by the CISG*, 26 J.L. & COM. 1 (2006), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky-flechtner.html> (defending the distinction). For another example of the majority’s scorn for non-expansionists willing to consider competing domestic rules, see CISG Advisory Council Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Comment 35 (2007), available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=169> (“submitted that the *interpreter who takes seriously* the CISG’s confessed purpose of unifying the law of sales, as articulated in Article 7(1), will probably exhaust all technically available means to respond to the hardship problem within the ‘four corners’ of the Convention, rather than resorting to the application of potentially disparate domestic legal rules and doctrines”) (emphasis added).

15. See generally Michael Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1988), available at <http://www.cisg.law.pace.edu/cisg/biblio/alstine2.html>.

16. See Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs*, *Computer*

expansionist,¹⁷ others critiqued as too narrow.¹⁸ Right now, I see reason to pick up the latter thread and elaborate on what I see as the virtues of a non-expansionist line of reasoning.

To avoid doubt at the outset, I am *not* advocating some “new [CISG] textualism” as a commercially viable alternative to expansionism (dynamism).¹⁹ To take one simple example: I do *not* interpret CISG Article 13, which expressly defines a “writing” to include telegram and telex, as impliedly excluding (e.g.) telefax or e-mail from that definition.²⁰ I do, however, remain skeptical of truly expansionist CISG solutions unfurled under the banner of “international interpretation,” as if that ratio, standing alone, could render a given CISG judgment persuasive.²¹ On the contrary, those who run wild with the CISG—stretching its borders to solve controversial problems it was not designed to solve—might unwittingly provide commercial certainty-seekers with an excuse to opt out of the Convention regime altogether.²²

Programs and Preemption Under the 1980 Vienna Sales Convention (CISG), 2003 DUKE J. COMP. & INT'L L. 263, available at <http://www.law.duke.edu/shell/cite.pl?13+Duke+J.+Comp.+&+Int%27+L.+0263>; see also generally JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (4th ed. edited & updated by Harry Flechtner 2009).

17. See Steven Walt, *The CISG's Expansion Bias: A Comment on Franco Ferrari*, 25 INT'L REV. L. & ECON. 342, 345 (2005), available at <http://www.sciencedirect.com/science/article/B6V7M-4JG5FG5-1/2/c8ce45179ac697511487f1e61c99cc7e> (regarding judicial interpretation of CISG Article 6); see also Lookofsky, *supra* note 16 (where I express my approval of the precedents to which Walt refers).

18. For a rebuttal of expansionist-criticism of views shared by Flechtner and Lookofsky on the attorneys' fees issue, see Lookofsky & Flechtner, *supra* note 14; regarding the CISG Advisory Council's (critical) “Opinion” of my views on hardship, see CISG Advisory Council Opinion No. 7, *supra* note 14.

19. Compare the rigid dichotomy suggested by Van Alstine. *Cf.* Van Alstine, *supra* note 15, at 687 (proponents of “new textualism” assert federal courts must refrain from invasive interpretive techniques, regardless of effects on long-term health of statutory law, whereas supporters of “dynamic” interpretation recognize active judicial role ensuring vitality of statutes).

20. See JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG § 2.11 (3d ed. 2008).

21. See generally *id.* §§ 2.8–2.9; regarding factors which can render a given CISG judgment persuasive see also Joseph Lookofsky, *Digesting CISG Case Law: How Much Regard Should We Have?*, 8 VINDOBONA J. INT'L COM. L. & ARB. 181 (2004), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky9.html>. For a striking example of a truly expansionist CISG solution, see *infra* Part IV.

22. See, e.g., Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984), available at <http://www.cisg.law.pace.edu/cisg/biblio/rossett.html> (“For the sophisticated international trader the Convention holds few perils. Article 6 permits sophisticated parties to draft their way out.”).

II. INTERPRETING CISG SCOPE

Now in effect in some 75 Contracting States²³—including six G-7 States,²⁴ as well as China and Russia—the CISG provides the contractual gap-filling (default) regime for countless cross-border transactions each year.²⁵ But prevalence is not necessarily a compelling success standard,²⁶ and the Convention (and its creators) have in fact been subjected to considerable criticism,²⁷ mainly because key treaty rules are susceptible to more than one (reasonable) interpretation,²⁸ with the attendant risk of non-uniform application (in contravention of a key desideratum in the CISG world).²⁹

Underlining the diverging interpretations of one much-discussed Convention rule in this category, German and Austrian courts have taken a strikingly strict (seller-friendly) stance in relation to the do-or-die rule in Article 39(1) which requires CISG buyers to provide sellers with notice of an alleged non-conformity within a “reasonable” time (or forever hold their peace).³⁰ Finnish, French and American courts, on the other hand, have allowed CISG buyers much more leeway, thus extending the life-span of their often legitimate non-conformity claims.³¹

But even the *scope* of the treaty can seem uncertain—a potentially serious problem highlighted by ongoing academic disagreement about which “matters” the Convention was designed to cover (regulate), with accompanying controversy about how arguably covered matters should be “settled.” Thus, although the Convention, by its own terms, governs only sales

23. See Status 1980—United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

24. These 6 are Canada, France, Germany, Italy, Japan, United States; the UK is the odd man out.

25. Regarding factors indicating widespread Convention application, thus tending to refute largely undocumented claims of widespread “opting out,” see LOOKOFKY, *supra* note 20, § 1.1.

26. See Walt, *supra* note 17, at 345.

27. For an early example see Rosett, *supra* note 22. For a more recent example see Clayton Gillette & Robert Scott, *The Political Economy of International Sales Law*, 25 INT’L REV. L. & ECON. 466 (2005), available at <http://www.cisg.law.pace.edu/cisg/biblio/gillette-scott.html>.

28. Compare JOSEPH LOOKOFKY & KETILBJØRN HERTZ, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION. AN ANALYSIS OF AMERICAN, EUROPEAN & INTERNATIONAL LAW ch. 4 (3d ed. 2011) (regarding conflicting interpretations of key provisions in the Hague Service and Evidence Conventions).

29. See generally LOOKOFKY, *supra* note 20, § 2.9.

30. For a particularly egregious example (concerning a large quantity of used shoes) see Harry Flechtner, *Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice Thereof under the United Nations Sales Convention*, 26 B.U. INT’L L.J. 1 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1144182; see also LOOKOFKY, *supra* note 20, § 4.9.

31. See LOOKOFKY, *id.*

contract formation and the parties' rights and obligations arising from such a contract,³² some academics have read CISG rules which measure damages for breach as pre-empting (trumping) domestic rules of procedure which determine whether the losing party in CISG litigation should pay the successful party's attorney's fees.³³ Other academics flatly refuse to allow competition between the CISG contract-conformity regime and negligence-based rules of domestic tort (delict),³⁴ just as some would resolve disputes involving "hardship"³⁵ solely by resort to unwritten CISG general principles,³⁶ even though the Convention makes no mention of hardship, let alone the remedies used to resolve hardship disputes.

To help explain and illustrate the nature of such problems and the range of possible solutions, I will first provide a few concrete examples of the contract-tort conundrum,³⁷ including a judgment rendered by the Supreme Court of Israel in March 2009.³⁸ I will then provide some examples of the hardship problem, including a decision rendered in June 2009 by the Supreme Court of Belgium.³⁹ Along the way I'll have occasion to comment on differing opinions on complex issues like these.

32. See CISG art. 4.

33. See, e.g., John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, 15 PACE INT'L L. REV. 91 (2003), available at <http://cisgw3.law.pace.edu/cisg/biblio/felemegas4.html>. But see Harry Flechtner & Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 VINDOBONA J. INT'L COMM. L. & ARB. 93 (2003), available at <http://www.cisg.law.pace.edu/cisg/biblio/flechtner5.html>; see also Lookofsky & Flechtner, *supra* note 14.

34. See, e.g., Schwenzer, in COMMENTARY, *supra* note 13, at 431 (CISG rules on lack of conformity exhaustive: "no room for domestic remedies based on the seller's negligent misrepresentation"). But cf. Peter Schlechtriem, *The Borderland of Tort and Contract—Opening a New Frontier?*, 21 CORNELL INT'L L.J. 467 (1988), available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem.html>.

35. I.e. 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. See International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts art. 6.2.2 (2004), available at <http://www.unilex.info/> [hereinafter UNIDROIT Principles].

36. See generally *infra* Part IV.

37. See generally *infra* Part III.

38. *Pamesa Ceramica*, *supra* note 12.

39. See generally *infra* Part IV.

III. THE CONTRACT-TORT CONUNDRUM

A. *Howard Marine & Barge Capacity*

Before I assess the Israeli (*Pamesa*) decision,⁴⁰ which provides the key precedent for this part of my discussion, I want to say something about the pre-CISG foundations on which it stands. So I turn now, as I did some 20 years ago (when I first started writing about *Pamesa*-type problems),⁴¹ to *Howard Marine*, a most interesting case decided in 1978 by the English Court of Appeal.⁴² “This case,” the illustrious Lord Denning opined, “is very complicated,” so, like his Lordship, “I will try to state the main facts as simply as I can, missing out many details.”⁴³

Howard Marine: English Recipient (R) needs 2 barges to dump clay into the sea. R contacts English Supplier (S) to ask about the carrying capacity of its German-built vessels, and S quotes Lloyd’s register (the industry Bible): 1,600 tons. A contract for the hire of the barges is signed, and while it contains no information regarding capacity, it does contain a disclaimer which states that R, by accepting the barges, is deemed to have examined them and found them fit for their purpose. When R puts the barges to use, however, it discovers their actual capacity is only 1,000 tons. R’s operations are delayed and its earnings reduced. In the ensuing litigation, R demands damages, grounding that liability allegation in both contract and tort.⁴⁴

On appeal from a lower English court judgment in favor of S, the Court of Appeal held that S could not be said to have breached the contract, because there was nothing in the pre-contract negotiations which could amount to (what Common lawyers call) a “warranty,”⁴⁵ but that S was nonetheless *liable*

40. See *infra* Part III.B. regarding *Pamesa Ceramica v. Yisrael Mendelson Ltd.*, *supra* note 12.

41. Joseph Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403 (1991), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky6.html>.

42. *Howard Marine and Dredging Co. Ltd v. A. Ogden & Sons (Excavations) Ltd.*, (1977) 2 Eng. Rep. 1134 (Q.B.), <http://www.bailii.org/ew/cases/EWCA/Civ/1977/3.html>.

43. *Id.*

44. This section, headed “Damages for misrepresentation,” provides: “Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.” See MISREPRESENTATION ACT, 1967, c.7 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1967/7> [hereinafter *Misrepresentation Act*].

45. In his opinion in *Howard Marine* (*supra* note 42) Shaw L.J. confessed he was “at one time inclined to view [the capacity statement] as part of the description of the subject matter [. . .] giving rise

for misrepresenting the deadweight capacity, because that was a most material matter, because S did not prove that their marine manager had reasonable grounds for believing that the misrepresented fact were true,⁴⁶ and because S could not escape liability by relying on the contractual disclaimer (which S had drafted to protect itself) since, under English statutory law, that would not be “fair and reasonable.”⁴⁷

Howard Marine shows how contractual and non-contractual claims can provide an injured plaintiff with alternative theories of recovery, each capable of supporting a given claim for damages. Since the contract and tort claims are fundamentally different, the negligence-based claims of the injured party are not “absorbed” by the contractual breach-of-promise claim; on the contrary, the tort claim(s) survive even if the contract claim fails. This willingness to allow such competition between contract and tort has, in fact, been part of English judge-made law for centuries.⁴⁸

To show how a similar kind of rule-set competition can arise in the CISG context, I will now (as I did in 1991)⁴⁹ transpose *Howard Marine* into an international-sale-of-goods hypothetical:

Barge Capacity: English buyer (B) needs a large barge to dump clay into the sea. B asks about the carrying capacity of the vessel of a German seller (S), and S quotes the tonnage stated in Lloyd’s register (the industry Bible): 1,600 tons. The sales contract, which provides for delivery in England, contains a CISG choice-of-law clause,⁵⁰ as well as a disclaimer clause, but no information regarding capacity. When B puts the barge to use, he discovers that the actual capacity is but 1,000 tons. For this reason, B’s operations are delayed, its earnings are reduced, and B sues S to recover damages.

to a warranty.” This example illustrates the affinity between a Common law (contractual) “warranty” and a CISG (contractual) “obligation” under CISG Article 35(1), although Common lawyers ought not use domestic terminology in CISG contexts. See LOOKOFSKY, *supra* note 20, § 4.4 n.44.

46. In other words, S did not discharge the “reversed burden of proof” under the Misrepresentation Act 1967. See G.H. TREITEL, *THE LAW OF CONTRACT* § 9-038 (12th ed. 2007); at English common law, however, as well as in most legal systems, the plaintiff bears the burden of proving negligence. The significance of the distinction is also well-illustrated by *Pamesa Ceramica*, *supra* note 12, discussed *infra* Part III.B; as regards the marine manager’s insufficiently founded belief as to capacity see *Howard Marine*, *supra* note 42, 1134 (“All Mr. O’Loughlin had to do was to look at documents in Howard’s possession and to read them accurately”). See also the opinion of Justice Bridge, who, having found R liable under the Misrepresentation Act, found it unnecessary to express a view on the issue of negligence at common law.

47. See Misrepresentation Act at § 2(1).

48. I.e. long before the enactment of the Misrepresentation Act; see ANDREW BURROWS, *UNDERSTANDING THE LAW OF OBLIGATIONS* 24 (1998).

49. Lookofsky, *supra* note 41.

50. Although the Convention can in some cases apply by default even when only one party resides in a Contracting State (a conclusion which both English and German courts would likely reach in a case like this: see LOOKOFSKY, *supra* note 28, § 2.4), I put an opt-in clause in *Barge Capacity* since a barge is a “vessel” under CISG art. 2(e).

I designed *Barge Capacity* to highlight what I then (in 1991) saw as the writing on the CISG wall: the potential for controversy in the borderland between the Convention and domestic law, the potential competition between (international) contractual and (domestic) non-contractual rules.

Depending on how one views the *Barge Capacity* evidence, one might (or might not) conclude that the barge delivered by S fails to fulfill the quality-related obligations set forth in the contract and/or CISG Article 35,⁵¹ and it is at least clear that this CISG-based *contractual* assessment supplants (pre-empts) the corresponding contractual rules which define a seller's obligations under the otherwise applicable domestic (sales) law. But this purely contractual pre-emption does not necessarily lead to the conclusion that B should be denied access to *non-contractual* remedies otherwise available under domestic law. Indeed, the CISG treaty expressly defines its own scope as *solely contractual* (the Convention "governs only [. . .] the rights and obligations arising from such a contract").⁵² And since the conduct exhibited by S in *Barge Capacity* under English law is likely to give rise to a concurrent/competing non-contractual liability claim,⁵³ B might—in a forum like England—be allowed to supplement its Convention-based claim with a claim grounded in the English law of tort; if, on the other hand, the issue of rule-concurrence were decided in a German forum, the result might well be different.⁵⁴

I recognize that many commentators would scorn the "English" approach in a case like this. Since, in their view, uniform Convention interpretation requires a single solution for a given set of "operative facts," they'd say the

51. Depending on the circumstances, a seller's oral representation regarding quality (e.g. capacity) of the goods can become part and parcel of an otherwise written CISG contract, but this determination can only be made on a case-by-case basis. *See generally id.* at § 4.5.

52. CISG art. 4.

53. As in *Howard Marine*, discussed *supra* notes 42–45 and accompanying text. *See also* TREITEL, *supra* note 46, ch. 9, § 3. In other systems (e.g. in France) the doctrine of *non-cumul* may prevent a party bound by contract from bringing a tort action in respect of acts involving that relationship. *See* HERBERT BERNSTEIN & JOSEPH LOOKOFSKY, *UNDERSTANDING THE CISG IN EUROPE* § 4-6 (2d ed. 2003).

54. In my *Barge Capacity* hypothetical the CISG is clearly applicable, at least with respect to the plaintiff's contractual claim (*see supra* note 50), whereas the viability of a concurrent tort claim might depend on whether the forum is England or Germany. *See generally* LOOKOFSKY, *supra* note 20, § 4-6 (differing views as to rule-concurrence in various jurisdictions). For an excellent discussion of the inter-relationship between EU rules on jurisdiction and choice-of-law in cases which give rise to both contractual and delictual claims, *see* JONATHAN HILL & ADELIN CHONG, *INTERNATIONAL COMMERCIAL DISPUTES* § 5.6.8 n.288 (4th ed. 2010) (if court assumes jurisdiction on basis of either Article 5(1) or (3) of Brussels I Regulation, whether concurrent claims regarded as being contractual and tortious under domestic law are allowed will depend on law of forum). Regarding jurisdiction to adjudicate under art. 5(1) of the Brussels Regulation, *see* LOOKOFSKY & HERTZ, *supra* note 28, pt. 2.2.2(A).

Convention should be interpreted as occupying the entire non-conformity field, thus precluding access to any domestic law.⁵⁵ So, they might argue, if the *Barge Capacity* buyer (B) is not entitled to a CISG remedy, then B is not entitled to any remedy.

But I am not swayed by that argument. Since the Convention, by its own terms, governs only contractual matters, it was hardly designed to displace the law of delictual (tort) liability—(i.e.) a separate rule-set with its *own* set of operative facts. Indeed, in a case like this, I submit that a narrow CISG-interpretation is preferable. To be sure, the potential for rule-competition might, depending on the domestic laws which compete for application, sometimes lead to non-uniform results, but that risk is attributable to differences among domestic (delictual liability) rules, and those are differences which the CISG was not designed to iron out. Or to put it more simply: States which sign on to the *sales* Convention expressly agree to replace their domestic sales laws with the CISG treaty regime; they do not (expressly or impliedly) sign away their domestic law of tort.⁵⁶

B. Pamesa v. Mendelson

Pamesa v. Mendelson, decided by the Supreme Court of Israel on 17 March 2009,⁵⁷ involved a buyer's claim in respect of losses suffered due to defects in ceramic tiles. The underlying fact-pattern looked like this:

Pamesa: S (in Spain) manufactures and sells a large quantity of ceramic tiles to B (in Israel). B then sells the tiles to TP (an Israeli contractor) who installs them in a housing complex. Later, a latent defect in the tiles is discovered. TP replaces the tiles and then sues B for their price, the work involved in replacing them, and compensation for loss of goodwill. B then seeks to hold S liable for any compensation which B might owe TP, but S claims B's claim is time-barred.

In the first instance, the District Court found B liable to TP.⁵⁸ It also held S liable to B, thus rejecting the claim by S that B could not rely on the defect.⁵⁹

55. See Schwenger, in COMMENTARY, cited *supra* in notes 13 and 34. See also note 68 *infra* and accompanying text.

56. See LOOKOFSKY, *supra* note 20, § 4.6. See also *infra* Part III.B.

57. CA 7833/06 Pamesa Ceramica v. Yisrael Mendelson Ltd., [2009] IsrLR 27.

58. B (Mendelson) was not, however, held liable for the damages S (Eisenberger) claimed for loss of goodwill.

59. The ratio underlying this District Court holding was (a) that Pamesa (S) had been "aware" that the tiles were problematic, and (b) the 2-year cut-off period in any case only applied to contractual claims and Pamesa had been negligent in the manufacture of the tiles. So, although B (Mendelson's predecessors)

All three parties appealed the judgment of the District Court to the Supreme Court.⁶⁰

The Supreme Court considered the seller's appeal first.⁶¹ S argued, *inter alia*, that B's claim was time-barred under an Israeli statute based on the 1964 Hague Uniform Law on Contracts for the International Sale of Goods (ULIS).⁶² But since the relevant ULIS rules are virtually identical to the corresponding CISG rules (also ratified by Israel) the Supreme Court treated CISG case law and scholarly opinion as highly relevant for resolution of the *Pamesa* dispute.⁶³

Under the ULIS time-bar rule, which corresponds to CISG Article 39(2), the buyer shall lose the right to rely on a lack of conformity if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over,⁶⁴ and the Supreme Court held that B did not satisfy that requirement.⁶⁵ But B argued that the ULIS (like the CISG) governs

bought the tiles from Pamesa in 1996, and although Mendelson first sent its third party notice in 2001, the District Court upheld Mendelson's claim against Pamesa, *inter alia*, because the relevant cut-off rule (*see text infra* with note 64) was held applicable *only to remedies in the contractual sphere*, whereas the third party notice was also filed on the basis of a cause of action arising from the law of torts, in this case Pamesa's negligent manufacture of the tiles. The District Court also rejected Pamesa's claim in this connection because it held that Pamesa was aware of the defects in its products, but the Supreme Court reversed the District Court on this point (*see text infra* with note 83).

60. With the Supreme Court sitting (in this case) as the Court of Civil Appeals. Mendelson (B) appealed the finding that it was liable to Eisenberger (TP). Pamesa (S) appealed the finding that it was liable to Mendelson, the key question being whether the cut-off period of two years in the Sales Law (*see infra* note 64) can be "circumvented" by a buyer who does not give the requisite notice of a defect in goods and who then raises a claim against the seller/manufacturer in tort. Eisenberger appealed solely on the quantum of damages for loss of goodwill. *Id.*

61. If Pamesa's appeal were denied, there would be no need to consider Mendelson's appeal.

62. Regarding ULIS *see* LOOKOFSKY, *supra* note 20, §§ 1.2 & 8.2.

63. Since Israel ratified the CISG on 22 January 2002, the Israeli courts incurred a *treaty-based* obligation to apply the Convention to contracts made on or after 1 February 2003. In fact, three years before that, the CISG was incorporated into internal Israeli law by the Sales Law (International Sale of Goods), which came into effect on 5 February 2000. *See* <http://www.cisg.law.pace.edu/cisg/countries/cntries-Israel.html>. Still, it was the 1971 (Hague-based) Israeli sales law which found direct application in *Pamesa*, because the relevant contract between the seller (Pamesa) and the buyer (Mendelson) was made in 1996.

64. Unless the lack of conformity constituted a breach of a guarantee covering a longer period (this exception was not relevant in *Pamesa*).

65. First, because even though Mendelson (B) knew of the defect in 1998, it did not give Pamesa (S) notice thereof promptly after its discovery, and, second, because no notice was given within the absolute cut-off period of two years from the date on which the goods were handed over to the Mendelson in 1996. In this connection the Supreme Court also emphasized "another side" to the Hague (and CISG) cut-off provisions, which is Article 40: "The seller shall not be entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose." Mendelson's position, upheld by the *District Court* in the first instance (*see supra* note 59), was that the fact that Pamesa was *aware* of defects that had been discovered in other goods

only the obligations of the seller and the buyer that derive from the parties' *contract*, and that the time-bar restrictions therefore do not apply to tort-based claims. Following this line of reasoning, B argued that S had been *negligent* because it sold defective tiles that a reasonable person would not have sold, and that S under Israeli domestic law was in breach of a duty of care to consumers who later bought the apartments in question (with the defective tiles installed).

Having determined it was too late for B to rely on the sales law provisions that concern non-conformity, the Court proceeded to examine the trial court's ruling that the time bar in question relates only to remedies in the contractual sphere. Are the ULIS rules intended to replace only domestic sale and contract laws? Or do they seek also to apply to claims in tort? To answer this question the Supreme Court again emphasized the similar content—and even similar numbering—of the corresponding rules in the CISG Convention. It was, said the Court, possible without any difficulty to draw a comparative line linking the two.

As regards the rule-competition issue, the Supreme Court first quotes Professor Schlechtriem: "The question whether the ground of liability in question falls within the scope of the [CISG] Convention must be clarified by interpretation and, since the Convention defines its own scope, it is the Convention itself which must be interpreted."⁶⁶ As with Article 8 of ULIS, Article 4 of the Vienna Convention provides: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract." *Prima facie*, the Court continues, the CISG Convention does not apply to obligations in tort law—since these ostensibly do not "arise from a contract of sale." On the question of whether it is possible to file a claim in tort when the sale contract is governed by the CISG Convention, the Supreme Court proceeds to summarize the two main approaches promulgated in international academic literature. Under the first of these approaches to interpretation (the one I call expansionist),⁶⁷ domestic

that it marketed to other importers in Israel is sufficient to satisfy the requirements of this provision (compare the arbitration award of the Arbitration Institute of the Stockholm Chamber of Commerce in *Beijing Light Automobile Co. Ltd v. Connell Limited Partnership*, 5 June 1998, available at <http://www.cisg.law.pace.edu/cases/980605s5.html>, holding that Article 40 applies in the case of a seller who *consciously disregarded* facts which were of relevance to the nonconformity). These complexities notwithstanding, the Supreme Court found it sufficient to hold that Article 40 requires at least negligence that constitutes a breach of the customary care in trade, since even judging by this standard, *Pamesa* did not fall within the scope of the exceptional cases to which Article 40 applies.

66. *Pamesa Ceramica v. Yisrael Mendelson Ltd.*, at 59.

67. *See id.* at 61 (referring to this as the "narrow approach" because it denies the applicability of

rules that turn on “substantially the same facts” as the rules of the Convention must be displaced by the Convention.⁶⁸ According to this view, B cannot “circumvent” the Convention obligation to notify by defining its claim as a tortious claim based on a departure from what is expected of a reasonable seller.⁶⁹

The second approach is more tolerant to concurrent tort claims. Among the proponents of this position, the Court cites Professor Schlechtriem as support for an analytical distinction between, on the one hand, a claim that is intended to protect contractual interests that were created by the parties within the framework of their sales agreement (especially the duty to supply a certain quantity and quality of a product for a certain sum of money), this in contrast with tortious causes of action that are intended to protect interests not dependent on the existence of a contract.⁷⁰

Ultimately, the Court tells us, we are dealing with a complex issue, both because of the protected interests, and because of the desire to protect the international uniformity underlying the Convention. This creates a spectrum of possible balancing points. The choice between these points is affected to a large extent by the question of the approach of domestic law on the distinction between tort claims and contract claims. Are we, asks the Court, dealing with (a) two different and concurrent fields, (b) different fields that are not concurrent (non-cumul), or (c) a single field: the law of obligations (“contorts”)?⁷¹ European case law on this question is, the Court continues, relatively meager.

In one case cited by the Israeli Supreme Court, an appellate court in Germany held that a buyer of fish who did not give prompt notice (under CISG Article 39) of an infection

potentially “competing” domestic rules). In my terminology this provides an example of “expansive” CISG interpretation: *see* notes 13 and 32–36 *supra* and accompanying text.

68. *Id.* (citing JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 122 (2d ed. 1991) (any other result would destroy Convention’s basic function to establish uniform rules). The Israeli court citation of Honnold is taken out of a *product-liability context*, but that citation hardly indicates that Honnold would adopt such an expansionist approach in a *Pamesa* (misrepresentation) type context; *see* following note.

69. *Pamesa Ceramica v. Yisrael Mendelson Ltd.*, at 61. As suggested in the preceding note, the views expressed by Honnold as regards misrepresentations in his 2d edition seem less expansionist than the court suggests (*see* HONNOLD, *id.* at 317) and these nuanced views are maintained by Harry Flechtner in Honnold’s 4th edition: *see* HONNOLD, *supra* note 16, at 344.

70. *See Pamesa Ceramica v. Yisrael Mendelson Ltd.*, at 62 (citing Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 VICTORIA U. WELLINGTON L. REV. 781, 793 (2005) (“I advocate the opinion that concurrent actions are not excluded by the Convention.”)).

71. *Id.* at 63 (citing Lookofsky, *supra* note 41 (who borrows this tongue-in-cheek epithet from Grant Gilmore)).

from which the fish suffered could not sue the seller for negligent carriage that allegedly caused the infection, even though the fish supplied caused serious damage to the buyer's stock of fish.⁷² The Israeli Court also cites a decision by a Court of Appeal in Belgium where notice was not given promptly under Article 39, holding the seller could only be heard in a tort action if the alleged fault relates to a breach of a general duty of care as opposed to a contractual duty.⁷³

By contrast, the Supreme Court notes, extensive and consistent American case law has, since the beginning of the twenty-first century, adopted a line that permits claims based on extra-contractual causes of actions.⁷⁴ The Court also cites similar case law in Canada,⁷⁵ as well as in Australia.⁷⁶

Summarizing the authorities on both sides of this difficult question,⁷⁷ the Supreme Court decides to allow the plaintiff (B) to make its claim in tort (that S was negligent in the manufacture of the tiles). The court bases this conclusion on several cogent premises, including the persuasive proposition that the tort-interests for which B seeks protection are not identical to the interests the Convention seeks to protect. There is, in other words, a basis for distinguishing between rights that were created by the parties to the contract, the protection of which we should restrict to the Convention, and the interests that the law of torts was intended to protect, which make it possible to sue for damage under domestic law. For these reasons, the Supreme Court adopts the

72. *Id.* at 64 (citing Oberlandesgericht Thüringen [Provincial Court of Appeal] Germany, 26 May 1998, available at <http://cisgw3.law.pace.edu/cases/980526g1.html>).

73. *Id.* (citing ING Insurance v. BVBA HVA Koeling, Hof van Beroep [Appellate Court] Belgium, 14 Apr. 2004, available at <http://cisgw3.law.pace.edu/cases/040414b1.html>).

74. *Id.* (citing sources which indicate: that the CISG does "not apply to tort claims," *Viva Vino Import Corp. v. Farnese Vini S.r.l.*, 2000 WL 1224903 (E.C. Pa. 2000), available at <http://www.cisg.law.pace.edu/cases/000829u1.html>; that the CISG "clearly does not preempt the claims sounding in tort," *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485 (2d Cir. 2004); and noting "similar case law in recent years," including *Sky Cast, Inc. v. Global Direct Distrib., LLC*, 2008 WL 754734 (E.D. Ky. 2008), available at <http://cisgw3.law.pace.edu/cases/080318u1.html>; *Teevee Toons, Inc. v. Schubert GmbH*, 2002 WL 498627 (S.D.N.Y. 2002), available at <http://cisgw3.law.pace.edu/cases/020329u1.html>; *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*, 2006 WL 2924779 (S.D. Ohio 2006), available at <http://cisgw3.law.pace.edu/cases/061010u1.html>).

75. *Id.* (citing *Shane v. JCB Belgium N.V.* [Superior Court of Justice] Canada, 14 Nov. 2003, available at <http://cisgw3.law.pace.edu/cases/031114c4.html>; Rajeev Sharma, *The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience*, 36 VICTORIA U. WELLINGTON L. REV. 847 (2005)).

76. *Id.* (citing *Ginza Pte Ltd v. Vista Corporation Pty Ltd* [Supreme Court of Western Australia] Australia, 17 Jan. 2003, available at <http://cisgw3.law.pace.edu/cases/030117a2.html>, although the matter was not expressly considered there).

77. *Id.* at 64–65. In this connection the Supreme Court notes that Article 34 of the Hague Convention, which governed *Pamesa*, has no parallel in the Vienna Convention. At the same time, the Court opines that the Hague Convention did not intend to deny the possibility of suing on the basis of domestic tort law.

view previously expressed in non-expansionist CISG doctrine: “The international sales contract thus has the character of private legislation, made by and for the parties in privity; this in contrast with delictual obligation and the law of tort.”⁷⁸

In this case, B claimed S was negligent in manufacturing the tiles and that it shipped a product that a reasonable manufacturer would not have marketed. If S was indeed negligent in this way, this is not a negligent performance of a CISG contractual obligation, but rather—under Israeli domestic tort law—negligent performance of a general duty of care of manufacturers that does not derive from the agreement between the parties. *Prima facie*, there should not be an absolute (CISG) bar against such a claim. Since the seller in *Pamesa* “wears two hats,” the Supreme Court also saw reason to cite additional academic authority as regards the distinction between a manufacturer and a seller:⁷⁹ since “a tort action against the manufacturer is [. . .] always available when the manufacturer did not sell the product directly to the injured party, [. . .] it is arguable that the same result should prevail if the seller and the manufacturer are identical.”⁸⁰

Ultimately, Chief Justice Rubenstein concludes:

I am of the opinion that the trial court was essentially correct when it agreed to consider the claim that [S] was negligent in manufacturing the tiles in a manner that caused the various building contractors that used its products serious damage, even though it did not comply with the provisions of the Convention. I have not reached this conclusion lightly [. . .] because it can be argued that the Convention and the uniform law are intended to regulate the relationship between the parties in its entirety. But life creates complex situations that cannot easily be fitted into a predefined framework, and this leads to the attempt to distinguish between the different types of negligence. This distinction is not an easy one, and there is a concern that it will lead to a slippery slope. Notwithstanding, it should be adopted, so that justice may be done in appropriate cases.⁸¹

For these reasons, including persuasive foreign CISG case law, the Supreme Court held that a buyer in an international sales case maintains a viable tort claim as against a seller/manufacturer for negligence even after the two year [time-bar]⁸² period has expired. But was the alleged negligence proved in this

78. *Id.* at 71 (quoting Lookofsky, *supra* note 41, at 405).

79. *Id.* at 72.

80. *Id.* (quoting HERBERT BERNSTEIN & JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE 59 (1st ed. 1997)). The 2nd (2003) edition of this authority is in accord. *See* BERNSTEIN & LOOKOFSKY, *supra* note 53, § 4-6 with note 82.

81. *Id.* at 70 (internal italics omitted).

82. “Time-bar” seems more appropriate in this context than “prescription”—the term used by the Israeli Court in the English-language version of the decision. *See, e.g., id.* at 67.

case? Unfortunately for the buyer in *Pamesa*, it was not,⁸³ and for this (good) reason the Supreme Court reversed the ruling of the District Court on this key point.

Had [B] given notice of the defects at the proper time, it would have benefited from the advantages of strict CISG liability, but when it failed to do so (and also failed to prove negligence on the part of [S]), it must suffer the disadvantages. That result is perhaps unsatisfactory, since the defective products were manufactured by [S]; but we are dealing with law, and anyone who does not comply with the terms of the law must suffer the consequences.⁸⁴

In Israel, as in most CISG Contracting States, the (heavy) burden of proving negligence in a case like this is not “reversed.”⁸⁵ For this reason, the *Pamesa* Court’s decision to allow competition between domestic tort law and the Convention was not outcome-determinative, nor would it be so generally, except in cases of blatantly tortuous conduct. For this reason, Contracting States (like Israel) which permit such competition between rule-sets do not unduly rock the CISG uniformity boat.

IV. HARDSHIP

A. Devaluation Nightmare

As with the contract/tort-conundrum, hardship in the CISG context has also proved to be a tough nut to crack. Although most scholars would agree that the term “hardship” refers to situations where the original contract equilibrium is subsequently disturbed (either because the cost of one party’s performance has increased or because the value of the other party’s

83. “Even if we adopt the assumption that the tiles that were supplied contained latent defects, and even if we assume that these were a result of a production defect, this is insufficient to impose liability in torts. As a rule, it is well known that causation in itself is not a sufficient basis for liability in torts. In view of the scale of production, the type of defects and the nature of the risk that they are likely to cause, it is not self-evident that the existence of a defect retrospectively proves negligence and a breach of a duty of care. Production without defects is not always possible, and therefore defects do not always indicate negligence; in certain cases it has even been held that the circumstances impose a greater burden on the buyer to examine the goods. We should also recall that when they arrived in Israel, the tiles were examined by the Standards Institute and were found to be of a proper standard, and at least in this respect it is not possible to accuse Pamesa [S] of negligence in not examining its products. This is no small matter, even though a question may always arise with regard to the date when the defects appeared. Finally, in the substantive and procedural circumstances of the case before us, it is hard to accept Mendelson’s assumption that the existence of latent defects in the tiles necessarily proves negligence in their manufacture.” *Id.* at 72.

84. *Id.* at 75.

85. Compare as regards the Misrepresentation Act in England, *supra* III.A.

performance has diminished),⁸⁶ there is little agreement as to what (if anything) should be done about it. Some years ago, to help illustrate my own thinking on this controversial issue with a concrete example, I imagined that an arbiter (judge or arbitrator) might be faced with the following hypothetical situation:

Devaluation Nightmare: Party A (in State X) makes a contract to sell goods to party B (in State Y), this at a price stated in the currency of State Z. One month later, but before the parties are scheduled to exchange delivery and payment, a political crisis leads to a sudden and massive (80%) devaluation of the Z-currency, making the deal a “steal” for B, but a nightmare for A.⁸⁷

Now let’s suppose that X is a CISG Contracting State and that the contract in question is subject to “the law of X.” That makes the CISG applicable,⁸⁸ but does that mean that the CISG “covers” this hardship situation, such that A, due to the devaluation, might be entitled to Convention relief?

To answer that question, we look first to CISG Article 79, for although the word “hardship” is not mentioned there (nor anywhere else in the Convention text) the criteria which under that provision entitle a party to a CISG liability “exemption” clearly appear relevant in a *Nightmare*-type situation:

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he 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.⁸⁹

Notably, neither Article 79 nor its (confusing) legislative history provide a clear answer as to whether an economic dislocation qualifies as an impediment,⁹⁰ but nearly all CISG scholars agree that the Article 79 exemption

86. I.e. as that term is *defined* in UNIDROIT Principles of International Commercial Contracts, art. 6.2.2.

87. Joseph Lookofsky, *Walking the Article 7(2) Tightrope Between CISG and Domestic Law*, 25 J.L. & COM. 87, 99 (2005), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky16.html>.

88. See LOOKOFSKY, *supra* note 20, § 2.7.

89. CISG art. 79(1).

90. For a well-documented account of the confusing legislative history on this point see CISG Advisory Council Opinion No. 7, *supra* note 14, at cmt. 29 (“As to the drafting history of this provision, isolated discussion of proposals that were dismissed or the comments by some delegates may lead one to conclude that there was some type of consensus among the members of the Working Group against the doctrine of ‘hardship.’ In fact, some passages of the *travaux préparatoires* appear to indicate that the choice of the word ‘impediment’ was made for the purpose of adopting a unitary conception of exemption with the intention of setting aside [. . .] hardship theories based on ‘changed circumstances.’ Thus, according

standard is not literal impossibility, but rather extreme difficulty of performance,⁹¹ thus opening the possibility of a liability exemption for an impediment based on “hardship,”⁹² at least if the economic dislocation in question is sufficiently extreme.

In other words, it seems both logical and reasonable to allow a party disadvantaged by a fundamental equilibrium-alteration to invoke—though not necessarily obtain—a liability exemption under Article 79,⁹³ and in 2007 this widely accepted proposition was “codified” by the CISG Advisory Council in the following black-letter Opinion:

A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous (“hardship”), may qualify as an

to some legal commentators, the exclusion [. . .] of hardship from the scope of Article 79 would emerge from its drafting history. Following the successive drafts preceding what finally became Article 79, the Working Group of UNCITRAL considered but rejected a proposal allowing a party to claim avoidance or adjustment of a contract whenever facing unexpected ‘excessive damages.’ Yet, a closer look at this passage reveals that after briefly setting out the arguments in support of the proposal, the report simply stated that it was not adopted, not reappearing in subsequent discussions. Other commentators have seized upon the rejection of a Norwegian proposal linked to a passage of what later became Article 79(3) in order to infer a rejection of the position that Article 79 may extend its application to a situation of genuine hardship [. . .] Although the recollection of the discussions among the participant delegates, or what should be made out of those discussions, is far from uniform, the rejection of the Norwegian proposal did not settle the issue of economic hardship because it was actually not discussed as such.”). *See also* PETER SCHLECHTRIEM & PETRA BUTLER, UN LAW ON INTERNATIONAL SALES § 291 (2009) (majority view in the end was probably that also economic impossibility could relieve the debtor). *But see* HONNOLD, *supra* note 16, at 629 n.37 (arguing that the rejection of proposals to include “hardship-like doctrine” during the drafting of Article 79 supports the proposition that hardship “should have no application in CISG contracts”).

91. *Accord* Peter Schlechtriem, *Exemptions (Article 79)*, in EXCERPT FROM UNIFORM SALES LAW—THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 101 (Manz 1986), available at <http://www.cisg.law.pace.edu/cisg/biblio/slechchtriem-79.html> (“One of the controversial points in the preliminary UNCITRAL discussions was whether economic difficulties—‘unaffordability’—constitute a ground for exemption. In the end, the general view was probably that both physical and economic impossibility could exempt an obligor.”). *See also in accord* Joseph Lookofsky, *Fault and No-Fault in Danish, American and International Sales Law: The Reception of the United Nations Sales Convention*, 27 SCANDINAVIAN STUDIES IN L. 109, 117 (1983), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky4.html>.

92. As defined in the UNIDROIT Principles, art. 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.

93. *See* HONNOLD, *supra* note 16, at 627 (language of Article 79(1) leaves room for exemptions based on economic dislocations that constitute an “impediment” comparable to non-economic barriers).

“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 79.⁹⁴

Had the Council stopped there, its Opinion would mirror the opinion of most CISG scholars on the hardship issue. The Council, however, proceeded to go further, along a far more controversial line. But before we follow the Council down that rocky road, let’s consult Article 6.2.3 of the UNIDROIT Principles, so as to get some input about the *effects of hardship*:

In case of hardship the disadvantaged party is entitled to request renegotiations. [. . .] Upon failure to reach agreement either party may resort to the court. If the court finds hardship it may, if reasonable, terminate the contract [or] adapt the contract with a view to restoring its equilibrium.⁹⁵

Obviously, the relief associated with hardship (as codified in the Principles) is very different from the effect of an exemption under the “force majeure” rule in CISG Article 79, and the difference is so significant that UNIDROIT elected to *supplement* its own hardship provisions with a *separate* Principle (Article 7.1.7) to deal with force majeure type situations,⁹⁶ thus underlining the fact that force majeure and hardship trigger totally different remedial solutions.⁹⁷ So, although one can easily envisage “factual situations which can at the same time be considered as cases of hardship and force majeure,”⁹⁸ it is, in the words of UNIDROIT, “for the party affected by these events to decide which remedy to pursue.”⁹⁹ So clearly, under the *Principles* at least, we can

94. CISG Advisory Council Opinion No. 7, *supra* note 14, pt. 3.1.

95. See UNIDROIT Principles art. 6.2.3 (*Effects of hardship*), the full version of which provides as follows: (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.

96. See *id.*, art. 7.1.7, cmt. 1: “This article covers the ground covered in common law systems by the doctrines of frustration and impossibility of performance, and in civil law systems by doctrines such as force majeure, *Unmöglichkeit*, etc.”

97. See *id.*, art. 6.2.2, cmt. 6: “If [the party affected] invokes force majeure, it is with a view to its non-performance being excused. If, on the other hand, a party invokes hardship, this is in the first instance for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms.”

98. *Id.*

99. *Id.*

envisage factual situations where the remedies available for cases involving (i) force majeure and (ii) hardship would be allowed to compete.

Returning to the factual situation in *Devaluation Nightmare*, let's assume that State X is Denmark—a country which does not have a specific hardship statute, but which does have a black-letter rule authorizing Danish courts to *adjust the terms of any contract which has become unreasonable*. Should CISG Article 79 be read as pre-empting the application of this Danish *validity* rule in a *Nightmare*-like scenario?¹⁰⁰ Or should these international and domestic rules be allowed to compete, so that party A (the one disadvantaged by the devaluation) gets two separate shots at hardship relief: (i) if he convinces the arbiter that the difficult-to-fulfill requirements for a CISG liability exemption are satisfied,¹⁰¹ or (ii) if he convinces the arbiter that the demanding Danish requirements for adjustment of a contract made (highly) unreasonable by “hardship” are met.¹⁰²

When I constructed *Devaluation Nightmare* (in 2005) I knew that some prominent scholars had already rejected the idea that domestic rules of hardship should be allowed to compete with Article 79; they had, in other words, “ruled” in favor of pre-emption (without using that word).¹⁰³ But rather than hop on that scholarly bandwagon, I maintained that competition between rule-sets should remain a viable option. Just as the UNIDROIT Principles are sufficiently roomy to accommodate separate force majeure and hardship conceptions, I argued the same might be said of “Danish law” in the larger sense,¹⁰⁴ especially since the CISG (which is part of Danish law) is generally

100. See Joseph Lookofsky, *Impediments and Hardship in International Sales*, 25 INT'L REV. L. & ECON. 434, 439–40 (2005), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky17.html>; *supra* notes 54–60 and accompanying text. See also Joseph Lookofsky, *The Limits of Commercial Contract Freedom Under the UNIDROIT “Restatement” and Danish Law*, 46 AM. J. COMP. L. 485 (1998), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky2.html> (documenting that § 36 of the Contracts Act clearly functions as a rule of “validity” in the CISG art. 4 sense of that word).

101. See LOOKOFSKY, *supra* note 20, § 6.19.

102. Rarely applied in by Danish courts in cases involving contracts between merchants (and apparently never in a commercial sales case), § 36 of the Contracts Act has been applied recently in a commercial “hardship” context in order to adjust the “fixed” rental sum otherwise payable under a 150-year-old land lease. See MADS BRYDE ANDERSEN & JOSEPH LOOKOFSKY, *LAEREBOG I OBLIGATIONSRET* 195 (3d ed. 2010). Compare TREITEL, *supra* note 46, ¶¶ 19–34 (“great financial or commercial hardship to one of the parties [not] of itself sufficient”). But see *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.*, (1978) 77 LGR 17 (A.C.) (rightly characterized by Lord Denning (*id.*) as a “frustration” case, and although Professor Treitel disagrees, the Staffordshire scenario is essentially the same as the just-cited Danish hardship scenario).

103. For an account of the conflicting views of scholarly authorities on point, see Hans Stoll & Georg Gruber, in COMMENTARY, *supra* note 12, at 822–26.

104. So as to include both Danish domestic law and the CISG, especially since nearly all courts,

not concerned with rules of validity, and since Danish domestic law deals with hardship with a validity rule.¹⁰⁵ This does *not*—in case you’re wondering—mean that I would resolve my own *Nightmare* scenario in favor of the party disadvantaged by the devaluation; indeed, I would *not*.¹⁰⁶

But in 2005 I did not know how a court or arbitral tribunal would deal with a real *Nightmare*-type situation, since (at that point in time) I hadn’t seen the hardship issue resolved in a real CISG case.¹⁰⁷ But even in the absence of such precedent, some (Common law trained) commentators, emphasizing what they see as the distinctly “Civilian” nature of hardship-tailored remedies (contract renegotiation and adjustment),¹⁰⁸ maintain that proposals to include such remedies were considered but rejected during the drafting of Article 79.¹⁰⁹ In the eyes of these commentators the matter of economic dislocations in a CISG context is solely governed and expressly settled by Article 79, so for them, the only remedy which might be available for the victim of an (*extreme*) economic dislocation in a CISG case is a CISG liability exemption.¹¹⁰

Now, I do not agree with these commentators’ interpretation of the CISG legislative history, nor can I accept their position that the CISG regime pre-empts domestic hardship rules. Like them, however, I reject the (for me outlandish) proposition that the CISG itself provides authority for a court or arbitrator to order renegotiation and/or adjustment of a CISG contract. But this

tribunals and scholars agree that a reference to (e.g.) “Swiss law” or the “law of Switzerland” includes a reference to the CISG. See LOOKOFSKY, *supra* note 20, at § 2.7. But see Walt, *supra* note 17, at 325 n.4.

105. Regarding § 36 of the Danish Contracts Act (which in a sufficiently “extreme” domestic context might be allowed to compete with the force majeure provision in the Danish Sales Act); see Lookofsky, *supra* note 100, at 494–98; see also ANDERSEN & LOOKOFSKY, *supra* note 102, at 190–96 (comparing a domestic sales law precedent from 1940 with a non-sales hardship precedent from 2008 and more generally emphasizing the fundamental remedial differences between force majeure and hardship).

106. And judging by domestic precedent (*see* preceding note), I am quite sure that a Danish court faced with this scenario would not either.

107. In this connection, I expressly discounted an earlier Italian precedent as largely irrelevant, since I regarded (and still regard) the hardship-portion of the opinion rendered there as (unpersuasive) *dictum*, as opposed to an outcome-determinative *holding*. See Lookofsky, *supra* note 87, at 98–99 with notes 68–72.

108. See Harry Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on “Hardship” Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court*, BELGRADE L. REV. (forthcoming 2011); see also Joseph Perillo, *Hardship and its Impact on Contractual Obligations: A Comparative Analysis*, Saggi, Conferenze E Seminari #20, at 1–14 (1996), available at <http://www.cisg.law.pace.edu/cisg/biblio/perillo4.html> (illuminating the differences between Common and Civilian hardship views).

109. See HONNOLD, *supra* note 16, at 629 n.37. But see CISG Advisory Council Opinion No. 7, *supra* note 14, cmt. 32.

110. See HONNOLD, *id.*, at 627–30.

is in fact the proposition underlying part 3.2 of the CISG Advisory Council's Opinion on Article 79:

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.¹¹¹

What the Council means by “further relief” is in fact *relief specially tailored to hardship*, and that kind of relief (renegotiation and/or contract adjustment) is fundamentally different from a liability exemption, i.e. the *only* kind of relief expressly authorized by Article 79 (and, we will recall, approved for hardship-application by the Council in the less controversial part of the same Opinion).¹¹² So to seek this “further” end the Council had to hunt for CISG “general principles” which might authorize further hardship relief in accordance with CISG Article 7(2):

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Now, if we compare the black letters of the Council Opinion on hardship with those of CISG Article 7(2), we see that the Council has taken the liberty of replacing the CISG “conformity” criterion with a new and seemingly more elastic “consistency” criterion, but that subtle spin can hardly help the Council steer Article 79 in an expansionist direction, simply because there *is no* CISG general principle which provides persuasive authority for “further [hardship] relief.”

The Council is of course well aware that hardship options abound,¹¹³ just as the Council knows that CISG legislative history provides no clear evidence of legislative hardship intent.¹¹⁴ So, to fill in this picture in the absence (in 2007) of relevant case law, the Council asks (itself): what kind of *factual scenario* might be proposed for an exceptionally “hard” case of hardship which might merit hardship relief?¹¹⁵ Then, to answer its own rhetorical

111. CISG Advisory Council Opinion No. 7, *supra* note 14, pt. 3.2.

112. Regarding pt. 3.1 of CISG Advisory Council Opinion No. 7 (*supra* note 14), *see* note 94 *supra* and accompanying text.

113. CISG Advisory Council Opinion No. 7, *supra* note 14, at cmt. 26 (variety of national laws and doctrines coupled with amplitude of term “impediment” provides fertile ground for divergent approaches to hardship question).

114. *Id.*, cmt. 27.

115. *Id.*, cmt. 32.

question, the Council asks us to “imagine” a totally unpredictable political and economic crisis which leads to a massive currency devaluation of 80 percent—i.e., a scenario virtually identical to that in my own *Devaluation Nightmare* (2005).¹¹⁶

Should the buyer plagued by that *Nightmare* (the Council asks itself)¹¹⁷ be entitled to find relief under the CISG by reading the word impediment in Article 79 to include hardship or by concluding that there is a gap within the CISG to be filled by some underlying general principle? If the CISG applies, the Council reasons, then it “naturally pre-empts” other, potentially applicable domestic rules dealing with hardship.¹¹⁸ Recognizing that the inability to settle the hardship issue by CISG means would leave “no alternative” other than resort to domestic legal rules, the Council simply declares a CISG-based solution to be “more palatable” than the alternative of leaving the question to the conflict of law rules of the forum, especially given the great diversity of potentially applicable legal doctrines. Indeed, according to the Council, “the interpreter who takes *seriously* the CISG’s confessed purpose of unifying the law of sales, as articulated in Article 7(1), will probably *exhaust all technically available* means to respond to the hardship problem within the ‘four corners’ of the Convention, rather than resorting to the application of potentially disparate domestic legal rules and doctrines.”¹¹⁹ But seriously folks, CISG expansionists regularly “exhaust all means” to achieve pre-emption, in this case not only by twisting CISG Article 7(2), but also by over-interpreting Article 7(1) which only requires some unspecified measure of “regard” to the need for uniform interpretation, as opposed to “paramount” regard (as the Council would prefer to have us read it).¹²⁰

Hardship, the Council concedes, may be regarded in *some* legal systems as a *validity-related* issue, and so “it may be *argued* that the hardship issue is excluded from the scope of application of the CISG by virtue of Article 4.”¹²¹ In fact, the Council even thinks this argument “deserves careful

116. *Id.*, cmt. 33 with note 43.

117. *Id.*, cmt. 34.

118. *Id.* But see LOOKOFSKY, *supra* note 20, § 2.6 (explaining that domestic solutions can “compete” with the CISG, i.e. even in cases where the CISG applies).

119. CISG Advisory Council Opinion No. 7, *supra* note 14, cmt. 35 (emphasis added).

120. See Loukas Mistelis, *CISG-AC Publishes First Opinion*, MORE ABOUT THE CISG ADVISORY COUNCIL, CISG ADVISORY COUNCIL, <http://www.cisgac.com/default.php?sid=149>: “The Council is guided by the mandate of Article 7 of the Convention as far as its interpretation and application are concerned: the paramount regard to international character of the Convention and the need to promote uniformity.”

121. CISG Advisory Council Opinion No. 7, *supra* note 14, cmt. 36 n.44 (emphasis added); see also Lookofsky, *supra* note 100, at 496.

consideration,” because in some Scandinavian legal systems the issue of hardship is in fact approached as an issue of validity,¹²² and since there is “something to be said” (thank you) in favor of granting the defaulting party the benefit of finding appropriate relief by choosing among competing domestic doctrines of hardship. And yet, this Scandinavian approach “does not sound convincing or persuasive,” at least not in the Council-collective’s expansive set of ears.¹²³

For these reasons, the Council opines that the *Nightmare* situation *deserves* a legal response under the Convention that would pre-empt the application of domestic rules on hardship.¹²⁴ And to tackle that challenge—to “ascertain the contours of the remedial guidelines that may be followed to grant the most appropriate [hardship] remedy”—the Council *infers*, from the obligation to interpret the Convention in good faith under Article 7(1), a *duty* imposed upon the parties to *renegotiate* the terms of the contract with a view to restore a balance of the performances.¹²⁵

Now, if such negotiations fail, there are of course no Convention guidelines for a court or arbitrator to adjust or revise the terms of the contract so as to restore the balance of the performances. But the Council is ready to tackle that too: “Even if one were not ready to *stretch* the principle of good faith *buried* in CISG Article 7(1) in order to find a balance of the performances, CISG Article 79(5)¹²⁶ may be relied upon to *open up the possibility* for a court or arbitral tribunal to *determine what is owed* to each other, thus ‘*adapting*’ the terms of the contract to the changed circumstances.”¹²⁷

122. CISG Advisory Council Opinion No. 7, *supra* note 14, cmt. 36.

123. *See id.*: “Unlike a situation of unconscionability (. . . or gross disparity of the performances at the time the contract is concluded), which clearly falls under the rubric of validity, the hardship problem tends to be associated in most legal systems with force majeure or impossibility of performance, that is, a situation of exoneration or mitigation of liability due to events subsequent to the conclusion of the contract, more than as a case of nullity or avoidance due to infirmities or flaws affecting the contract from its inception. Moreover, every benefit potentially obtained from allowing national doctrines of hardship to compete for its application is more than offset by the high price in terms of uniformity that is to be paid under this approach.”

124. *Id.* at cmt. 37.

125. *Id.* at cmt. 40.

126. A one-sentence provision which provides: “Nothing in this article [79] prevents either party from exercising any *right* other than to claim damages *under this Convention*” (emphasis added).

127. CISG Advisory Council Opinion No. 7, *supra* note 14, cmt. 40 (emphasis added).

B. Scafom International v. Lorrain Tubes

At this point, I suppose some non-expansionists might be gasping for breath. But just 2 years after the Council proclaimed its own (2007) Opinion, yet another breath-taking hardship opinion came down, this time a *judicial* opinion rendered by the Supreme Court of Belgium (*Cour de cassation/Hof van Cassatie*) in the *Scafom* case,¹²⁸ where the *Nightmare* scenario looked like this:

Scafom: Seller (S) contracts to sell steel tubes to buyer (B) at a given price. Later, the market price of the steel used by S to produce those tubes suddenly jumps up by some 70%. When B refuses to accede to a demand by S to renegotiate, S sues B, demanding that the court award damages suffered as a result of B's refusal.

In *Scafom* S and B have their main places of business in different CISG Contracting States, and since these parties have not opted out, the CISG clearly applies. What is less clear, however, is how the court should deal with the hardship problem in this particular case. On the one hand, I doubt that many arbiters would consider a 70 (or even 80) % price-increase to be sufficiently extreme to warrant a liability exemption for S under Article 79 (which means that S in *Scafom* should remain strictly liable in damages for its failure to deliver the goods to the buyer at the originally agreed contract price);¹²⁹ on the other hand, I assume that many arbiters would say (using hardship terminology) that the price increase in *Scafom* “fundamentally alters the equilibrium” of the contract.¹³⁰

But this latter assumption need not necessarily imply that the *Scafom* seller (S) is entitled to demand renegotiation of the contract and/or that a Belgian court should adjust the original contract price. This is because the assumption of a fundamental alteration of the contract equilibrium in *Scafom* does not automatically lead to hardship relief. Indeed, the hardship scenario in *Scafom* will only trigger hardship effects if the default rule which the court holds applicable—be that CISG Article 79, UNIDROIT Principles Article

128. Hof van Cassatie [Supreme Court] Belgium, 19 June 2009, Belgium 19 June 2009; Court of Cassation [Supreme Court] (*Scafom International BV v. Lorraine Tubes S.A.S.*), available at <http://cisg3.law.pace.edu>.

129. See HONNOLD, *supra* note 16, at 630 (only if the impediment constitutes a barrier to performance comparable to other types of exempting causes).

130. See UNIDROIT Principles, art. 6.2.2, illus. 3 (unforeseeable massive devaluation of the order of 80%).

6.2.3 or a domestic (hardship or hardship-related) rule—can be interpreted as prescribing such effects.

(Note in this connection that the buyer in *Scafom* had not accepted the price-adjustment clause in the French seller's standard terms,¹³¹ nor had such a clause become part of the contract by virtue of commercial usage.¹³² For these reasons, the Belgian Court was obligated to determine whether or not to grant the seller relief on the basis of a gap-filling rule.¹³³)

So, once again, the possible hardship solutions abound. Distinguished American CISG scholars, for example, would solve the hardship problem in *Scafom* within the “black letter” of Article 79, thus leaving no room for supplementary solutions divined from unwritten CISG general principles.¹³⁴ At the same time, these American scholars adamantly reject the views of European scholars who seem to read “civil law” hardship doctrine into Article 79,¹³⁵ a point which might raise some Civilian eyebrows, since this “American” CISG interpretation conveniently accords with American domestic doctrine (interpreting the comparable rule in UCC § 2-615),¹³⁶ as well as the rejection of “judicial activism” associated with a famous-but-isolated American domestic precedent.¹³⁷

If, on the other hand, the court determines that the hardship situation in *Scafom* should be regarded as a “matter” governed-but-not-settled by the Convention, the court might then seek out CISG “general principles” to settle it. And this was, in fact, what the Belgian *Cour* did. Overturning the *ratio* employed by the Antwerp Court of Appeal—which had applied French domestic law to supplement the CISG (presumably because the applicable

131. See the decision in *Scafom*, *supra* note 128. Since the S-B contract was concluded on the basis of B's purchase orders (which had been accepted by S when it stamped and returned them to B), the standard conditions of S did not become part of the parties' contract by virtue of the mere fact that S subsequently sent those terms to B. The lower Belgian court's well-reasoned decision on this point (not challenged on appeal) accords with the decision of the U.S. Federal Court of Appeal in *Chateau des Charmes*. See *Chateau des Charmes Wines Ltd. v. Sabata USA, Inc.*, 328 F.3d 528 (9th Cir. 2003), available at <http://cisgw3.law.pace.edu/cases/030505u1.html>.

132. See the decision in *Scafom*, *supra* note 128. See also CISG art. 9 and LOOKOFSKY, *supra* note 20, § 2.13.

133. See *Scafom* at *id.*

134. See HONNOLD, *supra* note 16, at 629 n.40; see also *supra* notes 108–10 and accompanying text.

135. See HONNOLD, *supra* note 16, at 629 n.39.

136. See generally JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE 3–9 (6th ed. 2010) (discussing increased costs as a basis for a finding of commercial impracticability).

137. See *id.*, commenting on *Aluminum Co. of America v. Essex Group*, 499 F. Supp. 53 (W.D. Pa. 1980) (“If one can rely on activist judges to modify onerous contract terms [. . .] in the hope that the judge will change the rules of the game before the opponent can play his cards if the price term later turns sour, [that] might even increase the unjustified rewards of strategic behavior during the negotiation.”).

conflict-of-laws rule pointed to the “seller’s law”¹³⁸—the *Cour de cassation* filled the CISG hardship gap with *general international trade principles*, as purportedly *expressed in* the UNIDROIT Principles, thus using the UNIDROIT Principles to divine a *CISG-based* obligation upon the parties to *renegotiate* their contract (*obligée de renégocier les conditions du contrat*);¹³⁹ at the same time, the *Cour de cassation* let stand the Appellate Court’s award of monetary compensation (€ 450,000!) to S for losses due to B’s refusal to renegotiate.¹⁴⁰

Having read countless opinions rendered by Danish courts—nearly all brief, some also opaque¹⁴¹—I hesitate to criticize the ratio of the highest Belgian Court. But the *Scafom* opinion has already attracted some cogent criticism,¹⁴² and viewed from my own perspective, this Belgian decision hardly seems more persuasive than the rambling Advisory Council Opinion on the same subject.¹⁴³

Applauding the *Scafom* result, but not the method used by the *Cour* to reach it, one commentator would expand the hardship potpourri by using international (UNIDROIT) principles to *interpret domestic* law.¹⁴⁴ Quite apart

138. See the decision in *Scafom*, *supra* note 128, premise 14 (under French law duty to perform in good faith requires re-negotiation of contractual conditions in certain situations, *inter alia*, if, after conclusion of contract unforeseeable circumstances occur, creating serious unbalance between obligations, such that further performance becomes excessively onerous for one party). See also LOOKOFSKY & HERTZ, *supra* note 7, pt. 3.2.4 (describing the rules which determine the applicable sales law in a Belgian court in such a situation).

139. See the holding in *Scafom*, *supra* note 128 (under Article 79(1) changed circumstances can form impediment; under Article 7(1) regard to be had to need to promote observance of good faith; under Article 7(2) gaps filled in uniform manner in accord with general principles which govern law of international trade; under CISG general principles as incorporated in UNIDROIT Principles party who invokes changed circumstances disturbing contract balance entitled to claim renegotiation; Appellate Court found unforeseen price increase gave rise to serious imbalance; Appellate Court could decide Buyer must renegotiate; appeal from that judgment not accepted).

140. See Flechtner, *supra* note 108 (Cassation Court affirmed intermediate appeals court’s order increasing the price buyer was obliged to pay by € 450,000).

141. See generally Joseph Lookofsky, *Precedent and the Law in Denmark*, PRECEDENT AND THE LAW (E.W. Hondius ed., 2006).

142. See generally Flechtner, *supra* note 108.

143. See generally *supra* Part IV.A. Regarding the questionable use of the UNIDROIT Principles or the Principles of European Contract Law to divine “general principles” upon which the CISG is based, see Franco Ferrari, *Gap-Filling and Interpretation of the CISG: Overview of International Case Law*, 7 VINDOBONA J. INT’L COM. L. & ARB. 63, 63–92 (2003), available at <http://www.cisg.law.pace.edu/cisg/biblio/ferrari11.html>. As emphasized by Ferrari, the rule in CISG art. 7(2) applies (only) to “the general principles on which it [i.e., the CISG] is based.”

144. See Anna Veneziano, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court*, UNIFORM L. REV. 137–51 (2010), available at <http://www.unidroit.org/english/publications/review/articles/2010-1-veneziano-e.pdf>.

from my own “Scandinavian” solution (using—if appropriate in sufficiently extreme situations—a domestic validity rule to supplement the CISG),¹⁴⁵ I have also suggested that non-expansionist arbiters might achieve a viable “international” solution to a given governed-but-not-settled conundrum by supplementing the CISG regime with *lex mercatoria* as a *CISG-independent* supplement.¹⁴⁶ I realize, however, that this particular road might only be accessible by an international arbitral tribunal functioning within a liberal *lex arbitri* climate, i.e. a dispute resolution environment where rigid choice-of-law methodologies (such as those of the Rome I Regulation) need not be applied.¹⁴⁷ At the same time, I would caution that not all arbitrators would regard UNIDROIT hardship remedies as reflecting truly “international” *lex mercatoria*.¹⁴⁸

V. CONCLUSION

The CISG core content seems clear and familiar. But due to differences among existing domestic conceptions, the Convention founders sometimes opted for compromise, not least to avoid the alternative of no Convention at all.¹⁴⁹ So, for better or for worse, some CISG provisions were formulated in open-ended fashion, whereas other issues were left untouched and unresolved, with some loose ends even tucked under the CISG rug.¹⁵⁰ And so it should hardly seem surprising that we find continuing controversy and debate along the borderline between the CISG and domestic law.

Fortunately (for all of us who support the Convention), the great majority of international sales disputes will continue to revolve around everyday sales law claims, (e.g.) that the goods delivered do not conform to the contract; that they have not been delivered on time; etc. In these familiar contexts, the Convention will continue to provide a reasonably level default playing field for resolving problems of greatest practical importance. When it comes to

145. See *supra* note 105 and accompanying text.

146. See LOOKOFSKY, *supra* note 20, at § 2.11 n.232.

147. See LOOKOFSKY & HERTZ, *supra* note 6, at 78, 172–74; see also Hill & Chong, *supra* note 54, §§ 23.2.12–23.2.15, 24.2.45 (regarding arbitration in England). Compare LOOKOFSKY & HERTZ, *id.*, pt. 6.2.3. (as regards applicable substantive law in international commercial arbitration in general).

148. See Perillo, *supra* note 108, at 10 (common law has no developed doctrine of dissolving or adapting a contract because of hardship; in American doctrine some support for adaptation of long term contracts but American cases that arguably take such a position not decided by important courts and usually cited only for purpose of adverse criticism); see also Flechtner, *supra* note 108.

149. See Gillette & Scott, *supra* note 27.

150. See Lookofsky, *supra* note 41, at 403.

more controversial CISG borderline issues, however, we must travel a winding and bumpier road. Indeed, given the sharply differing opinions on how to resolve some of these issues, I think lawyers who plan ahead—and who prefer well-defined rules to unwritten CISG principles—might do well to equip their clients' contracts with choice-of-forum clauses, perhaps coupled with choice-of-law clauses which expressly supplement the CISG with domestic law.¹⁵¹

I realize that expansionist academics might discount the need for (and effect of) such clauses, since in their view the Convention “settles” most borderline issues without resort to domestic law; I also realize that the *Scafom* decision might further energize those same academics. Still, I doubt that many non-Belgian courts or arbitrators would be likely to follow that *Cour de cassation* lead. With no supranational court to keep the international community in line, courts in Contracting States need only have “regard” to decisions rendered by courts in other CISG States.¹⁵² And since the treaty does not tell national courts *how much* regard to have for foreign (e.g. Belgian) case law, I have argued that the relevant measure should depend on various factors, including not only the prominence of the court, but also the force of its reasoning and the apparent soundness of the result.¹⁵³

I concede my argument is influenced by the American and Scandinavian doctrine with which I am most familiar.¹⁵⁴ Still, I think the logic underlying this national doctrine also rings true here, although persuasiveness in the CISG context should of course include an appropriate measure of regard to the Convention's international character and the need to promote uniformity in its application. And although I would not overestimate the foreign impact of the Israeli Supreme Court's decision in *Pamesa*, I think it and similarly well-reasoned decisions might perhaps persuade some whose positions along the borderline are not yet entrenched. Even a few small steps in that direction would—in my opinion—be an encouraging development for international private law.

151. See LOOKOFKY, *supra* note 20, § 2.7 n.131.

152. See *generally id.*, § 2.8.

153. See *generally* Lookofsky, *supra* note 21.

154. See ALAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 52–57 (3d ed. 1996) (speaking of American notion of “persuasive”—as opposed to “binding”—case law authority, a category which includes decisions of courts of other jurisdictions). Regarding the significance of prior precedent in Denmark (case law: *retspraksis*) see HENRIK ZAHLE, RETTENS KILDER (Sources of Law) 51 ff (Copenhagen 1999); see also MADs BRYDE ANDERSEN, RET & METODE (Law & Method) 155 (Copenhagen 2002).