

**CHANGE OF CIRCUMSTANCES IN INTERNATIONAL
INSTRUMENTS OF CONTRACT LAW.
THE APPROACH OF THE CISG, PICC, PECL AND DCFR.**

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CONTENTS

1	<i>Introduction</i>	233
2	<i>The Approach of the CISG</i>	235
3	<i>The Approach of Non-Legislative Codifications- the PICC, the PECL & the DCFR</i>	246
4	<i>Conclusion</i>	263

1 INTRODUCTION

The subject of change of circumstances, hardship, *Wegfall der Geschäftsgrundlage*, *ecessiva onerosità* or *imprévision*¹; i.e. the situation where the performance of the contract has become excessively onerous or difficult for one of the parties due to unforeseen circumstances after the conclusion of that contract, is a polemic and controversial one. It is frequently introduced as a conflict between principles (*pacta sunt servanda* and *rebus sic stantibus*) or values (certainty and justice). Both under the civil and common law a great amount of scholarly writing have been produced and judicial decisions (especially from superior courts) are always subject to critical reviews and comments.

The present paper will analyse the approach of four different international instruments of contract law concerning the subject: the Convention on Contracts for the International Sale of Goods (**CISG**)², the UNIDROIT Principles of International Commercial Contracts (**PICC**)³, the Principles of European Contract Law (**PECL**)⁴

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¹ There is a great variety in the denomination of the subject. However, nowadays hardship and a change of circumstances seem to be more readily recognised in international contract law and therefore such expressions will be used in this paper.

² United Nations Convention on Contracts for the International Sale of Goods, Vienna (1980), (hereinafter 'CISG').

³ UNIDROIT Principles of International Commercial Contracts (2004), (hereinafter 'PICC').

and the Draft Common Frame of Reference (DCFR)⁵. One of these instruments, the CISG, is an international convention and is therefore binding for the states parties. The other three can be considered as soft-law or non-legislative codifications in the sense that they are not based on a sovereign's will and have been drafted outside the political sphere of states and governments.⁶ In spite of their different nature and origins, all are nowadays relevant and their study cannot be avoided in the field of comparative contract law.⁷

Thus, before the publication of the DCFR, it was argued that the PICC and the PECL could be considered as the more relevant set of modern principles of contract law, at least from an academic point of view.⁸ Internationally, both are competitors and they are comparable in many respects: their preparation, drafting and aims, especially the purpose of being a restatement of contract law and then serving as a model for national legislators or as the applicable law when the parties have agreed thereon.⁹ Nowadays, the more recent DCFR must also be taken into account because of its declared purpose to be a model for a political Common Frame of Reference (CFR) in contract law, and especially to be an academic instrument for the analysis of and research into European private law. Moreover, without considering the criticism about the drafting procedure or the substantive solutions included therein, the DCFR "is likely to play a prominent role in the further development of European contract law", even if it remains, to a great extent, pure soft law.¹⁰

On the other hand, the CISG has generally been considered as a success and has even been described in terms of being the "greatest legislative achievement aimed at harmonizing private commercial law"¹¹. Although such a statement can indeed be contested, the importance of the CISG should not be underestimated: it is in force in seventy six countries, is increasingly applied by domestic and international courts and

⁴ Principles of European Contract Law (1999), (hereinafter 'PECL').

⁵ Draft Common Frame of Reference (2009) (hereinafter 'DCFR').

⁶ See Jansen, N., *The making of legal authority: non-legislative codifications in historical and comparative perspective*, 2010, Oxford University Press, Oxford, at p. 7.

⁷ The examination of the process of harmonisation of international contract law and, in particular, of European private law is outside the scope of this paper. The scholarly literature is abundant concerning the subject. See for instance, Bonell, M.J., "The CISG, European Contract Law and the Development of a World Contract Law" (2008) 56 *The American Journal of Comparative Law* 1. Zimmermann, R., "The Present State of European Private Law" (2009) 57 *The American Journal of Comparative Law* 479.

⁸ See Hondius, E., "Current developments. European Private Law. Survey 2002-2004" (2004) 12 *European Review of Private Law* 855, at p. 863.

⁹ See Zimmermann, *supra* fn 7, at pp. 6-7.

¹⁰ See Hesselink, M.W., "CFR & Social Justice: A Short Study for the European Parliament on the Values Underlying the Draft Common Frame of Reference for European Private Law-What Roles for Fairness and Social Justice?" (2008) Centre for the Study of European Contract Law Working Paper Series, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270575>, at p. 70.

¹¹ Lookofsky, J., "Loose Ends and Contorts In International Sales" (1991) 39 *The American Journal of Comparative Law* 403, at p. 403.

it has influenced both directly and indirectly, a number of domestic legislations, including EU legislation as in the case of the Consumer Sales Directive.¹²

2 THE APPROACH OF THE CISG

It is disputed in legal doctrine whether the notion of a change of circumstances is applicable to a contract regulated by the CISG. Part of the legal doctrine argue that under the CISG a party can only seek relief if its performance has become impossible, but others extend that possibility to cases of severe hardship due to changed circumstances. The subject will be analysed in the following sections, together with an overview of the system of exceptions and of gap filling of the CISG, which is necessary for a proper understanding of the matter.

2.1 THE CISG SYSTEM OF EXEMPTIONS

The CISG is usually regarded as a system of strict contractual liability because a party is liable for all events within its control independently of its negligence.¹³ Articles 79 and 80 provide the only available relief for a party who has failed to perform: it has to prove that the failure was due to an impediment beyond its control and which was reasonably unexpected at the time of contracting.¹⁴

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.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

¹² For a detailed analysis of the influence of the CISG on international and domestic contract law, see Ferrari, F. "The CISG and its Impact on National Contract Law – General Report" in Sánchez Cordero, J. (ed), *The Impact of Uniform Law on National Law. Limits and Possibilities*, 2010, Inst. de Investigaciones Jurídicas: México D.F.

¹³ Lindström, N., "Changed Circumstances and Hardship in the International Sale of Goods" (2006) *1 Nordic Journal of Commercial Law* 2, at p. 2.

¹⁴ Article 80 will be not analysed because it is irrelevant for the purposes of this paper.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

*(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.*¹⁵

Based on the text of the above cited article, legal doctrine has usually determined the following prerequisites for a party to claim the application of the exemption: (a) the existence of an impediment beyond its control; (b) which is unforeseeable at the time of the conclusion of the contract; and (c) which is unavoidable (either the impediment itself or its consequences). The mentioned prerequisites are also subject to the principle of reasonability.¹⁶

The above-mentioned articles merely provide an exemption from damages to the breaching party. The other remedies provided by the CISG remain in principle available, although that can be qualified regarding the circumstances of the particular case.¹⁷ Article 79 was drafted with the express intention to create an autonomous concept to grant relief to the non-performing party to an international sales contract, in order to avoid the influence of related domestic law concepts in a particular case.¹⁸

2.2 GAP-FILLING IN THE CISG

The examination of the CISG's system of gap filling is relevant because it has been argued that the notion of a change of circumstances is a matter which is not expressly resolved by the CISG and therefore should be settled by the application of Art. 7.2. In this regard, the CISG provides for a clear (in theory) system of gap filling. In matters not expressly regulated by it, but that can be considered to be included within its scope, Art. 7.2 provides:

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

¹⁵ CISG, *supra* fn 2, Art. 79.

¹⁶ Lindström, N., *supra* fn 134; Lookofsky, J. "Impediments and Hardship in International Sales: A Commentary on Catherine Kessedjian's 'Competing Approaches to Force Majeure and Hardship'" (2005) 25 *International Review of Law and Economics* 434.

¹⁷ The other main remedies available to the non-breaching party are specific performance, avoidance of the contract and a reduction in the contract price. But, for instance, the right to claim specific performance is necessarily related to the nature and extent of the excusing impediment. See Garro, A.M., "Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG" (1994) 69 *Tul. L. Rev.* 1149.

¹⁸ See Lindström, N., *supra* fn 134, at p.5; and Kruisinga, S., *(Non-) Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?*, 2004, Intersentia Uitgevers NV, Antwerp, at p.125.

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.

Thus, if a legal situation is considered to be governed under the scope of the CISG (and therefore not rejected by it) but it is not expressly or completely regulated by the CISG, the matter has to be resolved by referring to the general principles on which the CISG is based. However, the CISG fails to determine or express any general principles.¹⁹ With the exception of the principle of good faith mentioned in Art. 7.1, it has been legal doctrine which has deduced some general principles from the provisions of the CISG itself, e.g. the principles of reasonableness, *favor contractus*, or mitigation.²⁰ Nevertheless, it is argued that those general principles cannot only be deduced from the text of the CISG, but also from external principles which are considered to be general principles of international trade or commerce.²¹

In this sense, the PICC have been considered to be adequate to complement and fill the eventual gaps in the CISG. The goal of uniformity in the application of the CISG and the task of the courts will be facilitated with the use of the PICC in the context of Art. 7.2.²² Such a purpose is expressly laid down in the Preamble to the Principles: “[These Principles] may be used to interpret or supplement international law instruments”²³. It is added that reasons of fairness also support the application of the PICC since resorting to uniform law is better in that it equally protects the interest of both parties rather than solving the dispute according to some domestic jurisdiction which may benefit only one of them.²⁴ The avoidance of the threat to uniformity and conceptual autonomy that a reference to domestic solutions represents seems to be the general background on which the applicability of the PICC relies.²⁵

Nevertheless, the assertion that the PICC incorporate or represent general principles of international trade must be qualified concerning some points. The PICC state in their introduction that in some matters the texts adopted were considered as the “best solutions, even if still not yet generally adopted”²⁶. The CISG was an obligatory point of reference for the Working Group and some of its provisions were incorporated in

¹⁹ Kruisinga, S., *supra* fn 18, at p.18.

²⁰ Lindström, N., *supra* fn 13, at p. 20.

²¹ *Ibid.*

²² Bonell, M.J., "UNIDROIT Principles of International Commercial Contracts and CISG- Alternatives or Complementary Instruments" (1996) 1 *The. Unif. L. Rev.* 26, at pp.34-36. But see Schlechtriem, P. and Schwenzer, I., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2010, Oxford University Press, Oxford, at p. 139 sets of rules such as the PICC, the PECL or the DCFR “are not principles on which [the CISG] is based as required by the wording of article 7.2” and therefore “they may only serve as an additional argument for a solution advocated when filling internal gaps”.

²³ UNIDROIT Principles, *supra* fn 3, at p.1.

²⁴ Garro, *supra* fn 178, at p. 1159.

²⁵ See Kruisinga, S., *supra* fn 18, at pp. 18 ff.

²⁶ PICC, Introduction, XV.

the Principles, but at the same time in other matters UNIDROIT did derogate from or expand upon the CISG when this was considered appropriate.²⁷

This latter approach was adopted with regard to hardship, with the approach of both instruments being completely different with regard to the remedies adopted by Art. 79 of the CISG and Art. 6.2.3 of the PICC. In addition, it is far from clear that the provisions of the PICC on this subject represent internationally recognised principles, especially taking into account the different approaches of the civil and common law.

Thus, the most problematic of the eventual remedies in cases of changed circumstances under the PICC, i.e. adaptation of the contract by the court, is completely unfamiliar to the common law tradition. In English common law, frustration²⁸ terminates the contract with effect from the time of the frustrating event: if a contract is frustrated, each party is released from any further obligation to perform.²⁹ Furthermore, frustration operates automatically irrespective of the wishes of the parties and may therefore be invoked by either party, not only by the party affected by the supervening event.³⁰ Consequently, as a general principle, English common law does not provide mechanisms for adjusting contracts where a substantial change in circumstances has occurred "so each party loses the benefit of the bargain and each party bears his own reliance losses"³¹. On the other hand, under the U.S. doctrine of commercial impracticability,³² the provisions of the Uniform Commercial Code (UCC) and the Restatement (Second) of Contracts provide a number of mitigating doctrines (e.g. restitution, reliance damages) to avoid the negative effects of the complete discharge of the contract and even the comments of the relevant provisions have been interpreted as giving the court the power not only to decide on a fair distribution of losses, but also to adapt the terms of a contract for future performance; in practice the courts have been extremely reluctant to adjust a

²⁷ *Ibid.* See also Slater, S.D., "Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG" (1998) 12 *Fla. J. Int'l. L.* 231, at p. 231.

²⁸ Under English common law the term frustration of contract includes at least three different situations: the case where performance has become physically or legally impossible, the case where performance has become impracticable (i.e. extremely onerous or difficult) and the case where a counter-performance has lost its value to the creditor (frustration of purpose). See Kull, A., "Mistake, Frustration, and the Windfall Principle of Contract Remedies" (1991) 43 *Hastings L. J.* 1, at p. 1; and Treitel, G., *Frustration and Force Majeure*, 2004, Thomson Sweet & Maxwell, London.

²⁹ Beale H.G. et al., *Contract. Cases and Materials*, 2001, Butterworths, London, at p. 482.

³⁰ McKendrick, E., "Frustration and Force Majeure - Their Relationship and Comparative Assessment" in McKendrick, E. (ed), *Force Majeure and Frustration of Contract*, 1991, Lloyd's of London Press Ltd., London, at p. 38. For a detailed analysis see Treitel, G., *supra* fn 29, at pp. 545ff. But if frustration is a consequence of a deliberate act by one of the parties, this party cannot rely on frustration although the counterparty is entitled to do so.

³¹ Kull, A., *supra* fn 289, at p.18; see also Beale H.G. et al., *supra* fn 30, at p. 886.

³² Impracticability is usually defined as excused performance for the party that suffers extreme, unreasonable and unforeseeable hardship due to an unavoidable event or occurrence, Williston, S. and Lord, R.A., *A Treatise on the Law of Contracts*, 1990, Thomson/West, Rochester, New York, at S. 77:11, p. 2.

contract to supervening circumstances³³ Thus, the only decision which has clearly modified the future performance of a contract through an equitable adjustment is *Aluminium Co. of America v. Essex Group, Inc.*³⁴ Nevertheless, despite the revolutionary approach of the court and the extensive literature on the controversial case, the decision was not followed in later cases and only two judges (one concurring opinion in the West Virginia Supreme Court and one Federal magistrate judge in New Jersey) have embraced the rule.³⁵

On the contrary, ‘continental’ solutions mostly provide an (at least implicit) duty to renegotiate and the possibility to adjust the contract by the court as the legal consequences of changed of circumstances. Thus, Art. 6:258 (complemented by Art. 6:260) of the *Dutch Civil Code* (Burgerlijk Wetboek – BW) and S.313 of the *German Civil Code* (Bürgerliches Gesetzbuch – BGB) deal expressly with the effects of unforeseen circumstances giving to the Court the power to modify or terminate the contract in that case. Similar provisions are contained in the *Portuguese Civil Code* and *Greek Civil Codes*. Along the same lines, Italian case law has interpreted Art. 1467 of the *Italian Civil Code* as giving the Courts the power to adapt the contract to the new circumstances; however, the text of the provision only grants the affected party the right to terminate the contract and the advantaged party the right to offer an equitable modification. The French and Belgian rejection of *imprévision* seems to be the main exception to this trend. Finally, the acceptance of hardship and its effects on the binding force of contracts is also replicated in non-European civil law jurisdictions.³⁶

2.3 *HARDSHIP UNDER THE CISG*

There is no doubt that Art. 79 of the CISG is applicable to situations of *force majeure*, i.e. cases where performance has become completely impossible. However, the answer is more difficult when the question is whether the exemption under Art. 79 is also applicable to situations of hardship. Legal doctrine is divided on this and the case law is too thin on the ground to give a definitive answer.³⁷

³³ Trakman, L.E., "Winner Take Some: Loss Sharing and Commercial Impracticability" (1984) 69 *Minn. L. Rev.* 471, at p. 471; Hillman, R.A., "Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law" (1987) 1987:1 *Duke L. J.* 1, at p. 1.

³⁴ *Aluminium Co. of America v. Essex Group, Inc.* 499 F. Supp. 53 (W.D. Pa. 1980), (hereinafter ‘Alcoa’).

³⁵ *McGinnis v Cayton*, 312 S.E.2d 765 (W. Va. 1984); *Unihealth v U.S. Healthcare Inc.*, 14 F. Supp. 2d 623 (D.N.J. 1998). See White, J.J., and Peters, D.A., "A Footnote for Jack Dawson" (2002) 100 *Mich. L. Rev.* 1954, at p.1973, noting that although both opinions referred to Alcoa, the facts and final outcomes of the cases do not follow the decision.

³⁶ The Civil Codes of Argentina, Brazil, Peru and Paraguay expressly admit a change of circumstances as a ground for relief for the affected party. The main exception is Chile, where the doctrine of *imprevisión* has been rejected by the Courts.

³⁷ See Garro, A.M., "Comparison between provisions of the CISG regarding exemption of liability for damages (Art. 79) and the counterpart provisions of the UNIDROIT Principles (Art. 7.1.7)," (2005), available at: <<http://www.cisg.law.pace.edu/cisg/principles/uni79.html#giv>>.

Therefore, the first issue to be ascertained is whether hardship is an exemption which is excluded or even rejected implicitly or expressly by the CISG. If the answer to this question is in the affirmative, then the party who fails to perform because of hardship commits a breach of contract and is therefore liable under the CISG. On the other hand, if the answer is that hardship is a matter which is covered by the CISG, two alternatives are possible: the issue is regulated by Art. 79 or it is a matter which is governed by the CISG but is not expressly resolved therein, and must therefore be settled in conformity with the general principles on which the CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.³⁸ A variation of the second alternative is also possible: hardship is governed by Art. 79, but the CISG does not regulate in exact terms how cases of changed circumstances have to be decided upon, as such, Art. 7.2 is applicable again.³⁹

Part of the legal doctrine has argued that a party cannot seek relief for breach of contract under the CISG on grounds different from those provided by Art. 79, which excludes hardship. Thus, it has been stated that “Art. 79 CISG only governs impossibility of performance and the majority of academic opinion supports that a disturbance which does not fully exclude performance, but makes it considerably more difficult/onerous (*e.g.*, change of circumstances, hardship, economic impossibility, commercial impracticability, *etc.*) cannot be considered as an impediment (doctrine of *clausula rebus sic stantibus*)”⁴⁰. The main reasons in support of that interpretation are the legislative history of the provision which resulted in a rule which is stricter than its ‘predecessor’ Art. 74 of the ULIS and the rejection of proposals for the incorporation of an express provision on the subject.⁴¹

Additionally, it has been argued that the principle of good faith cannot be a ground to discard solutions expressly regulated by provisions of the CISG, which has opted for

³⁸ See Art. 7.2 of the CISG; and Lindström, N., *supra* fn 134, at pp. 11-12.

³⁹ Krusinga, S., (*Non-*) *Conformity*, *supra* fn 18, at, p. 153.

⁴⁰ Flambouras, D., "Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108. (2002) available at: <<http://www.cisg.law.pace.edu/cisg/text/pcelcomp79.html#er>>.

⁴¹ See references in Lindström, N., *supra* fn 134, at pp. 14-15; Rimke, J., "Force majeure and Hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts 2000" (1999) available at: <<http://www.cisg.law.pace.edu/cisg/biblio/rimke.html>>, at pp. 197-243: stressing that the history of Art. 79 rules out the assumption of the existence of a gap on the subject. But see Garro, A.M., "Comparison", *supra* fn 378, at s. IV.12, arguing that: “the drafting history of the Convention evidences that the discussions were not sufficiently conclusive on this question”; and Garro, A.M., “CISG Advisory Council Opinion No. 7 I. Exemption of Liability for Damages Under Article 79 of the CISG” (2008) 1 *Nordic Journal of Commercial Law* 1, available at: <http://www.njcl.fi/1_2008/commentary1.pdf>, .stating that: the historical background is insufficient to warrant the conclusion that CISG Article 79 cannot exempt a party from performing its obligations, in whole or in part, when the impediment is represented by a totally unexpected event that makes performance excessively difficult.

a unitary concept of exemptions under Art. 79 and has therefore discarded the theory of changed circumstances.⁴² It has also been stressed that the use of good faith as the legal basis of situations of changed circumstances on international trade would endanger the aim of uniformity of the CISG, because it gives too much room for divergent judicial interpretation.⁴³

On the other hand, some have argued that changed circumstances are matters which are regulated by Art. 79 of the CISG. The main arguments are related to the concept of impediment and the reasonable overcoming of its consequences by the affected party. Thus, Lando states that the rule of Art. 79 is applicable to both situations of total impossibility and situations where performance has become severely burdensome so that it would be unreasonable to expect performance.⁴⁴ It has been added that the relevant issue is to determine what effort a party can reasonably be expected to make in order to overcome the consequences of the impediment. The conclusion is that Art. 79, interpreted in the light of the observance of good faith in international trade, cannot be read as imposing on the affected party an obligation to take on extraordinary responsibilities in order to perform.⁴⁵ Therefore, the 'limit of sacrifice' is linked to the reasonability standard.⁴⁶

Honnold states that the concept of impediment in Art. 79 has to be interpreted in the sense that such an impediment must prevent performance, even though that does not mean that such performance has become literally impossible "but rather such extreme difficulty in performance as amounts to impossibility from a practical (although not technical) point of view" has arisen.⁴⁷ Therefore, economic difficulties and dislocations can also be considered as an impediment in the context of Art. 79 if they are sufficiently extreme.⁴⁸ Fletcher, supplementing Honnold's opinion, argues that however economic difficulties may configure an excuse on the grounds of Art. 79, this provision must preclude recourse to domestic rules and national hardship-like doctrines because Art. 79 exhaustively regulates the effect of changed circumstances on the parties' obligations. Accordingly, the system of remedies under Art. 79 must

⁴² Tallon, D., "Article 79" in Bianca-Bonell, *Commentary on the International Sales Law*, 1987, Giuffrè, Milan, at pp. 572 - 595, available at: <<http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html>>. In the same sense see also: Slater, S.D., *supra* fn 27, at p. 259, who states that "no remedy based on hardship is available [under CISG] and that the nonperforming party is not excused from performing his or her contractual obligations".

⁴³ Rimke, J., *supra* fn 41.

⁴⁴ Lando, O., *Udenrigshandelens kontrakter*, 1987, 3rd ed. DJØF Forlag, Copenhagen, at p. 299; cited by Lindström, N., *supra* fn 13, at p.13.

⁴⁵ *Ibid.*

⁴⁶ Schlechtriem, P. and Schwenzer, I., *Commentary*, *supra* fn22, at p. 1076 stating that "as a rule, price fluctuations amounting to over 100 per cent do not yet constitute a ground for exemption".

⁴⁷ Honnold, J. and Flechtner, H.M., *Uniform law for international sales under the 1980 United Nations Convention*, 2009, Kluwer Law International, Alphen aan den Rijn, at pp. 628 and 432.2.

⁴⁸ Evidently, also the other conditions in Art. 79 must be fulfilled to grant relief to the breaching party.

prevail over any other alternatives provided by the mentioned doctrines (e.g. the duty to renegotiate or the adaptation of the contract by the court).⁴⁹

With regard to the remedies, Art. 79(5) provides that “[n]othing in this article prevents *either* party from exercising any right other than to claim damages under this Convention” (emphasis added). Hence, the party affected by hardship may request the avoidance of the contract and, if it is appropriate for overcoming the hardship, a reduction of the contract price. Both remedies may be used, to a certain extent, as devices to distribute the losses resulting from the disruptive event affecting the parties and therefore to ‘adapt’ the contract to the changed conditions.⁵⁰ In the same sense, it has been argued that the mechanism of remedies provided by the CISG, combined with the duty to mitigate (if considered as a general principle) may lead in practice to flexible results to be adopted by a court.⁵¹

It has also been argued that the remedy of a price reduction in Art. 50 is a reflection of a general principle of the CISG with regard to an adjustment or an adaptation to the contract in cases where there is a disturbed equilibrium between the counter-performances that can be used “as a springboard to develop a general rule of adjustment in hardship cases”⁵². In the same sense, the principle of good faith has been used to establish an obligation to cooperate in the adjustment of the contract and to grant to the court the power to adapt the contract by interpreting the intention of the parties in the light of the aforementioned principle.⁵³ The mentioned principle has

⁴⁹ Honnold, J. and Flechtner, H.M., *supra* fn47, at pp. 630-632, 432.2. In the same sense, Rimke, J., *supra* fn 41, stating that, “Despite the fact that Article 79’s ‘impediment’ connotes a barrier that prevents performance, it refers to a more flexible standard than force majeure [...] The adaptation of the contract by the judge, however, is not expressly allowed by the CISG, and must therefore be regarded as impossible”.

⁵⁰ In this sense, it has been stated that “CISG Article 79(5) may be relied upon to open up the possibility for a court or arbitral tribunal to determine what is owed to each other, thus ‘adapting’ the terms of the contract to the changed circumstances. Other than the payment of damages, a court or arbitral tribunal may order, if justified under the CISG, the termination of the contract as of a certain date. Of course, it is impossible to require specific performance as called by the contract, but a flexible method for the purposes of adjusting the terms of the contract may be obtained by resorting to price reduction under CISG Article 50” in Garro, A.M., “Comparison”, *supra* fn 37, at IV.16; and CISG-AC Op. No.7, *supra* fn 41, at p.40.

⁵¹ Schwenger, I., “Force Majeure and Hardship in International Sales Contracts” (2008) 39 *U. Wellington L. Rev.* 709, at p. 724. It is argued that a general duty of mitigate can be deducted from Article 77 of the Convention, which states that “A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated”.

⁵² Schlechtriem, P., “Transcript of a Workshop on the Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, *Nachfrist*, Contract Interpretation, Parol Evidence, Analogical Application, and much more” (1999), transcribed and edited by Flechtner, H.M., available at: <<http://cisgw3.law.pace.edu/cisg/biblio/workshop-79.html>>. It must be said that the cited author qualifies such statements as speculative.

⁵³ Kruisinga, S., *supra* fn 18, at p. 150.

also been used to argue for the existence of a duty to renegotiate the terms of the contract in order to restore the balance between the performances.⁵⁴

2.4 THE APPROACH OF THE CASE LAW

Although in other matters regulated by the CISG there has been abundant case law either by national courts and arbitral tribunals as stated above, in the case of changed circumstances the case law is still insufficient to draw definitive conclusions. Thus, although the trend may be acceptance that Art. 79 is also applicable to situations of hardship,⁵⁵ the reported cases are inconclusive and demonstrate that the approach of the courts to the subject is very restrictive, imposing high standards for the nature and consequences of the impediment to be considered as an excuse under Art. 79. In practice, such standards imply that only in situations amounting to impossibility will relief be granted to the affected party.⁵⁶

In cases where a price fluctuation was the ground for seeking relief, the courts rejected the claims even with variations of more than 100% over the agreed price. For instance, relief was denied in a case where the international market price of the goods in question had increased by between one and two times the contract price from the time of the conclusion of the contract and the agreed date of shipment for the goods.⁵⁷ In another decision, the seller sought relief based on the non-delivery of goods by its supplier. The court stated that the requirements for an exemption under Art. 79 of the CISG had not been fulfilled because the seller was not exempted if its supplier had not delivered, even if the supplier's action was unforeseeable and a breach of contract. The court added that such an impediment can be overcome by the seller as long as there are replacement goods available on the market, stressing that an excess of the absolute limit of sacrifice had not been reached in spite of the fact that the market price that had to be paid for substitute goods had tripled.⁵⁸

⁵⁴ CISG-AC Op. No.7, *supra* fn 41, at 40.

⁵⁵ Schwenzer, I., "Force Majeure," *supra* fn 51, at p. 713; Garro, A.M., "Comparison," *supra* fn 37, at IV.2, stating that judicial decisions "are too few and inconclusive to this date to warrant a stable trend either excluding or including hardship within the purview of CISG article 79".

⁵⁶ *Nuova Fucinati S.p.A. v. Fondmetall Int'l A.B.*, 14 January 1993, District Court of Monza, available at: <<http://cisgw3.law.pace.edu/cases/930114i3.html>>; where an increase of 30% on the agreed price was alleged by the seller as ground of relief, the Court stated that the CISG, in contrast to the Italian *Codice Civile*, was not applicable to situations of change of circumstances, but only to cases of absolute impossibility.

⁵⁷ China International Economic & Trade Arbitration Commission [CIETAC], 02 May 1996, CISG 1996/21, available at: <<http://cisgw3.law.pace.edu/cases/960502c1.html>>.

⁵⁸ OLG Hamburg, 1 U 167/95, 28 February 1997, available at: <<http://cisgw3.law.pace.edu/cases/970228g1.html#ca>>. The court stated that the transaction (sale of iron-molybdenum from China) was very speculative.

Similarly, significant drops in the market price or major reductions of the repurchase price by the final customers of the buyer have also been rejected as grounds to invoke the impediment under Art. 79.⁵⁹

In all the cited cases, the reason the courts rejected the application of Art. 79 was because in international transactions, the possibility of market price fluctuations are assumed to be higher than in domestic markets and therefore they have to be considered as foreseeable for the parties involved in international trade.⁶⁰

Relief based on Art. 79 has also been denied in cases concerning problems with the storage of the goods, negative developments on the internal market and a revaluation of currency;⁶¹ severe reductions in (but not a total loss of) tomato crops and a resulting price increase;⁶² and a refusal by the seller's supplier to deliver the goods which were the subject of the contract.⁶³

The recent decision by the Belgian Supreme Court (*Hof van Cassatie*), *Scafom International BV v. Lorraine Tubes S.A.S* is the first reported case that does not follow the mentioned trend.⁶⁴ The analysis of the case is relevant because it is related to two contentious issues, the CISG's mechanism for gap filling and the inclusion of hardship as an excuse which is available to the parties in an international sales contract, in particular with regard to the effect of price fluctuations on the obligations of the parties.⁶⁵

⁵⁹ *Vital Berry Marketing NV v. Dira-Frost NV*, Rechtbank [Belgian District Court] van Koophandel Hasselt, 2 May 1995, available at <<http://cisgw3.law.pace.edu/cases/950502b1.html>>; *Soci t  Romay AG v. SARL Behr France*, French Cour de Cassation, 30 June 2004, available at: <<http://cisgw3.law.pace.edu/cases/040630f1.html#cx>>.

⁶⁰ See *supra* fns 56 - 59 and accompanying text.

⁶¹ Bulgarian Chamber of Commerce and Industry [BTTP (Bulgarska turgosko-promishlena palata)], 11/1996, 12 February 1998, available at: <<http://cisgw3.law.pace.edu/cases/980212bu.html#cd>>.

⁶² OLG Hamburg, 1 U 143/95 and 410 O 21/95, 4 July 1997, available at: <<http://cisgw3.law.pace.edu/cases/970704g1.html>>. On similar terms, see *Agristo N.V. v. Macces Agri B.V.*, Rb Maastricht, 9 July 2008, available at <<http://cisgw3.law.pace.edu/cases/080709n1.html#cx>>; where the seller alleged a drastic fall on the crop and harvest of potatoes as a ground for relief because of extreme weather conditions: "It can be expected from a diligent grower that he considers the weather circumstances when entering into a sales contract concerning future harvest insofar that he can fulfill his duty to deliver in 90% of the cases. This means, in the instant case, that [Seller] can only rely on an impediment beyond control, if the harvest stayed behind the minimum of crop achieved in 90% of the years".

⁶³ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 155/1994, 16 March 1995, available at: <<http://www.cisg.law.pace.edu/cases/950316r1.html>>.

⁶⁴ *Scafom International BV v. Lorraine Tubes S.A.S*; Hof van Cassatie, 19 June 2009, N C.07.0289.N, English translation available at: <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/090619b1.html#ctoc>>, (hereinafter '*Scafom*').

⁶⁵ For a strong criticism to the decision, see Fletchner, H., "The exemption Provisions of the Sales Convention, Including Comments on 'Hardship' Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court" (2011) 9 *Belgrade Law Review* 84. See a comprehensive annotation of the

In the *Scafom* case, the parties concluded a number of sales contracts for the delivery of steel tubes. After the conclusion of the contract, the price of steel unforeseeably increased by 70%. The contracts did not contain any price adaptation clause. Due to the mentioned rise in costs, the seller (a French company) requested an adjustment of the contract price but the buyer (a Dutch company) refused every proposal to modify the contract and insisted on its performance as originally agreed upon. The buyer claimed a breach of contract and damages, and the seller counterclaimed an adjustment to the price based on the unforeseen and drastic increase in costs. In summary proceedings, the seller was ordered to deliver the agreed goods against the payment of the contract price plus the consignment of half of the proposed price increase.

At first instance, the Commercial Court of Tongeren rejected the application of hardship as a ground for the requested adaptation to the contract price on the basis that this situation was not covered by Art. 79 or any other provision of the CISG. The Court of Appeal of Antwerp reversed the first instance decision stating that the existence of an explicit rule on *force majeure* in the CISG (i.e. Art. 79) does not imply that the possibility for the parties to invoke hardship in cases of unforeseeable changed economic conditions is excluded. Further, the Court of Appeal concluded that a request for a price adaptation based on hardship was not against the principles on which the CISG is based, but since that situation is essentially different from one of *force majeure* (regulated in art. 79) the dispute must be decided in conformity with the law applicable by virtue of the rules of private international law⁶⁶, in this case French law. The Court added that under French domestic law the duty to perform contracts in good faith, included in the last part of Art. 1134 of the *Code Civil*, imposes on the parties the duty to renegotiate the terms of the agreement if an unforeseen change of economic circumstances renders the agreed performance unjustified under the new circumstances. On this basis, the Court ruled that the failure of the buyer to renegotiate the terms of the contract entailed a breach of the duty of good faith in performance and granted damages to the seller.

The buyer appealed in cassation to the Belgian Supreme Court (*Hof van Cassatie*). The Supreme Court rejected the buyer's plea and confirmed the findings of the Court of Appeal but on different grounds, thereby stating that unforeseen circumstances which result in a serious disturbance of the contractual equilibrium can amount to an impediment in the context of Art. 79 of the CISG and considering that there is a gap in the subject that must be filled by the general principles of the law of international trade.⁶⁷ The Court added that under those principles, in particular incorporated in the PICC, the party affected by a change of circumstances that fundamentally disturb the contractual balance is entitled to request the renegotiation of the contract.

case in Dewez et al., "The Duty to Renegotiate an International Sales Contract under CISG in Case of Hardship and the Use of the UNIDROIT Principles" (2011) 1 *European Review of Private Law* 101.

⁶⁶ See Art. 7.2 of the CISG.

⁶⁷ *Ibid.*

The approach of the Court implies that the notion of an impediment in Art. 79 is broad enough to include not only an absolute impossibility of performance, but also cases in which the performance has become excessively onerous for one of the parties. With particular regard to the conditions required for hardship, the decision by the Belgian Supreme Court seems to be the first which accepts an excuse on grounds of hardship based on a price increase concerning the goods that are the object of the contract, because generally it is stated (both in legal doctrine and case law) that price fluctuations are foreseeable for the parties involved in international trade.⁶⁸

In its decision, the Supreme Court adopted the view that hardship is governed by Art. 79 but the CISG does not regulate in exact terms how cases of changed circumstances have to be decided upon, and therefore, Art. 7.2 is applicable.

In this regard, the decision of the Court implies that the ‘general principles’ mentioned in Art. 7.2 are not only those contained in the CISG itself (internal principles) but also those that may be deduced from international commercial law (external principles). Additionally, without regard to the doctrinal disputes mentioned above, the PICC were considered by the Court to be the main restatement of international commercial law, and therefore, the main source for the courts to look for and find such general principles and to apply them to particular cases.

3 THE APPROACH OF NON-LEGISLATIVE CODIFICATIONS- THE PICC, THE PECL & THE DCFR

Just as modern codifications as the Dutch and the Brazilian, these sets of principles contain express provisions to deal with a change of circumstances. Thus, the PICC deal with the subject under the heading of *hardship* in Arts. 6.2.1 to 6.2.3. Similar to the PICC, the PECL and the DCFR also expressly regulate a *change of circumstances* in Arts. 6:111 and III.-1:110. The content of the rules, despite the differing terminology, is similar and because of this its examination will be made jointly, stressing any differences when necessary.

3.1 GENERAL CONSIDERATIONS

3.1.1 GENERAL RULE

The general rule is the prevailing binding force of contracts (*pacta sunt servanda*), which is expressly laid down in all the relevant articles, even if the principle of the sanctity of contracts has already been established in a general provision.⁶⁹ The aim of

⁶⁸ Schwenger, I., "Force Majeure," *supra* fn 51, at p. 709, adding at 716 that "all decisions dealing with hardship under article 79 concluded that even a price increase or decrease of more than 100 per cent would not suffice" (references omitted). As mentioned above, in the case, the price increase amounted to 70%.

⁶⁹ As in the case of Article 1.3 of the PICC: "A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles" and Art.II.- 1:103 of the DCFR: "Binding effect - (1) A valid contract is binding on the parties. (2) A valid unilateral undertaking is binding on the person giving it if it is intended to be legally binding without acceptance. (3) This Article does not prevent modification or

the correspondent provisions is to clarify the exceptional character of the rule on changed circumstances with regard to the mentioned *pacta sunt servanda* principle.

This exceptional nature is confirmed in the comments of the articles. Thus, the official comment of the PICC states that “performance must be rendered as long as it is possible and regardless the burden it may impose on the performing party”⁷⁰. Similarly, the of the PECL stresses that the rule on a change of circumstances will only apply in exceptional cases.⁷¹

In particular, according to the of the DCFR, the rule is considered as a limitation to the principles of freedom of party autonomy, freedom of contract⁷² and security, which are considered as contractual security that is primarily reflected in the rule on the obligatory force of contracts⁷³ (Art. II.- 1:103). The basis for this restriction is the principle of justice: “it may be *unjust* to enforce the performance of contractual obligations that can literally still be performed according to the original contract terms if the circumstances in which the obligations were assumed were completely different to those in which they fall to be enforced”⁷⁴. However, the basic proposition of the DCFR is that “in normal situations there is no incompatibility between contractual freedom and justice” so “in some situations, freedom of contract, *without more*, leads to justice”⁷⁵. In the case of the rule on a change of circumstances, this means in particular that “the parties remain free, if they wish, to exclude any possibility of adjustment without the consent of all the parties”⁷⁶. The extent of this statement will be discussed below.

The exceptional nature of the rules on a change of circumstances has been confirmed by the scarce reported case law that has relied on the rules of the PICC as the main or a complementary foundation. An example is a case where a Dutch and a Turkish party had concluded a contract for the installation of machinery used in the production of lump sugar. The law applicable to the contract was Dutch law. After the conclusion of the contract the Turkish buyer refused to pay the agreed amount of the advance payment, invoking financial difficulties due to a sudden drop in the market demand for lump sugar. The buyer invoked Art. 6:258 of the *Dutch Civil Code* (the law applicable law to the case) as a ground of relief. The ICC International Court of Arbitration rejected the defence of the buyer not only based on Dutch law,

termination of any resulting right or obligation by agreement between the debtor and creditor or as provided by law”.

⁷⁰ See PICC, at p. 182.

⁷¹ PECL, Art. 6:111.

⁷² See Art. II.- 1:102 of the DCFR.

⁷³ See Art. II.- 1:103 of the DCFR.

⁷⁴ DCFR, Principles, p. 47, (emphasis added).

⁷⁵ *Ibid.*, at p. 39, emphasis added. Of course, that assertion is *only* true in the hypothetical situation in which the parties are fully informed and in an equal bargaining position. The problem is that in most cases that hypothesis is not present, because there are asymmetries in information and/or the bargaining power between the parties.

⁷⁶ *Ibid.*, at p. 47.

but also relying on Art. 6.2.1 of the PICC, which was cited because of the international nature of the dispute.⁷⁷

3.1.2 SCOPE OF THE RULES

By their very nature, the relevant provisions of the PECL and the PICC are only applicable to contractual obligations. In contrast, Art. III.-1:110 of the DCFR is applicable to contractual obligations and obligations arising from a unilateral juridical act. The inclusion of the latter category is not a common feature of national jurisdictions or international instruments, but taking into account that a large number of unilateral juridical acts (and in some case of unilateral contracts) have a gratuitous nature (i.e. the debtor does not receive any counter-performance), the protection granted to the debtor facing a serious and unforeseen change of circumstances in these cases is completely justified.

The official comments of the DCFR also stress the exclusion of obligations which arise by the operation of law.⁷⁸ That option seems justified as the law itself provides mechanisms to adjust (or not to do so) the obligations imposed on the debtor, e.g. in maintenance obligations in family law. In the case of non-contractual liability, the arguments of protecting good faith and fair dealing cannot be applied, as well as the equilibrium between counter-performances. Besides, in that situation, the victim is entitled to reparation for the damage suffered, regardless of the onerousness or difficulty for the person liable to comply with such an obligation.

3.2 CONDITIONS FOR THE APPLICATION OF REMEDIES

3.2.1 EFFECT OF CHANGED CIRCUMSTANCES OF PARTIES' OBLIGATIONS

Although the three instruments under analysis require that the supervening events have a severe consequence for the obligation of the parties, including either an increase in the cost of the performance to be rendered or a decrease in the value of the expected counter-performance, conceptually there are some differences concerning when this disturbance becomes relevant for the application of the respective provisions.

The PICC definition of hardship is based on the fundamental alteration of the equilibrium of the contract. It has been argued that the word 'fundamental' implies a high threshold for the configuration of hardship, reflecting the general rule laid down

⁷⁷ ICC International Court of Arbitration, Zürich, September 1996, n. 8486, available at: <<http://www.unilex.info/case.cfm?pid=2&do=case&id=630&step=Keywords>>. Other cases are cited in Bonell, M.J., *The UNIDROIT Principles in Practice. International Caselaw and Bibliography on the UNIDROIT Principles of International Commercial Contracts*, 2006, Transnational Publishers, Ardsley, New York; McKendrick, E., "Hardship" in Vogenauer, S. and Kleinheisterkamp, J. (eds.) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2009, Oxford University Press, Oxford, at, p. 716.

⁷⁸ See DCFR, at p. 714.

in Art. 6.2.1.⁷⁹ The approach of the PECL may be regarded as similar, even when the emphasis of Art. 6:111 is placed on the supervening excessive onerousness of the affected party's performance. Unlike the PICC, the PECL official comment adds that such excessive onerousness takes place when the changed circumstances result in a 'major imbalance in the contract' such that the contract is 'completely overturned by events'. Although no reference is made in the PICC to an excessive burden for the affected party as a consequence of the supervening events, it is considered that such a condition is implicit in the requirement that the alteration of the contract equilibrium has to be fundamental.⁸⁰

On the other hand, the approach of the DCFR can be considered to be more restrictive. Thus, the DCFR not only requires that the performance has become excessively onerous, but it also has to be *manifestly unjust* for the debtor to perform the obligation as agreed.⁸¹ The DCFR similar to the PECL, adds that in the case of a contract this means that "the whole basis of the contractual relationship can be regarded as completely overturned by events"⁸². Neither in the PECL nor the PICC is a reference to the justice or injustice of the supervening onerousness or the contractual imbalance made.

Similarly, domestic laws also avoid any reference to the criteria of fairness or justice. Thus, Art. 1467 of the *Italian Civil Code* only requires that performance by one of the parties has become excessively onerous. The *German BGB* refers to a fundamental change of circumstances (*Störung der Geschäftsgrundlage*) which has become the basis of the contract. The French reform projects also mention the excessive onerousness of the performance or a disturbance to the contractual equilibrium as relevant parameters. The *Dutch BW* may be considered as an exception because its Art. 6:258 is applicable in the case that "unforeseen circumstances which are of such a nature that the co-contracting party, according to criteria of reasonableness and *equity*, may not expect that the contract be maintained in an unmodified form"⁸³.

The interpretation of the expression 'manifestly unjust' may be problematic. There is no doubt that considerations of justice are the fundamental nature of and the background to the provisions on changed circumstances, but at the same time the conditions stated for its application must avoid, as far as possible, subjective parameters that can be arbitrarily interpreted both in favour of or against any of the parties. Thus, the assessment of justice may lead the court to examine, for the application of the provision, factors which are external to the contract itself, e.g. the

⁷⁹ McKendrick, E., *supra* fn 77, at p. 718: stressing the difference with other concepts as 'material' or 'substantial' that implies a lower threshold.

⁸⁰ *Ibid.*, at pp. 719-720.

⁸¹ Article III.- 1:110(2) of the DCFR.

⁸² DCFR, at p. 713

⁸³ Translated in Busch et al., *The Principles of European Contract Law and Dutch Law. A commentary*, 2002, Kluwer Law International, The Hague.

economic situation of the promisor, its relative position on the market and even its related contracts with third parties.⁸⁴ This approach has been contended because it “raises serious obstacles to consistency in the application of the doctrine” in the sense that it entails enormous processing costs in litigation and it only has an ad-hoc value which is limited to the particular facts of each case.⁸⁵ In this sense, Italian legal doctrine has agreed that the assessment of onerousness should be based on objective criteria and not in the subjective situation of the specific party.⁸⁶

In any case, the assessment of the onerousness of the performance as being excessive or severe is difficult and a case-by-case analysis cannot be avoided. Furthermore, such an assessment cannot be made by means of arithmetical parameters, but is a task for the court that has to consider the circumstances of the particular case in order to establish the seriousness of the consequences for the debtor in maintaining performance as agreed.⁸⁷ The assessment has to be made by comparing the situation at the time of concluding the contract with the situation at the time of its execution, with the evaluation being made with regard to the whole transaction and not only the obligation of the affected party. Therefore, a comparison between the counter-performances is required in order to determine whether the economic balance of the contract has been fundamentally altered as was intended by the parties upon its conclusion. Thus, even when the supervening events have made the performance of the affected party excessively onerous, if the counter-performance is also severely burdened by the new circumstances, the relevant provisions are not applicable.

3.2.2 CHANGE OF CIRCUMSTANCES MUST OCCUR AFTER THE OBLIGATION IS INCURRED

This is a common prerequisite both in uniform law instruments as well as in domestic jurisdictions. The aim is to distinguish the rules on a change of circumstances from (principally) the rules of mistake. Thus, if the relevant circumstances were already present at the time when the obligation was incurred, but they were ignored by the parties, or at least by the affected party, the rules on mistake may be applicable, provided that the conditions for its application are met.

Nevertheless, Art. 6.2.2(a) of the PICC also includes the case where “the events [...] become known to the disadvantaged party after the conclusion of the contract”.

⁸⁴ This has been the approach in some American decisions: *Louisiana Power & Light Co. v. Allegheny Ludlum Industries Inc.*, 517 F. Supp. 1319 (E.D. La. 1981); *Iowa Electric Light and Power Company v. Atlas Corporation*, 467 F.Supp. 129 (N.D. Iowa 1978); *Eastern Airlines Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fl. 1975).

⁸⁵ Halpern, S. W., "Application of the Doctrine of Commercial Impracticability: Searching for 'The Wisdom of Solomon'" (1987) 135 *U. Penn. L. Rev.* 1123, at p. 1137.

⁸⁶ Sacco, R. and De Nova, G., *Il contratto*, 2004, UTET, Torino, at p. 998.

⁸⁷ See PICC, s to Art. 6.2.2. It is worth noting that its previous version (1994) contained a paragraph which was suppressed in the 2004 version: “If, however, the performances are capable of precise measurement in monetary terms, an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a ‘fundamental’ alteration”.

Therefore, the provision may be applied to events that occurred before the conclusion of the contract but were ignored by the affected party, giving the opportunity to claim on grounds of hardship that can conceptually be considered as cases of mistake.

3.2.3 DEBTOR DID NOT & COULD NOT BE REASONABLY EXPECTED TO TAKE INTO ACCOUNT CHANGE OF CIRCUMSTANCES

This requirement can be summarised by stating that the change of circumstances has to be *reasonably unforeseen* for the debtor. The introduction of the standard of reasonableness to measure the foreseeability of the events implies that the condition is not satisfied with a mere subjective analysis of the particular situation of the debtor, i.e. its internal perspective; rather, the measure has to be in relation to “a reasonable person in the same situation of the debtor”⁸⁸. Therefore, the assessment must include objective standards such as the quality of the affected party, the nature of the contract, the surrounding market conditions and other similar criteria. The reasonableness standard is also related to the aptitude of the debtor (as an average party or a reasonable man in the same situation) to foresee and to anticipate such events, acting with proper diligence and care, according to the circumstances of the particular case.

Article III.-1:110(2)(b) of the DCFR expressly states that the foreseeability test is applicable in relation to the *possibility* of a change of circumstances (that is, its occurrence) as well as to the *scale* of such change (that is, its magnitude or intensity). This is an improvement in comparison with the respective provisions of the PECL and the PICC that refer only to the possibility of the occurrence of that change. In some cases, even a foreseeable event may have an unforeseeable *intensity*. The assessment of foreseeability is therefore not only related to the nature of the event, but also to its magnitude or consequences concerning the obligations of the parties.⁸⁹ As will be examined further on, the inclusion of the scale of the change of circumstances as a measure of foreseeability may have consequences for the express or implied assumption of risks by the parties.

3.2.4 EXCEPTIONAL NATURE OF THE CHANGE OF CIRCUMSTANCES

In contrast to the PICC and the PECL, the DCFR requires that the change of circumstances must be ‘exceptional’. However, a definition of the term ‘exceptional’ is not provided in the official comment and the corresponding Illustration (2) is unclear. The insertion of the *exceptional* requirement is justified in the Comment as a consequence of the consultation with the stakeholders who criticised the lack thereof in the PECL.⁹⁰ Again, the reasons for such concern are not specifically stated, but can

⁸⁸ See DCFR, at p. 714.

⁸⁹ Italian and Argentinean case law has adopted this approach. See Cornet, M., "La aplicación de la teoría de la imprevisión y la emergencia económica. Anuario de Derecho Civil" (2002) 7 *Universidad Católica de Córdoba* 77.

⁹⁰ See DCFR, at p.713.

be deduced from the general intention to place strict limits on the application of the rules on changed circumstances.

The absence of such a definition is understandable since the concept of ‘exceptional’ is difficult in both theory and practice to delimit and distinguish from the further requirement of foreseeability. This is especially so when foreseeability is linked to the standard of reasonableness, which is again related to concrete (i.e. objective) standards and not only to the internal perspective of the affected party.⁹¹

Taking into account the mentioned requirement of unforeseeability, one option is to link the exceptional nature of the change of circumstances to objective standards capable of external and even neutral assessment. For instance, the event should be unusual (not frequent or not regular over time) and of a general nature (affecting society as a whole or at least an entire category of parties in the same situation). This has been the approach of domestic jurisdictions having provisions with a similar requirement. For instance, Art. 1467 of the *Italian Civil Code* requires for its application that the events rendering the performance excessively onerous have to be ‘extraordinary’. The case law has stated that “the extraordinary character of the event has an objective nature and is described according to the consideration of elements such as its frequency, its magnitude, its intensity, etc., and is likely to be measured, so as to permit, through a quantitative analysis, at least statistical classifications [...]”, in opposition to the foreseeability requirement, which would be of a subjective nature.⁹²

The requirement that the change of circumstances be of an exceptional nature can be questioned. From a comparative perspective, in most cases that requirement is not present. As analysed above, the PICC does not include the requirement that the change of circumstances has to be exceptional or extraordinary, but only requires that the affected party could not have reasonably taken into account the change. The provisions of domestic jurisdictions such as S. 313 of the *German BGB* and Art. 6:258 of the *Dutch BW* follow the same trend. Likewise, the relevant provisions of the different proposals for the reform of the law of obligations in France include only the foreseeability test with regard to a change of circumstances. In similar terms, the Revised Principles of European Contract Law does not require that a change of circumstances must be exceptional or extraordinary, but only ‘reasonably unforeseeable’.⁹³

⁹¹ Reasonableness is defined in DCFR article I.–1:104: “Reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices”.

⁹² Cass., sez. II, 23.2.2001, n. 2661. Author’s own translation.

⁹³ Article 7:101: Change of Circumstances (modification of article 6: 111). The Revised Principles of European Contract Law were prepared by the Association Henri Capitant des Amis de la Culture Juridique and the Société de Législation Comparée. See Fauvarque-Cosson et al., *European contract law: materials for a common frame of reference: terminology, guiding principles, model rules*, 2008, Sellier, Munich.

Even the assertion that the requirement is implied in the PECL is somewhat doubtful. The text of Art. 6:111 refers just to a change of circumstances and when the comments refer to ‘exceptional circumstances’, this is in relation to the exceptional nature of the rule (as an exception to the *pacta sunt servanda* principle) and not specifically as a condition of the change of circumstances in itself as relevant.⁹⁴

Additionally, Art. III-3:104 of the DCFR rules on impossibility do not require the impediment to be ‘exceptional’ but that it must be beyond the debtor’s control. The requirement is therefore linked to external causes outside the debtor’s sphere of control, but in any case it is conditional upon being ‘exceptional’. Then, the internal coherence between the provisions on impossibility and a change of circumstances means that the suppression of the exceptionality requirement is preferable. This is particularly true if it is assumed that, in practice, it may be difficult to distinguish between situations of impossibility and a change of circumstances.⁹⁵ If the essential difference between the two institutions is the *consequence* of the supervening events for the obligation of the debtor (in the former case performance becomes impossible and in the latter case excessively onerous) then the requirements for the operation of both provisions should be consistent with regard to the *causes* of the mentioned consequences. As the comments state, the provision on a change of circumstances ‘must be read along with the article on ‘impossibility’.⁹⁶ In sum, the external nature of the circumstances and the standard of reasonable foreseeability should be common requirements for these two provisions. This is the approach of Art. 7.1.7 of the PICC, which in the provisions on hardship and on *force majeure* require, as a common requisite that the events must have been beyond the control of the affected party.

Finally, it can be argued that the requirement of exceptionality places too heavy a burden on the affected party to rely on the provision and may have the effect that it cannot be invoked in practice. The requirement of reasonable foreseeability is sufficient both to protect the general principle of the sanctity of contracts and the interests of the creditor. The standard of reasonableness implies objective criteria for measuring foreseeability and does not rely only on the internal considerations of the debtor, therefore providing legal certainty to the process of assessing that foreseeability and avoiding eventual opportunistic behaviour by the debtor.

3.2.5 RISK ALLOCATION

The three instruments being studied require that the affected party did not assume the risk of a change of circumstances. Their s clarify that such an assumption may be

⁹⁴ See PECL, Art. 6:111.

⁹⁵ See DCFR, at p. 711, which states that :“there is sometimes a very fine line between a performance which is only possible by totally unreasonable efforts, and a performance which is only very difficult even if it may drive the debtor into bankruptcy”. In the same sense, the in Art 6.2.2 of the PICC adds that “there may be factual situations which can at the same time be considered as cases of hardship and of force majeure”, at p.187.

⁹⁶ See DCFR, at p. 711.

express or implied, arising from the nature of the transaction or other relevant circumstances of the particular case.

With regard to the latter category, this prerequisite overlaps with the others. Thus, if the change of circumstances was reasonably foreseeable and the debtor did not take any measures to protect himself, it can be considered that he assumed the risk of that change. In the same sense, if the supervening onerous of the obligation (the *consequence* or *effect* of the change of circumstances) is not excessive, then it can be considered as included in the normal risks of the contract. In that event, in most cases, the allocation of risks *ex-post* is determined by the concurrence (or not) of the other conditions laid down for the application of the rules. The nature of the contract as a parameter for the distribution of risks is also problematic because without regard to clear exceptions such as some speculative transactions, the determination of what is considered to be the *nature* of the transaction is unclear. For example, it can be argued with similar strong and valid arguments that the essential element in a long-term relationship is to protect the parties from future changes and therefore the party affected by a change of circumstances must be assumed to bear the risks of such a change; *or*, that long-term relationships are essentially incomplete and therefore a change of circumstances implies the necessity to adapt the relationship.

The implied assumption of risk has been used by the courts to reject the application of the PICC hardship provisions in particular cases. Thus, in a case decided by the Supreme Court of Lithuania, the buyer of shares in a company refused to pay the total agreed price (20% had already been paid) on the ground that between the conclusion of the contract and the date for paying the balance, the company had become insolvent and consequentially, the value of the shares had considerably diminished. On rejecting the buyer's defence, the court stressed the special nature of the goods (shares) and that the risk of fluctuations in the price of the shares was deemed to be assumed by the buyer.⁹⁷ In another case, a Mexican grower (the defendant) and a U.S distributor (the claimant), entered into a one-year exclusive agreement according to which the grower undertook to produce specific quantities of squash and cucumbers and to provide them to the distributor on an exclusive basis. The grower did not perform the contract, arguing that its failure to deliver the goods was due to the destruction of the crops by a series of extraordinarily heavy rainstorms and flooding caused by the meteorological phenomenon known as 'El Niño'. According to the grower these events amounted to a case of force majeure and/or hardship. The *Centro de Arbitraje de México* tribunal rejected both grounds of relief and stated, in particular concerning hardship, that although the alleged events substantially increased the grower's costs in performing, in the context of a distributorship

⁹⁷ *G.Brencius v. Ukio investicine grupe*, Supreme Court of Lithuania, 19 May 2003, n. 3K-3-612, available at: <<http://www.unilex.info/case.cfm?id=1183>>.

agreement concerning specific quantities of goods to be delivered, a vegetable grower *typically* takes on the risk of a crop destruction by rainstorms and flooding.⁹⁸

Concerning an express ex-ante distribution of risks, the parties are in principle free to agree on the allocation of risks in the contract, e.g. stating that one or more particular risks are exclusively assumed by one of the parties. In that case, the party who assumed the risk of the change of circumstances cannot later rely on the remedies provided for that situation.

However, because that assumption implies an aggravation of the responsibility of the debtor, it should be strictly construed and in good faith, being only applicable to the specific situations provided in the contract and in cases which can be regarded as reasonably foreseeable for the parties. Furthermore, the bargaining process and the situation of the parties are relevant in establishing the extent of the clause.⁹⁹

In addition, the inclusion of the *scale* of the change of circumstances as a measure of foreseeability may have consequences for the express or implied assumption of risks by the parties. Then, even when the contract includes express clauses dealing with the consequences of particular supervening events and placing the burden of the risk of the occurrence of such events on one of the parties, if the intensity or scale of those events can be regarded in the particular case as being unforeseeable and therefore totally outside the legitimate expectations of the parties, the debtor is entitled to invoke the remedies for a change of circumstances.

For instance, if the contract includes a stabilisation clause, such a clause does not prevent the invocation of the remedies when the contract has been concluded under normal economic conditions (e.g., with a regular fluctuation in the values of currencies or in the rate of inflation) which were subsequently radically disturbed not by the *occurrence* of the event itself (which may even have been already present, as in the case of inflation) but by its extraordinary and unforeseeable *intensity*. It can be argued that the aim of such clauses is to anticipate reasonably foreseeable circumstances as well as their foreseeable effects for the obligations of the parties, but they cannot be regarded as covering consequences which were never considered by the parties.¹⁰⁰

A further problem arises in relation to a general assumption of risks by the debtor. In this case, the debtor assumes a higher degree of liability, because in theory he has to perform his obligation without considering any supervening event that may affect it. Therefore, the application and interpretation of this kind of general clause must be even more restricted than those clauses dealing with the assumption of risks concerning particular events. Besides all the restrictions previously stated (especially

⁹⁸ Centro de Arbitraje de México (CAM), 30 November 2006, available at: <<http://www.unilex.info/case.cfm?id=1149>>.

⁹⁹ A similar approach has been adopted in Argentina. Rezzónico, L.; *Estudios de las obligaciones en nuestro Derecho Civil*, T. I, at p. 184; cited by Cornet, M., *supra* fn 90.

¹⁰⁰ *Ibid.*

with regard to the scale or intensity of the change of circumstances) the text proposed in the Revised Principles of European Contract Law seems appropriate:

Article 7:102: Clauses relating to the Allocation of Risk.

A clause which allocates the major part of the risk of a change of circumstances to one of the parties is only valid where it does not bring about unreasonable consequences for that party. The clause cannot be applied when the change of circumstances is due, either completely or in part, to the party to whose benefit such a clause operates.

The provision has the aim of preventing the parties from completely avoiding the application of the rules on a change of circumstances. In comparative law, as an expression of good faith, the provisions concerning a change of circumstances are considered to have a mandatory nature in Germany,¹⁰¹ the Netherlands¹⁰² and Italy.¹⁰³

The last assertion is linked to the problem concerning the mandatory or dispositive nature of the provisions on a change of circumstance. The DCFR comments on the principle of security seem to imply that the rules on a change of circumstances are not mandatory, since, as already stated, “the parties remain free, if they wish, to exclude any possibility of adjustment without the consent of all the parties”¹⁰⁴. Therefore, the parties could exclude the application of Art. III.- 1:110 to their contractual relationship, which would imply that the party affected by a change of circumstances would have to bear the risk of such a change in all cases.¹⁰⁵ The approach of the DCFR with regard to mandatory rules is restrictive and the test of fairness is preferred in order to protect the weaker party, then, “usually it would be sufficient that a term is not binding on the aggrieved party if *in the particular circumstances* it is unfair”¹⁰⁶. Therefore, the fact that the rules on a change of circumstances are not mandatory for the parties is consistent with the general approach of the DCFR concerning restrictions to the freedom of contract.

However, for a number of reasons, the best option is to consider the rules on a change of circumstances to be mandatory for the parties. Those rules are a reflection of the principle of justice (as a qualified exception to security) and more particularly of the duty to act in accordance with good faith and fair dealing, which “may not be

¹⁰¹ Rösler, H., "Hardship in German Codified Private Law - In Comparative Perspective to English, French, and International Contract Law" (2007) 15 *European Review of Private Law* 483, at p. 490.

¹⁰² See Hondius, E. and Grigoleit, H. C., *Unexpected Circumstances in European Contract Law*, 2010, Cambridge University Press, Cambridge (forthcoming).

¹⁰³ Trabucchi, A., *Istituzioni di diritto civile*, 2001, CEDAM, Padova, at p. 724.

¹⁰⁴ See DCFR, at p. 47, para. 21. The comment refers to Arts. II.- 1:102 (party autonomy) and III.- 1:110(3)(c) as a ground for its assertion.

¹⁰⁵ In a bilateral contract, the exclusion may be laid down for the obligations of both parties or only for one party.

¹⁰⁶ DCFR, Principles, at pp. 42-43 (emphasis added).

excluded or limited by contract or other juridical act”¹⁰⁷. Hence, the rules on a change of circumstance are contained in the mandatory nature of the mentioned duty. It is contradictory to state, on the one hand, that the parties cannot themselves avoid the duty of good faith, but on the other, that this is possible in specific cases that are a consequence of such a duty. A conclusion such as this would imply that the content of the duty to act in good faith would be vacuous and its practical application would be denied.¹⁰⁸

A logical argument may be also added: if the parties exclude the application of the rules on a change of circumstances it is the same as if they (or one of them) assume *all* the risks (and therefore the liability) of *all* changes of circumstances (both foreseeable and unforeseeable) that may affect performance. The problem is that assumption of risk implies at least that the party who assumed the risk should reasonably be expected to have taken the occurrence of that risk into account. In other words, it is impossible to assume the risk of the occurrence of an unforeseeable change of circumstances because such an assumption necessarily requires the (reasonable) foreseeability of the risk by the debtor. Therefore, a clause that generally excludes the application of Art. III.-1:110 or that allocates all the risks of performance on one party cannot be considered as valid. In any case, such an exclusion clause will be inapplicable with regard to reasonably unforeseeable changed circumstances that may affect performance and which (because they were reasonably unforeseeable) cannot be regarded as being included in the exclusion clause.¹⁰⁹

3.2.6 REQUEST FOR RE-NEGOTIATION

The final condition for the application of the provisions on a change of circumstances is the request to renegotiate the contract by the affected party. Neither the PICC or the PECL include the request to renegotiate as an express requirement in the respective articles, but since the parties may only resort to the courts after renegotiations have failed, it follows that it is compulsory for the debtor to make such a request if he wants to rely on the provisions on changed circumstances. In contrast, Art. III.-1:110(2)(d) of the DCFR expressly states as a condition for its application that “the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation”.

The attempted renegotiation has to be reasonable and in good faith, which implies that renegotiations must be requested without undue delay and the grounds on which

¹⁰⁷ DCFR, Art. III.-1:103(2).

¹⁰⁸ The imperatives of ‘not taking undue advantage’ and ‘no grossly excessive demands’ are regarded as a manifestation of justice and complement the duty of good faith and therefore also support this conclusion. See DCFR, Principles, at pp. 68-69.

¹⁰⁹ Mosset Iturraspe, J., *La Interpretación económica de los contratos*, 1994, Rubinzal Culzoni, Santa Fe, at p. 295, which states that it is impossible to assume a risk that one could not know or anticipate and that to argue the contrary is to admit the fiction that it is possible to foresee the unforeseeable.

the request for renegotiation is based must be indicated. Consequently, the request must be made just after the affected party has knowledge of the supervening events and must specify what the new circumstances are and how they affect its performance so that the counterparty may properly consider the request. The duty of good faith also entails that the proposals have to be serious, coherent and provide all the necessary information for their adequate evaluation by the counter-party. In addition, a reasonable time must be established for the renegotiation process.¹¹⁰

The DCFR adds that the adjustment proposed by the affected party must be 'reasonable and equitable'. This must be interpreted in the sense that, to be reasonable and equitable, the proposed adjustment of the contract cannot entail an absolute restoration of the contractual balance as agreed by the parties at the time of concluding the contract, but simply eliminates the excessive onerousness of the performance so that the transaction will still be a good deal for the creditor and a bad but bearable deal for the debtor. In short, the rule cannot be used as a way of *completely* shifting the risks from one party to the other.¹¹¹

3.2.6.1 ABSENCE OF AN OBLIGATION TO RENEGOTIATE

The DCFR expressly states that Art. III.-1:110 does not impose an obligation to negotiate but, instead, 'in order to encourage negotiated solutions' the debtor has to request renegotiations if he wants to rely on the remedies provided by the article. Regardless of that intention, it is difficult to see how negotiated solutions will be encouraged if the DCFR s themselves state that "there is no question of anyone being forced to negotiate or being held liable in damages for failing to negotiate". The main reason for changing the approach followed by the PECL is that a duty to renegotiate is 'undesirably heavy and complicated'. However, the DCFR Comments do not provide any further argumentation to support such a statement other than a criticism of 'some stakeholders' and an example of an exceptional nature, which is far from persuasive.¹¹²

Consequently, good faith is required for the affected party to request renegotiations, but on the contrary, it can be argued that such a duty is not imposed on the advantaged party at the same stage, which seems to contradict the general duty of good faith provided by Art. III.-1:103.¹¹³ Then, even a complete and unjustified refusal to enter into renegotiations would not lead to sanctions for the advantaged party.

¹¹⁰ See PICC s at pp. 190-191.

¹¹¹ Italian and Argentinian law have adopted a similar approach. See Zingales, U., "La risoluzione per impossibilità sopravvenuta e la risoluzione per eccessiva onerosità" (2005) *Diritto e Formazione* 691. Morello, A. M., *La adecuación del contrato: Por las partes, por el juez, por los árbitros*, 1994, Librería Editora Platense, La Plata.

¹¹² See DCFR, at pp. 712-713.

¹¹³ See Article III.-1:103: *Good faith and fair dealing*.

However, it can also be argued that Art. III.- 1:103 is applicable to the creditor in this situation and therefore the breach of the duty of good faith may prevent him from exercising or relying on the rights and remedies arising from the non-performance of the contract by the debtor; e.g. specific performance and damages. This is a natural consequence of the DCFR's general approach to good faith, since the duty of good faith - the requirement for the parties to act in good faith - is considered as a duty and not an obligation.¹¹⁴

In similar terms, it has been argued that under the PICC there is no express obligation for the advantaged party to enter into renegotiations, especially if the relevant provision is contrasted with Art. 6:111 of the PECL.¹¹⁵ Nevertheless, this argument is not totally convincing, since it is not superfluous that PICC Art. 6.2.3 expressly *entitles* the disadvantaged party to request renegotiations. If such a party is so entitled because he has a *right* to do so, consequently the advantaged party has the *duty* to enter into renegotiations. Additionally, the request for renegotiations is included in the provision that deals with the *effects* of hardship. It would be nonsense to expressly grant such a right for the affected party with no counter-duty for the advantaged party because obviously both of them may require a renegotiation of the contract, even if no hardship is present. The PICC confirms this interpretation by expressly stating that “the disadvantaged party does not lose its *right* to request renegotiations simply because it fails to act without undue delay”. In the same sense, Bonell does not question the existence of a duty to renegotiate as the primary effect of hardship under the PICC, stating that “Art.6.2.3 (Effects of Hardship) *grants* that party the right to request the renegotiation of the contract in order to adapt its terms to the changed circumstances”¹¹⁶. Arbitral decisions have also recognised the existence of a duty to renegotiate under Art. 6.2.3 of the PICC.¹¹⁷ As mentioned above, the Belgian *Hof van Cassatie* has held, in a case concerning an international sales contract governed by the CISG, that under the principles of the law of international trade, in particular incorporated in the PICC, the party affected by a change of circumstances that fundamentally disturbs the contractual balance is entitled to request a renegotiation of the contract.¹¹⁸

¹¹⁴ *Ibid.*

¹¹⁵ McKendrick, E., *supra* fn 78, at p. 722 DCFR, at p.713.

¹¹⁶ Bonell, M. J., *An international restatement of contract law*, 2005, Transnational Publisher, New York, at p. 118.

¹¹⁷ 2000 Arbitral Award ICC International Court of Arbitration (No.10021); and December 2001 Arbitral Award ICC International Court of Arbitration (No. 9994), cited in Bonell, M. J., *The UNIDROIT Principles*, *supra* fn 77, at pp. 337, 817, 985. In the latter decision, the Court expressly stated that the duty to renegotiate in cases of changed circumstances “is also prevailing in international commercial law (see UNIDROIT Principles Arts. 6.2.2 and 6.2.3)”. In the same sense, Centro de Arbitraje de México (CAM), 30 November 2006, available at: < <http://www.unilex.info/case.cfm?id=1149>>.

¹¹⁸ See *Scafom*, *supra* fn 65.

On the contrary, the PECL expressly recognise the existence of a duty to renegotiate in the case of changed circumstances.¹¹⁹ Legal doctrine agrees that if the reason for the failure is the unjustified refusal by one party to enter into negotiations, or if the reason for breaking off negotiations is abusive conduct or bad faith, the affected party may claim damages. In this case, damages caused by a delay and the costs incurred when relying on attaining the failed agreement could be awarded.¹²⁰ The PECL expressly follow this approach considering the obligation to renegotiate as independent from the remedies granted in a case of changed circumstances. Thus, the last paragraph of Art. 6:111 states:

‘In either case [the termination or adaptation of the contract by the court], the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing’.

The DCFR option is not followed in many legal systems even when the legal provisions do not expressly lay down a duty to renegotiate in cases of changed circumstances. Thus, in Germany, it has been stressed that the primacy of adaptation over termination as the desirable solution to a conflict between the parties leads to the conclusion that such a duty does exist. In this sense, even before the BGB reform, it had been argued that regarding special legislation and the philosophy of many court decisions, the normal legal consequence of the collapse of the foundation of the transaction was that the parties were initially obliged to attempt to renegotiate an adaptation of the contract in good faith.¹²¹ As in German law, Art. 6:258 (complemented by Art. 6:260) of the *Dutch Civil Code* (Burgerlijk Wetboek – BW) does not expressly refer to a duty to renegotiate, but some authors have stated that such a duty could be supported by the general provision on reasonableness and equity (Art. 6:248 BW).¹²² Finally, however, the effect of a change of circumstances is expressly regulated in the Italian *Codice Civile*, in that a general duty to renegotiate a contract which has been disturbed by unexpected circumstances is not provided by the main provision which is applicable to this subject (Art. 1467). Nevertheless, based on the *favor contractus* principle and the duty of good faith which is present in the rules of interpretation, integration and the performance of contracts (Arts. 1366,

¹¹⁹ See Art. 6:111(2) of the PECL.

¹²⁰ Berger, K. P., "Renegotiation and Adaption of International Investment Contracts: The Role of Contract Drafters and Arbitrators" (2003) 36 *Vanderbilt Journal of Transnational Law* 1347, at p. 1369; Mazeaud, D., "Renégociation ne rime pas avec reviser!", note sous Com., 3 Oct. 2006" (2007) *Recueil Dalloz de doctrine de jurisprudence et de legislation: hebdomadaire* 765, at p. 767.

¹²¹ Karampatzos, A., "Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo American, German, French and Greek Law" (2005) 13 *European Review of Private Law* 105, at p. 134 - which stresses that the parties are *obliged* to enter into negotiations before they resort to the courts (emphasis added); see also Horn, N., "Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law" in Horn, N. (ed), *Adaption and Renegotiation of Contracts in International Trade and Finance*, 1985, Kluwer, Denver, at p. 15.

¹²² See for further references Busch et al., *supra* fn 84, at p. 289.

1374 and 1375) a general duty to renegotiate in good faith has been inferred by Italian legal doctrine.¹²³

The trend has been followed by jurisdictions traditionally opposed to the doctrine of a change of circumstances. Thus, in France, recent but consistent case law has held that a duty to renegotiate does exist if performance by one party has become excessively onerous, thereby radically changing the original contractual equilibrium.¹²⁴ Based on the last part of Art. 1134 of the *Code Civil*¹²⁵ which establishes the duty to perform contracts in good faith, the *Cour de Cassation*, first by its *Chambre commerciale* and then by its *Chambre civile*, has stated that if unforeseen and serious circumstances result in a severe imbalance in the contractual equilibrium, the principle of good faith and the duty of loyalty between the parties give rise to a duty for the advantaged party to renegotiate the terms of the contract at the request of the affected party. The different proposals to reform the law of obligations also include in their relevant provisions the duty to renegotiate the contract in case of excessive onerousness.¹²⁶

3.3 REMEDIES

If the conditions stated above are fulfilled, and the parties could not reach an agreement concerning the contract's adjustment to the new circumstances, either of the parties may bring the matter before the courts.¹²⁷ The courts have wide powers and can either modify the contract or terminate it whichever is the more suitable in a specific case.

The termination of the contract is the easiest and more drastic solution. However, this solution cannot be the most appropriate for the interests of the parties, particularly if both want to preserve the contract or if another kind of interest is involved in the transaction, such as third party or public interests. Thus, the option of giving the courts wide powers to determine the terms of the termination (e.g. concerning

¹²³ See Antonioli, L. and Veneziano, A., *Principles of European contract law and Italian law*, 2005, Kluwer Law International, The Hague; and Macario, F., *Adeguamento e rinegoziazione nei contratti a lungo termine*, 1996, Jovene Editore, Naples.

¹²⁴ Cass. com, 3 November 1992, « *arrêt Huard* », *D.* 1995, Somm. at p. 85; D. Ferrier; Cass. com. 24 November 1998, « *arrêt Chevassus-Marge* », *D.* 1999, IR at p. 9; Cass. civ. 16 March 2004, *D.* 2004 Somm. at p. 1754; Denis Mazeaud; CA Nancy 2nd Ch. Com. 26 September 2007, *La Semaine Juridique* No 20, 14 May 2008, at p. 29.

¹²⁵ Article 1134 of the *Code Civil* provides that agreements lawfully entered into take the place of the law for those who have made them. They may be revoked only by mutual consent, or for causes authorised by law. They must be performed in good faith.

¹²⁶ See Arts. 1135-1 to 1135-3 of the *Avant-projet Catala*, Art. 136 of the *Projet de la Chancellerie* and Art. 92 of the *Projet Terré* which are available in Cartwright et al., *Reforming the French law of obligations. Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription ('the Avant-projet Catala')*, 2009, Hart Publishing, Oxford; and in Terré, F., *Pour une réforme du droit des contrats*, 2009, Dalloz, Paris, respectively.

¹²⁷ In theory, the right is granted to either party, but in practice in most cases will be the debtor who will request the intervention of the court on these grounds, either as an action or as a defence.

retroactivity, the date, restitution, non-performed or partially performed obligations) seems appropriate to mitigate the eventual inconvenience of this remedy.

Although there is not an order of preference between termination and adaptation, it follows from the principle of *favor contractus* that the court first has to explore the eventual adaptation of the relationship to the changed circumstances. With regard to this adaptation, the aim laid down in the provisions is to make the obligation reasonable and equitable under the new circumstances. The official comments of the PECL and DCFR add that in the case of contractual obligations this entails re-establishing the contractual balance “by ensuring that *any* extra costs caused by the unforeseen circumstances are borne fairly by the parties. They should not be placed solely on one of them”¹²⁸.

However, those statements are not completely correct and may lead to confusion. As stated with regard to the equitable proposal to adjust the contract, the aim of the adjustment or adaptation is not to restore *completely* the economic equilibrium of the contract as and when it was concluded, but simply to eliminate the excessive onerousness of the performance. Thus, it is incorrect that *any* costs resulting from the supervening circumstances must be fairly shared by the parties, but only those costs that can be considered to be beyond the ‘limit of sacrifice’, “i.e. the threshold where performance has not only become ‘more onerous’, but ‘excessively onerous’”¹²⁹. Taking such a limitation into account, the court must “seek to make a fair distribution of the losses between the parties...the adaptation will not necessarily reflect in full the loss entailed by the change in circumstances [...]”¹³⁰. Therefore, considering that the binding force of contracts is a general principle, the affected party must bear the risk of any increased performance until it becomes excessively onerous.

A further restriction to the powers of the courts is the prohibition on redrafting the entire contract or changing its nature.¹³¹ Therefore, any modification of the contractual terms cannot in any case result in a new and completely different contract being imposed on the parties, e.g. changing the subject-matter of the contract or imposing a new and completely different obligation for one party.

Finally, it has to be stressed that the remedy of adapting the contract is still not widely accepted in European jurisdictions. Thus, continental modern Civil Law codifications such as the *German BGB* and the *Dutch BW* expressly provide for this solution, but, on the other hand, English common law rejects the notion that the courts have the power under common law to adapt or modify contracts in the light of supervening events.¹³² As noted above, the effect of frustration in English law is the

¹²⁸ See PECL, at p. 326 and DCFR, at p. 715.

¹²⁹ Brunner, C., *Force majeure and hardship under general contract principles: exemption for non-performance in international arbitration*, 2009, Kluwer Law International, Alphen an den Rijn, at p. 499; see also Sacco, R. and De Nova, *supra* fn 86, at p. 1003.

¹³⁰ See PICC 7, Art. 6.2.3.

¹³¹ See PECL, at p. 117.

¹³² Treitel, G., *supra* fn29, at p. 584.

automatic and total discharge of the contract. Similarly, in French private law, since the leading case of *Canal de Craponne*, the courts have persistently rejected the possibility of revising contracts in situations of *imprévision*.¹³³ The conservative approach of French law concerning the adaptation of the contract by the court is confirmed by the mentioned reform proposals, where only the so-called *Projet Terré* clearly entitles the court to adapt the contract in accordance with the legitimate expectations of the parties.¹³⁴

4 CONCLUSION

The starting point is that that the buyer must be in a position to obtain title to the goods. The examination of the international instruments of contract law included in this paper has revealed that the contemporary trend is to recognise the effect of changed circumstances on the parties' obligations, conferring wide powers on the courts to decide on the termination and adaptation of the contract. The three non-legislative codifications examined follow this approach, and their provisions can be considered as being equivalent to a great extent, despite the more restrictive attitude of the DCFR with regard to the requisites and effects of a change of circumstances.

In this regard, the exceptional nature of the change of circumstances and the condition that, as a consequence of such a change, it would be manifestly unjust to hold the debtor to his obligation are excessive requirements for the application of the rule. To avoid an eventual abuse of the rule by a party merely seeking to escape from bad dealings, the reasonable foreseeability test and the excessive onerousness of the performance seem to be adequate and sufficient prerequisites in this respect.

Similarly, the rejection of renegotiation as a duty for both parties is against the general trend in European and international contract law. The reasons stated for that rejection are far from clear, and they oppose the generally accepted assertion that the parties themselves are in the best position to adjust or adapt the contract terms to the new circumstances. In this sense, the law and the courts should encourage the parties, as far as possible, to find a way to settle their conflict by agreement.

On the other hand, the inclusion of the scale of the change of circumstances as a measure for assessing its foreseeability must be considered as a positive innovation of the DCFR in comparison with the PICC and the PECL.

¹³³ See Mazeaud, D., "La révision du contrat. Rapport Français" in *Le Contrat: Journées Brésiliennes*, 2008, Société de Législation comparée, Paris. However, some decisions by the French Courts of Appeal seem to admit a possibility for a court to revise a contract when negotiations have failed. Thus, in *Electricité de France c/ Shell Française* (CA Paris, 1st Ch. A. 28 September 1976, *La Semaine Juridique* 1978, at 18810, n. Jean Robert) and *SAS Novacarb c/ SNC Socoma* (CA Nancy 2nd Ch. Com. 26 September 2007, *La Semaine Juridique* No. 20, 14 May 2008, at 10091, n. Marie Lamoureux) it was held that if negotiations ordered by the court with the aim being to adapt the contract to new circumstances had not succeeded, the Court then had the possibility to revise the contract for the same purpose.

¹³⁴ See Art. 92 of the project.

With regard to the CISG, the subject of a change of circumstances remains unsettled both in legal theory and in case law.¹³⁵ This fact demonstrates that the option of the drafters to exclude the regulation of the subject from the CISG was not the best, because too much room has been left for diverging interpretations. It is not realistic to assume that the parties themselves will always provide for solutions to hardship or change of circumstances in their agreements. On the contrary, a number of factors may prevent the inclusion of express clauses in this respect, e.g. the parties are not always sufficiently sophisticated, the excessive costs of the negotiations, the existence of asymmetries in the available information or the position of the parties, or simply because there is not enough time to settle the deal in all its details.¹³⁶ Besides, situations of hardship have a great potential to arise in international commercial transactions as well as in long-term contracts. The complexity of modern contractual relationships and, in general, of the social and economic environment, requires similar weight to be given to values other than the classical values of freedom, security and certainty, such as *favor contractus*, cooperation, solidarity and flexibility. Nowadays, the multiple and even countless factors that can affect the legitimate expectations of the parties are more relevant because of strong economic interdependence due to the process of globalization which has led to multiple close and complex economic interrelationships. The approach of the PICC, the PECL and the DCFR, with an express and clear legal provision regulating the concept, the requirements, and the effects of a change of circumstances seems to be the best option in solving more of the problems and discussions on the subject.

In this sense, the decision of the Belgian *Hof van Cassatie*, by which the concept of impediment includes cases of excessive onerousness due to an unforeseen change of circumstances, and referring to general principles to fill the gap in the CISG, appears to be the right approach to the problem. The express purpose, stated in Art. 7.1 of the CISG, of promoting uniformity in its application is an issue which is of major relevance and that cannot be omitted by the courts. The great differences between national legal systems with regard to the acceptance, the requirements, and the effects of hardship or a change of circumstances will result in uncertainty for the parties if the courts rely on domestic law to decide a dispute.

Although it can be argued that the hardship rules as contained in the PICC can be used as a reflection of the general principles on which the CISG is based, the approach of the PICC has advantages that make it preferable. The CISG suffers from the deficiencies resulting from its own legal nature: being an international convention

¹³⁵ Lindström, N., "Changed Circumstances," *supra* fn 9, at p. 22, stating that "'article 79 is a chameleon-like example of superficial harmony" and that it is possible to interpret the Article so that it suits the interpreters' background the best.' (references omitted); Tallon, D., "Article 79," *supra* fn 42, adding that 'the general wording of Article 79 leaves much room for judicial interpretation'. In the same sense, Honnold, J. and Flechtner, H. M., *Uniform law*, *supra* fn 47, at p. 627, 432.1: 'Article 79 may be the Convention's less successful part of the half-century of work towards international uniformity'.

¹³⁶ See Hillman, R. A., "Maybe Dick Speidel Was Right About Court Adjustment" (2009) 46 San Diego L. Rev. 595.

is the product of necessary and unavoidable compromises and updating it to incorporate new developments is extremely difficult. Thus, the only alternative to avoid the danger that the CISG becomes an obsolete and static instrument is through the incorporation of innovative and, at the same time, well-grounded doctrines by legal scholarship and case law. It would be a mistake to interpret literally the words of Art. 7.2 (the general principles on which [the CISG] *is based*) in order to restrict its application only to principles which existed at the time of the enactment of the CISG.

Thus, in 1980 the doctrine of changed circumstances, even though it had been accepted or applied in a number of legal systems, was not as *expressly* recognized as it is nowadays. For instance, in the Netherlands it was incorporated in the BW of 1992 (Art. 6:258) and in Germany (regardless of its wide acceptance in the case law) the theory of *Wegfall der Geschäftsgrundlage* was only formally included in the BGB reform of 2002 (§313). Additionally, the reform projects on the law of obligations both in France and Spain expressly include a rule on the subject.¹³⁷ The same trend has been followed in Latin American jurisdictions: a rule on changed circumstances was included in the Civil Codes of Peru (1984), Paraguay (1987) and Brazil (2003).¹³⁸ The first edition of the PICC is from 1994 and Part I of the PECL is from 1995. Most of the contemporary legal doctrine also agreed, in line with the provisions of the PICC and the PECL, and both with regard to domestic and international transactions, that a relevant change of circumstances has the following effects: the duty to renegotiate in good faith and if the renegotiations fail there is the right for either party to resort to the courts to request an adaptation of the contract to the new circumstances, thereby granting the courts wide powers to either modify the contract or to terminate it, whichever is the more suitable in the specific case. Thus, the decision of the Belgian *Hof van Cassatie* is also significant because it expressly recognises the existence of a duty to renegotiate an international sales contract affected by hardship. In this respect, the most relevant divergence from that trend is the DCFR, which expressly rejects the fact that a duty to renegotiate arises in cases of a change of circumstances.

Any rule on changed circumstances must be the exception and the principle of *pacta sunt servanda* must be the general rule. However, this statement cannot be used to argue that a rule allowing the revision of contracts in those cases is a risk to the whole economic system. Even when not so extreme, the DCFR seems to be becoming closer to that assertion: “Consultation on this topic revealed a great concern that any mechanism for adjusting obligations on the basis of hardship might, if not strictly controlled, undermine fundamental principles of the law of contract and

¹³⁷ The Spanish reform project is available at:
<<http://www.mjusticia.es/cs/Satellite?blobcol=urldescarga1&blobheader=application%2Fpdf&blobkey=id&blobtable=SuplementoInformativo&blobwhere=1161679155283&ssbinary=true>>.

¹³⁸ Excessive onerousness was already regulated in the Civil Code of Argentina in 1968. The same applies to Italy (*Codice Civile of 1942*).

the stability of contractual relations”¹³⁹. This is the main reason for the highly strict approach to the subject. The problem with an excess of restrictions or higher standards for the application of the rules on a change of circumstances is their eventual practical non-applicability that can lead to a useless and only decorative provision.¹⁴⁰ However, even in cases of express legislative authorization, judges are still very reluctant to use their powers to revise and adapt the terms of contracts. The danger of a “chain reaction” or a collapse of the economic system has not been empirically proven and, on the contrary, it can be said that in such cases the courts adopt a restrictive approach.¹⁴¹ In addition, most of the time, the revision and judicial adjustment of contracts do not lead to economic instability; on the contrary, such a revision is the result of such instability and can therefore be regarded as a remedy against economic, political or social turbulence, thereby providing good grounds to allow the (adapted) performance of contracts instead of their termination.¹⁴² As Windscheid stated more than 100 years ago in relation to the rejection of the inclusion of the *clausula rebus sic stantibus* doctrine in the BGB: ‘Thrown out by the door, it will always re-enter through the window.’¹⁴³

¹³⁹ See DCFR, at p. 711.

¹⁴⁰ In the United States, however impracticality is expressly allowed and regulated by article 2 of the UCC; in practice, the courts usually consider a performance to be impracticable only if it has become virtually impossible, treating the “Code impracticability very much like the common law of impossibility”. See Walter, P., “Commercial Impracticability in Contracts” (1986) 61 *St. John’s L. Rev.* 225, at p. 259. Furthermore, extreme supervening increased costs or difficulties do not seem to be enough to justify the affected party being excused.

¹⁴¹ See Mazeaud, D., “La révision,” *supra* fn 133, atp. 559, who gives as an example the *loi du 9 juillet 1975* which gave the courts the power to reduce excessive *clauses pénales* (liquidated damages clauses).

¹⁴² *Ibid.* p. 578 *et seq.* stating at 583 that “...l’idée de révision judiciaire...constitue, en effet, en situation de crise, la seule alternative à l’inexécution du contrat, à sa rupture, et le seul remède propre à sauvegarder le contrat, à assurer sa pérennité”.

¹⁴³ B. Windscheid, ‘Die Voraussetzung’, (1892) 78 *Archiv für die civilistische Praxis* 197, cited by Zimmermann, R. *The law of obligations: Roman foundations of the civilian tradition*, 1996, Oxford University Press, Oxford, at p. 581.