Revista Jurídica vol. 02, nº. 64, Curitiba, 2021. pp. 158 - 183

COVID 19 AND THE CONTRACTUAL PERFORMANCE CRISIS IN INTERNATIONAL CONTRACTS GOVERNED BY THE VIENNA CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE AND PURCHASE OF GOODS (CISG)

COVID-19 E A CRISE DE PERFORMANCE CONTRATUAL NOS CONTRATOS INTERNACIONAIS REGIDOS PELA CONVENÇÃO DAS NAÇÕES UNIDAS SOBRE CONTRATOS DE COMPRA E VENDA INTERNACIONAL DE MERCADORIAS (CISG)

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[Received/Recebido: Janeiro 12, 2021; Accepted/Aceito: Março 19, 2021]

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ABSTRACT

Objectives: This paper analyzes the implications of the COVID-19 pandemic in international commercial contracts and its impacts on the obligations performance within the United Nations Convention on Contracts for the International Sale of Goods (CISG).

Methodology: The research was conducted through an inductive, hypothetical approach, based on an understanding of legal concepts and a bibliographic/documentary survey, with an exploratory and conclusive objective.

Results: The study leads to some conclusions regarding the total or partial failure to perform contracts due to the COVID-19 pandemic and its consequences on international trades.

Contributions: This is a topical matter of great relevance, given its impacts on the different countries' economies and on the society as a whole, which falls within the field of interest of international law.

Keywords: COVID-19; Risks in International Contracts; CISG. Hardships.

RESUMO

***Objetivos**: Através deste artigo analisaremos as implicações da pandemia do vírus COVID-19 nos contratos internacionais, impactando as cláusulas de performance segundo a CISG.*

[Received/Recebido: Janeiro 12, 2021; Accepted/Aceito: Março 19, 2021]

***Metodologia**: A pesquisa foi realizada mediante uma abordagem indutiva, hipotética, entendimento de conceitos jurídicos e uma pesquisa bibliográfica/documental, com objetivo exploratório e conclusivo.*

***Resultados**: O estudo do assunto nos leva à algumas conclusões quanto ao não cumprimento total ou parcialmente dos contratos internacionais do comércio em razão das dificuldades impostas pela crise epidemiológica mundial da COVID-19.*

***Contribuições**: Trata-se de assunto de grande relevância e atual, em especial pelos impactos que estão acarretando nas economias dos diversos Países e na sociedade como um todo, se inserindo num estudo de interesse do Direito Internacional.*

***Palavras-chave:** COVID-19; Riscos nos Contratos Internacionais; CISG; Hardship.*

1 INTRODUCTION

Over the centuries, *pacta sunt servanda* has played an extremely important role as a guarantor of legal security in the traffic of economic relations, which is why it has been generally respected by the most liberal to the most interventionist state orders. However, on the opposite side lies the either classic idea that the extreme modification of the factual substrate underlying the agreement may affect the bargain that the contractors have made and generate imbalances between the obligations undertook, which is why the pact can be revised or even terminated, in order to avoid denaturing the original intention and to reestablish the economic balance of the deal.

Throughout the centuries, pacta sunt servanda has played an extremely relevant role as a guarantor of legal security in the traffic of economic relations, for which reason it has been respected, as a general rule, by State regulations ranging from the most liberal to the most interventionist. However, on the opposite side of the same face of legal security lies the equally classic idea that the extreme modification of the factual substratum underlying the agreement may affect the original intention of the parties or generate manifest imbalances between the agreed provisions, for which reason the transaction may be rescinded or reviewed in order to avoid the denaturation of the original intention and to reestablish the economic-financial balance of the transaction.

[Received/Recebido: Janeiro 12, 2021; Accepted/Aceito: Março 19, 2021]

Othon Sidou (1984) observes that centuries before the creation of Rome, the following written is found in article 48th of the Code of Hammurabi, king of Babylon: "If someone has an interest debt, and a storm ravages the countryside or it destroys the crop, or due to lack of water, wheat does not grow in the field, he must not give wheat to the creditor that year, he must modify his contract table and not pay interest for that year"[1].

Similar logic also echoes from the famous medieval adage that *contractus qui habent tractum successivum et dependentiam de futuro, rebus sic stantibus intelliguntur*[2], which, in the lesson of Carlos Roberto Gonçalves (2012, p. 170), embodies what is currently called the "rebus sic stantibus clause".

With the advent (2002) of the Brazilian Civil Code, within the scope of domestic law, it established the acceptance of the so-called Theory of Imprevision complementing the position of the Consumer Protection Code (DA SILVA, 2001) and that has as conditions for application:

(i) validity of a contract of deferred or successive performance;

(ii) radical alteration of the objective economic conditions at the time of the execution, in comparison with the objective environment at the time of conclusion;

(iii) excessive onerosity for one of the contracting parties and excessive benefit for the other;

(iv) unpredictability of the consequences of such radical change - which must be beyond the circumstances of the contract entered into.

Most scholars sustain, furthermore, as a requirement: the absence of fault on the part of the party that would bear the unbalance as a result of the alteration of circumstances, also postulating that the debtor could not be in default in order to apply the consequences of the theory.

Prior to the Civil Code of 2002, the Brazilian Federal Constitution of 1988, in its article 5, item XXXV, gave support to these variations of the initial conditions of the

[1] Free translation from: "*Se alguém tem um débito a juros, e uma tempestade devasta o campo ou destrói a colheita, ou por falta d'água não cresce o trigo no campo, ele não deverá nesse ano dar trigo ao credor, deverá modificar sua tábua de contrato e não pagar juros por esse ano*".

[2] Free translation: "Contracts that have a successive agreement or that are conditioned to a future term are subordinated, at all times, to the same state of subsistence of things".

[Received/Recebido: Janeiro 12, 2021; Accepted/Aceito: Março 19, 2021]

contract, stipulating that "the law shall not exclude from the review of the Judiciary any lesion or threat to a right". Therefore, the State, through the Judiciary, would have the duty to repair the injury, provided that the interested party would take measures to revise or terminate the contract.

Very well: in the year 2020 the world was taken by surprise by the health crisis resulting from the pandemic of the new Coronavirus (COVID-19), which brought along economic consequences of dimensions rarely recorded in history.

Spain, for example, experienced a drop of 11% in its Gross Domestic Product (GDP) in 2020, the biggest retraction ever recorded in the country, while France, in the same period, reported a reduction of 8.3% in its economic activity, the biggest recession seen since World War II (DW, 2021). In Portugal, GDP decreased by 7.6% in 2020. In the same year, 897 thousand workers were subject to the simplified “lay off” regime and the hotel sector reported a 63% reduction in overnight stays, compared to 2019 (DN, 2021). Brazil, in its turn, experienced a 4.4% loss in GDP in 2020, the biggest decline since 1962, according to a measurement by the São Paulo’s School of Economics of the Getúlio Vargas Foundation (EESP-FGV, 2020).

Since the beginning of the pandemic, this conjecture has been observed in practically all countries that comprise the world’s twenty largest economies (G-20)[3-4].

The cooling of commercial relations can obviously make it difficult or even impossible to accomplish the contractual obligations, especially those signed prior to the advent of the COVID-19 pandemic, when the current situation was absolutely unpredictable between the parties.

The issue is even more evident in the field of international trade contracts, considering the closure of borders and stricter international sanitary controls, which have been blocking the regularity of transnational flow of goods and services.

It remains very clear that the COVID-19 pandemic may change the contractual legal relationships in our society, not only internally but mainly in the dealings between

[3] Argentina, Australia, Brazil, Canada, China, France, Germany, United States, India, Indonesia, Italy, Japan, Mexico, Republic of Korea, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom and the European Union.
[4] The only exception was China, which still accounted for a 2.3% growth in its GDP (BBC, 2021).

[Received/Recebido: Janeiro 12, 2021; Accepted/Aceito: Março 19, 2021]

people from different National States, who would experience enormous difficulties in fulfilling their import/export contracts by the ongoing resurgence of legal fences and walls between countries in response to the virus outbreak.

In this scenario, the present article analyzes the problematic of the contractual performance crisis resulting from the substantial variation of the factual conditions of the agreements within the scope of contracts subject to the United Nations Convention on Contracts for the International Sale of Goods (CISG), in view of the economic and legal consequences brought by the current COVID-19 pandemic.

2 PROPEDEUTICAL ISSUES

2.1 THE INTENTION OF THE CONTRACT

The internationality of the contract is generally measured from an economic, legal and eclectic angle.

The economic criterion, according to Luiz Olavo Baptista (2011, p. 21-23), remained enshrined in the judgment of the *Péllissier du Besset affair* by the French Court of Cassation in 1927, in which the concept of international contract was reached, for the allowance of payment in foreign currencies, as the one that "produces a movement of flow and reflow over the borders" (transnational flow of wealth).

This criterion was soon criticized, in view of its excessive empiricism, so that the internationality of the contract could not be defined in advance or safely, for it should be assessed on a "case by case" basis, by the appreciation of all elements that are taken into account in order to check the characteristics that goes beyond the context of the domestic economy (BAPTISTA, 2011, p. 23).

For this reason, scholars of private international law began to suggest a more precise and secure criterion for determining the internationality of contracts. To this end, a legal description was sought, rather than a factual one.

According to the legal criterion, a contract would hold international status in the presence of any element that link it to two or more legal systems. It would be

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enough if one of the parties is domiciled in a foreign country or if a contract is concluded in one country to be fulfilled in another (ARAÚJO, 2016, p. 342).

In brief, the legal criterion of internationality of the contract lies on the existence of a link between one of the elements of the pact (parts, object, applicable law) with more than one legal system, as explained by Irineu Strenger (2003, p. 93): "A contract is international when there is a legal connection of internationality between two or more countries, that is, when there is any circumstance that expresses an indicative link of applicable law"[5].

On the other hand, the eclectic (or mixed) criterion was idealized in view of the conclusion that, in certain cases, the economic and legal criteria, taken in isolation, would be insufficient for the precise definition of an international contract. Thus, little by little, the tendency to combine the analysis of the legal and economic characteristics of the agreement emerged, giving the interpreter more flexibility in the appreciation of the "foreign" elements of the contract, always taking into account the interests of international commerce (CRETELLA NETO, 2010, p. 115).

Despite this diversity of theories to explain or delimit what an international contract is, it is undoubtedly true that we can only be sure about the internationality of an agreement after examining the concrete factual situation. It is the understanding of Adriano Stagni Guimarães (2017, p. 26), who points out some varied angles of analysis for recognizing specific features of an international contract, making use of the economic, the legal and the eclectic approaches. To sum up, the law is dynamic and several perspectives are placed on us, which is why all of them must not be disregard, for they can bring the answer, individually or in a combination of its factors.

Several international conventions also use mixed criteria, admitting as an element of internationality both the circulation of wealth between borders and the legal link of one of the elements of the deal (parts, object, applicable law) with more than one national legal system, encompassing any trade manifestation that affects the interests of international trade. This is exactly the case of the United Nations

[5] Free translation from: *"Um contrato é internacional quando há conexão jurídica de internacionalidade entre dois ou mais países, ou seja, quando exista qualquer circunstância que exprima um liame indicativo de Direito aplicável".*

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Convention on Contracts for the International Sale of Goods (CISG), which simultaneously adopts either the economic criterion (article 1, a) and a legal criterion (article 1, b), as it will be discussed below.

International trade is the keystone of economic globalization and, therefore, could not be left out of regulation by private international law.

To this end, the United Nations Commission on International Commercial Law (UNCITRAL) approved the Convention on Contracts for the International Sale of Goods (CISG), in the city of Vienna, on April 11, 1980, aiming to adopt uniform rules favoring the reduction of economic and legal costs, as well as the guarantee of higher predictability, security and transparency when dealing with international sale contracts.

Analyzing the CISG text, it reveals that not all international trade contracts are governed by it, but only those related to the purchase and sale of goods between parties that have their establishments in different States, when: i) the same are Contracting States - article 1, "a"; or ii) the rules of private international law lead to the application of the law of a Contracting State - article 1, “b”.

Article 2 also excludes from the scope of the Convention the supply of goods bought for personal, family or household use (consumer contracts), “unless the seller at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use” (art. 2,“ a ”), as well as the following types of goods: ships, vessels, hovercraft, aircraft, electricity, investment securities, currencies, stocks, shares, as well as the sales by auctions and on executive processes. In addition, the CISG does not either apply to contracts “in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services” (Article 3, “b”).

The above situations encompass the negative field of application of the CISG generic discipline and, therefore, have been relegated to specific legal regimes. However, excepting the afore mentioned exclusions, the concept of an international sales of goods contract must be interpreted in such a way as to ensure the greatest possible amplitude for transactions that represent the transfer of ownership of the good and the respective delivery to a foreign establishment upon payment of a cash value, according to the combined analysis of articles 1 (caput), 3 and 50.

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In fact, the preamble to the UNIDROIT Principles of International Commercial Contracts (UNIDROIT, 2016) points out that the term “commercial contracts”:

> The restriction to “commercial” contracts is in no way intended to take over the distinction traditionally made in some legal systems between “civil” and “commercial” parties and/or transactions, i.e. to make the application of the Principles dependent on whether the parties have the formal status of “merchants” (commerçants, Kaufleute) and/or the transaction is commercial in nature. The idea is rather that of excluding from the scope of the Principles so-called “consumer transactions” which, within the various legal systems, are increasingly being subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer, i.e. a party who enters into the contract otherwise than in the course of its trade or profession.

Thus, the positive field of application of the Convention even disregards the nationality and the civil or commercial character of the parties of the contract (art. 1, 3), demanding solely the cross-border flow of goods for reallocation into the supply chain, in the contexts indicated in article 1, “a” (economic criterion) or “b” (legal criterion)[6], excepting only the expressed exclusions provided in the text of the Convention (ships, vessels, hovercraft, aircraft, electricity, investment securities, currencies, stocks, shares, as well as the sales by auctions and on executive processes).

3 THE COVID-19 PANDEMIC AND THE IMPOSSIBILITY OF CONTRACTUAL PERFORMANCE WITHIN THE CISG TEXT

Due to the countless domestic solutions about the problem of the contractual performance crisis and the usual difference in the treatment of the matter between civil law and common law systems, during the negotiation of the CISG text it was decided to avoid the use of concepts, escaping from the complex task of predicting situations

[6] "Chapter I. Sphere of application Article 1 (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. [...] ”

that fit in the notions of force majeure, impracticability, hardship, *imprévision*, *Störung der Geschäftsgrundlage*, among others.

As a result, UNCITRAL adopted its own model of liability exemption clause to be applied to the general regulation of international commercial purchases and sales, provided in Article 79 of the Convention.

Janssen and Wahnschaffe (2021, p. 3) observe that the CISG establishes a strict liability for breach of contract – that is, without the requirement of fault –, if he can demonstrate the prerequisites of article 79, paragraph (1), namely:

> (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.

In sum, the exemption from liability provided for in the CISG is subject to the cumulation of three objective requirements: (i) the occurrence of an uncontrollable impediment – "impediment beyond control"; (ii) that it was unreasonable to expect it to be taken into account when the contract was concluded – "unforeseeability"; and (iii) whose consequences could not be overcome or avoided – "unavoidability".

The above-mentioned conditions are fully compatible with the ongoing COVID-19 pandemic.

In Fact, the outbreak of COVID-19 virus brought devastating economic consequences worldwide, representing direct effects on importers and exporters, such as the reduction in consumers demand, difficulties in logistics, business closures, supply chain disruption etc.

In addition to reasons linked to the economic activity plunge, numerous indirect state measures - settled to refrain the spread of the virus around the globe - have had a substantial impact on the international trade, such as the interruption of businesses, curfews, increased health borders control, quarantine imposed on container ships and other official prohibitions.

Such situations are naturally beyond the control of the parties ("impediment beyond control") and are absolutely unpredictable ("unforeseeability") in the context

[Received/Recebido: Janeiro 12, 2021; Accepted/Aceito: Março 19, 2021]

prior to the World Health Organization (WHO) declaration of international emergency due to the outbreak of a new coronavirus (dated January 30, 2020). Besides, its consequences may be unavoidable ("unavoidability"), according to the analysis of the case at hand, which would justify the recourse to Article 79 of the CISG by the seller or by the buyer who eventually find himself prevented from satisfying the clauses regarding the object or the temporal/spatial aspects of the contract.

For the above reasons, certain National States, i.e. Italy and China, since the beginning of 2020 have been issuing force majeure factual certificates in order to ensure their domestic companies of subsequent claims due to the contractual misfortunes arising from the current pandemic. Such documents officially attest to the occurrence of *de facto* situations and the respective details, which may serve as a valuable element of proof of the uncontrollable, unpredictable and inevitable event, capable of giving rise to the exemption from liability in any judicial or arbitral dispute, given the impossibility of complying with the contract.

Regarding force majeure certificates, Shopia Tang (2020) quotes the following report from the Council of China for the Promotion of International Trade:

> The force majeure factual certificate is the proof of objective, factual circumstances, not the 'trump card' to exempt contractual obligations. The CCPIT issues relevant force majeure factual certificates to Chinese enterprises that are unable to perform contracts due to the impact of the new coronavirus epidemic. The certificate can prove objective facts such as delayed resumption of work, traffic control, and limited dispatch of labour personnel. An enterprise can request for delaying performance or termination of the contract based on this certificate, but whether its obligation can be fully or partially exempt depends on individual cases. The parties should take all the circumstances and the applicable law into consideration to prove the causal link between 'the epidemic and its prevention and control measures' and the 'failure to perform'.

Article 79 (2) also allows exemption from liability if one of the parties designates an independent third person engaged to fulfill the whole or a part of the obligations, provided that the defaulter party successfully proves that the requirements of article 79 (1) are satisfied both as for himself and for the third person.

Notwithstanding, in any case the invocation of the supervening impossibility must be necessarily preceded by notification of the adverse party, within a reasonable

[Received/Recebido: Janeiro 12, 2021; Accepted/Aceito: Março 19, 2021]

time. The failure to comply with this rite results in the loss of the right to claim the exemption clause provided for in the CISG, in accordance with article 79 (4) of the Convention.

> (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.

This is a substantial aftermath of the "duty to mitigate the loss" and of the good faith clause that must permeate the relationship between the parties of the contract - CISG, art. 7 (1)[7].

4 ARTICLE 79 OF THE CISG AND HARDSHIP SITUATIONS IN THE SHADOWS OF THE COVID-19 CRISIS

At first glance, the wording of Article 79 of the CISG suggests that the only modality of exception to the *pacta sunt servanda* principle in the contracts it governs would be the exemption from liability due to "impediments" of performance.

This fact would reflect the triumph of doctrines linked to countries with common law-based tradition in drafting the text of the Convention, above all because of the immense share that the United Kingdom and the United States of America held in international commerce in the 1970s.

Such countries have strong cultural ties to economic liberalism and, on the legal level, *pacta sunt servanda* has traditionally taken on an almost sacramental character (sanctity of contractcs).

In England, the mandatory force of the contracts only came to consent exceptions after the trial of the case *Taylor v. Caldwell* by the High Court (Queen's

[7] "(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

Bench Division) in 1863. On that occasion, the Court recognized that every contract implies a condition that ensures the parties to be released from the deal if it is impossible to fulfill, due to the perishing or destruction of its object. Since then, the doctrine of "impossibility" has been enshrined in the English common law (DANTAS, 2018, p. 53).

Likewise, in the United States of America the 20th century's jurisprudence began to permit the exemption from liability through the theory of "discharge by supervening impracticability" (or simply "impracticability"), which is currently embedded in the wordings of § 261 of the Second Restatement of Contracts[8] and § 2-615 of the Uniform Commercial Code (UCC)[9].

Both doctrines of "impossibility" and "impracticability" assume, as an implicit resolutive condition of the contract, the supervenience of events that make impossible (totally or partially) the fulfillment of the obligations undertook. However, in the main commom law systems, the advent of mere difficulty that severely modifies the economic equation of the bargain would hardly authorize the extinction or revision of the arrangement, unless the possibility has been explicitly agreed between the parties. Thus, in such countries, in support of the autonomy of private will, the parties have become habituated to write down explicit clauses of hardship, aiming at the revision of the deal or, if the parties fail in renegotiate, the termination of the contract (BAPTISTA, 2011, p. 244), to safeguard themselves from an extraordinary disadvantage (excessive onerousness) arising from a supervening, involuntary, and unforeseeable event.

Taking back to the context of the CISG and the apparent adherence of its model to the British and North American contract law systems, Professor Alejandro M.

[8] "Where, after a contract is made, a partys performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."

[9] "Except so far as a sellermay have assumed a greater obligation and subject to the preceding section on substituted performance: (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."

[Received/Recebido: Janeiro 12, 2021; Accepted/Aceito: Março 19, 2021]

Garro, of Columbia University School of Law (New York), recalls that after successive draft texts that preceded the final version of Article 79 of the CISG, the UNCITRAL Working Group considered the proposal to allow the party to plead for termination or rebalancing of the contract terms in view of "excessive" and "unpredictable" damages[10].

For decades that was the dominant understanding. According to the reverberated case "Nuova Fucinati, SpA, vs. Fondmetall International AB ", in a decision rendered in 14 January 1993, the *Tribunale Civile di Monza* (Italy) refused to apply the theory of "supervening excessive onerousness" (embraced by article 1467 of the Italian Civil Code[11]) in relation to an international commercial contract, on the grounds that the exclusion/limitation of liability arising from hardship, if not previously endorsed by explicit contractual provision, would be "out of context" of the Convention.

In this perspective, the effects of COVID-19 on international trade contracts would only benefit the party of the relationship who was legally or factually unable to keep the pact, due to the advent of uncontrollable, unpredictable and inevitable impediments of the pandemic on its activities. Among the examples that seem more obvious, but that would still require an analytical-causal assessment regarding the alleged impediment: official lockdown measures, interruption of the supply chain, hardening of sanitary barriers, quarantine imposed on container vessels.

However, different opinions[12] were responsible for consolidating the understanding that was later adopted by Advisory Opinion No. 7 of the CISG Advisory Council (CISG-AC, 2007), in a meeting held in 2007, in Wuhan (China)[13] —, through which the following orientation was established:

[10] CISG-AC Comments on Advisory Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG (item 29).
[11] "*Art. 1467. Nei contratti a esecuzione continuata o periodica ovvero a esecuzione differita, se la prestazione di una delle parti è divenuta eccessivamente onerosa per il verificarsi di avvenimenti straordinari e imprevedibili, la parte che deve tale prestazione può domandare la risoluzione del contratto, con gli effetti stabiliti dall'articolo 1458.La risoluzione non può essere domandata se la sopravvenuta onerosità rientra nell'alea normale del contratto. La parte contro la quale è domandata la risoluzione può evitarla offrendo di modificare equamente le condizioni del contrato*."
[12] Among several others, Larry DiMatteo (2015, p. 45-47) argues that Article 79 should be interpreted more broadly, with the aim of ensuring the possibility of exclusion of liability in cases of hardship.
[13] Which years later coincidentally would become the epicenter of the COVID-19 pandemic.

> 3.1 A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1). The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79.

For this doctrine, the content of article 79 is sufficiently flexible to include in the concept of "impediment" situations of extreme disproportionality between the obligations in relation to the dates of celebration and execution of the pact (hardships)[14]. Thus, it is accepted the extensive interpretation of the provision to shelter circumstances that not only prevent the fulfillment of the contract, but also those that reach the "justice" of the original agreement and have escaped the natural risks of the pact, regardless of any previous contractual stipulation.

The same point of view is shared by the "Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis" (UNIDROIT, 2020, p. 24):

> A manifestation of hardship of this kind might, for instance, arise when a distributor of protective masks and clothing, due to an export ban imposed as a consequence of COVID-19 by the public authority in country X where its usual supplier is located, has to acquire them at a substantially higher price from another supplier in another country. Or a similar situation might ensue when the specific raw material used in the manufacturing of products to be delivered under the contract suffer a large increase in cost, either because the health crisis has increased the extraction costs of the material due to the mandatory limitation of the number of workers in one same space or because the supplier of the material may not obtain certain substances necessary to use mechanical means of extraction.

In practical terms, unlike what occurs in the main systems guided by the common law, the solution adopted by the CISG-AC admits the hardship clauses in

[14]Article 6.2.2 of the "UNIDROIT Principles of International Commercial Contracts (2016)" defines the concept of "hardship" as supervening facts that fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and: (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

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international trade contracts as implicit, thus bringing the CISG model closer to the civil law systems French-inspired[15], who for centuries already admitted the extinction of the contract on the grounds of the impossibility of fulfilling the arrangement by fortuitous event (*casus fortuitus*) or force majeure (*vis major*)[16]; and, after the enactment of the "Falliot Law" of 1918[17], also contemplate as an implied contractual condition the right to plead the renegotiation/adaptation of the pact or, ultimately, its resolution due to excessive onerousness (with the return to the *status quo ante*), in line with the '*Theórie de l' imprévision' (unforeseeability)*

As an example, the French Civil Code embeds the termination of the contract under force majeure situations as well as the revision or resolution for "excessive onerousness", in articles 1218 and 1195, respectively. The same pattern is observed in the Italian "Codice Civile" of 1942, in its articles 1463 and 1644 (supervening impossibility) and 1467 (resolution or revision due to costs overruns). The Brazilian Civil Code of 2002 does not differ from this trend and admits both possibilities: the debtor's exemption for absolute impediment ("act of God" and force majeure - article 393) and the right to revision or termination of the contract owing to "excessive onerousness" (Theórie de l'*imprévision* (unforeseeability) - articles 478 to 480). Similar provisions can still be found in Art. 437 of the Civil Code of Portugal, in Art. 1091 of the Civil Code of Argentina, in § 313 of the German *Bürgerliches Gesetzbuch* and in Art. 672 of the Civil Code of Paraguay.

After more than a decade of Opinion No. 7/2007, judicial and arbitration decisions, as well as academic articles on the subject, are practically unanimous on the possibility of extending the scope of the Article 79 CISG standard to hardship cases, as indicated by the CISG-AC comments to Opinion nº 20 (CISG-AC, 2020, p. 11-12). This novel consultative opinion, which was already issued after the outbreak of COVID-19 virus, in addition to ratifying Opinion No. 7/2007, provides further

[15] Present in most countries of the western continental Europe, Latin America and part of Africa.
[16] As a remnant of Ancient Roman Law that directly inspires them.
[17] Approved in France in 1918, in the context of contractual imbalances generated by the effects of the First World War.

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interpretative details regarding the incidence of hardships and their respective effects on international commercial contracts.

From the analysis of Opinion CISG-AC nº 20/2020, it indicates that, except for the hypothesis of explicit contractual prohibition, the advent of a qualifying situation as hardship in international contracts implies the right of the aggrieved party to plead the revision or termination of the agreement, provided that it notifies the contrary party within a reasonable while. In conducting the process, the judge or arbitrator, whenever possible, must adapt the contract to the supervening situation, in order to preserve the deal and rebalance the arrangement to the new concrete substrate. However, although stimulated by the CISG-AC (contract conservation principle), the revision/adaptation cannot be coercively imposed on the parties by the dispute judge/arbitrator, unless both contractors have given them authorization to do so. This is because adaptation does not constitute an obligation for any of the parties, who can freely reject it (in prestige to the autonomy of the parties' will) and choose to terminate (avoidance) the pact. This is what can be observed from conclusions 1,2,3, 8, 11 and 12 of the mentioned consultative opinion[18].

In view of the COVID-19 pandemic, the International Chamber of Commerce (ICC), in complete harmony with Advisory Opinion CISG-AC nº 20/2020, updated its “Model Hardship Clause” (ICC, 2020), establishing that where a party proves that the continued performance of the contractual duties “has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract”; and that “it could not reasonably have avoided or overcome the event or its consequences”, the parties are bound to renegotiate the terms of the agreement, within a reasonable time, in order to overcome the hardship event. In case of disagreement on a negotiated

[18] "1. The following Rules on hardship apply, unless the contract otherwise provides. 2. The CISG governs cases of hardship. 3. A party is bound to fulfill its obligations even if performance has become more onerous, unless there is hardship. […] 8. The party affected by hardship must give notice to the other party of the circumstances and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party affected knew or ought to have known of the hardship situation, it is liable for damages resulting from such non-receipt. […] 11. Under the CISG, the parties have no duty to renegotiate the contract in case of hardship. 12. Under the CISG, a court or arbitral tribunal may not adapt the contract in case of hardship”.

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solution, the clause provides three possible alternatives between which the parties may choose: 1) party to terminate: the disadvantaged contractor may terminate the pact on its own initiative, but cannot require the adaptation without the consent of the other party; 2) judge to adapt or terminate: either party may request the judge or arbitrator to adapt the contract in order to restore its balance or to terminate it, as appropriate. In this case, the judge or arbitrator decides which of the two alternatives is most appropriate, especially when the adaptation does not seem to be a reasonable possibility; 3) judge to terminate: either party is entitled to request the judge or arbitrator to declare the termination of the contract.

It may be observed that options "1" and "3" favor the self-composition of the dispute. The only hetero-based settlement is option "2", which can arouse apprehension to the contractors for giving a third party (judge or arbitrator) the power to adapt (rebalance) the agreement to a new *status quo*. However, as also provided in the conclusion nº 13 of the CISG-AC Advisory Opinion 20/2020, under no circumstances a court or arbitral tribunal may adapt the contract in case of hardship, unless this extraordinary power has been priorly given by the mutual consent of the parties. Even so, in this occasion the ICC Model Hardship Clause (2020) suggests that "the judge or arbitrator invites the parties to submit proposals of the required adjustments, which might be taken as starting point for adapting the contract".

5 AUTONOMY OF PRIVATE WILL AND CONTRACTUAL RISKS

As Adriano Stagni Guimarães (2017, p. 53-55) states:

> Indeed, risk is always a very important factor in any type of legal relationship. Any good is susceptible to a number of external factors that may cause its total or partial depreciation. [...] The situations described as Force Majeure can be the most varied, ranging from a governmental act of a legislative nature, a given nature event and even a simple market circumstance. [19]

[19] Free translation from: *"Ora, o risco é sempre um fator muito importante em qualquer tipo de relação jurídica. Qualquer bem está suscetível a inúmeros fatores externos que possam ocasionar sua depreciação total ou parcial. [...] As situações descritas como Força Maior podem ser as mais variadas,*

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Therefore, in an international contract there are countless possibilities of risk that may prevent, totally or partially, its fulfillment.

Although imbued with the purpose of providing uniformity and legal certainty to international trade, the CISG will only have an impact on international sale of goods contracts if so stipulated by the parties or when the deal is silent on the indication of the applicable legislation. This is because, favoring the private autonomy, Article 6 of the CISG[20] adopts *lex voluntatis* as the connective element to indicate the normative paradigm of the agreement, granting the parties the power to thoroughly design the terms of the contract, to suit their own specific demands and wills.

In this sense, the parties are entitled to exclude the application of the Convention as a whole or any of its parts and to indicate, or not, any national law to be applied. They may also make the formation of the contract subject to certain conditions, define what to be considered non-performance, foresee the causes of exemption from liability, pre-set the amount of damages etc. (MOSER and PIGNATTA, 2015, p. 14).

In the praxis of commercial relations, it is quite common for players to embrace model clauses enshrined in the *lex mercatoria*[21] in the specific economic niche in which they operate, in addition to or even to the exclusion of domestic and/or international legal regulations[22]. For example, in the scope of the international sales of goods,

indo desde um ato governamental de natureza legislativa, um determinado evento da natureza e até uma simples circunstância de mercado."

[20] "The parties may exclude the application of this Convention, derogate from any of its provisions or modify its effects, subject to the provisions of Article 12."

[21]On the concept of lex mercatoria: "It is the law of merchants, the law of international trade or also called international trade practices. Through lex mercatoria we have a remarkable systematization of international trade rules that forms a true body of legal rules, which would be applicable to international commercial transactions. This true legal system of international trade is due to the customs and practices practiced over the centuries by international traders" (GUIMARÃES, 2009, pg. 104). Free translation from: "*É o direito dos comerciantes, o direito do comércio internacional ou também chamado de práticas internacionais do comércio. Através da lex mercatoria temos uma notável sistematização de regras do comércio internacional que forma um verdadeiro corpo sistema de normas jurídicas, que seriam aplicáveis às transações comerciais internacionais. Esse verdadeiro sistema jurídico do comércio internacional é decorrente dos usos e costumes praticados ao longo dos séculos pelos comerciantes internacionais*".

[22]In this sense, see "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry". Author: Lisa Bernstein. Source: The Journal of Legal Studies, Vol. 21, No. 1 (Jan., 1992), pp. 115-157.

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despite the existence of a generic regulation on the transfer of risks (articles 66 to 70), specific INCOTERMS clauses suggested by the ICC are generally adopted, through which it is determined the division of risks on losses and damages, identifying precisely the time and place in which the risks will be transferred from the seller to the buyer, with the consequent obligation and responsibility for contracting insurance (GUIMARÃES, 2009, p. 108).

Regarding the management of potential crisis situations in contractual performance, studies by ICC, CISG-AC and UNIDROIT are unanimous in recognizing the primacy of the parties' will in defining contractual claims and in managing businesses risks, even in the context of performance crises resulting from the effects of COVID-19 on the global economy.

There is nothing to prevent a party, for example, from explicit or tacitly take on the risk of a fundamental change in the bargain's factual or legal background. Therefore, the qualification of events such as force majeure and hardship, as well as their effects regarding each party, must be examined in light of the will manifested in the contract, considering the distribution of risks between the contractors and the definition of the invokable remedies.

In any case, paragraph 7 of Opinion CISG-AC No. 20/2020 provides guidelines already enshrined in the *lex mercatoria* to define whether the supervening "uncontrollable, unpredictable and inevitable" event can be deemed sufficiently extraordinary to configure the breach of the explicit or implicit risks undertaken in the contract, thus legitimizing the claim for avoidance or adaptation of the arrangement:

> 7. In assessing whether hardship exists the following nonexclusive factors should be taken into account: a) whether the risk of a change of circumstances was assumed by either party; b) whether the contract is of a speculative nature; c) whether and to what extent there have been previous market fluctuations; d) the duration of the contract; e) whether the seller has obtained the goods from its own supplier; f) whether either party has hedged against market changes.

Such circumstances, as Yasutoshi Ishida (2018, p. 366-367) argues, are measured according to the good faith principle and to the logic of the "reasonable

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expectation test", whereby the disadvantaged party may be exempted from liability if the contractual performance, even if technically possible, it requires huge and unreasonable expenses or efforts, grossly disproportionate to the value of the original obligation.

6 FINAL CONSIDERATIONS

In a synopsis of what was exposed, it was shown that the outbreak of COVID-19 has not been restricted to sanitary consequences, but it is also profoundly interfering in international trade, in view of the unparalleled economic crisis underlying the pandemic. In addition, numerous legal measures have been imposed to combat the virus, which significantly affected international sale of goods contracts.

As explained, performance crisis situations must be resolved in light of what was explicit or tacitly settled in the negotiation between the parties, given that Article 6 of the CISG adopts *lex voluntatis* as the primary criterion to designate the normative paradigm applicable to the case at stake. This allows the parties to reduce uncertainties, insofar as they can consensually predict the causes of exemption or limitation of liability, the precise distribution of risks, remedies for overcoming default crises, prefixation of the indemnity amount for damages and losses etc.

Thus, the CISG only governs the contacts for the international sale of goods if so stipulated by the parties or when the deal is omitted in designate another applicable normative paradigm. In these cases, the advent of direct and indirect consequences of the current pandemic implying impediment of performance or costs overruns entitle the disadvantaged party to invoke Article 79 of the Convention, which, according to the widely dominant scholar interpretation, enshrines classic termination situations (avoidance) of the contract qualifying as "force majeure", "impossibility" and "impracticability", as well as some of the latest acceptable exceptions to *pacta sunt servanda* suitable to the legal notions of hardships, *eccessiva onerosità*, *Störung der Geschäftsgrundlage* and i*mprévision*.

[Received/Recebido: Janeiro 12, 2021; Accepted/Aceito: Março 19, 2021]

Among the most relevant institutional manifestations in the field of private international law regarding the relationship between COVID-19 and the performance crisis in international commercial contracts, the present study highlighted the Advisory Opinion CISG-AC nº 20/2020, the "ICC Model Force Majeure and Hardship of March 2020", and the "Note from the UNIDROIT Secretariat on the UNIDROIT Principles of International Trade Contracts and the COVID-19 Health Crisis".

Such tools constitute the greatest source of legal and scholar studies on the subject and represent valuable subsidies available to importers, exporters, judges and arbitrators in the assessment of the contractual uncertainties caused by the current pandemic.

[Received/Recebido: Janeiro 12, 2021; Accepted/Aceito: Março 19, 2021]

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[Received/Recebido: Janeiro 12, 2021; Accepted/Aceito: Março 19, 2021]