Predicting Exemptions and Hardship in CISG Context

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1. Dedication and general introduction

Peter Møgelvang-Hansen and I became colleagues and friends at the University of Copenhagen, where we had both studied law (at different points in time) and begun our academic careers.

My main ticket to academia was a senior thesis I wrote in 1980 on liability exemptions under Article 79 of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).[1] Although the Convention was brand new when I wrote my thesis, it has since become the law in more than eighty States, representing three-fourths of all world trade.[2] Attesting to the treaty's significance in our particular part of the world, Peter and I co-authored a piece in 1999 where we proposed modernizing the century-old Danish domestic Sales Act (*Købeloven*) to bring it more in line with CISG.[3]

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1 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 Law (1983) 109–138, available at <www.cisg.law.pace.edu/cisg/biblio/lookofsky4.html>; this Scandinavian Studies piece tracks my thesis, first published in Justitia (Copenhagen, 1981) as 'CISG: The Basis of Liability'.

2 See <www.cisg.law.pace.edu/cisg/countries/cntries.html>.

3 *(Bl.a.) Afskaffelse af den forældede species/genus-sondring, der præger KBL [af 1906] og indførelse af et enstrenget system, hvorefter ethvert brud af købekontrakten udløser et ansvar, dog med undtagelse for force majeure, altså på samme måde som den enkle og effektive kontrolansvars-regel i CISG*. See Joseph Lookofsky and Peter Møgelvang-

In my contribution to this *Festschrift* in Peter's honor, I will revisit and cast some new light on my thesis topic by highlighting some post-1980 developments in Article 79 theory and practice, including the advent of a highly controversial conundrum: how to handle 'hardship' in the liability-exemptions context? Before I proceed with these developments, however, I will briefly sketch the larger Sales Convention picture and its relationship to domestic law; and I'll also include some general observations about the nature of CISG case law and academic scholarship.

2. We didn't have no C-I-S-G

When I studied American law in the late 1960's, and even when I studied Danish law a decade later, truly *international* sales law was still the stuff of dreams.[4] The explanation, as Professor Harry Flechtner so poignantly put it (to hillbilly music) was this: *We didn't have no C-I-S-G*.[5]

So back in those days, a national court confronted with an international sales dispute had 'no choice' but to make a *choice-of-law* determination in order to decide *which domestic* sales law to apply. So if, in 1987:

> French seller (S) sold clothing to California buyer (B), and S sued B in France for B's failure to pay, the French court (assuming it had jurisdiction)[6] would have applied its own rules of private international law (PIL) to determine which country's sales law to apply, and these PIL rules would probably have led to the application of French substantive sales law.[7] But if a California court (assuming it had jurisdiction)[8] were confronted with the same scenario, its own (very different) choice-of-law rules might well have led to the application of American substantive law.

Hansen, 'En ny dansk indenlandsk købelov: KBL III', Ugeskrift for Retsvæsen 1999B.240.

4 The ULIS and ULF Conventions (1964) were largely failures, having been ratified by only nine States.

5 From the chorus of Professor Harry Flechtner's 'CISG Song' (2005): See the lyrics and hear the sound track at <http://law.pitt.edu/academics/cile/cisgsongpage>.

6 Which was likely, given the infamously exorbitant jurisdictional rule in Article 14 of the French Code Civil (still applicable outside the Brussels I context): see Joseph Lookofsky and Ketilbjørn Hertz, EU-PIL (2nd ed. 2015) at 32.

7 See id., Ch. 3.3.2.

8 Which is also likely: regarding jurisdiction in contract in American courts, see generally Joseph Lookofsky and Ketilbjørn Hertz, *Transnational Litigation & Commercial Arbitration* (3rd ed. 2011) Ch. 2.5.2.

Today, however, the situation is totally different, in that France and the United States now have the *same international sales law*. So if a case like this were to be decided today, neither French nor American courts would apply a PIL rule to determine which country's sales law applies.[9]

3. Liability and exemptions under CISG Article 79

The starting point for my 1980 senior thesis was the (then brand new) black-letter 'Exemptions' rule in CISG Article 79(1):

> 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 [...]

I decided to write about this particular topic after reading an article written the year before by Barry Nicholas, then a prominent professor at Oxford. Using *French* and *English* domestic law as his comparative frame of reference, Nicholas described the same (then draft) exemptions rule as an example of 'superficial harmony which merely mutes a deeper discord,' not least the discord between the Civil (*fault*) and Common (*no-fault*) approaches to liability for breach of contract, the potential problem being that national courts in different jurisdictions might interpret the CISG rule in accordance with their differing domestic traditions and that such interpretations were likely to produce fundamentally varying CISG applications.[10]

> (As an aside, the brief story of how I came to read that article illustrates the impact of coincidences: I'd been in the elegant old reading room of the Royal Library in Copenhagen, studying for the 'regular' written exams which would have marked the end of my Danish legal studies (in those days, there was no thesis requirement). But as fate would have it, I took a break from the required reading material and wandered over to the magazine rack, where I stumbled

9 For present purposes I disregard the continuing need to make a choice of law with respect to non-sales law issues, as well as other 'matters' which are 'not governed' by the CISG. In my (minority) view, this is the case with respect to the matter of 'hardship' (see discussion infra).

10 See Barry Nicholas, 'Force majeure and Frustration', 27 *American Journal of Comparative Law*, pp. 231 ff. (1979).

> upon the latest issue of the *American Journal of Comparative Law*, and in it the piece by Nicholas about *force majeure* under (what was soon to become) CISG Article 79.)

Although I had never seen or heard *anything* about the Sales Convention before that, I had an immediate and strong reaction to what Nicolas wrote, something like: 'not so, Professor [...] at least not when viewed through my own (Danish and American) comparative lens.' And so, with that as my impetus, I decided to write a senior thesis (*afløsningsopgave*) which dared to challenge the Professor's view, in the end concluding:

> 'Although the Convention's liability rules naturally embody a certain degree of compromise, the result does not so much ignore or conceal differences between opposing legal theories as it highlights a surprising degree of substantive agreement—an agreement resting on common fundamental criteria. In Denmark and America at least, one may look forward to an essentially uniform interpretation [of Article 79].'[11]

Now I suppose that someone who reads these lines today (some 35 years after I wrote them) might wonder: *so who made the right prediction, Joseph: the Englishman or you?* And if you put that question to me, I'd reply: *well, we were both right, at least to some degree!*

Granted, since my own prediction was focused *primarily* on prospective Article 79 application by *American and Danish* courts, the outcome is hard to assess, since only four such decisions seem to have been reported. In the only Danish case I could find (decided in 2002, but not reported in the usual channels), an import restriction did not qualify the buyer for an 'exemption,' since that contingency in the concrete context concerned was held to be within the buyer's contractual sphere of risk.[12] As for the American cases, two of them (decided in 2008) confirm obvious points: that an impediment which the

11 Lookofsky, *supra* note 1, pp. 136–137.

12 See the limited information available regarding the otherwise unreported District Court (2001) and Appellate Court (2002) decisions cited at <http://cisgw3.law.pace.edu/cases/011210d1.html>, referring to the bare-bones abstract at <www.cisg nordic.net/021030DK.shtml>. According to the abstract: 'buyer did not lift its burden of proof that an agreement to cancel the contract [in the event of an import restriction?] had been made with the seller.' According to CISG Nordic, the text of this decision is (as of this writing) 'coming' (id.).

obligor can easily 'overcome' cannot provide an Article 79 exemption,[13] and that unforeseen 'war' qualifies as force majeure.[14]

The fourth—and arguably most interesting—case in this selective collection is *Manfred Forberich*, decided by a U.S. District Court in 2004.[15] For although Harry Flechtner and I later described this as perhaps 'the worst CISG decision in 25 years,' simply because its *homeward-trend* reasoning treats Article 79 as if it were an *American domestic* rule, the court managed to reach the *right result*, at least when viewed from our American-Danish scholarly perspective, thus tending to confirm that Article 79 'does not so much ignore or conceal differences between opposing legal theories as it highlights a surprising degree of substantive agreement—an agreement resting on common fundamental criteria.'[16]

So much for these four, but I had hoped that my thesis predictions might also have implications beyond Denmark and the United States. And if we turn to the many Article 79 decisions which have been rendered by courts in other Contracting States, I think it's fair to say that *most* of these courts have interpreted the rule in an essentially *uniform* way,[17] thus tending to support my 1980 prediction. Most significant among these precedents, I think, is the decision

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13 *Macromex Srl. v. Globex International, Inc.*, U.S. District Court, 16 April 2008, at <http://cisgw3.law.pace.edu/cases/080416u1.html>.

14 *Hilaturas Miel, S.L. v. Republic of Iraq*, U.S. District Court, 20 Aug. 2008, available at <http://cisgw3.law.pace.edu/cases/080820u1.html>.

15 *Raw Materials Inc. v. Manfred Forberich GmbH & Co.*, U.S. District Court, 7 July 2004, available at <http://cisgw3.law.pace.edu/cases/040706u1.html>.

16 See text *supra* with note 11 and Joseph Lookofsky and Harry Flechtner, 'Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?' in 9 *Vindobona Journal of International Commercial Law and Arbitration* (2005/1) 199–208, also at <www. cisg.law.pace.edu/cisg/biblio/lookofsky13.html> (District Court dismissed plaintiff's summary judgment motion because defendant-seller, at trial, might establish elements necessary for Article 79 exemption). See also id. at 203 with note 38, citing Harry Flechtner, 'The CISG in American Courts: The Evolution (and Devolution) of the Methodology of Interpretation,' in *Quo Vadis CISG* (Franco Ferrari, ed. 2005): 'Not one word of [the Manfred Forberich court's] discussion would have to be changed if UCC Article 2 [American domestic sales law] had actually been the applicable law.' To this I add a special note of thanks to my good friend, Harry Flechtner, for reading an earlier draft of the present piece and for providing key insights which helped me improve the *Manfred Forberich* discussion.

17 See generally Joseph Lookofsky, *Understanding the CISG* (4th Worldwide ed. 2012) § 6.19.

rendered by the Supreme Court of Germany in 1999 in the *Vine Wax* case.[18] In that decision, regarding a middleman-seller's liability for damage caused by non-conforming goods, the *Bundesgerichtshof* made it clear that Article 79 *does not alter the basic CISG allocation of risk*, in that the basis of CISG liability is essentially *no-fault* (i.e. 'strict liability' for breach). That made me happy, as I had made a similar point in my thesis (nearly twenty years before):

> 'Article 79's theoretical applicability to defects is thus no cause for buyers to panic. The starting point for resolving the issue of liability for defects is the same as for delay and non-delivery: the defect itself is the relevant allegation (*anbringende*), and article 79 provides no "it-wasn't-my-fault" catchall exemption. Sellers who seek to limit their liability for, e.g., consequential damages may of course do so by contractual modification of the Convention's non-mandatory rules.'

In *Vine Wax* the *Bundesgerichtshof* also confirmed another point which was central to my thesis: that a party who seeks an exemption must prove that the alleged impediment in question lay 'beyond his control';[19] and since every CISG obligor should *always* be 'in control' of his or her own business and financial condition, internal 'excuses' are *never* 'beyond' that party's control.[20] For good reason, the *Vine Wax* decision has subsequently been favorably cited by national courts and CISG scholars alike.[21]

4. Exemption for Hardship?

Although I could also cite and discuss many other Article 79 decisions, I turn now to one rendered by an Italian court in 1993.[22] In this case an Italian seller

18 See Bundesgerichtshof, 24 March 1999, CLOUT Case 271. See also Schlechtriem, *Bundesgerichtshof* (in English at <http://cisgw3.law.pace.edu/cases/990324gl.html>).

19 See Lookofsky, *supra* note 1 at 132: 'the non-performing party must also prove that the impediment was '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.'

20 See Joseph Lookofsky, *supra* note 17, § 6.19, text with note 250.

21 Just Google it: <https://www.google.dk/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=vine+wax+case%2C+cisg>.

22 See the decision by Tribunale Civile di Monza, 14 January 1993, CLOUT Case 54, also available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930114i3.html>.

who had failed to deliver goods as agreed to a Swedish buyer claimed avoidance of the contract by reason of *hardship*, in that the price of the goods—after conclusion of the contract, but before delivery—had increased by almost 30 %. Having determined (incorrectly) that the CISG did not apply to this sales transaction at all,[23] the Italian court nonetheless *opined* that, *even if* the CISG had applied, the seller *could not* have relied on *hardship* (in Italian law: *eccesiva onerosità sopravvenuta*), since the CISG (in the court's view) *pre-empts* the application of domestic rules of hardship.[24]

Before I go further, I should say that neither Nicholas (in 1979) nor I (in 1980) wrote anything about 'hardship' as such. But we did both write about the possibility of a CISG exemption due to an *increase in cost*. Nicholas, for his part, referred to Professor Tunc, who (in his ULIS commentary) had envisaged that an exemption might cover some cases in which nonperformance was 'due to' an unforeseen rise in prices—a possibility which (according to Nicholas) would 'astonish' a Common lawyer (and indeed a French lawyer though not a German).[25] My own, less astonishing, thesis thoughts were these:

> In these inflationary times, the foreseeability of (exorbitant) cost increases is an issue likely to be tested pursuant to article 79. Here the Convention does no more than what could reasonably be expected of a modern statutory provision: provide the framework necessary for the performance of a good judicial determination (*judicium*). But the Convention's starting point in article 45 is *pacta sunt servanda*; and an increase in price is the thing that contracts are designed to protect against. Because of that and because the experience of the last ten years has made such cost changes more foreseeable than formerly, 'hard-nosed' deci-

23 Whereas the court *correctly* held that the CISG did not apply by virtue of Article 1(1)(a), since the Convention was not in force in Sweden when the contract was made, the court *incorrectly* excluded the Convention on the ground that the parties had chosen 'Italian law' (which, the court failed to understand, includes the CISG). See the CLOUT abstract and compare Franco Ferrari's well-justified critique in 'Uniform Law of International Sales: Issues of Applicability and Private International Law,' 15 *Journal of Law & Commerce*, 174 (1995).

24 The explanation (according to the CLOUT abstract) is that 'hardship is not a matter expressly excluded in Article 4 CISG from the scope of the Convention.' See also the English translation available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930114i3.html>: 'the Convention [...] if it were applicable to the case, *would preempt* the general law of Article 1467 et seq. of the Civil Code.'

25 See Nicholas, *supra* note 10, text with notes 27-28.

> sions are likely to be handed down by American and Scandinavian courts pursuant to the Convention.[26]

In 2005, I co-authored a discussion of hardship within the context of Danish domestic contract law,[27] and I also wrote about the just-cited Italian case in CISG context.[28] Since I could not then find other CISG precedents on point, I speculated as to what other courts or tribunals might do if faced with a hardship claim in a nightmarish devaluation situation like this:[29]

> Seller A in State X makes a contract to sell goods to buyer B in State Y 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.

Now, if this contract had been made subject to 'the law of X' (a Contracting State), the CISG would surely apply,[30] but would the case then fall solely within Article 79? To put the same question another way: if X was the Netherlands (where hardship is recognized)[31] or Denmark (with its infamous General Clause),[32] should Article 79 *pre-empt* the application of Dutch or Danish

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26 Lookofsky, *supra* note 1, at 132.

27 See Mads Bryde Andersen and Joseph Lookofsky, *Lærebog i Obligationsret* (2nd ed. 2005) § 5.1.h.

28 See Joseph Lookofsky, 'Impediments and Hardship in International Sales', 25 *International Review of Law & Economics* (2005) 434, available at <www.cisg.law.pace.edu/cisg/biblio/lookofsky17.html>; Joseph Lookofsky, 'Walking the Tightrope between CISG Article 7 and Domestic Law', 25 *Journal of Law & Commerce* (2006), available at <www.cisg.law.pace.edu/cisg/biblio/lookofsky16.html>.

29 This example was based on a similar Illustration in the 2004 version of Unidroit Principles Article 6.2.2 (*Definition of Hardship*).

30 See Lookofsky, *supra* note 17, § 2.7.

31 Article 6.258(1) of the New Dutch Civil Code provides: 'Upon the demand of one of the parties, the court may modify the effects of a contract or it *may set it aside, in whole or in part*, on the basis of unforeseen circumstances of such a nature that the other party, according to *standards of reasonableness and fairness*, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect.' Emphazis added here.

32 The black letter of this General Clause expressly authorises a court to deny enforcement of—or amend—*any unreasonable contract or term*, and that includes a term

domestic law? Or should the international and domestic rules be allowed to *compete*?

In 2005, in the absence of any non-Italian hardship precedents, I took my Article 79 crystal ball out of retirement and *predicted* that at least *some* courts faced with my devaluation-nightmare hypothetical would opt for rule-*competition* (as opposed to pre-emption), particularly in CISG jurisdictions (such as Denmark) where the applicable domestic law provides authority for *modification* of contract terms which have become unduly burdensome.

In 2007, however, the 'CISG Advisory Council' rejected my theory, and in 2009, the highest court in Belgium rendered its decision in the *Scafom* case,[33] a decision which accords better with the Council's view than mine. But before I say more about *Scafom*, let's take a quick look at the special nature of CISG 'case law' as well as CISG 'scholarship'.

5. CISG case law: An orchestra without a conductor

Since the many CISG Contracting States have entered a 'contract among nations,' the courts in these States are bound (by public international law) to apply the Convention to all transactions within the treaty's scope. These national courts are also bound to promote *uniform* CISG interpretation and application, this by having 'regard' to CISG decisions in other jurisdictions.[34]

And indeed, as courts in the many CISG Contracting States have applied the Convention in thousands of CISG cases, creating a mountain of CISG 'case law,'[35] I think the result overall is a *largely harmonious* body of jurisprudence, not only in relation to liability exemptions under Article 79, but with respect to countless other CISG issues as well.

Still, the CISG 'case-law' conception remains problematical, in part because no higher (supra-international) court has the authority to promote (truly) uniform CISG interpretation. And since no court can iron out differ-

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which *becomes unreasonable* after the contract is made. See generally Joseph Lookofsky, 'The Limits of Commercial Contract Freedom under the UNIDROIT 'Restatement' and Danish Law,' 46 *American Journal of Comparative Law* (1998) 485, 496 ff., also available at <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky6.html>.

33 See Hof van Cassatie/Cour de Cassation, Belgium, 19 June 2009, at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

34 See generally, Lookofsky, *supra* note 17, § 2.9.

35 See (e.g.) 3,000 CISG cases and 10,000 case annotations at <http://www.cisg.law.pace.edu/cisg/text/casecit.html>.

ences in opinion among sovereign national instances, the judges in the CISG national court collective resemble 'members of an orchestra without a conductor,'[36] musicians who don't always play the same tune.[37] Indeed, in the case of hardship, the highest court in Belgium struck what (for many observers) sounds like an awfully sour note.[38]

6. CISG scholarship: The expansionist majority

Given the discord in parts of CISG case law, we should hardly be surprised to find those diverging strains amplified by a contentious academic choir. Indeed, a sampling of recent CISG scholarship reveals that even the *scope* of the treaty seems controversial in some respects, not least as regards ongoing academic disagreement about which 'matters' (issues/subjects) the Convention was designed to cover (regulate) and about how arguably covered matters should be 'settled.' In this context, many academics read the Convention with an 'expansionist' lens,[39] arguing (e.g.) that hardship is a matter 'governed but not settled' by the Convention and one which should be settled by resort to unwritten CISG 'general principles,'[40] this even though the Convention makes no mention of hardship or hardship-like-remedies whatsoever.

Noteworthy in this connection is the expansionist opinion on hardship issued by the so-called 'CISG Advisory Council':

> 'The Advisory Council is, quite obviously, not an 'international legislature' [...] [it] is comprised merely of self-appointed representatives of the CISG scholarly community. It is certainly a distinguished group of scholars, but organizing themselves into a (private) body gives their opinions no more inherent authority concerning the meaning of the CISG than the opinions of other scholars: Advi-

36 Peter Schlechtriem, 'Uniform Sales Law in the Decisions of the Bundesgerichtshof,' in English at <http://cisg.law.pace.edu/cisg/biblio/schlechtriem3.html>, p. 2.

37 See Joseph Lookofsky, 'Digesting CISG Case Law: How Much Regard Should We Have?' *Vindobona Journal of International Commercial Law and Arbitration* (2004), Vol. 8(2), pp. 181-195, also available at <www.cisg.law.pace.edu/cisg/biblio/lookofsky9.html#jlfn49>.

38 See *infra*, head 7.

39 See Joseph Lookofsky, 'Not Running Wild with the CISG,' 29 *Journal of Law & Commerce* 141 (2011), also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376353>.

40 See generally *infra* under head 7.

> sory Council opinions have authority only insofar as they present a *convincing* analysis.'[41]

In the eyes of the CISG expansionists, the real 'evil-doers' are the non-expansionists, including those who (like me) often advocate a greater degree of rule-competition along the borderline between the CISG and domestic law, thus allowing (e.g.) domestic hardship solutions to supplement the Convention's own liability regime.

7. Hardship: The UNIDROIT Principles and the Scafom precedent

As already suggested, a difficult question arises as to the relationship between the more typical (*force majeure*-type) impediments, which are clearly covered by the exemptions rule in CISG Article 79, and situations which fall under the arguably separate heading of 'hardship,' as that term is typically understood in domestic systems and also within the field of international commercial law. As defined in the UNIDROIT Principles, artikel 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.[42]

For situations which qualify as hardship under this definition, the UNIDROIT Principles make the following remedial relief available to the disadvantaged obligor:

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41 See Harry Flechtner and Joseph Lookofsky, 'Zapata Retold: Attorneys' Fees are (Still) Not Governed by the CISG,' 26 *Journal of Law and Commerce* 1, 7 (2007), available <http://ssrn.com/abstract=1334299>.

42 Unidroit Principles of international commercial contracts (2004 edition), Article 6.2.2 (*Definition 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.[43]

Given the affinity between situations (international sales scenarios) which might be categorized either as hardship and/or as 'economic *force majeure*,' one might assume that the disadvantaged obligor in such situations might have a choice: either to seek relief in the rules for hardship or under Article 79.[44] But (apart from me) few CISG scholars share that view.

Professor Harry Flechtner, for example, has proposed *exclusive* use of the black letter formula of Article 79 to 'settle' the hardship question, such that the only relief (if any) available to a CISG obligor disadvantaged by economic dislocation would be a difficult-to-obtain liability exemption under Article 79.[45]

A second position, adopted by the CISG Advisory Council, prefers to describe hardship as a 'matter' which is 'governed' but not 'settled' by the CISG, arguing that this matter can and should be settled on the basis of CISG *general principles*, including unwritten principles which might be said to lie between the lines of Article 79.[46]

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43 Id., article 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.

44 See (re. hardship and *force majeure*) id., Article 6.2.2 (*Definition of Hardship*), Comment 6, making it clear that in situations which can, at the same time, be considered as cases of hardship and *force majeure* (Article 7.1.7), it is for the party affected to decide which remedy to pursue.

45 See generally 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 Law Review (2011) no. 3 pp. 84–101, also available at <http://cisgw3.law.pace.edu/cisg/biblio/flechtner10.html> (decision by Belgian Court of Cassation, holding CISG incorporates, as part of its general principles, hardship provisions of UNIDROIT Principles, distorts meaning of CISG and threatens its political legitimacy).

Last but not necessarily least is my own view, which would allow the CISG and other (domestic or international) rule-sets to co-exist, such that the exemption rule in Article 79 might, depending on the concrete circumstances, be *supplemented* by *domestic* rules designed to regulate hardship.[47] One justification for this approach lies in the fact that the remedies traditionally associated with *force majeure* and hardship are fundamentally different, just as (I would argue) the 'force majeure' rule in Article 79 and rules of 'hardship' have very different functions.[48]

Returning now to the 2009 decision of the Supreme Court of Belgium (*Cour de cassation*) in the *Scafom* case, a French seller (S) refused to deliver steel to Dutch buyer (B) due to a post-contractual 70 % increase in costs. When B (who had purchased the steel for the manufacture of scaffolding by its Belgian affiliate, BA) refused to renegotiate the price, S sued B and BA for the difference between the contract price and the increase in cost. As it turned out, the highest Belgian court opted for a solution essentially in line with the second (CISG AC/expansionist) approach outline above:[49] Having discerned a CISG 'gap' on the question of whether to *adapt the terms of the contract*, the court used CISG Article 7(2) to fill that gap, in particular by applying the 'general [CISG] principle' of good faith as a basis for amending the contract and requiring the buyer to pay an additional 450,000 beyond the original price.[50]

46 See CISG Advisory Council Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Comments 35-40 (2007), available at <www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=169>.

47 See Lookofsky, *supra* note 28; Lookofsky, *supra* note 39.

48 See Lookofsky, *supra* note 39. Note in this connection that the CISG is generally 'not concerned' with rules of *validity* (Article 4). In my opinion, hardship is a *validity-related* conception. And since the Convention drafters were not prepared to legislate on sales contract validity, they can hardly have intended to put hardship into the Convention 'through the back door', especially since hardship is a blood relative to other validity-based defenses to (sales) contract enforcement which courts use to police contracts for unfairness.

49 By contrast, the Belgian *intermediate* court had applied reasoning quite similar to the PIL approach I have suggested for such cases: see Flechtner, *supra* note 45, text with note 25.

50 Hof van Cassatie/Cour de Cassation, Belgium, 19 June 2009, 19 June 2009; [Supreme Court], available at <http://cisgw3.law.pace.edu/cases/090619b1. html>.

Whether courts in other countries will follow this dubious Belgian lead, or whether they will prefer one of the other hardship solutions outlined above, remains an open question.[51]

8. Conclusions

Because there is no established scale to evaluate the 'weight' of CISG foreign precedent, the persuasive or unpersuasive nature of any given foreign decision will depend on various factors, including the force of the reasoning in the foreign opinion and the apparent soundness of the result; it may also depend on the prominence of the foreign court and whether the decision has support in other jurisdictions.[52]

I have elsewhere argued that the reasoning applied by the highest Belgian court in the *Scafom* case is not persuasive,[53] and I have therefore argued that it ought not be followed in other jurisdictions. At the same time, I have argued that the expansionist hardship view expressed by the CISG Advisory Council, which opposes my view, is equally unpersuasive (to say the least).[54]

That said, I acknowledge that the Article 79 predictions I made in my 1980 student thesis and the academic hardship predictions I made in 2005 did not all pan out as I had hoped. And so if someone were now to ask me to predict the *post-Scafom* future of hardship, I might simply cite an often-used Danish saying: 'It's difficult to make predictions, especially about the future.'[55]

51 For a commentary highly critical of the Belgian decision, see Flechtner, *supra* note 45; see also Lookofsky, *supra* note 39.

52 Lookofsky, *supra* note 37, p. 186.

53 Lookofsky, *supra* note 39.

54 For a full critique in rebuttal to the CISG AC position, see id.

55 *Det er svært at spå, især om fremtiden.*