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### The Impact of Force Majeure on Contracts for the International Sale of Commercial Goods Under Art. 79 of the CISG



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#### Abstract



The United Nations Convention on Contracts for the International Sale of Goods (CISG) aims to harmonise international trade law by providing unified rules for sales contracts across its 97-member countries, as of April 2025. Despite its wide adoption, the CISG's approach to non-performance and liability differs markedly from domestic legal systems, particularly those based on civil law traditions. The CISG provides that the debtor failing to perform their obligations must compensate for the loss, unless exempted under Article 79, which introduces the concept of "impediment beyond the debtor's control" as a basis for exemption. For this exemption to apply, the impediment must be unforeseeable, unavoidable, and the direct cause of the failure to perform. However, these criteria make its application rare in practice, while its requirements have been satisfied in only a limited number of cases. This study examines Article 79 CISG in detail, exploring its stringent criteria and the challenges it presents in practice. Furthermore, the paper will assess Article 79's effectiveness in addressing force majeure and hardship scenarios, despite the absence of explicit references to these concepts within the CISG text.

#### Keywords


International Sales Law · Impediment Beyond Control · Force Majeure · Hardship · Impossibility



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## I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods provides uniform rules for international sales contracts. As of January 2025, the CISG has been ratified by 97 countries, thereby establishing it as the governing law for international sales of goods in almost half of the world's jurisdictions.

The CISG's system of non-performance differs significantly from the conceptual non-performance system that is typical of civil law jurisdictions. First, the CISG provides for strict liability, whereby the debtor who fails to perform their obligations, for whatever reason, is obliged to compensate the other party for the loss suffered.<sup>1</sup>

The boundaries of this strict liability are set out in Article 79. The CISG, which is the result of a harmonisation effort, does not directly address the concepts of force majeure and hardship, which have been the subject of much debate. Instead, Article 79 describes the concept of "impediment beyond the debtor's control" as an excuse for exemption from liability for damages. Such an external impediment must be the cause of the debtor's failure to perform. Nevertheless, the mere existence of an external impediment to performance does not, in and of itself, constitute grounds for the debtor's exemption from liability. In addition, the impediment must be unforeseeable and unavoidable.<sup>2</sup> Ultimately, the unforeseeable and unavoidable external impediment must be the cause of the debtor's failure to perform.

As a consequence of such an impediment, exemption from liability for damages is afforded under Article 79. This has no further effect on the other obligations of the debtor. The other party may still rely on other remedies available under the CISG, provided that the relevant conditions are met.<sup>3</sup>

In practice, Article 79 has very limited application and is rarely helpful to parties in distress because it sets higher standards for possible exemption from liability than most national laws.<sup>4</sup> To date, the requirements of Article 79 have only been satisfied in a limited number of cases.<sup>5</sup>

Article 79 of the CISG states as follows:

*"(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.*

<sup>1</sup>Y Atamer, 'Article 79 CISG' in S Kröll and L Mistelis and P Perales Viscasillas (eds), *UN Convention on the International Sale of Goods (CISG)- A Commentary*, (2<sup>nd</sup> edn, CH Beck/Hart/Nomos, 2018), para 1; A Janssen and J Wahnschaffe, 'Covid-19 and international sale contracts: unprecedented grounds for exemption or business as usual?', (2021) *Unif. L. Rev.* 1, 3; P Pichonnaz, *Impossibilité et Exorbitance: étude analytique des obstacles à l'exécution des obligations en droit suisse (art. 119 CO et 79 CVIM)*, (Éditions Universitaires Fribourg, 1997), para 1600.

<sup>2</sup>Atamer (n 1), para 2-3; H Flechtner, 'Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods', (2007) 19 *Pace Int'l L. Rev.* 29, Available at: <https://digitalcommons.pace.edu/pilr/vol19/iss1/3>, 31; P Huber and A Mullis, *The CISG: A New Textbook for Students and Practitioners*, (Sellier, 2007), 259; J M Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, (The Hague, 2012), 188.

<sup>3</sup>Atamer (n 1), para 4.

<sup>4</sup>Janssen/Wahnschaffe (n 1), 3.

<sup>5</sup>CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007. For the unsuccessful exemption cases, see: **Arbitral awards**: ICC, 01 January 2000 - 8790/2000, CLOUT Case No: 1085; **Germany**: Landgericht Freiburg im Breisgau (District Court Freiburg), 22 August 2002 - 8 O 75/02, CISG-online No: 711; Bundesgerichtshof (German Supreme Court), 09 January 2002 - VIII ZR 304/00, CISG-online No: 651; Oberlandesgericht Hamm (Hamm Higher Regional Court), 12 October 2001 - 13 U 102/01, CISG-online No: 1430; Bundesgerichtshof (German Supreme Court), 24 March 1999 - VIII ZR 121/98, CISG-online No: 396; Amtsgericht Charlottenburg (Local Court Charlottenburg), 04 May 1994 - 7b C 34/94, CISG-online No: 386; **Switzerland**: Amtsgericht Willisau (Lower Court), 12 March 2004 - 10 01 5, CLOUT Case No: 893; Handelsgericht Zurich (Commercial Court), 10 February 1999 - HG970238, CLOUT Case No: 331; **USA**: U.S. Northern District of Illinois, Eastern Division, 07 July 2004-03 C 1154, CLOUT Case No: 696.



(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.*

(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."*

Accordingly, for the debtor to be relieved of liability, the following conditions must be met:<sup>6</sup>

1. The existence of an impediment beyond the debtor's control;
2. The debtor could not reasonably have foreseen the impediment at the time the contract was concluded (*unpredictability*);
3. The debtor could not reasonably have avoided or overcome the impediment or its consequences (*inevitability*);
4. The non-performance must be a direct result of the impediment (*establishment of a causal link between the two*).

## II. CISG Article 79

### A. Conditions

#### 1. Existence of an Impediment Beyond Control

The first condition of Article 79 is the presence of an impediment that lies beyond the debtor's sphere of control. The term "impediment" is employed with the intention of narrowing and objectifying the events that may constitute grounds for exemption under Article 79.<sup>7</sup>

Accordingly, only those events related to the non-performance of the obligation in question and occurring outside the debtor's sphere of control should be regarded as an impediment within the meaning of this Article. The concept of the debtor's sphere of control is contingent upon the contractual risk allocation and may be determined by reference to the principles set forth in customary law and general practice.<sup>8</sup>

It is incontestable that the debtor is liable for the impediments within their sphere of control.<sup>9</sup> Similarly, the debtor is responsible for any impediments resulting from his own personal situation, including economic

<sup>6</sup>I Schwenzer, 'Article 79 CISG' in P. Schlechtriem and I. Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (4<sup>th</sup> edn, OUP, 2016), para 11-16; D Tallon, 'Article 79 CISG' in CM. Bianca and MJ. Bonell (eds), *Commentary on the International Sales Law*, (Giuffrè, 1987), para 2.6.1.

<sup>7</sup>Schwenzer, 'Article 79 CISG', (n 6), para 12.

<sup>8</sup>Schwenzer, 'Article 79 CISG', (n 6), para 12.

<sup>9</sup>Schwenzer, 'Article 79 CISG', (n 6), para 12. **Germany:** Oberlandesgericht Munich (Munich Higher Regional Court), 5 March 2008-7 U 4969/06, CLOUT Case No: 1233. In this case, the seller who could not transfer the goods to the buyer because his car was stolen was held liable.

difficulties due to his own financial situation or capacity, organisational impediments<sup>10</sup> or risks arising from the acts of his own personnel.<sup>11</sup> According to Article 79(2), the debtor is also liable for any default of the third person appointed to perform all or part of the obligation on his behalf. The mere fact that these persons are outside the debtor's organisational sphere and that they act independently does not change this consequence. However, there may also be cases where the debtor could be exempted from liability regardless of whether the requirements of Article 79(2) are met.<sup>12</sup>

According to the broad wording of Article 79, the impediment that releases the debtor from liability may either be present at the time of the conclusion of the contract or arise subsequently. However, there is a disagreement in the literature and in practice as to when the impediment arises. One view argues that the impediment is covered by Article 79 only if it arises after the conclusion of the contract. In other words, an initial impediment unknown to the debtor is a matter of validity, which is not governed by the CISG under Article 4(a). The prevailing view, on the other hand, is that Article 79 applies both to the impediment existing prior to the conclusion of the contract but unknown to the debtor and to the subsequent impediment arising after the conclusion of the contract.<sup>13</sup> Therefore, the initial impossibility, which may lead to invalidity under some national laws, should be assessed in the context of the CISG.

Sometimes the impediment only partially prevents performance. In such cases, the debtor is exempted from liability for damages only regarding that part of the performance that is prevented by the impediment.<sup>14</sup>

## 2. Unpredictability

The debtor is liable for an impediment that could reasonably have been considered at the time the contract was concluded. In other words, the impediment should be objectively impossible to foresee or predict at the time of the conclusion of the contract.<sup>15</sup> For determining this condition, it should be assessed whether an average reasonable person of the same type could have reasonably foreseen such an impediment.<sup>16</sup>

As reflected by the wording of the article, the debtor is not exempt from liability if the impediment could have been anticipated at the time the contract was concluded.<sup>17</sup> However, the wording does not clarify when the impediment must have arisen. If the debtor knew about the impediment at the time of contract conclusion, they would not be released from liability. In such cases, the debtor could reasonably account for the impediment and take appropriate measures. Nevertheless, the question of whether an impediment

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<sup>10</sup>Tallon, 'Article 79 CISG', (n 6), para 2.6.5.

<sup>11</sup>Atamer (n 1), para 47; Schwenger, 'Article 79 CISG', (n 6), para 21. See also *Germany*: Oberlandesgericht Munich (Munich Higher Regional Court), 5 March 2008 - 7 U 4969/06, CLOUT Case No: 1233; Bundesgerichtshof (German Federal Supreme Court), 24 March 1999 - VIII ZR 121/98, CLOUT Case No: 271.

<sup>12</sup>Huber/Mullis (n 2), 109 et seq.; Schwenger, 'Article 79 CISG', (n 6), para 35. See also related case law where the concept of "third person" and the requirements of Article 79(2) are discussed: **Arbitral Award**: China International Economic & Trade Arbitration Commission (CIETAC), 10 March 1995 - CISG/1995/04, CISG-online No: 1065; **Switzerland**: Tribunale d'appello Ticino (Court of Appeal Canton Ticino) Switzerland, 29 October 2003 - 12.2002.181, CISG-online No: 912; Handelsgericht des Kantons Zürich (Commercial Court Canton Zurich), 10 February 1999 - HG 970238.1, CISG-online No: 488.

<sup>13</sup>Atamer (n 1), para 48; Schwenger, 'Article 79 CISG', (n 6), para 13.

<sup>14</sup>Tallon, 'Article 79 CISG', (n 6), para 2.10.3.

<sup>15</sup>Schwenger, 'Article 79 CISG', (n 6), para 14.

<sup>16</sup>Atamer (n 1), para 52; Schwenger, 'Article 79 CISG', (n 6), para 14, Tallon, 'Article 79 CISG', (n 6), para 2.6.3. See also the case law, **Arbitral Awards**: China International Economic & Trade Arbitration Commission (CIETAC), 30 November 1997 - CISG/1997/33, CISG-online No: 1412; China International Economic & Trade Arbitration Commission (CIETAC), 02 May 1996 - CISG/1996/21, CISG-online No: 1067; China International Economic & Trade Arbitration Commission (CIETAC), 14 March 1996 - CISG/1996/14, CISG-online No: 1523. For an opposing opinion that suggests that the assessment shall be made according to the contract between the parties, see A Keil, *Die Haftungsbeziehung des Schuldners im UN-Kaufrecht*, (Peter Lang, 1993), 37.

<sup>17</sup>Schwenger, 'Article 79 CISG', (n 6), para 14.

existing at the time of the conclusion of the contract can release the debtor from the liability remain open to debate. The criterion set by the CISG is not the existence of the impediment at the time of the contract, but the predictability of the impediment by the debtor.<sup>18</sup> The mere existence of the impediment prior to the contract's conclusion does not necessarily mean that the debtor could have accounted for it. Nevertheless, since the burden of proof rests on the debtor seeking exemption, it will be challenging for the debtor to demonstrate the condition of unpredictability if the impediment existed at the time the contract was concluded.

Most circumstances of *force majeure* could be interpreted as unforeseeable external impediments within the meaning of Article 79, provided that they are not of a recurrent nature. However, the recurrence of such circumstances would make them foreseeable and thus the debtor could not be exempted from liability.<sup>19</sup> Furthermore, if the debtor has not made any reservations in the contract, even though the impediment is foreseeable, the debtor is deemed to have assumed the risk.<sup>20</sup>

### 3. Inevitability

Even if the impediment is not initially foreseeable by the debtor, the debtor shall not be exempted from liability if he could reasonably have avoided or overcome the impediment or its consequences.<sup>21</sup> To avoid the impediment or its consequences, the debtor should have taken all the necessary precautions from the outset.<sup>22</sup> If the impediment is unavoidable, regardless of the precautions taken, it is then necessary to ascertain whether it can be overcome. It will be deemed to have been carried out in this manner, when all the steps that could possibly be expected to be taken have taken, and the negative impact created by the impediment has been duly compensated.<sup>23</sup>

The assessment of whether it is generally possible and reasonable to avoid or overcome the impediment or its consequences is of an objective nature.<sup>24</sup> In this context, the criteria to be applied should be very strict in relation to international trade.<sup>25</sup> The debtor may be expected to perform his contractual obligation even if the impediments result in consequential costs or damage.<sup>26</sup> For example, the debtor should consider the alternative routes of transport or even the delivery of substitute goods in the event of an accident on his

<sup>18</sup>However, one view argues that an impediment existing at the time of contract conclusion constitutes an initial impossibility, which, according to many national legal systems, renders a contract invalid. Since issues of contract validity fall outside the scope of the CISG, Article 79 cannot be applied in such cases. See Tallon, 'Article 79 CISG', (n 6), para 2.4.3. Cf. J Rimke, 'Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts' *Pace International Law Review* (ed) *Review of the Convention on Contracts for the International Sale of Goods (1999-2000)*, (Kluwer, 2001), 197, 214-215.

<sup>19</sup>Pichonnaz (n 1), para 1721; Tallon, 'Article 79 CISG', (n 6), para 2.6.3. See also the case law, **Arbitral Award**: China International Economic & Trade Arbitration Commission (CIETAC), 02 May 1996, CISG-online No: 1067. In this case, the arbitral court did not accept the demand for exemption from liability due to an avalanche that occurred in a place that is usually snowy in Decembers. Cf. **USA**: U.S. District Court, Northern District of Illinois, East. Div., 06 July 2004, CISG-online No: 925. Strangely, in this case the court considers the freezing of a port in St. Petersburg in December as unforeseeable.

<sup>20</sup>Schwenzer, 'Article 79 CISG', (n 6), para 14. See also the case law, **Arbitral Award**: China International Economic & Trade Arbitration Commission (CIETAC), 05 March 2005, CISG-online No: 5007. In this case, exemption from liability under Article 79 was rejected by the arbitral tribunal on the grounds that SARS happened two months prior to the contract conclusion date between the parties, meaning that it was not unpredictable. **Spain**: Tribunal Supremo (Spanish Supreme Court), 09 July 2014 - 359/2014, CISG-online No: 2578. In this case, the court found that the risk might have been avoided if the seller had acted with the foresight of a reasonable man.

<sup>21</sup>Schwenzer, 'Article 79 CISG', (n 6), para 15; Tallon, 'Article 79 CISG', (n 6), para 2.6.3. See also the case law, **Germany**: Landgericht Freiburg im Breisgau (District Court Freiburg), 22 August 2002-8 O 75/02, CISG-online No: 711. In this case, the court held the seller whose car was stolen liable for not taking all due measures to prevent the stealing of the car.

<sup>22</sup>Rimke (n 18), 216; Tallon, 'Article 79 CISG', (n 6), para 2.6.4.

<sup>23</sup>Rimke (n 18), 216; Tallon, 'Article 79 CISG', (n 6), para 2.6.4.

<sup>24</sup>Schwenzer, 'Article 79 CISG', (n 6), para 15; Tallon, 'Article 79 CISG', (n 6), para 2.6.4.

<sup>25</sup>Tallon, 'Article 79 CISG', (n 6), para 2.6.5.

<sup>26</sup>Schwenzer, 'Article 79 CISG', (n 6), para 15.



regular route, even if they are expensive.<sup>27</sup> Otherwise, the debtor cannot be exempted from liability under Article 79.<sup>28</sup> Such efforts to avoid the impediment should not ruin the debtor.<sup>29</sup>

The burden of proof regarding the inevitability rests with the debtor. Moreover, regardless of the existence of such inevitability, the debtor is compelled to act accordingly.<sup>30</sup> In technical terms, this establishes a duty to act. Should the debtor contravene the right to assert Article 79, they will forfeit their exemption from liability.

#### 4. Causality

For the debtor to invoke the exemption under Article 79, the unforeseeable and unavoidable impediment must be the sole cause of his non-performance.<sup>31</sup> If the debtor breaches the contract, even due to an unforeseeable and unavoidable impediment, they will not be exempted from liability.

Similarly, if more than one event causes the non-performance, one view argues that in order for a causal link to be established, the impediment must be the sole cause of the breach of contract.<sup>32</sup> In other words, if there are additional factors contributing to the breach of contract beyond the fulfilment of the conditions set forth in Article 79, the debtor remains liable. Another view holds that the impediment need not be the sole cause of the breach of the contract.<sup>33</sup> In circumstances where one cause is superseded or absorbed by another, if the breach of contract arises due to an impediment that fulfils the conditions set forth in Article 79, the debtor should be exempt from liability. However, the impediment must be identified as the ultimate cause. Consequently, the impediment can subsume previous causes of breach of contract, thereby affording the debtor the opportunity to be relieved of liability.

Consequently, the debtor that is already in default at the time of the occurrence of the impediment could not be exempted under Article 79.<sup>34</sup> In such a case, the debtor is liable for his default. Nevertheless, the causality may be important in the assessment: If the debtor can prove that his breach has no effect on the damage that has occurred, he could be exempted from liability.<sup>35</sup>

## B. Specific Cases

### 1. Natural Events

Natural events such as rain, storm, wind, flood, earthquake, fire, drought and frost are usually considered to be impediments beyond the debtor's control. However, to be exempted from liability under Article 79, such natural events should not have been foreseeable and the consequences of the impediment could not have been prevented or overcome.<sup>36</sup>

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<sup>27</sup>See *Arbitral Award*: American Arbitration Association, *Macromex Srl. v. Globex International Inc.*, 12 December 2007, 50181T 0036406, CISG-online No: 1647. In the sale of chicken legs, the American seller delayed the delivery, and in the meantime, the Ukrainian Government imposed restrictions on the import of chicken due to avian influenza, and the goods could not be delivered to the buyer in Ukraine. Also see, **Germany**: Oberlandesgericht Hamburg (Hamburg Higher Regional Court), 4 July 1997–1 U 143/95, CISG-online 1299. In the sale of tomato paste, although the heavy rains in France caused a reduction in tomato production and a significant increase in the market price of tomatoes, it is not considered to be an unforeseeable and unavoidable impediment by the court since it does not cause the entire tomato crop to be destroyed.

<sup>28</sup>Schwenzer, 'Article 79 CISG', (n 6), para 15; Tallon, 'Article 79 CISG', (n 6), para 2.6.5.

<sup>29</sup>Schwenzer, 'Article 79 CISG', (n 6), para 15.

<sup>30</sup>F Enderlein and D Maskow, *International Sales Law* (Oceana, 1992), 324; also see Rimke (n 18), 216.

<sup>31</sup>Atamer (n 1), para 73; Schwenzer, 'Article 79 CISG', (n 6), para 16; Tallon, 'Article 79 CISG', (n 6), para 2.6.6.

<sup>32</sup>Schwenzer, 'Article 79 CISG', (n 6), para 16; Tallon, 'Article 79 CISG', (n 6), para 2.6.6.

<sup>33</sup>See, Enderlein/Maskow (n 30), 322.

<sup>34</sup>Schwenzer, 'Article 79 CISG', (n 6), para 16; Tallon, 'Article 79 CISG', (n 6), para 2.6.6.

<sup>35</sup>Atamer (n 1), para 59.

<sup>36</sup>Huber/Mullis (n 2), 259; Schwenzer, 'Article 79 CISG', (n 6), para 17. See **Netherlands**: Rechtbank Maastricht (District Court Maastricht), 09 July 2008-120428 / HA ZA 07-550, CISG-online No: 1748; **USA**: U.S. District Court for the Northern District of Illinois, 06 July 2004 - 1:03-cv-01154, CISG-online No: 925.



## 2. Economic Crises

Economic crises have usually changed economic circumstances that cause an unreasonable burden on the parties in the performance of their contractual obligations. It has long been debated in the literature whether such cases of economic impossibility would lead to an exemption under Article 79. The prevailing view is that this would be the case “*if the ultimate limit of sacrifice has been exceeded.*”<sup>37</sup> As there is no common understanding of what this limit is, it should be determined on a case-by-case basis whether the limit has been exceeded.<sup>38</sup> It should also be noted that this limit is not interpreted narrowly in the literature. On the contrary, price fluctuations are usually considered foreseeable.<sup>39</sup>

## 3. Economic Difficulties of the Debtor

In a contractual relationship, the debtor bears the risk of economic difficulties due to his own financial capacity, i.e., this lies within his sphere of responsibility.<sup>40</sup> This includes the procurement of the foreign currency in which the contractual price is determined and the timely transfer of the contractual price, including the risks of the intermediary. However, the cases where the transfer of the contract price is prohibited due to the state sanctions could lead to an exemption under Article 79, unless these state sanctions are directed against the debtor.<sup>41</sup>

## 4. Regulatory Changes and Bans on Imports and Exports

Regulatory changes that impede the performance of the contract, such as quotas, export or import bans, rationing of goods, exchange controls or trade bans, are often beyond the control of the parties.<sup>42</sup> To be considered as a reason for exemption, it must also be shown that the impediment is unforeseeable and has a causal link to the non-performance.<sup>43</sup> However, there is considerable debate whether such cases should be considered an exemption under Article 79. While some arbitral tribunals have exempted the debtor, others have been more reluctant to do so because of the foreseeability at the time of the conclusion of the contract.<sup>44</sup> Legal literature therefore advises that parties should allocate the risk of regulatory changes in relation to import and export bans in their contractual clauses.

It is also debated whether a state-run or state-owned enterprise can also rely on the exemption under Article 79 in the event of regulatory changes that impede performance.<sup>45</sup>

## 5. Strikes and Lockouts

In the case of labour disputes (strikes and lockouts), it is extremely important to determine whether the specific dispute is “*beyond the control of the debtor*” or not. If the dispute arises solely from the terms and

<sup>37</sup>Atamer (n 1), para 79; Schwenger, ‘Article 79 CISG’, (n 6), para 31.

<sup>38</sup>Schwenger, ‘Article 79 CISG’, (n 6), para 31.

<sup>39</sup>Schwenger, ‘Article 79 CISG’, (n 6), para 31. See **Belgium**: Rechtbank van Koophandel Tongeren (Commercial Court Tongeren), 25 January 2005 - A.R. A/04/01960, CISG-online No: 1106; Rechtbank van Koophandel Hasselt (Commercial Court Hasselt), 02 May 1995 AR 1849/94, CISG-online No: 371; **France**: Cour de Cassation (French Supreme Court), 30 June 2004 - Y 01-15.964, CISG-online No: 870; Cour d’appel de Colmar (Court of Appeal Colmar), 12 June 2001 - 1 A 199800359, CISG-online No. 694.

<sup>40</sup>Lookofsky (n 2), 188-189. See **Arbitral Award**: Schiedsgericht der Handelskammer Hamburg (Court of Arbitration of the Hamburg Chamber of Commerce), 21 March 1996-Partial Award (on the merits), CISG-online No: 187.

<sup>41</sup>Lookofsky (n 2), 191; Schwenger, ‘Article 79 CISG’, (n 6), para 26; Tallon, ‘Article 79 CISG’, (n 6), para 2.6.5.

<sup>42</sup>Schwenger, ‘Article 79 CISG’, (n 6), para 18; Janssen/Wahnschaffe (n 1), 13.

<sup>43</sup>Atamer (n 1), para 73.

<sup>44</sup>Schwenger, ‘Article 79 CISG’, (n 6), para 18. See **Arbitral Awards**: Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 10 December 1996 - VB 96074, CISG-online No: 774; China International Economic & Trade Arbitration Commission (CIETAC), 15 December 1998 - CISG/1998/09, CISG-online No: 1167; China International Economic & Trade Arbitration Commission (CIETAC), 07 May 1997 - CISG/1997/11, CISG-online No: 1152; China International Economic & Trade Arbitration Commission (CIETAC), 31 December 1996 - CISG/1996/58, CISG-online No: 1524.

<sup>45</sup>Schwenger, ‘Article 79 CISG’, (n 6), para 18.

conditions of employment in the debtor's business, the debtor undoubtedly bears such business risks.<sup>46</sup>

Labour disputes of a general and political nature, on the other hand, may be considered grounds for exemption under Article 79. However, even in such cases, all the conditions of Article 79 must be met. In other words, such a labour dispute could not have been foreseen at the time of the conclusion of the contract and its consequences could not have been overcome by reasonable measures.<sup>47</sup>

## 6. Illness of the Debtor

The debtor normally bears the risks within his own sphere of control. Therefore, an interruption of operations due to the unforeseen illness, death or arrest of the debtor or one of his employees does not exempt the debtor from liability under Article 79.<sup>48</sup> However, if such interruption is caused by an impediment beyond the debtor's control, such as natural disasters, epidemics or pandemics, the debtor may rely on Article 79.<sup>49</sup>

## C. Burden of Proof

The debtor in breach claiming the exemption under Article 79 must prove the relevant conditions.<sup>50</sup> In doing so, sometimes (in accordance with the type of impediment) the debtor may try to utilise “*governmental force majeure certificates*” to show a reliable basis for their allegations with regard to the foretold conditions.<sup>51</sup> The same also holds true whenever there is a third person to whom the performance (partly or fully) is entrusted as an auxiliary and the performance is impeded or impaired due to an uncontrollable event that has taken place. However, according to Article 79(2), in such a case, the burden of proof has two different dimensions: i) First, the debtor must prove that the condition of Article 79 is met, and ii) Second, he must also prove that a third person in a similar situation (if he were a party to the contract) would have also been exempted under Article 79.<sup>52</sup> As the debtor must prove both conditions, it is more difficult and complicated for the debtor to be exempted from liability under Article 79(2).<sup>53</sup>

If, on the other hand, the loss is due to the failure of the debtor claiming the exemption to give the other party timely and duly notification of its inability to perform, the injured party must prove that the requirements of Article 79(4) are satisfied in the particular case.<sup>54</sup>

## D. Exemption from Liability for Damages

### 1. Scope

Article 79 introduces a provision on exemption from liability for damages, which is its only consequence. It is accepted that the concept of “damages” should be interpreted broadly, including all kinds of damages that may result from non-performance, whether direct or indirect.<sup>55</sup>

<sup>46</sup>Schwenzer, 'Article 79 CISG', (n 6), para 22.

<sup>47</sup>Huber/Mullis (n 2), 260; Schwenzer, 'Article 79 CISG', (n 6), para 24.

<sup>48</sup>Lookofsky (n 2), 188; Schwenzer, 'Article 79 CISG', (n 6), para 19.

<sup>49</sup>Schwenzer, 'Article 79 CISG', (n 6), para 19.

<sup>50</sup>Atamer (n 1), para 99; Janssen/Wahnschaffe (n 1), 9; Schwenzer, 'Article 79 CISG', (n 6), para 60. See also *Arbitral Award*: China International Economic & Trade Arbitration Commission (CIETAC), 05 March 2005, CISG-online No: 5007; *Spain*: Sentencia de la Audiencia Provincial de Girona (Girona Provincial High Court), 21 January 2016 - 80/2015, CLOUT case no: 1580; *Switzerland*: Handelsgericht des Kantons Aargau (Commercial Court Canton Aargau), 10 March 2010 - HOR.2008.42/rl/tv, CISG-online No: 2176.

<sup>51</sup>Janssen/Wahnschaffe (n 1), 10.

<sup>52</sup>Atamer (n 1), para 99; Schwenzer, 'Article 79 CISG', (n 6), para 40, 60.

<sup>53</sup>Schwenzer, 'Article 79 CISG', (n 6), para 40.

<sup>54</sup>Schwenzer, 'Article 79 CISG', (n 6), para 60.

<sup>55</sup>Tallon, 'Article 79 CISG', (n 6), para 2.10.1.



However, the effects of exemption Article 79 on the penalty clauses and liquidated damages have long been a matter of debate. The prevailing view is that since this is a problem of interpretation of the penalty clauses and liquidated damages, these questions should be answered in accordance with Article 4.<sup>56</sup> However, if it is not possible to resolve the issue by interpretation, the CISG Advisory Council considers that the debtor who is released from liability for damages is also released from payment of amounts agreed in the contract, such as the penalty clause and liquidated damages, unless the parties agree otherwise.<sup>57</sup>

## 2. Availability of Other Remedies

Article 79 only provides for an exemption from liability for damages. In other words, failure to perform an obligation is still a breach of contract.<sup>58</sup> Therefore, the parties can still exercise other remedies available under the CISG even if there is an impediment that exempts the debtor from liability. This follows from the clear wording of Article 79(5).<sup>59</sup> In assessing the availability of other remedies, the conditions of each remedy should be assessed separately. Article 79 has no bearing on such an assessment.<sup>60</sup>

The same applies to the assessment of the availability of specific performance. Article 28 limits the availability of the right to specific performance to those jurisdictions that also provide for such rights.<sup>61</sup> It is therefore highly controversial whether specific performance can be sought despite the existence of an impediment falling within the scope of Article 79. One view argues that Article 79 constitutes a bar to claiming specific performance.<sup>62</sup> The purpose of Article 79 and the provisions on the passing of risk indirectly support this view. An assessment under Article 28 may lead to different results in similar cases, as it would require a different assessment each time according to the applicable national law.

According to the prevailing view in the legal literature, the existence of an impediment leading to absolute impossibility obviously excludes the availability of specific performance.<sup>63</sup> If the impediment does not lead to absolute impossibility but only makes performance extremely difficult, it does not directly exclude the availability of specific performance.

According to another opinion in the legal literature, there is a loophole in the CISG as to whether specific performance can be claimed and this loophole should be filled in accordance with Article 7(2) and the general principles of the CISG.<sup>64</sup> Accordingly, in cases where the debtor cannot be expected to fulfil his obligations, such as impossibility, Article 79 should be applied by analogy and therefore, specific performance may not be claimed.

## E. Duty to Notify

Article 79(4) stipulates that the debtor must timely notify the other party of the impediment and its likely effect on performance. The purpose of the notification under Article 79(4) is to enable the other party to take the necessary measures to overcome the consequences of such non-performance. This obligation is a manifestation of the good faith in Article 7 and the obligation to cooperate, which is one of the basic

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<sup>56</sup>See Schwenger, 'Article 79 CISG', (n 6), para 52.

<sup>57</sup>CISG-AC Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts, Rapporteur: Dr. Pascal Hachem, Bär & Karrer AG, Zurich, Switzerland. Adopted by the CISG-AC following its 16th meeting in Wellington, New Zealand on 3 August 2012, para 5.2.

<sup>58</sup>Schwenger, 'Article 79 CISG', (n 6), para 49.

<sup>59</sup>Pichonnaz (n 1), para 1806; Schwenger, 'Article 79 CISG', (n 6), para 50 et seq., especially see N. 52.

<sup>60</sup>Atamer (n 1), para 4; Schwenger, 'Article 79 CISG', (n 6), para 50.

<sup>61</sup>J Honnold, *Documentary History of the Uniform for International Sales*, (Kluwer, 1989), para 435.5, U Magnus, *Staudinger Kommentar zum Bürgerlichen Gesetzbuch: Wiener UN-Kaufrecht*, (Sellier/deGruyter, 2005), Art.46 para 25.

<sup>62</sup>Schwenger, 'Article 79 CISG', (n 6), para 54.

<sup>63</sup>Schwenger, 'Article 79 CISG', (n 6), para 54; Tallon, 'Article 79 CISG', (n 6), para 2.10.2.

<sup>64</sup>Huber/Mullis (n 2), 193.

principles of the CISG.<sup>65</sup> Therefore, such a notice should include information on the nature, extent, severity, and possible duration and consequences of the impediment.<sup>66</sup>

One view in the legal literature argues that the duty to notify arises only if the impediment to performance is unavoidable<sup>67</sup>, while another view proposes that the debtor is obliged to notify the other party even if the impediment can be prevented by the debtor himself.<sup>68</sup> The notice can be made in any form, but it must be given within a reasonable time<sup>69</sup> after the debtor knew or ought to have known of the impediment. The notice takes effect as soon as it reaches the other party.<sup>70</sup> Therefore, the debtor is not exempted from liability until the other party receives the notice.<sup>71</sup>

The debtor who fails to timely and properly notify the others will be liable for the loss arising from such failure. In other words, the debtor could be exempted from liability under Article 79, but still be liable for the damage caused by the failure to notify.<sup>72</sup> The debtor will not be liable for the failure to notify if the impediment prevents him from doing so.<sup>73</sup>

## F. Duty to Mitigate

Article 77 CISG provides for a general duty to mitigate. It requires the parties to take reasonable measures to mitigate the damage caused by the other party's breach. In other words, it requires the injured party to take reasonable steps to minimise the extent of the loss suffered. This general duty to mitigate applies by analogy to the exemption under Article 79. Accordingly, the debtor relying on Article 79 must take reasonable measures to mitigate the consequences of the risk of an impediment. Otherwise, the debtor could not rely on the application of Article 79. The same applies to the other party. The other party cannot claim damages if it could have reasonably avoided the loss.

It is also recognised that the duty to mitigate may lead to renegotiation. Thus, the parties may try to find a middle way to minimise the consequences of the impediment under Article 79.<sup>74</sup>

## III. Its Relation with Similar Concepts

### A. Hardship

The hardship or the extreme onerosity of performance is the unforeseeable subsequent circumstances in which the performance becomes extremely difficult or burdensome for the debtor after the conclusion of the contract and thus the existing initial contractual equilibrium between the parties has fundamentally deteriorated.<sup>75</sup>

<sup>65</sup>Atamer (n 1), para 95; Schwenger, 'Article 79 CISG', (n 6), para 44; Tallon, 'Article 79 CISG', (n 6), para 2.8.

<sup>66</sup>Atamer (n 1), para 95; Schwenger, 'Article 79 CISG', (n 6), para 45; Tallon, 'Article 79 CISG', (n 6), para 2.8.

<sup>67</sup>Tallon, 'Article 79 CISG', (n 6), para 2.8.

<sup>68</sup>Pichonnaz (n 1), para 1762; Schwenger, 'Article 79 CISG', (n 6), para 15.

<sup>69</sup>Schwenger, 'Article 79 CISG', (n 6), para 45. Certainly, the reasonable time shall be considered in each case.

<sup>70</sup>Schwenger, 'Article 79 CISG', (n 6), para 46.

<sup>71</sup>**Germany:** Landgericht Berlin (District Court Berlin), 15 September 1994-52 S 247/94, CISG-online No: 399.

<sup>72</sup>Schwenger, 'Article 79 CISG', (n 6), para 48.

<sup>73</sup>Tallon, 'Article 79 CISG', (n 6), para 2.8

<sup>74</sup>**Austria:** Oberlandesgericht Wien (Vienna Higher Regional Court), 27 February 2017-1 R 207/16t, CISG-online No: 2814.

<sup>75</sup>I Schwenger, 'Force Majeure and Hardship in International Sales Contracts', (2008) 39 VUWLR, 709, 714.

<sup>76</sup>Atamer (n 1), para 78; Schwenger, Force Majeure and Hardship, (n 75), 712.



The CISG does not contain an explicit provision on hardship.<sup>76</sup> As mentioned above, the CISG does not directly deal with the notions of absolute impossibility or hardship but instead with the notion of “impediment” under Article 79. On the other hand, in international sales contracts, it is very likely to encounter grounds for hardship.

Thus, the question of whether Article 79 also covers the hardship is still a heated and unsolved debate in the legal literature, especially whether there is an obligation to renegotiate under the CISG. Undoubtedly, if there is an agreement between the parties on a renegotiation obligation, it will apply. If not, the applicable rules and availability of the renegotiation duty are highly controversial. According to the first view, it is claimed that the CISG excludes the concept of hardship; thus, the cases of hardship must be resolved in accordance with the applicable national law in each case.<sup>77</sup> This view is highly criticised since the solutions provided in the domestic laws may differ, which would be contrary to the CISG’s essential aim of unifying different legal systems.<sup>78</sup>

The second view argues that though a broad interpretation, the cases of hardship should be evaluated as an “impediment beyond the debtor’s control” within the framework of Article 79.<sup>79</sup> In other words, the notion of “impediment” indeed covers both the notions of absolute impossibility and hardship with the provision that the conditions of exemption under Article 79 exists. This view is criticised since Article 79 does not provide sufficient remedies.<sup>80</sup> As explained above, Article 79 merely regulates the exemption from liability and does not exclude the application of other available remedies under the CISG.

The third view rejects the application of Article 79 in cases of hardship. According to this view, there is a legal loophole in the CISG regarding the cases of hardship, but the supporters of this last view diverge in the applicable provisions to this legal loophole. The first approach proposes that Article 79 must be applied by analogy.<sup>81</sup> However, the outcomes and the shortcomings of such a view would be very similar to the one that accepts hardship as an impediment within Article 79.

The second approach argues that the legal gap must be filled with the general principles pursuant to Article 7 (2). Accordingly, Article 6.2.3 PICC should be considered as a general principle and thus the parties should be provided with the remedies of renegotiation and adaptation of the contract.<sup>82</sup> This view is criticised since the underlying principles of the CISG arise directly from the Convention itself.<sup>83</sup> According to another view in the literature, in cases of extreme hardship, the parties can only exercise their right to avoid the contract.<sup>84</sup> The CISG Advisory Council supports the view that the cases of extreme hardship are assessed within the scope of the CISG; however, the parties are not obliged to renegotiate in such cases and

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<sup>77</sup>H Stoll, ‘Article 79 CISG’ in P. Schlechtriem (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (2<sup>nd</sup> Edn, OUP, 1998), para 39.

<sup>78</sup>Rimke (n 18), 219.

<sup>79</sup>Atamer (n 1), para 79; CISG-AC Opinion No.7 para 3.1. **Belgium**: Rechtbank van Koophandel Hasselt (Commercial Court Hasselt), 02 May 1995 - AR 1849/94, CISG-online No: 371; **France**: Cour d’appel de Colmar (Court of Appeal Colmar), 12 June 2001 - 1 A 199800359, CISG-online No: 694; **Italy**: Tribunale di Monza (District Court Monza), 14 January 1993 - 4267/88, CISG-online No: 102. However, it should also be noted that in all of these decisions, it is awarded that the contractual equilibrium is not fundamentally changed by the unexpected change, meaning that there is no impediment in terms of Article 79.

<sup>80</sup>Schwenzer, *Force Majeure and Hardship*, (n 75), 723.

<sup>81</sup>U Magnus, ‘Force Majeure and the CISG’ in P. Šarčević and P. Volken (eds), *The International Sale of Goods Revisited*, The Hague, 2001, 10; Rimke (n 18), 223; Schwenzer, *Force Majeure and Hardship*, (n 75), 725.

<sup>82</sup>Atamer (n 1), para 86. See also **Belgium**: Hof van Cassatie van België/Cour de cassation de Belgique (Belgian Supreme Court), 19 June 2009 - C.07.0289.N, CISG-online No: 1963.

<sup>83</sup>H M Flechtner, ‘The Exemption Provisions of the Sales Convention, Including Comments on ‘Hardship’ Doctrine and the 19th June 2009 Decision of the Belgian Cassation Court’, (2011) *Belgrade Law Review*, No. 3, 84, 95-98; Rimke (n 18), 240.

<sup>84</sup>E Erdem, *La Livraison des marchandises selon la Convention de Vienne*, (Editions universitaires Fribourg, 1990), 1205, Pichonnaz (n 1), para 1821.

it is not possible for the courts or arbitral tribunals to adapt the contract.<sup>85</sup>

## B. Temporary Impracticability

Article 79(3) provides that “*the exemption provided [...] has effect for the period during which the impediment exists.*” Accordingly, it is suggested in the legal practice that in the case of a temporary impediment, performance of the contract is deemed to be suspended for that period, provided that the temporary impediment lasts only for a reasonable time. Thus, the debtor is not liable for damages for the delay in performance, but only for that specific period.<sup>86</sup> Once the effects of the temporary impediment cease, the debtor performs his contractual obligation.<sup>87</sup>

If, on the other hand, the impediment is of a longer term in which the sustaining non-performance jeopardises the contractual relationship, or if the temporary impediment actually causes a permanent impossibility of the contractual relationship, dissolution of the contractual relationship would be a more appropriate solution. In such a case, it is considered that the sustaining impediment deprives the debtor of what it was entitled to expect and causes a complete and definitive breach of the contract, which is fundamental.<sup>88</sup> If the sustaining non-performance constitutes a fundamental breach under Article 25, the other party is entitled to avoid the contract (Article 49).<sup>89</sup> However, the other party cannot claim damages for the delay caused by the temporary impediment.

## C. Moral Impossibility

Moral impossibility is accepted as a ground for exemption under Article 79. The “dual purpose (use) goods” are shown as examples of moral impossibility in the literature. Apart from their main purpose of use, these goods can be used in the production of chemical, biological or nuclear weapons. If the seller understands that the buyer’s genuine purpose in purchasing such goods is different or that the goods may be seized by the State for such purposes in the relevant country, the seller may refrain from fulfilling his obligation. In such a case, the seller could also be exempted under Article 79.<sup>90</sup>

## IV. Contractual Arrangements and Waiver to Invoke CISG 79

The uncertainty created by the consequences of force majeure events often leads parties to anticipate the effects of certain events on their contract by including specific force majeure provisions. The CISG does not prevent parties from making such arrangements. Indeed, under the freedom of contract clearly granted by Article 6 CISG, the parties may decide to exclude the application of the CISG in whole or in part or to modify the effects of its provisions.<sup>91</sup> It is also possible for the debtor to assume all risks arising from the contract beyond the application of Article 79.<sup>92</sup> Accordingly, the parties may include in their contract detailed

<sup>85</sup>CISG-AC Opinion No. 20, Hardship under the CISG, Rapporteur: Prof. Dr Edgardo Muñoz, Universidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2–5 February 2020, para 11, 12.

<sup>86</sup>Schwenzer, ‘Article 79 CISG’, (n 6), para 42.

<sup>87</sup>Atamer (n 1), para 87; Schwenzer, ‘Article 79 CISG’, (n 6), para 42.

<sup>88</sup>Atamer (n 1), para 88; Schwenzer, ‘Article 79 CISG’, (n 6), para 43. See also **Ukraine**: International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, 23 January 2012 - 218y/2011, CLOUT Case No: 1405.

<sup>89</sup>Atamer (n 1), para 87; Huber / Mullis (n 2), 264, Schwenzer, ‘Article 79 CISG’, (n 6), para 42.; Tallon, ‘Article 79 CISG’, (n 6), para 2.10.4.

<sup>90</sup>Schwenzer, ‘Article 79 CISG’, (n 6), para 33.

<sup>91</sup>Schwenzer, ‘Article 79 CISG’, (n 6), para 58; Janssen/Wahnschaffe (n 1), 27.

<sup>92</sup>Schwenzer, ‘Article 79 CISG’, (n 6), para 59.



provisions on force majeure, which will supersede the application of Article 79.<sup>93</sup>

In practice, parties often choose to include force majeure and hardship clauses in their contracts. Such an approach has its advantages. After all, there are many questions that have not yet been fully answered in the application of Article 79. Therefore, the outcome of a possible dispute could be unpredictable. The inclusion of specific provisions on force majeure and hardship would allow the parties to allocate the contractual risks at the conclusion of the contract and thus provide legal certainty as to who will bear the possible consequences of these events.

However, a poorly drafted force majeure and hardship clause may complicate matters and add fuel to existing disputes. In addition, the parties should consider the applicable domestic law with respect to the validity requirements of such contractual arrangements.<sup>94</sup>

To avoid such problems, parties often prefer to use model clauses that have been prepared in advance by international organisations to meet the specific needs of international trade.<sup>95</sup> For instance, the International Chamber of Commerce (ICC) develops model clauses on force majeure and hardship to address two significant and frequently debated legal challenges faced by all actors of international trade.<sup>96</sup>

'ICC Force Majeure Model Clauses 2003 and 2020'<sup>97</sup> offers a simpler and less controversial alternative to the application of Article 79.<sup>98</sup> Nevertheless, they set forth similar criteria as those in Article 79. The ICC Model Clauses provide a definition of the force majeure in paragraph 1, followed by a list of events presumed to be "beyond the control of the parties" and unforeseeable at the time the contract was formed. In other words, the ICC Model Clauses specifies three criteria: (a) the occurrence of the impediment beyond the control of the affected party; (b) the unforeseeability of the impediment at the time of the conclusion of the contract; and (c) the inability of the affected party to avoid or overcome the effects of the impediment.<sup>99</sup>

According to the ICC Clause, the debtor shall be exempted from performance of its obligations in the event of force majeure as of the occurrence of the impediment, provided that timely notice is given, and the other party may suspend the performance of its obligations to the extent that it is prevented by force majeure upon the receipt of the notice.

This clause identifies a range of detailed force majeure events from armed conflicts, instances of civil unrest to governmental actions, natural disasters to significant disruption to infrastructure or labour disputes. The events in this list are assumed to fulfil the first two criteria.<sup>100</sup> Accordingly, the following events are deemed to constitute force majeure:

*"(i) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation: (ii) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy: (iii) currency and trade restriction, embargo, sanction: (iv) act of authority*

<sup>93</sup>*Arbitral Award*: Ukraine International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, 23 January 2012 - 218y/2011, CLOUT Case No: 1405.

<sup>94</sup>Janssen/Wahnschaffe (n 1), 28.

<sup>95</sup>Janssen/Wahnschaffe (n 1), 28.

<sup>96</sup>L Giunta, 'A Revision in Current Times of the Hardship and Force Majeure Clauses', (2021), *Il diritto marittimo*, 693, 696.

<sup>97</sup>The 2003 version of the ICC Force Majeure Model Clause was updated and published in March 2020. Available at <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> For detailed information on the amendments made, please see: E Erdem, 'Revision of the ICC Force Majeure and Hardship Clause', (Eds): Fabio Bortolotti, Dorothy Ufot, *Hardship and Force Majeure in International Commercial Contracts*, (International Chamber of Commerce, 2018), 123.

<sup>98</sup>It should be noted that the 2020 version introduced a short form besides the long form. The ICC introduced the short form to provide small and medium enterprises with a straightforward tool for addressing legal issues with a prompt and practical approach. See Giunta (n 96), 700.

<sup>99</sup>Giunta (n 96), 700.

<sup>100</sup>Schwenzer, 'Article 79 CISG', (n 6), para 58.

*whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation: (v) plague, epidemic, natural disaster or extreme natural event: (vi) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy: (vii) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises”*

The ICC Hardship Model Clause 2003 obliges the parties to renegotiate at the first stage, and if this renegotiation process fails, the affected party has the right to terminate the contract at the second stage. This clause does not provide the possibility of adaptation of the contract. On the other hand, the ICC Hardship Model Clause 2020 is entirely different. This new clause includes the obligation again to renegotiate at the first stage. In case this renegotiation process fails, it offers alternative options to the parties. They may choose between three different options: 1) termination of the contract by one of the parties, 2) termination of the contract by a judge or arbitrator, or 3) adaptation or termination by a judge or an arbitrator.

Furthermore, the parties may also conclude additional guarantee clauses that deviate from the application of Article 79. Such clauses may expect that certain atypical risks are directly and clearly borne by a party, definitely deactivating the application of Article 79. However, such clauses usually provide an extensive liability regime compared to Article 79. Therefore, the parties should carefully draft these clauses without leaving room for doubt. Otherwise, there is always the obvious risk of encountering interpretation problems during their application.<sup>101</sup>

## V. Conclusion

The effects of force majeure in contracts for the international sale of goods subject to the CISG can be assessed in the context of Article 79. Indeed, considering the application of CISG Art. 79, it would not be wrong to say that it is possible to avoid liability on the basis of this article in very limited cases. Nevertheless, due to its flexible structure, CISG Art. 79 can provide a solution to many force majeure disputes.

Recent disputes arising from the global Covid-19 pandemic and regional wars are likely to test the effectiveness of CISG Art. 79, as well as provisions in local laws and even model clauses commonly used in international commercial contracts. These global crises highlight the importance of clarity in drafting contract terms, particularly those relating to unforeseeable events. Parties are increasingly turning to tailored force majeure and hardship clauses to address potential issues that might arise in the application of Article 79 CISG. The interpretation and the application of Article 79 CISG by the case not only shape the understanding of the article itself but also influence the drafting practices for the tailored contractual terms.



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<sup>101</sup>Schwenzer, 'Article 79 CISG', (n 6), para 59.



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