
CISG hardship exemption in the time of COVID-19

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Abstract

Much has been written to address how the COVID-19 crisis can constitute hardship or force majeure for international commercial contracts. This article addresses how those situations are to be considered under the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) and provides additional considerations relevant as to the gravity of the crisis for the purposes of hardship.

I. Introduction

Much ink has been spilled to explain how the economic paralysis caused by the COVID-19 pandemic could constitute hardship or *force majeure* for international contracts. As infection rates escalate, States have been forced to take measures that impede international trade and place unduly obstacles to contract performance. As one of the most successful treaties governing private transactions, the 1980 United Nations *Convention on Contracts for the International Sale of Goods* (CISG) has recently drawn interest in the field of changed circumstances.¹ This article explores whether the pandemic triggers the doctrine of hardship, as well as its effects on CISG-governed contracts.

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¹ I Khan, 'COVID-19 Exemptions for Sellers/Exporters under the UN Convention on Contracts for the International Sale of Goods (CISG)' (2020) *Jurist*, available at: <https://www.jurist.org/commentary/2020/05/israr-khan-cisg-covid19/>; G Alper, 'COVID-19: Force Majeure Under CISG' (2020) *Jurist*, available at: <https://www.jurist.org/commentary/2020/05/gizem-alper-force-majeure/>; O Wright, B Boylan, 'The UN Convention on Contracts for the International Sale of Goods' (2020) *Law.com*, available at: <https://www.law.com/corpcounsel/2020/03/18/the-un-convention-on->

II. Hardship under the CISG

It is no secret that the CISG does not contain a provision expressly addressing issues of hardship. The closest equivalent is Article 79(1), which provides as follows:

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.

Article 79's language heavily resembles provisions of other, more recent uniform instruments providing for a *force majeure* exemption, *i.e.*, applicable to cases where performance has become impossible and not simply too onerous. Compare with Article 7.1.7(1) of the UNIDROIT Principles of International Commercial Contracts:

Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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.

For the longest time, scholars and practitioners interpreted the absence of an express provision on hardship as a sign that the CISG was not intended to provide a legal effect for situations where the performance of a contract becomes unreasonably onerous.² Indeed, some passages of the CISG's drafting process in connection with Article 79 of the CISG appear to indicate an intent to exclude hardship from the convention's coverage. For instance, the introduction of the term 'impediment' in Article 79 appears to have intended to exclude hardship-like theories of changed circumstances.³ Likewise, during drafting, the Norwegian delegation proposed including a provision stating that exemption due to a temporary impediment becomes permanent if, after the cessation of the impediment, the circumstances have changed so much that performance would be unreasonable. The French delegation raised the

[contracts-for-the-international-sale-of-goods/?sreturn=20200502030152](https://www.law.com/corpcounsel/2020/03/18/the-un-convention-on-contracts-for-the-international-sale-of-goods/?sreturn=20200502030152); B Lincoln, 'Australia: The UN CISG and its Implications for Australian Businesses During the COVID-19 Pandemic' (2020) *Mondaq*, available at: <https://www.law.com/corpcounsel/2020/03/18/the-un-convention-on-contracts-for-the-international-sale-of-goods/?sreturn=20200502030152>.

² See, for instance, V Heuzé, *La Vente Internationale de Marchandises* (LGDJ/Montchrestien, 2000); for a discussion on the (apparent) exclusion of hardship, see C Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Kluwer International, 2009), p. 216, footnote 1100.

³ See J Honnold, *Documentary History of the Uniform Law for International Sales* (Kluwer, 1989), pp. 185, 252.

concern that such a provision would show support for theories of hardship and *imprévision*. In the end, the proposal was not accepted.⁴ Finally, a proposal was made to include a provision explicitly governing hardship, which provided as follows:⁵

If, as a result of special events which occurred after the conclusion of the contract and which could not have been foreseen by the parties, the performance of its stipulations results in excessive difficulties or threatens either party with considerable damage, any party so affected has a right to claim an adequate amendment of the contract or its termination.

The drafting history shows that this proposal was simply not accepted.⁶

Despite this original uncertainty about hardship under the CISG, the CISG Advisory Council has pointed out that these passages of the *travaux préparatoires* do not demonstrate an all-out exclusion of hardship.⁷ The word ‘impediment’ does not equate to ‘impossibility’, but to an obstacle that hinders performance.⁸ Indeed, the drafting history of the CISG reveals that Article 79 was not intended as a *force majeure* provision, but as a ‘unitary notion of exemption’ that could also cover hardship events.⁹ As such, the majority opinion in scholarly circles is that the CISG does indeed cover hardship situations, provided that the event complies with Article 79(1), *i.e.*, that the event is an ‘impediment’ to performance that the affected party could not have predicted and could not avoid or overcome.

III. Available Remedies: The Adaptation Debate

While the CISG’s coverage of hardship *situations* is rather clear, the same cannot be said about the remedies available in case of hardship. The commonly cited remedy applicable to hardship situations is that of **adaptation**: the power of the parties to renegotiate or of a court or tribunal to unilaterally revise the affected obligation, and ‘adapt’ it to the new circumstances. Given that hardship applies to cases where the

⁴ CISG Advisory Council, *Opinion No. 7: Exemption of Liability for Damages under Article 79 of the CISG*, at paragraph 30.

⁵ Y Ishida, ‘CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness? Full of Sound And Fury, but Signifying Something’ (2018) *Pace International Law Review*, Volume 30, Issue 2, p. 362.

⁶ See *supra* note 3, pp. 460, 350.

⁷ See *supra* note 4.

⁸ See *supra* note 4, comment 3.1.

⁹ See *supra* note 4, at paragraph 29.

balance between the exchanged performances has become fundamentally disrupted, because one of the performances has become too difficult, it makes sense that the remedy is to ‘rebalance’ the bargain. This is precisely the remedy provided under the UNIDROIT Principles under Article 6.2.3(4)(b):

If the court finds hardship it may, if reasonable,

(...)

(b) adapt the contract with a view to restoring its equilibrium.

Given the absence of a hardship provision under the CISG, the convention also does not make explicit an adaptation remedy in cases of hardship. If the proposition that Article 79 governs hardship is to be accepted, then the remedy is an exemption from damages, *i.e.*, that the affected party ‘*is not liable for a failure to perform any of his obligations*’. Indeed, the drafter’s reluctance to the hardship doctrine appears to have been based, not on the possibility that the CISG would address hardship situations *per se*, but on the fear of introducing the concept that excessive onerousness should lead to a modification of the parties’ agreement.¹⁰

Many scholars have proposed importing the remedies provided by the UNIDROIT Principles – adaptation and termination – either by claiming that the UNIDROIT Principles are ‘*general principles on which [the CISG] is based*’ and therefore worthy of being employed to fill gaps¹¹ or as international trade usages under Article 9(2) of the CISG.¹² Other scholars have been more skeptical about the adaptation

¹⁰ Many passages of the *travaux* show the drafter’s reluctance to include doctrines of hardship or *imprévision* in the CISG, instead opting for a doctrine of ‘impediment’, which would operate as a unitary notion of exemption in case of a change of circumstances. This suggests that the drafters were not against the CISG covering hardship events *per se*; they were against the *notion* of hardship, *i.e.*, the concept that an excessive increase in performance costs should lead to a modification or termination of the contract. See Article 6.2.3(4) of the UNIDROIT Principles. By including hardship events under Article 79 but not providing the ordinary hardship remedies, Article 79 is *not* a ‘hardship provision’: it is a provision that grants exemption in extreme cases of hardship, as long as they constitute a qualified ‘impediment’. It should also be noted that Article 79 is also *not* a *force majeure* provision. The concept of ‘impediment’ in Article 79 must be interpreted autonomously, without reference to domestic terms or distinctions such as *imprévision*, *force majeure*, frustration or hardship (Article 7). Article 79’s coverage of situations that, under national or uniform law, constitute ‘hardship’ is not an indictment but a sign of the provision’s uniform character, and should not be taken as indication that Article 79 is to be interpreted with reference to extraneous materials and theories.

¹¹ C Brunner, B Gottlieb, *Commentary on the UN Sales Law* (Kluwer Law International, 2019), p. 580.

¹² P Schlechtriem, P Butler, *UN Law on International Sales* (Springer Berlin Heidelberg, 2009), p. 204, paragraph 91.

remedy, stating that it is neither necessary nor desirable in international sales contracts.¹³ Others have even proposed deriving an adaptation remedy from Article 50 of the CISG, which provides a remedy of price reduction for the buyer when the seller delivers non-conforming goods.¹⁴

The better view is that the CISG does not permit adaptation as a remedy for hardship. Leaving aside the express language of Article 79 (which in itself is sufficient to exclude adaptation), it is clear that the drafters intended for Articles 79 and 80 to exhaust the issue of exemption from performance,¹⁵ *i.e.*, there is no gap regarding hardship. The issue of modifying contracts is exhaustively regulated by Article 29 of the CISG, which provides that the parties are free to change the terms in mutual agreement. Therefore, it would be inapposite to allow external materials, such as the UNIDROIT Principles, to fill a gap that does not exist.¹⁶

Likewise, no discernable principle of contractual balance exists in the CISG that could apply to hardship situations. Article 50 applies in cases of non-conformity of goods, not of changed circumstances. While hardship-based adaptation seeks to create a new bargain to withstand the supervening event, Article 50 merely seeks to hold the breaching seller to the original agreement – the balance between the value and the price agreed at the time of contract conclusion. A supervening change in the market value of the goods cannot be remedied through Article 50 but would instead fall within the realm

¹³ I Schwenzler, E Muñoz, 'Duty to Renegotiate and Contract Adaptation in Case of Hardship' (2019) *Uniform Law Review*, Volume 24, pp. 167-170.

¹⁴ Peter Schlechtriem, '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 by Harry M. Flechtner' (1999) *Journal of Law & Commerce*.

¹⁵ Article 79 and 80 are the only provisions in Section IV (*Exemptions*) of Chapter V.

¹⁶ Article 7(2) only permits gap-filling through the general principles on which the CISG is made, and (logically) only if a gap is discernable. The UNIDROIT Principles of International Commercial Contracts do not necessarily reflect the CISG's underlying principles, as it is a later document and contains more detailed provisions on issues not regulated by the CISG (for instance, issues of validity, see Article 4 of the CISG). The remedy of adaptation of Article 6.2.3(4)(b) of the UNIDROIT Principles is most commonly found in civil law jurisdictions and therefore not sufficiently uniform to warrant regulation under the CISG. See L Di Matteo, A Janssen, U Magnus, R Schulze, *International Sales Law, Contract, Principles & Practice* (Nomos, CH Beck Verlag, Hart Publishing, 2016), p. 693; N Horn, *Adaptation and Renegotiation in International Trade and Finance* (Kluwer Law International, 1985), p. 22.

of hardship.¹⁷ Likewise, a change in performance cost would fall within the realm of Article 79 rather than that of Article 50.¹⁸ Interpreting Article 50 as a remedy for hardship creates unnecessary overlap. Likewise, interpreting from Article 50 a power to compel either party to perform something greater or different from what was agreed would be inappropriate. In cases of hardship, then, it is the principle of *pacta sunt servanda* that reigns: either to uphold the original bargain (if the impediment is of insufficient gravity) or suspend it (if the impediment complies with Article 79).

Thus, the safest bet for parties is to interpret that, consistent with Article 79, hardship cases trigger a remedy of exemption from liability for non-performance, not adaptation, which is not unheard of.¹⁹ If the parties desire for adaptation to be the remedy, then the correct route is to contract out of Article 79 and agree on a tailored hardship clause.²⁰

IV. Hardship Requirements as Applied to COVID-19

To argue a hardship under Article 79 of the CISG, two elements must be complied with: **First**, the event must not be within the sphere of risk of the obligor, and **second**, the event must fulfil the ‘hardship threshold’, *i.e.*, be an ‘*impediment*’ that the obligor ‘*could not reasonably be expected (...) to have avoided or overcome it or its consequences*’.

As for the issue of risk, the general principle is that an expected change of circumstances cannot trigger a remedy, even if detrimental. This principle comes from the expectation of professional competence and diligence in international commerce: a diligent merchant will guard him or herself from foreseeable risks through physical and

¹⁷ See, for comparison, the chapeau of Article 6.2.2 of the UNIDROIT Principles: ‘*There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract (...) because the value of the performance a party receives has diminished...*’.

¹⁸ *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (UNCITRAL, 2016), p. 375.

¹⁹ It is not uncommon that hardship definitions do not provide for adaptation. For instance, see the 2003 ICC model hardship clause, which provides renegotiation or termination as remedies; or the 2020 ICC model hardship clause, which provides adaptation as a remedy as option 3B, while options 3A and 3C provide for termination (either party-declared or judge-declared). See <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>.

²⁰ Article 6 of the CISG allows the parties to exclude the CISG or derogate from any of its provisions. The parties can exercise their right to derogate under Article 6 to modify the effects of hardship through contractual agreement.

contractual arrangements.²¹ This element has three cumulative considerations: **First**, the change of circumstances must not have been within the control of the obligor. If the hardship event was caused or could have been prevented by the obligor, then no remedy is deserved.²² **Second**, the hardship event must not be an assumed risk in the transaction. If a party agreed to be liable for a particular risk (*e.g.*, to suffer the effects of changes in customs regulations) then that party cannot claim hardship based on that risk. In this sense, risks can be taken expressly or impliedly.²³ **Third**, assuming the risk was not taken or within the control of the obligor, it must be established that it was unforeseeable. This is because foreseen risks are considered to have been assumed by the incumbent party unless it was contractually allocated to the other.²⁴

In the context of COVID-19, the issue of risk should not be problematic. It is clear that the pandemic and its effects are beyond the control of either party. Unless one of the parties took the risk of changing regulations or of market fluctuations, the effects of the pandemic cannot be qualified as an assumed risk. Finally, the foreseeability of the pandemic is a matter of timing. If the contract was concluded before November 2019, a pandemic of this size and gravity could not have been anticipated. If the contract was concluded after the first cases emerged in Wuhan, foreseeability becomes more likely – especially if the contract was concluded after the disease was declared a pandemic by the World Health Organization.

As for the hardship threshold, it must be assessed whether performance of the contract has become so burdensome that it cannot reasonably be expected of the obligor to maintain his or her end of the bargain. While some numerical approaches have been proposed, requiring an increase of 50%,²⁵ 100%²⁶ or even 150-200%²⁷ in the

²¹ See Principle I.2.3 of the Translex Principles, establishing the presumption of professional competence.

²² See the text of 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**...’.

²³ C Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* (Kluwer Law International, 2019), pp. 423-426.

²⁴ UNIDROIT, *Principles of International Commercial Contracts (2016)*, Official Commentary, Article 6.2.2, p. 220, comment 3(b).

²⁵ The 2004 version of the UNIDROIT Principles Official Commentary originally provided for a 50% cost increase as a rule of thumb for hardship. The comment was criticized and has been since removed.

²⁶ See *supra* note 23, p. 428.

²⁷ I Schwenzer, ‘Force Majeure and Hardship in International Sales Contracts’ (2008) *Victoria University of Wellington Law Review*, Volume 39, p. 717.

costs of performance, the truth is that these approaches are neither universal nor necessary.²⁸ The better view is that the increased costs must be analyzed from case to case. When the affected party assumed a small margin of risk, obtained a small profit margin or is faced with financial ruin as a result of the impediment, the threshold of hardship can be relatively low.²⁹

In the context of COVID-19, the gravity of the event will depend on what is the relevant 'hardship trigger': either the pandemic itself or the regulatory and political consequences it caused. If the latter is to be considered the hardship event, then an ordinary assessment of costs and risks is sufficient to address the applicability of hardship. However, the analysis changes if the event is the pandemic itself. An alternative method of determining hardship has been proposed, which puts on the forefront the question of life and health: If performance threatens human life or health, or has in fact caused death or serious harm, it is reasonable to assume that the hardship threshold has been met.³⁰ If performance puts the obligor or his or her employees in

²⁸ A percentage-based standard of hardship is not a blanket solution. See, for instance, the *Iron Molybdenum* case, where an increase of 300% in procurement costs was insufficient to fulfil Article 79 of the CISG, due to the conclusion that the market fluctuation was within the bounds of the ordinary risk of the contract. Germany, Provincial Court of Appeal, *Iron Molybdenum Case*, 28 February 1997, available at: <http://cisgw3.law.pace.edu/cases/970228g1.html>. This case demonstrates that even a 200% increase in costs might not be sufficient to trigger hardship and, instead, the manpower must be focused on assessing the individual circumstances of the case and particularly whether the risk might be assumed to have been taken by the obligor.

²⁹ See *supra* note 23, p. 431-438.

³⁰ D Girsberger, P Zapolskis, 'Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption' (2012) *Mykolo Romerio Universitetas*, pp. 130-131. See the example put forth by Professors Girsberger and Zapolskis: '*A contractor who is engaged in the building of houses in Alaska's wilderness needs to move a large quantity of stone from one side of a lake to another. The normal way is to move stones over a frozen lake by truck. Let us assume that this method is well known in Alaska and has been practiced for many years with no serious accidents reported. However, the ice cracked and the truck sank and the driver drowned. An additional inspection of the ice by a non-governmental agency showed that the other routes over the lake would have been safe as the ice was very thick. Alternative transportation methods did not exist because the area was surrounded by mountains and there was no other way to reach the point of construction. (...) Other cases may be added to this category. For example, in a case where the solo opera singer is advised by medical staff to skip a few concerts due to a minor breathing disorder, the singer could possibly insist on changing the concert tour schedule. In such cases, even though the singer may not obtain a medical certificate prohibiting her to sing, the mere medical recommendation may serve as an indication of a possible excessively onerous performance due to the increased risk of further damage to the singer's health. It is thus submitted that in such cases, a fundamental alteration cannot merely be measured in numeric terms: in these cases, an excessively onerous performance (fundamental alteration of the contractual equilibrium) occurs not only due to increased costs in monetary terms (e.g. higher transportation costs) but rather due to the increased risk to people or property.*' (emphasis added) In cases where performance becomes too dangerous to realize, and actually threatens the life of the persons involved, the hardship threshold can be deemed to have been met. Human life

harm's way, by exposing them to COVID-19 contagion and potential death, then hardship is sure to have ensued. The fulfilment of this hardship alternative depends on the necessity of employing natural persons in performance; the likelihood of infection; and the likelihood of developing a severe or even fatal case of COVID-19.

As a final note on COVID-19, the most sensible remedy for hardship remains an exemption of liability. To start with, providing a different remedy would force the parties or the adjudicator to draw a distinction between 'excessive onerousness' and 'impossibility', a daunting task in the middle of this crisis.³¹ Regulating inconsistent changed circumstances doctrines with different remedies is not a favorable policy solution to the issue – in the end, simplicity is the mother of certainty. Most importantly, adaptation is ill-suited to address a COVID-19-related hardship. COVID-19 has robbed us of the possibility to predict the near future and plan ahead. We are driving through the mist, and that is not an appealing prospect for an adjudicator to map out the parties' future relationship. If the contract is to be changed, it should be up to the parties to do it voluntarily, as they are in the best position to do so and they alone should bear the blame for an incorrect choice.

considerations vastly outweigh economic considerations behind contractual imbalance, as no party should be expected to endanger its own life or that of its employees to perform the contract. In fact, this criterion is consistent with the financial-ruin-approach: in both cases, performance threatens the existence of the party bound to perform. The mere (objective) threat that performance can destroy that party relieves it from the duty to undertake the agreed act.

³¹ On the difficulty to differentiate between impossibility and excessive onerousness, see *supra* note 23, pp. 213-216. Given this difficulty, creating an artificial distinction between the two concepts results in the danger that claims can be rejected for formal reasons rather than on the merits if the claimant chooses the wrong changed circumstances doctrine. Adopting a unified approach to changes of circumstances – that of 'impediment', which has a single and simple remedy – is likely to provide more legal certainty in times of great change.