# THE RELEVANCE OF THE CISG IN SETTLING INTERNATIONAL ARBITRATION CLAIMS ARISING DUE TO COVID-19 IN ABSENCE OF *FORCE MAJEURE* AND HARDSHIP CLAUSES

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## I. INTRODUCTION

The incentive for parties to argue for the application of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG") in arbitral proceedings stems from its broad-reaching list of remedies and defenses. Compared to domestic law, the CISG is better suited for settling international disputes. Further, with respect to the granting of relief, the CISG is perceived as a compromise between common-law and civil-law jurisdictions. Moreover, the CISG is regarded as a contract-law code that offers a series of default rules for filling gaps in contracts and assisting in their interpretation.

Nevertheless, while the CISG has increasingly become an *opt-out* instrument in practice, and an *opt-in* agreement in international arbitration, their interaction has led to a return to favor of the CISG. Data collected through empirical research[1] shows that international arbitral tribunals tend to apply the CISG without hesitation and have extended its application to settle trade-related disputes by applying its remedies, defenses and exemptions from liability.

In the absence of *force majeure* and/or hardship clauses or when domestic law fails to prescribe such exemptions from

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[1] LOUKAS MISTELIS, *CISG and Arbitration*, *in* CISG METHODOLOGY 375, 386 *et seq* (André Janssen and Olaf Meyer ed., Munich: Sellier Eur. L. Publishers 2009).

liability, the applicability of the CISG becomes paramount for the prospect of many claims. Further, the applicability of the CISG has become even more relevant in the current environment created by the COVID-19 pandemic, where the performance of contractual obligations and undertakings may well be deemed *impossible*, *impractical,* or *unreasonably onerous* based upon the occurrence of *unforeseen* circumstances or events *beyond the control* of the parties. The CISG's relevance can also come into play in contract disputes where the parties have agreed on *force majeure* and/or hardship clauses because CISG-related case law provides guidelines for the clauses' interpretation and application.

Both the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT PICC") and the Principles of European Contract Law ("PECL"), albeit deemed 'soft' precepts, must be used as gap-fillers and are an invaluable supplemental source for the interpretation of the CISG.

## II. PRACTICAL PROBLEMS ASSOCIATED WITH THE APPLICABILITY OF THE CISG

The year 2020 marked the 40th anniversary[2] of the CISG and many seminars and congresses[3] were held to analyze the Convention's relevance and applicability. However, many of these events had to be postponed precisely due to the COVID-19 pandemic.

The CISG offers multiple advantages that favor the development of international trade. Prominently, among these advantages, the CISG "harmonizes" the contractual solutions or "remedies" of the civil or continental law system with those contemplated by Anglo-Saxon or common law. For example, the CISG helps resolve the disparity that traditionally exists between the dilemma faced by judges and arbitrators of ordering monetary compensation for damages versus ordering specific performance and re-adaptation of the contract.[4] Moreover, the CISG is perceived as a "contractual

[2] The Convention was opened to signing at the concluding meeting of the Conference on April 11, 1980 in Vienna.

[3] Universidad Carlos III of Madrid had organized a commemorative Congress to be held in April 2020.

[4] Luis Díez-Picazo, *et al*, *La compraventa internacional de mercaderías. Comentario de la Convención de Viena* Cizur Menor (Navarra): Editorial Aranzadi (1998).

law code" (open to contracting States) that contains rules that both cure frequent contractual omissions by the parties and facilitate the interpretation of contractual clauses.[5]

Regrettably, however, the CISG has now faced nearly forty years of growing exclusion from contracts between commercial parties of countries with large economies who can impose on their counterparties the application of local laws that are closer or more favorable to them. In this sense, international arbitration has served as a forum for "rescuing" the everyday application of the CISG. This is largely due to the fact that the majority of international arbitrators are inclined to apply the CISG when deciding a range of disputes—even under circumstances of *force majeure* or excessive hardship—having agreed or not to specific clauses on the matter.

There are various incentives for invoking the application of the CISG in international arbitrations. This is especially true when the contract that gave rise to a dispute does not include specific clauses to resolve events or circumstances that are either beyond the control of the parties or unforeseeable, rendering the original contractual performance impossible (i.e., *force majeure*), or that break the economic balance of the contract by making the original fulfilment of the obligations excessively difficult (i.e., *hardship*).

Although the CISG has 93 member States,[6] the scenarios giving rise to debates as to its applicability are not limited exclusively to its material scope. The debates also include discussions on the interpretation to be given to the results arising from conflicting rules of private international law.

To illustrate this point, we will present a brief case study related to a recent international arbitration in which we had the opportunity to participate as counsel to one of the parties, while

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[5] ANDRÉ JANSSEN & MATTHIAS SPILKER, *The CISG and International Arbitration*, *in* INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 135–53 (Cambridge Univ. Press 2014).

[6] *United Nations Convention on Contracts for the International Sale of Goods*, UNITED NATIONS TREATY COLLECTION (last visited July 21, 2020), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en [hereinafter *Status of Treaty*].

naturally observing the precautions imposed by confidentiality and ethical obligations.

In March 2020, *South American buyers*, ("Claimants"), prevailed against a *European seller*, ("Respondent"), in an arbitral tribunal seated in Copenhagen and governed by the rules of the Danish Institute of Arbitration. The main legal issue in this matter was whether the CISG would govern the dispute because Claimants belonged to a state that was not a party to the CISG, also known as a "non-contracting state."[7] The applicability of the CISG became essential to Claimants' legal argument because unlike domestic law, the CISG provides a greater number of remedies for contractual default and breaches. The arbitral tribunal awarded Claimants a refund and accrued interest[8] pursuant to Article 84(1) of the CISG, by finding that the parties' choice of Respondent's domestic law (a contracting-state of the CISG) was sufficient to allow for the application of the CISG.[9]

In this case, Respondent argued that the CISG was not applicable for the following two reasons: (i) Claimants could not rely on the CISG because the country where Claimants were registered and domiciled had not adopted the CISG when the contract at issue was entered into; and (ii) no evidence or law existed to support the notion that the parties intended the CISG to govern the sale-purchase agreement.

However, Claimants argued that the CISG *did* apply because Respondent was a company registered and domiciled in a contracting-state and therefore, the contracting-state's domestic law *and* the CISG would apply to any legal issue not regulated by the former. Claimants also argued that when the parties referred to the law of a contracting-state without any further specification,

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[7] Major trading countries such as the United Kingdom, India, South Africa and Nigeria are non-contracting States.

[8] John Y. Gotanda, *Compound Interest in International Disputes*, 34 LAW & POL'Y INT'L BUS. 393 (2003).

[9] *See* Maaden v. Thyssen, ICC Case No. 6653 (1993) (The contract in this case was governed by French law and the tribunal held that the sales contract was governed by the CISG because the parties had chosen French law, which had incorporated CISG by the time the contract was executed), http://cisgw3.law.pace.edu/cases/936653i1.html#cx.

the CISG, as part of such law, would apply to the arbitral proceedings provided that the requirements of Article (1)(1) of the CISG were met. Claimants prevailed based on these arguments and were eventually compensated according to the remedies available under the CISG.

International arbitral tribunals infrequently grant the application of the CISG in cases involving non-contracting States for the following reasons: (i) the application of the CISG is rarely in dispute because the CISG has been adopted by a large number of States,[10] hence both claimants and respondents are likely to be contracting States[11]; (ii) traders, companies and stakeholders (even in contracting States) are becoming increasingly reluctant to incorporate the CISG into their contracts, so they expressly *exclude* its applicability (*opting-out* of its application) by virtue of the prevalence of party autonomy,[12] as prescribed by Article 6 of the CISG; and (iii) some contracting States[13] with major economies and large trading volumes, such as the USA, China, Germany and Singapore have declared[14] that they will not be bound by Article 1(1)(b) of the CISG[15] which extends its applicability to cases where the conflict of law rules favor a contracting State's law.[16]

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[10] *See Status of Treaty*, *supra* note 6.

[11] Pursuant to its Art. 1(1) (a), the CISG applies to contracts for the sale of goods between parties whose places of business are in different States, when the States are contracting States. This is the more frequent situation in international disputes.

[12] Pursuant to CISG Art. 6, parties may exclude the application of CISG.

[13] China, Germany, Czech Republic, Saint Vincent and the Grenadines, Singapore, Slovakia and the USA.

[14] Marlene Wethmar-Lemmer, *Applying the CISG via the Rules of Private International Law: Articles 1(1)(b) and 95 of the CISG - Analysing CISG Advisory Council Opinion 15*, 49 DE JURE 58 (2016).

[15] Pursuant to CISG Art. 1(1)(b), the CISG also applies to "*contracts of sale of goods between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a Contracting State.*"

[16] Declaration prescribed by CISG Art. 95.

To summarize, scholars have asserted that the applicability of the CISG can derive from one of the three following scenarios: (i) "*direct choice*" driven by party autonomy in contracts; (ii) "*indirect choice*" when parties—as in the case at hand—chose the law of a contracting state; and (iii) "*opt-out*" when parties expressly exclude the CISG.[17]

Despite the apparent popularity of the "*opt-out*" choice among traders and stakeholders in contracting States, empirical research has shed light on the CISG's applicability granted by many international arbitral tribunals frequently adjudicating the proceedings pursuant to its provisions.[18] This could simply result from the sheer number of aggrieved parties seeking relief by relying on the CISG, and from respondents raising defences.[19]

## III. INCENTIVES TO REQUESTING THE APPLICATION OF THE CISG IN INTERNATIONAL ARBITRATIONS

International arbitration is an alternative mechanism to the judicial path, it is adversarial by nature, and triadic. The frequent application of the CISG in international arbitration awards is not only due to the aforementioned arbitrators' inclination, but also to the requests by parties who support their claims for compensation (in the event of non-compliance), or defenses of exoneration (of liability), on the Convention's rules.

The incentive for parties to argue for the CISG's application in arbitral proceedings stems from its broad-reaching array of remedies and defenses. This is because the CISG is considered to be more suitable (when compared with domestic law) for settling international disputes arising out of both cross-border and trans-border transactions[20] and because of the perception that the CISG is a compromise between common-law and civil-law jurisdictions

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[17] JANSSEN & SPILKER, *supra* note 5.

[18] *See,* LOUKAS MISTELIS, supra note 1.

[19] STEFAN KRÖLL, LOUKAS MISTELIS, & PILAR PERALES VISCASILLAS, UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG: A COMMENTARY) (2d ed. 2018).

[20] *See* Franco Ferrari, *The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies,* 1 THE RABEL J. COMP. & INT'L PRIV. L. H. 52, 53–55 (2007).

when determining how parties are to be granted relief (i.e., awarding damages as a primary remedy *vs.* granting specific performance).[21] Moreover, the CISG is also perceived as a contract law code that offers a series of default rules that cover gaps in contracts and assist in their interpretation.[22]

Notwithstanding the above, some authors[23] have warned that the CISG does not cover all the problems arising out of contract disputes and in many cases the remedies provided by domestic law still play an important role in settling international disputes. These authors have also argued, for example, that the UNIDROIT PICC and the European PECL become essential as gap-fillers and as supplementary sources of arguments when interpreting the CISG.

## IV. THE CISG IN THE ABSENCE OF *FORCE MAJEURE* AND HARDSHIP CLAUSES

As already noted in our Introduction, the CISG has become an *opt-out* instrument in practice, and an *opt-in* agreement in international arbitration[24] and their interaction has led to a return to favor of the former. Data collected through recent empirical studies[25] show that international arbitral tribunals tend[26] to apply the CISG without hesitation and have extended its application to the settlement of trade-related disputes thanks to its remedies, defenses, and exemptions from liability.

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[21] Díez-Picazo, *supra* note 4.

[22] JANSSEN & SPILKER, *supra* note 5 at 142.

[23] Ferrari, *supra* note 20; *see also* PILAR PERALES VISCASILLAS, *The Role of the UNIDROIT Principles and the PECL in the Interpretation and Gap-Filling of CISG*, *in* CISG METHODOLOGY 287 *et seq*. (André Janssen and Olaf Meyer ed., Munich: Sellier Eur. Law Publishers, 2009); INGEBORG SCHWENZER, *Interpretation and Gap-Filling under the CISG*, *in* CURRENT ISSUES IN THE CISG AND ARBITRATION (Ingeborg Schwenzer, Yeşim M. Atamer, & Petra Butler ed., Eleven Int'l Pub. 2014).

[24] JANSSEN & SPILKER, *supra* note 5.

[25] MISTELIS, *supra* note 1; *see also CISG database*, INST. INT'L COM. L., https://iicl.law.pace.edu/cisg/cisg (last visited July 21, 2020).

[26] STEFAN KRÖLL, *Arbitration and the CISG*, *in* CURRENT ISSUES IN THE CISG AND ARBITRATION (Ingeborg Schwenzer, Yeşim M. Atamer, & Petra Butler ed., Eleven Int'l Pub. 2014).

Triggered by the occurrence of exceptional or unexpected events, past discussions of universal principles of contract law such as *pacta sunt servanda* and *rebus sic stantibus*, are being revisited. The list of exceptional or unexpected events was typically restricted to natural disasters (commonly referred to as "acts of God") such as fires, earthquakes and floods. However, for some one hundred years now, case law and scholars[27] have acknowledged that some human-driven events can affect contracts by making them impossible or too onerous to be performed. Some examples of these human-driven events are the cancellation of the London procession for the coronation of King Edward VII in 1902, (the "coronation cases"); the dramatic inflation of 1923 in Germany; the great depression of 1929 in the United States; the closing of the Suez Canal in 1956; the reunification of Germany in 1990; the September 11th, 2001 attacks in the United States; and—similarly to the ongoing Covid-19 pandemic—the Spanish Flu pandemic of 1918.

In the absence of *force majeure* and hardship clauses[28] or instances where domestic law[29] fails to prescribe such exemptions from liability,[30] the applicability of the CISG becomes of paramount influence on the outcome of many claims. The CISG has become even more important in the current times affected by

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[27] MARCEL FONTAINE, *The Evolution of the Rules on Hardship, From the First Study on Hardship Clauses to the Enactment of Specific Rules*, *in* HARDSHIP AND FORCE MAJEURE IN INTERNATIONAL COMMERCIAL CONTRACTS (Fabio Bortolotti & Ufot Dorothy ed., Kluwer L. Int'l 2018).

[28] The International Chamber of Commerce (ICC) offers its model *force majeure* clause and hardship clause. Their more recent versions were released in March 2020.

[29] Amidst the COVID-19 pandemic, it is fair to mention that Chinese (PRC) Law prescribes *force majeure* in Articles 117, 118 of its Contract Law and in Article 180 of the General Rules of Civil Law, which apply as default rules absent any specific contractual provision.

[30] In absence of a *force majeure* clause covering an event such as the COVID-19 ('pandemic'), domestic law remedies such as the common law doctrine of *frustration* (England and Wales, and some deviations in certain U.S. States such as New York and Texas) *impossibility* and *impracticability* (Uniform Commercial Code and The Restatement (Second) of Contracts, U.S) could grant exemption from liability. *Impracticability,* unlike *impossibility,* is a lower standard, which does not require that performance be objectively impossible, but rather unfeasibly difficult or expensive.

the COVID-19 pandemic. This is so because the performance of many contractual obligations and undertakings could well be deemed *impossible*, *impractical* or *unreasonably onerous* based upon the occurrence of *unforeseen* circumstances or events *beyond the control* of the parties.

From a practical perspective, the CISG's relevance could also come into play in contract disputes where parties have already agreed on *force majeure* and hardship clauses,[31] since CISG-related case law crafted by international arbitration tribunals[32] can provide useful guidelines on the clauses' interpretation and application.[33] Fortunately, arbitration case law shows a uniform approach to the interpretation and application of *force majeure*.[34]

Nevertheless, it is fair to say that the viability of affirmative defenses based on either *force majeure* or hardship derived from the CISG alone is to a certain point uncertain because there is still no consensus in the international arena as to whether the language contained in article 79 of the CISG has the same effect on those exemptions. Fortunately, most scholars[35] and awards

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[31] One of the advantages offered by the ICC *Force Majeure* Clause, it is that it seeks to strike a balance between the general requirements of *force majeure*, which must be verified in all cases where its invocation is sought, as well as the description of the facts that were allegedly outside the control of the parties and that could not be foreseeable when the contract was entered into. By way of a corollary to the above, in addition to defining '*force majeure*' the ICC *Force Majeure Clause* includes a catalog of events called *force majeure* that are supposed to meet the requirements to be considered within that category, which – it suggests – must be examined (for inclusion or not) by the parties to adjust them to their needs or conveniences. Therefore, the immediate and fundamental result of the successful invocation of *force majeure* is, precisely, the relief of the party that makes use of it from fulfillment of the agreed obligation or obligations and the consequent liability for damages.

[32] Pilar Perales Viscasillas & David Ramos Muñoz, *CISG & Arbitration*, 10 SPAIN ARB. R. (MADRID) 63 (2011).

[33] HARDSHIP AND FORCE MAJEURE IN INTERNATIONAL COMMERCIAL CONTRACTS: DEALING WITH UNFORESEEN EVENTS IN A CHANGING WORLD (Fabio Bortolotti & Ufot Dorothy ed., Kluwer L. Int'l 2018).

[34] CHRISTOPH BRUNNER & BENJAMIN GOTTLIEB, COMMENTARY ON THE UN SALES LAW (CISG) (Kluwer L. Int'l 2019).

[35] A landmark document on this issue is Opinion No. 7 of the CISG Advisory Council (point 3.1), published in 2008. In 2009, the Belgian Court of Cassation

rendered by international arbitral tribunals tend to affirm the applicability of article 79's.[36] However, which scenarios amount to an impediment under article 79 and what remedies are to be granted is still subject to dispute.

It is worth briefly noting the difference between the two cases of exemption from contractual liability. For many arbitration awards, *force majeure* is associated with circumstances that make it *impossible* to fulfill the obligations in the form and manner originally agreed. The excessive onerousness (*hardship*) can admit such fulfilment, but only by bearing a financial cost or sacrifice of such magnitude that it breaks the economic balance of the contract.[37]

Finally, it is also important to emphasize that both UNIDROIT PICC and PECL, albeit deemed 'soft' law instruments, must be used as gap-fillers and are an invaluable supplemental source for the interpretation of the CISG.

## V. CONCLUSION

Given the advantages offered by the CISG for resolving disputes in international arbitrations, there are indeed incentives for invoking its application, even in commercial disputes involving contractors from countries that are not signatories of the Convention.

In international arbitrations where the contracting parties have agreed to submit to local legislation without reservation, the application of the CISG could be invoked even if it involves a party from a non-signatory State. The selected country (to whose law the parties have submitted) must be a member of the Convention. The solution would be similar if the local legislation (of the member country) is applicable as a consequence of the conflict rules of private international law. This 'indirect' application of the

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was one of the first national courts to follow such approach (case of sale of steel tubes for scaffolding).

[36] Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts*, 39 VICTORIA U. WELLINGTON L. REV. 709 (2009).

[37] Among others, see ICC Awards Cases No. 9479 (2001), No. 15051 (2014) and No. 15610 (2014) in Bulletins Vol. 12, No. 2; Vol. 25, No. 2; and Vol. 25 No. 1, respectively, of the International Court of Arbitration (ICC).

CISG could only be blocked if the member State has made the declaration set forth in Article 95 of the Convention.

International arbitration has come to the rescue of the CISG, which has suffered a recurrent contractual exclusion by trading parties who prefer to impose submission to local laws that they consider more favorable or closer to their interests. Empirical data show an inclination by international arbitrators to apply the CISG in a large number of disputes, many of which involve defenses based on force majeure or hardship. Most arbitration panels and authors are inclined to recognize the inclusion of these exemptions from contractual liability within the scope of Article 79 of the CISG.

In international arbitrations involving contracts that are silent on situations that could be classified as force majeure or excessive onerousness (hardship), or that have stipulated a deficient national legislation or conflicting precedents, the application of the CISG offers harmonized contractual solutions or remedies. In fact, the application of the CISG can also be beneficial if the parties have agreed to specific clauses for resolving situations that have given rise to disputes, because the Convention also serves as tool for interpreting them.

Both UNIDROIT PICC and European PECL should be considered as supplementary rules to the CISG, particularly because they contemplate and regulate cases of force majeure and excessive onerousness (hardship), with some peculiarities, but which seek a balance.