



## **Non-performance of contractual obligations in international commercial contracts in the wake of Coronavirus: A legal perspective**

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### **Abstract**

The rapid growth of the Coronavirus disease (COVID-19) has undoubtedly impacted business relations worldwide, leading to significant consequences caused by the non-performance of international commercial contracts. Given the circumstances, the current study scrutinises how the international commercial law can provide relief for non-performance of contractual obligations due to the impact of the COVID-19 crisis through legal instruments such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) and UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles). This research was conducted following the doctrinal legal research methodology. Examining the CISG and the UNIDROIT Principles revealed that the legal concepts such as *force majeure* and hardship could be invoked to grant relief. The study finds that the COVID-19 Pandemic will provide the legal basis to invoke these measures depending on different factors such as the duration of impediment, allocation of contractual risks, causal link and the date of signing the contract. In conclusion, the relief provided by these international instruments is likely to be constructed based on the judicial precedent established during comparable circumstances in the past, such as the outbreak of the Severe Acute Respiratory Syndrome (SARS).

*Keywords: COVID-19, force majeure, hardship and international commerce*

### **Introduction**

COVID-19 has caused unprecedented challenges for businesses worldwide. This extraordinary situation has turned the spotlight on the consequences of COVID-19 on the performance of contractual obligations in the global business arena. This situation demands a close analysis of the various legal measures that allow coping with the difficulties in performing international commercial contracts obligations.

CISG and UNIDROIT Principles are the most commonly applicable legal instruments to international commercial contracts. The CISG is a binding legal instrument, whereas the UNIDROIT Principles constitute soft law. Further, the scope of the application of the UNIDROIT Principles is wider than the CISG. While the CISG applies only to specific types of international



sale of goods contracts, UNIDROIT Principles would also apply to solve disputes arising under international service or other contracts (Ryan, 2005).

Examining these legal instruments reveals that there are legal measures to excuse non-performance of contractual obligations in unforeseen situations such as the COVID-19 pandemic. The legal concepts of *force majeure* and hardship are significant in this context. Yet, it is unclear to date how the relevant provisions in these international legal instruments will be interpreted and applied given the current pandemic. In this light, this research explores how contracting parties will be provided relief under the CISG and the UNIDROIT Principles for non-performance due to the COVID-19 crisis.

### Literature Review

*Force Majeure* and Hardship are commonly invoked legal concepts in international trade when unforeseen events happen and render the performance impossible or impracticable (Bortolotti & Ufot, 2019). Article 79(1) of the CISG reflects *force majeure* and provides for an “impediment which is beyond his control (the Party’s) that he could not reasonably have been expected to take into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences”. Article 7.1.7 of the UNIDROIT Principles is titled *force majeure*, and it mirrors the wording of Article 79(1) of the CISG. Besides this, Article 6.2.2 of the UNIDROIT Principles spells out the legal concept of hardship. Hardship refers to an exceptional situation created when supervening circumstances are such that they lead to a fundamental alteration of the contract's equilibrium.

The precedent case law concerning comparable situations to the COVID-19 pandemic, such as the Arbitration Award 2005, L-Lysine case (2005) emphasised the importance of foreseeability under Article 79 of the CISG. In this arbitral award, the tribunal decided that the seller could not claim SARS as a *force majeure* event and get excused from performance under the Article described above since SARS had happened a few months before the contract was signed.

As for relevant case law on hardship, *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, (2018) decided by the Supreme Court of Canada, emphasised that “in a situation of ‘hardship’ that corresponds to the description of that concept set out in the UNIDROIT Principles, the conduct of the contracting party who benefits from the change in circumstances cannot be disregarded and must be assessed.”



## Methodology

This research was conducted following the doctrinal methodology, which typifies a distinctly legal research (Watkins & Burton, 2013). For data collection, mainly the primary sources *viz.* international Conventions and case law were critically analysed supported by the secondary sources *viz.* books and online sources to establish an arguably correct and complete statement of the law on the matter in hand.

An in-depth analysis of the CISG and the UNIDROIT Principles was conducted. The sole aim of this doctrinal research is to describe the relevant body of law and how it applies (Dobinson & Johns, 2007). However, the scarcity of case law to date on the particular scenario under concern constructed a research limitation. This research's scope is limited to the breach of contractual obligations of the contracts to which the CISG or the UNIDROIT Principles apply.

## Results and Discussions

Review of the CISG and the UNIDROIT Principles reveals that there are means to provide relief for failure to perform contractual obligations due to the COVID-19 pandemic's repercussions. Notably, the Supreme People's Court in the Republic of China has stated that the contracts affected by SARS shall be dealt with on the grounds of either *force majeure* or hardship (Cristofor&Dusa, 2020). Given the precedent, the COVID-19 crisis can be seemingly pleaded as an exonerating cause under Article 79 as well as the Articles 6.2.2 and 7.1.7 of the UNIDROIT Principles provided that the necessary elements such as unforeseeability are fulfilled. Article 79 and Article 7.1.7 of the UNIDROIT Principles can excuse non-performance of contracts temporarily. On the other hand, Article 6.2.2 UNIDROIT Principles permits renegotiating the contractual terms and allows the contract to be kept alive, although on revised terms.

Unlike Article 6.2.2 of the UNIDROIT Principles, there is no specific rule in the CISG that refers explicitly to hardship. Generally, under Article 79, economic hardship alone does not constitute *force majeure*. However, if the reasonable unforeseen circumstances have made the performance unequivocally burdensome for one of the parties, relief can be provided under Article 79 keeping in line with the reasoning in *Scafom International BV v. Lorraine Tubes S.A.S.*, (2009) decided by the Belgian Supreme Court.

## Conclusions and Recommendations

COVID-19 has affected and will continue to affect a broad spectrum of international commercial contracts. Nevertheless, there are tools in



international commercial law to tackle the difficulties this pandemic has created. COVID-19 pandemic will provide the legal basis to invoke these measures depending on different factors such as the duration of the impediment, allocation of contractual risks, causal link and the date of signing the contract. These are to be assessed on a case-by-case basis. Further, the relief provided by international instruments such as the CISG and UNIDROIT Principles are likely to be constructed based on the judicial precedent established during corresponding circumstances in the past, such as the outbreak of SARS.

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